

STATE OF MICHIGAN
COURT OF APPEALS

THOMAS MAGYAR,

Plaintiff-Appellant,

v

MICHAEL BARNES and DIANE BARNES,

Defendants-Appellees.

UNPUBLISHED

March 22, 2012

No. 299118

Saginaw Circuit Court

LC No. 09-005785-NO

Before: SHAPIRO, P.J., and SAAD and BECKERING, JJ.

BECKERING, J. (*concurring*).

I concur in result only with respect to the majority’s conclusion that the trial court did not err when it granted summary disposition for defendants on plaintiff’s negligence and nuisance claims. I write separately because, among other things, I respectfully disagree with the majority’s analysis of plaintiff’s common-law nuisance claim.

As the majority explains, this case arose when plaintiff Thomas Magyar slipped and fell on ice that accumulated on the steps of the entrance to property that his mother leased from defendants Michael and Diane Barnes. One issue on appeal is whether defendants’ “non-placement of gutters and eaves troughs over the roofing area” of the rental property, which contributed to the accumulation of ice on the front steps, constituted a nuisance.

“[T]he gist of a private nuisance action is an interference with the occupation or use of land or an interference with servitudes relating to land.” *Adkins v Thomas Solvent Co*, 440 Mich 293, 303; 487 NW2d 715 (1992). A defendant is liable to a plaintiff for a private nuisance for interfering with the plaintiff’s interest in the private use and enjoyment of land when (1) the plaintiff has property rights and privileges with respect to the use or enjoyment interfered with; (2) the interference caused significant harm; (3) the defendant’s conduct was the legal cause of the interference; and (4) the interference was either (a) intentional and unreasonable or (b) unintentional and otherwise actionable under the rules governing liability for negligent, reckless, or ultrahazardous conduct. *Terlecki v Stewart*, 278 Mich App 644, 654; 754 NW2d 899 (2008).

There are two general categories of nuisance: nuisance per se and nuisance in fact. *Bluemer v Saginaw Central Oil & Gas Serv, Inc*, 356 Mich 399, 411; 97 NW2d 90 (1959). A nuisance per se “is an act, occupation, or structure which is a nuisance at all times and under any circumstances, regardless of location or surroundings.” *Id.* “Nuisances in fact . . . are those which become nuisances by reason of circumstances and surroundings” *Id.* Nuisances in

fact include two subcategories: intentional nuisance and negligent nuisance. See *Wagner v Regency Inn Corp*, 186 Mich App 158, 164; 463 NW2d 450 (1990). “A nuisance in fact is intentional if the creator intends to bring about the conditions which are in fact found to be a nuisance.” *Id.* “A negligent nuisance in fact is one that is created by the landowner’s negligent acts, that is, a violation of some duty owed to the plaintiff which results in a nuisance.” *Id.*; see also *Buckeye Union Fire Ins Co v State*, 383 Mich 630, 636; 178 NW2d 476 (1970) (stating that a nuisance may result from want of due care).

I agree with the majority that this case does not involve a nuisance per se; defendants’ failure to provide eaves troughs over the front stairs of the rental property, which contributed to the accumulation of ice on the stairs, is not a nuisance “at all times and under any circumstances, regardless of location or surroundings.” *Bluemer*, 356 Mich at 411. However, I do not agree with the majority’s conclusion that plaintiff’s nuisance in fact claim fails because plaintiff’s allegations sound in negligence. A claim of negligent nuisance in fact is predicated on a negligent act, i.e., a violation of a duty owed to a plaintiff that results in a nuisance.” *Wagner*, 186 Mich App at 164; see also *Terlecki*, 278 Mich App at 654 (stating that an actor is subject to liability for private nuisance if the actor’s conduct is unintentional and otherwise actionable under the rules governing liability for negligent conduct). Nevertheless, I find that plaintiff’s common-law nuisance in fact claim fails for different reasons. First, defendants did not owe plaintiff a duty to erect and maintain eaves troughs above the front entrance of the rental property; therefore, defendants did not create a negligent nuisance in fact by violating a duty owed to plaintiff. *Wagner*, 186 Mich App at 164. Second, “[i]n order to create a legal nuisance, [an] act of man must have contributed to its existence. Ill results, however extensive or serious, that flow from natural causes, cannot become a nuisance, even though the person upon whose premises the cause exists could remove it with little trouble and expense.” *Ken Cowden Chevrolet, Inc v Corts*, 112 Mich App 570, 573; 316 NW2d 259 (1982) (citations omitted). “Unlike negligence, nuisance is a condition and not . . . [a] failure to act.” *Traver Lakes Community Maintenance Ass’n v Douglas Co*, 224 Mich App 335, 346; 568 NW2d 847 (1997). Defendants’ inaction—failing to provide eaves troughs above the front stairs of the rental property—cannot be a nuisance as a matter of law. *Id.*; *Corts*, 112 Mich App at 573.

Accordingly, I would hold that defendants are entitled to judgment as a matter of law on plaintiff’s common-law nuisance claim for these reasons.

/s/ Jane M. Beckering