STATE OF MICHIGAN

COURT OF APPEALS

ROBERT A. RADZIEWICZ,

Plaintiff-Appellant,

v

FRANKENMUTH PADDLEWHEEL TOURS and JENE QUIRIN,

Defendants-Appellees.

UNPUBLISHED
September 17, 2009

No. 282648
Saginaw Circuit Court
LC No. 07-063746-CZ

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

PER CURIAM.

Plaintiff appeals as of right from a circuit court order granting defendants' motion for summary disposition. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendants operate a paddlewheel boat on the Cass River in the city of Frankenmuth. The boat is equipped with a whistle that is sounded several times on each tour. Plaintiff filed this action, asserting that the repeated sounding of the whistle constitutes a nuisance. The trial court dismissed plaintiff's complaint on defendants' motion because plaintiff failed to show that the noise causes actual physical discomfort to an individual of ordinary sensibilities and because the sounding of the whistle was "done under color of applicable State and Federal marine navigation regulations."

A trial court's ruling on a motion for summary disposition is reviewed de novo on appeal. *Gillie v Genesee Co Treasurer*, 277 Mich App 333, 344; 745 NW2d 137 (2007). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). When reviewing a motion under subrule (C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant record evidence in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists warranting a trial. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West*, *supra* at 183.

"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). Citing 4 Restatement Torts, 2d, §§ 821D-F and 822, pp 100-115, the *Adkins* Court stated:

> According to the Restatement, an actor is subject to liability for private nuisance for a nontrespassory invasion of another's interest in the private use and enjoyment of land if (a) the other has property rights and privileges in respect to the use or enjoyment interfered with, (b) the invasion results in significant harm (c) the actor's conduct is the legal cause of the invasion, and (d) the invasion is either (i) intentional and unreasonable, or (ii) unintentional and otherwise actionable under the rules governing liability for negligent, reckless, or ultrahazardous conduct. [*Adkins, supra* at 304.]

With respect to the fourth element, it is the interference with the plaintiff's rights that must be unreasonable, not the defendant's conduct. *Id.* at 305. The interference is unreasonable if the gravity of the harm to the plaintiff outweighs the utility of the defendant's conduct. 3 Restatement Torts, 2d, § 826, p 119. Where the alleged nuisance is "predicated on conduct of a defendant that causes mental annoyance," the annoyance must be "significant" and the interference must be "unreasonable in the sense that it would be unreasonable to permit the defendant to cause such an amount of harm without paying for it." *Adkins, supra* at 309-310.

This Court has recognized that a possessor of land may bring an action for nuisance when the possessor's enjoyment of the land is interfered with by "noise, vibrations, or ambient dust, smoke, soot, or fumes." *Adams v Cleveland-Cliffs Iron Co*, 237 Mich App 51, 67; 602 NW2d 215 (1999). Otherwise lawful activity can still constitute a nuisance under certain circumstances. *Gruber v Dodge*, 45 Mich App 33, 38-39; 205 NW2d 869 (1973). Generally, noise does not constitute a nuisance per se; however, it may be of such a character as to constitute a nuisance in fact, even if it arises from the operation of a lawful business or occupation. *Borsvold v United Dairies*, 347 Mich 672, 680-681; 81 NW2d 378 (1957). With respect to a nuisance claim predicated on noise, courts should consider the character of the industry subject to complaint, the character, volume, time, and duration of the noise, and all of the facts and circumstances surrounding the case. *Smith v Western Wayne Co Conservation Ass'n*, 380 Mich 526, 536; 158 NW2d 463 (1968). We find helpful the opinion in *Louisville & N R Co v Commonwealth*, 166 SW 237, 237-238 (Ky App, 1914), where the court stated:

