

STATE OF MICHIGAN
COURT OF APPEALS

EVELYN CHILDS, BONITA EILEEN CHILDS
and ANITA CHILDS,

UNPUBLISHED
October 9, 2001

Plaintiffs-Appellants,

V

No. 220870
Wayne Circuit Court
LC No. 98-807284-CZ

K-MART CORPORATION, 7/MEYER LIMITED
PARTNERSHIP, AMERICAN REALTY
CORPORATION and SOBEL CO.,

Defendants-Appellees,

and

WALKER DEVELOPMENTS, INC.,

Defendant.

Before: K.F. Kelly, P.J., and Hood and Zahra, JJ.

PER CURIAM.

Plaintiffs appeal as of right from an order granting summary disposition for defendants pursuant to MCR 2.116(C)(8). Plaintiffs' action sought injunctive relief and monetary damages for an alleged nuisance in fact. We affirm.

This case arises from the construction and operation of a Super K-Mart store located in the City of Detroit, directly across the street from plaintiffs' residence. Plaintiffs filed their complaint before the construction project was complete. Plaintiffs alleged that the Super K-Mart, which was being built in a primarily residential neighborhood, would interfere with plaintiffs' use and enjoyment of their land. Plaintiffs sought injunctive relief and damages in excess of \$10,000 for excavation work that had already begun at the Super K-Mart site. Defendants denied the allegations.¹

¹ Defendants argued that the instant case should be consolidated with a prior-filed case brought by others representing the neighborhood under the assumed name of the Neighborhood Legal
(continued...)

The Super K-Mart store was completed in November 1998, and remained open to the public twenty-four hours per day, seven days per week. On December 28, 1998, plaintiffs filed an amended complaint, again alleging that the completed Super K-Mart was an unreasonable interference with plaintiffs' use and enjoyment of their land. In particular, plaintiffs alleged that the Super K-Mart was too large and busy for its residential location and that the construction of the store caused plaintiff, Evelyn Childs, to suffer respiratory problems. Plaintiffs asked the trial court to require defendants to take remedial actions to shield plaintiffs' property from the light, noise, pollution, traffic and crime that they alleged to originate from the Super K-Mart and sought money damages in excess of \$25,000.

Defendants filed a motion for summary disposition, arguing that plaintiffs failed to state a valid claim and that their action was barred by res judicata. The trial court concluded that plaintiffs failed to allege the elements of nuisance, particularly that the Super K-Mart caused significant harm to plaintiffs and that the operation of the Super K-Mart was unreasonable, and dismissed plaintiffs' claims pursuant to MCR 2.116(C)(8).²

I

Plaintiffs first argue that the trial court should not have dismissed their original complaint on the basis of res judicata or collateral estoppel. Plaintiffs claim that their complaint for injunctive relief was not barred by the trial court's decision in the NLDF case. See, *supra* n 1. However, in their brief on appeal, plaintiffs argue only that the trial court should not have dismissed their complaint pursuant to MCR 2.116(C)(8) because their complaint "sufficiently set forth a cause of action for a nuisance in fact." In plaintiffs' reply brief on appeal, they argue that their claim was not barred by res judicata or collateral estoppel, but fail to provide any legal

(...continued)

Defense Fund (NLDF). The NLDF filed suit against the City of Detroit Planning and Development Department, the City of Detroit Planning Commission and City Council and the developer of the Super K-Mart, seeking to enjoin the construction of the Super K-Mart. The NLDF alleged that the Super K-Mart was contrary to the existing zoning ordinance and, therefore, a nuisance per se. Plaintiff, Evelyn Childs, testified in the NLDF litigation that the then-proposed Super K-Mart would be disruptive to the neighborhood, particularly in regard to traffic flow. On or about June 9, 1998, the trial court dismissed the NLDF case, finding that there was no evidence of an increase in crime related to the construction and operation of the Super K-Mart, that there was insufficient evidence of a diminution in property values, and that more people in the neighborhood favored the Super K-Mart than opposed its construction. Thereafter, defendants argued that the present case must be dismissed on the basis of res judicata and, alternatively, that there was no issue of material fact and defendants were entitled to judgment as a matter of law. The trial court granted defendants summary disposition and dismissed plaintiffs' claim for injunctive relief, but permitted plaintiffs to amend their complaint to plead a claim of nuisance and the jurisdictional amount of damages.

² Also, the trial court denied reconsideration of the decision to grant defendants' motion for summary disposition regarding the injunction. See, *supra* n 1.

authority to support their conclusions that the NLDF lawsuit for an injunction against the construction of the Super K-Mart was not decided on the merits and that plaintiffs were not in privity with the parties in the NLDF litigation. Because this Court will not search for authority to support a plaintiffs' position, this issue is not properly presented for this Court's review. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998); *McPeak v McPeak*, 233 Mich App 483, 495-496; 593 NW2d 180 (1999). Furthermore, we note that plaintiffs were permitted to amend their complaint following the trial court's grant of defendants' first motion for summary disposition. Thus, the trial court permitted plaintiffs to maintain their nuisance claim against defendants.

