STATE OF MICHIGAN

COURT OF APPEALS

SUSAN COLEGROVE, Personal Representative of the Estate of GERTRUDE ELIZABETH COLEGROVE, Deceased, and the Estate of CLAUDE CHARLES KINGSLEY, Deceased, Plaintiff-Appellee,	UNPUBLISHED August 10, 2001
v	No. 219593 Arenac Circuit Court
STANDISH COMMUNITY HOSPITAL, Defendant-Appellant.	LC No. 97-005648-NO

Before: Holbrook, Jr., P.J., and Hood and Griffin, JJ.

PER CURIAM.

Defendant appeals by leave granted from the trial court's orders granting plaintiff's motion for a new trial, denying defendant's motion to limit trial to the claim of nuisance, and denying defendant's motion for summary disposition. We reverse and remand for entry of the jury verdict.

On February 20, 1997, Gertrude Elizabeth Kingsley and her husband, Claude Charles Kingsley, both now deceased, approached the entrance of Dr. Rey Franco's office. Claude put his hand out to open the door, when it suddenly flew open. Frightened, Gertrude jerked back, and her heel bumped into a raised portion of the sidewalk. As a result of the bump, Gertrude fell on her buttocks. The Kingsleys had visited Dr. Franco at this location every three months for a five or six-year period. During this time period, Gertrude noticed that the condition of the sidewalk changed based on the season. Specifically, a cement slab of sidewalk, or step back pad, adjacent to another cement slab of sidewalk was raised in height by approximately one inch during the winter. However, in the summertime, the disparity in the height of the cement slabs disappeared and the evenness of the cement slabs returned. Gertrude did not report her seasonal observation of the sidewalk prior to the fall.

Two causes of action, negligence and nuisance, were presented to the jury as a basis for defendant's liability.[1] The jury returned a verdict of no cause of action in favor of defendant.

[1] Review of the complaint filed in this action reveals that plaintiff pleaded a cause of action in (continued…)

Based on a motion for new trial filed by plaintiff, the trial court concluded that the jury verdict regarding the negligence claim was proper, but concluded that the jury verdict regarding the nuisance claim was against the great weight of the evidence. Despite its agreement with the jury's decision regarding the negligence claim, the trial court refused to limit a new trial to the nuisance claim only. We granted defendant's application for leave to appeal.

Defendant first argues that the trial court abused its discretion in granting plaintiff's motion for a new trial. We agree. Our review of the trial court's decision regarding a motion for a new trial is for an abuse of discretion. *Abke v Vandenberg*, 239 Mich App 359, 361; 608 NW2d 73 (2000). While the legal concept of nuisance is difficult, if not impossible to define, *Hadfield v Oakland Co Drain Commissioner*, 430 Mich 139, 150; 422 NW2d 205 (1988), two basic categories, public and private, have developed. *Id*. at 151. "A private nuisance is a nontrespassory invasion 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). A private nuisance protects a property owner's reasonable comfort in occupation of land. *Id*. at 303. A public nuisance is an unreasonable interference with a common right enjoyed by the general public. *Cloverleaf Car v Phillips*, 213 Mich App 186, 190; 540 NW2d 297 (1995). The unreasonable interference involves conduct that (1) significantly interferes with the public's health, safety, peace, comfort, or convenience, (2) is proscribed by law, or (3) is known or should have been known by the actor to be of a continuing nature that causes a permanent effect on these rights. *Id*. A private citizen may maintain a cause of action for a public nuisance if the citizen can demonstrate that he suffered a type of harm different from that of the general public. *Id*.

In the present case, plaintiff cannot maintain a cause of action for a private nuisance because there was no interference with the Kingsleys' use of their own land. *Adkins, supra*. Additionally, a public nuisance action fails because plaintiff has failed to identify a type of harm that is different than a type of harm that the general public might have suffered when encountering this sidewalk in the winter. *Cloverleaf, supra*.

In *Hadfield, supra*, the Supreme Court recognized two additional categories of nuisance, nuisance per se and nuisance in fact or per accidens. Nuisance in fact has been subdivided into two subclasses, intentional and negligent. *Id*. at 153. "A nuisance per se is an act, occupation, or structure which is a nuisance at all times and under any circumstances." *Wagner v Regency Inn Corp*, 186 Mich App 158, 164; 463 NW2d 450 (1990). The existence of a nuisance per se is established by proof of the act of creation and is deemed a nuisance as a matter of law. *Orion Twp v Burnac Corp*, 171 Mich App 450, 459; 431 NW2d 225 (1988). A nuisance in fact, however, is a nuisance as a result of circumstances and surroundings. *Wagner, supra*. When the

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negligence only. In the damages portion of the complaint, plaintiff alleged that, as a result of defendant's "negligence, breach of duties and creation or maintenance of a nuisance," she suffered numerous injuries. Defendant, however, never challenged the sufficiency of the pleadings regarding any nuisance claim despite the deficiencies in the complaint. Furthermore, if defendant had challenged the pleadings pursuant to MCR 2.116(C)(8), plaintiff would have been given the opportunity to amend the complaint. MCR 2.116(I)(5). Therefore, we will address the nuisance claim as if it had been properly pleaded.

natural tendency of an act is to create danger and inflict injury on person or property, the act may be a nuisance in fact. *Id.* A negligent nuisance in fact is created by the landowner's negligent acts, specifically, a violation of some duty owed to the plaintiff that results in the creation of a nuisance. *Id*. A nuisance in fact is intentional if the landowner or creator intends to bring about the conditions which are in fact found to be a nuisance. *Freedman v City of Oak Park*, 170 Mich App 349, 355; 427 NW2d 557 (1988). Furthermore, a knowledge requirement is applied to a nuisance claim. *Id*. at 356. That is, the defendant knew or must have known that harm to a plaintiff was substantially certain to follow as a result of the nuisance. *Id*.; see also 4 Restatement Torts, 2d, § 839, p 161.

In the present case, plaintiff has failed to prove a cause of action for nuisance per se. Rather, plaintiff's proofs demonstrated that any alleged nuisance did not exist at all times and under any circumstances. *Wagner*, *supra*. Review of the testimony revealed that the condition was only present in the winter due to the change in the weather. Additionally, plaintiff failed to establish a nuisance in fact because there was no indication that defendant was aware of the presence of the condition that arose in the winter. *Freedman, supra*. Furthermore, as was aptly stated in *Freedman, supra*, quoting *Schroeder v Canton Twp*, 145 Mich App 439, 441; 377 NW2d 822 (1985), "Too often, 'nuisance' terminology is used to mask what are, in fact, simple negligence claims for the purpose of avoiding some effects of calling it what it is, a negligence claim." That statement applies aptly here where the elements of all possible nuisance claims could not be satisfied. Because of our disposition of the first issue, we need not address defendant's remaining issues on appeal.

Reversed and remanded for entry of a judgment of no cause of action in favor of defendant as rendered by the jury. We do not retain jurisdiction.

/s/ Donald E. Holbrook, Jr.
/s/ Harold Hood
/s/ Richard Allen Griffin