> It is a matter of common knowledge that the emission of smoke from engines, and ringing of bells, the blowing of whistles, and the grinding of wheels are necessary incidents to the operation of railroad trains. A railroad cannot be operated without burning coal, and the coal cannot be burned without making smoke; the ringing of bells and the blowing of whistles are not only necessary incidents to the operation of railroad trains, but the giving of signals in that way is actually required by law in many instances; and it is perfectly apparent that the grinding of wheels cannot be avoided in the operation of trains. It will be observed that there is no allegation in the indictment that the things complained of were unnecessarily done, or that it was not necessary for the railroad company in the operation of its trains to blow the whistles, to ring the bells, or to cause the emission of large volumes of smoke. The necessities of commerce demand the

> operation of railroads, and railroads cannot be operated without these necessary incidents, and there can be no nuisance in the operation of a railroad or of its switchyards, unless the noises created thereby are unnecessary in its operation.
>
> The doing of a lawful thing in a careful and prudent manner cannot be a nuisance; but the doing of a lawful thing in a reckless, careless, or negligent way may be a nuisance. In this case if the ringing of bells, the blowing of whistles, and the emission of smoke was not done to any greater extent than was necessary in the prudent operation of appellant's trains, there was no nuisance[.]

Considering the facts and circumstances relevant to this case, we conclude that the trial court did not err in granting defendants' motion for summary disposition. Plaintiff resides in the city of Frankenmuth, a city that is actively promoted as a tourist destination. Defendants' operation is one of the promoted attractions. The one-hour riverboat tours are conducted during reasonable hours (9:00 a.m. to 9:00 p.m.), and there are no more than seven tours a day. Defendant Quirin supplied an affidavit in which he addressed the questions of when and why the vessel's horn is sounded on any given tour, averring:

> Two short (less than one second each) blasts are blown in order to indicate that the vessel is going to start its engines; because of the use of hydraulic motors to propel the exposed paddlewheel, the horn serves as a warning to passengers, crew and users of the waterway that the paddlewheel may begin to turn at any moment;
>
> One prolonged blast (4 to 6 seconds) is sounded as the vessel utilizes its side thrusters to push it away from the dock and immediately before the vessel begins to turn sideways in the river; the long blast warns all traffic upon the river, which has included water skiers, swimmers, persons using inner-tubes, kayaks and boats, etc., that the vessel will be substantially blocking the navigable portion of the river as it completes its rotation toward an intervening obstruction (bridge) and a blind bend in the river;
>
> One prolonged blast is sounded again upon the vessel's return to the dock for the same purposes as hereinbefore indicated and to indicate the vessel will be stalled in the channel and will be moving sideways under side thruster power toward the dock.

The soundings relative to leaving the dock and maneuvering around the bend in the river and other obstructions are required by law pursuant to Coast Guard rules and regulations. The other soundings are not required by law, but they clearly serve a legitimate safety function as indicated in the affidavit. Plaintiff's competing affidavit, which was from plaintiff himself and was the only documentary evidence submitted by plaintiff, contains no averments challenging or

contradicting the above-quoted averments made by Quirin.[1] Additionally, even if the soundings of the whistle required by Coast Guard rules and regulations were not mandated, the soundings would nonetheless serve a legitimate safety function as reflected in Quirin's affidavit. All of the soundings are necessary for the prudent operation of the riverboat. The soundings in no way evince recklessness, carelessness, or negligence. Given the circumstances, the minor annoyance caused by any extra soundings of the whistle that go beyond that required by law is not such as to cause significant harm to plaintiff in the use and enjoyment of his property. Moreover, because the soundings of the whistle are either required by law and/or serve legitimate safety concerns, any interference with plaintiff's rights is not unreasonable to the extent that the interference outweighs the utility of defendants' activity. Although the trial court granted summary disposition for different reasons, this Court will not reverse where the trial court reaches the right result. *Netter v Bowman*, 272 Mich App 289, 308; 725 NW2d 353 (2006).

Affirmed.

/s/ William B. Murphy
/s/ Patrick M. Meter
/s/ Jane M. Beckering

[1] Where the party opposing summary disposition fails to present documentary evidence establishing the existence of a material factual dispute, the motion for summary disposition is properly granted. *Quinto v Cross & Peters Co*, 451 Mich 358, 363; 547 NW2d 314 (1996).