II

Plaintiffs next argue that the trial court erred when it determined that plaintiffs failed to state a claim for nuisance. The grant or denial of a motion for summary disposition is a question of law that this Court reviews de novo on appeal. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999); *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). The trial court considered evidence outside the pleadings and, thus, we consider defendant's motion for summary disposition with respect to the nuisance issue as having been granted pursuant to MCR 2.116(C)(10). *Butler v Western Waterproofing, Inc*, 214 Mich App 521, 524; 542 NW2d 912 (1996). When reviewing a grant of summary disposition pursuant to MCR 2.116(C)(10), this Court must consider the entire lower court record, including pleadings, affidavits, depositions, admissions and other documentary evidence submitted, in the light most favorable to the nonmoving party. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 75-76; 597 NW2d 517 (1999). Summary disposition is appropriate if the evidence shows that there is no genuine issue with respect to any material fact, and the moving party is entitled to judgment as a matter of law. *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999).

A nuisance in fact is a nuisance by reason of the circumstances and surroundings, in contrast to a nuisance per se, 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). To survive summary disposition, a plaintiff must present sufficient evidence to raise an issue of fact in regard to whether a defendant created and maintained a nuisance in fact on its premises. *Id.*; see *Maiden, supra*. The elements of a nuisance in fact are: (1) the plaintiff has property rights and privileges with respect to the land alleged to be interfered with, (2) an invasion onto the property resulted in significant or substantial harm, (3) the defendant's conduct was the legal cause of the invasion, and (4) the invasion is either intentional and unreasonable, or is otherwise actionable as negligent, reckless or ultrahazardous conduct. *Adkins v Thomas Solvent Co*, 440 Mich 293, 304; 487 NW2d 715 (1992); *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 193; 540 NW2d 297 (1995); see also Taylor *et al.*, Michigan Practice Guide, Torts §§ 1:748-1:772. Thus, most significant to the instant case, plaintiffs must demonstrate that they suffered "significant harm resulting from [defendants'] unreasonable interference with the use or enjoyment of [plaintiffs'] property." *Jackson v Thompson-McCully Co*, 239 Mich App 482, 490; 608 NW2d 531 (2000); see also *Adams v Cleveland-Cliffs Iron Co*, 237 Mich App 51, 67, 72; 602 NW2d 215 (1999). To establish a claim of nuisance, "the plaintiff must prove all damages, which may be awarded only to the extent that the defendant's conduct was 'unreasonable' according to a public-policy assessment of its overall value." *Id.* at 67. In making this

assessment, this Court should balance the intrusion into the plaintiffs' enjoyment of their land with the degree to which the defendants' conduct is socially desirable. See *id.* at 62-63.

Plaintiffs alleged that defendants' conduct, the construction and operation of the Super K-Mart, interfered with plaintiffs' use and enjoyment of land in which they had property rights. Plaintiffs' conclusory statement that such interference was "unreasonable . . . i.e. a 'nuisance in fact,'" is insufficient to support a cause of action for nuisance in fact. See *ETT Ambulance Service Corp v Rockford Ambulance, Inc.*, 204 Mich App 392, 395; 516 NW2d 498 (1994); *Freedman v Oak Park*, 170 Mich App 349, 355; 427 NW2d 557 (1988). Rather, plaintiffs must support the allegation with evidence of interference rising to the level of an unreasonable interference. Plaintiffs alleged:

(a) [the Super K-Mart] is too large and busy to be situated on such a small site within a primarily residential neighborhood, to wit:

(i) retail store hours are 24 hours, 7 days per week;

(ii) freight delivery hours are not sufficiently limited;

(iii) there is insufficient parking;

(iv) there is insufficient traffic control;

(v) there is insufficient security;

(vi) there is light pollution inside Plaintiffs' home caused by, inter alia, automobile headlights in the parking lot, the parking lot lights, and the big "K" light;

(vii) there is noise pollution inside Plaintiffs' home caused by increased vehicles and pedestrians, e.g. honking horns, squealing brakes, loud radios, and freight delivery vehicles;

(viii) there are noxious emissions from the increased vehicles, e.g. making it difficult to breathe or entertain guests inside Plaintiffs' home;

(ix) there is increased vehicular (including semi-tractor trailers) and pedestrian traffic and illegal parking on Monte Vista; and

(x) there is increased auto theft near plaintiffs' residence.

(b) it has caused Plaintiff Evelyn Childs to experience respiratory problems as a result of air-borne material generated by Defendants' construction and use.

Plaintiffs supported their nuisance claim with little evidence other than their affidavits, which mirror the allegations in their amended complaint. In their affidavits, plaintiffs state that they reside at property directly across from the Super K-Mart and list their alleged harms. Each plaintiff complained of "substantial and unreasonable interference with the enjoyment of my

property,” including (1) exhaust fumes that make it difficult to plant flowers and socialize outside, (2) excessive light that makes it “difficult to sleep, read, work, or concentrate,” (3) unsightly trash blowing into their yard, (4) increased traffic, (5) a belief that crime was increasing, and (6) a “much noisier” neighborhood. Plaintiffs stated that their “quality of . . . life has been greatly diminished as a result of Defendants’ operation of their Super Kmart Store,” and “Bonita and Anita Childs have taken some video which depicts conduct by Defendants which we believe is unreasonable, unwarranted, and infringes on our right to live quietly in a neighborhood we have enjoyed for 35 years.”³ The remainder of plaintiffs’ evidence consisted of photographs of the houses in the area, which appear well maintained, and Evelyn Childs’ medical records, which indicate that she complained of a slightly irritated voice, but that an examination of her neck and throat revealed nothing abnormal. For the reasons that follow, we conclude that such allegations and supporting evidence are insufficient to maintain a claim that plaintiffs suffered *significant* harm as a result of defendants’ *unreasonable* interference in plaintiffs’ property interests.

Although plaintiffs recite numerous complaints, they fail to claim or to submit proof that any adverse consequences were caused by anything other than the ordinary operation of the Super K-Mart. Plaintiffs allege that harmful pollutants came from traffic and defendants’ “use” of the property. Where plaintiffs fail to allege and provide evidence that the Super K-Mart does not comply with local zoning and ordinance requirements, the ordinary operation of a retail superstore and its associated traffic are not “unreasonable.” In *Thompson-McCully*, this Court concluded that the plaintiff failed to establish a *prima facie* nuisance case against a proposed asphalt plant. *Thompson-McCully Co, supra* at 490-491. Like the instant case, the property designated for the asphalt plant had to be rezoned to permit construction of the offending business, in that case from agricultural to heavy industrial. *Id.* at 486. This Court stated that the asphalt plant would not “amount to an unreasonable and substantial interference with [the] plaintiffs’ use and enjoyment of their properties that is practically certain, strongly probable, or inevitable.” *Id.* at 491. Although the plaintiffs in *Thompson-McCully* were seeking an injunction based on a theory of anticipatory nuisance, we consider the circumstances as guidance in the instant case. We cannot conclude that the problems plaintiffs allege to be caused by the Super K-Mart rise to the level of interference that an asphalt plant would cause. In contrast to the heavy pollution and noise associated with an asphalt plant, plaintiffs make only unsubstantiated allegations of increased traffic, unpleasant lighting and minor throat problems caused by dust.

Plaintiffs also failed to set forth any evidence that they suffered significant harm. The only harms alleged by plaintiffs were “respiratory problems” and “diminution of Plaintiffs’ use and enjoyment of their residence, diminution or impairment of the value of plaintiff’s personal property, and damages for Plaintiffs’ personal injury, anxiety, and emotional distress.” Allegations of minimal harm will not support a nuisance claim. *Adkins, supra* at 309-310. By describing their alleged injuries merely as “problems” and “diminution” of the use, enjoyment and value of their property, plaintiffs failed to set their claims apart from minimal damages insufficient to support a claim of nuisance. Furthermore, plaintiffs failed to submit, and in fact

³ There is no indication that such a video was in evidence.

admitted that they did not possess, evidence supporting their allegations of light pollution, increased crime, increased traffic, increased pollution and debris, or decreased property value.

In contrast, defendants submitted evidence indicating that the Detroit Planning and Development Department deemed the location appropriate for the Super K-Mart, as well as a traffic impact study indicating that the Super K-Mart would cause increased traffic delays and impede traffic movement, but that proposed improvements in the roads would result in improved traffic flow when compared to pre-construction traffic. Defendants also submitted the deposition of Detroit Police Officer Terrence Castelow, who was assigned to work out of the Super K-Mart facility. According to Officer Castelow, the area around the Super K-Mart was approximately seventy percent residential, with the remaining thirty percent consisting of retail and industrial development. He did not notice an unreasonable increase in crime related to the Super K-Mart, but explained that five or six cars were been stolen out of the lot between November 1998 and April 1999. Officer Castelow stated that he perceived a decrease in local crime, which he attributed in part to the security lighting at the Super K-Mart. The area had previously been an unsafe, "car theft haven" with abandoned stores and crack houses in the neighborhood, one directly behind plaintiffs' house. According to defendants' evidence, the community found the store beneficial, and the local property values would most likely increase as a result of the Super K-Mart's construction and operation.

Thus, the evidence before the trial court indicated that the Super K-Mart would provide a significant utility to the neighborhood. Furthermore, the uncontested evidence refuted plaintiffs' allegations that they suffered significant harms as a result of the Super K-Mart's operation. For the foregoing reasons, we conclude that the trial court properly dismissed plaintiffs' claims for nuisance.

Affirmed.

/s/ Kirsten Frank Kelly

/s/ Harold Hood

/s/ Brian K. Zahra