

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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READ LUMBER & HARDWARE INC d/b/a  
LAKELAND ACE HARDWARE,

UNPUBLISHED  
July 3, 2012

Plaintiff/Counter Defendant-  
Appellee,

v

MARY ANN LAMKIN and STEVE LAMKIN,

No. 303597  
Livingston Circuit Court  
LC No. 05-021728-CH

Defendants/Counter Plaintiffs-  
Appellants.

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Before: BECKERING, P.J., and FITZGERALD and STEPHENS, JJ.

PER CURIAM.

Defendants appeal as of right from the trial court's grant of summary disposition in favor of plaintiff. The trial court granted plaintiff's motions for summary disposition, which were filed in response to defendants' counter-complaint alleging trespass and nuisance per se. We affirm.

Defendants Mary Ann and Steve Lamkin reside in Hamburg Township. Defendants have owned their piece of lakefront property for more than 20 years. The property is accessed by way of Island Shore Drive, a privately owned road that connects defendants' neighborhood with M-36. It is undisputed that defendants and their neighbors have an easement interest in Island Shore Drive, which is apparently owned by Nicholas Haro and John Bosery, two individuals who are not parties to this action. Plaintiff Read Lumber & Hardware is a retail business located at the intersection of M-36 and Island Shore Drive. Plaintiff has operated in that location since 1987; however, the location has continuously hosted a business since the 1950s. When plaintiff acquired the property in 1987, the existing structure could be, and was, accessed from both M-36 and Island Shore Drive. Plaintiff continued to allow its customers to use either road to access the parking lot. In 2002, plaintiff made certain improvements to its property. It submitted a site plan to Hamburg Township. Plaintiff testified that Hamburg Township required that the site plan allow for access to the property from Island Shore Drive.

On October 19, 2005, plaintiff filed a complaint alleging that defendants had engaged in continuous harassing behavior toward plaintiff's customers. Specifically, defendants allegedly verbally assaulted several customers, picketed in front of the store and attempted to block customers' access to the store. Plaintiff sought relief under theories of nuisance and intentional

interference with a business expectancy. Plaintiff requested injunctive relief to prevent future interference by defendants. The trial court entered a preliminary injunction on November 5, 2005. On December 21, 2007, it entered a permanent injunction prohibiting defendants from entering plaintiff's property or otherwise interfering with its business.

In response to plaintiff's complaint, defendants filed an answer and a counter-complaint. In the answer, defendants generally denied any liability for their conduct and stated that plaintiff was not entitled to relief because each of their alleged acts were the result of plaintiff's illegal use of Island Shore Drive as a commercial roadway. In their counter-complaint, defendants asserted that plaintiff had, at all times, been in violation of several Hamburg Township zoning ordinances. According to defendants, plaintiff's modification of its property in 2004 was impermissible because it resulted in an expansion of its nonconforming use. Defendants asserted that plaintiff's use of Island Shore Drive for commercial purposes was prohibited and that it constituted a trespass, a nuisance per se and a nuisance in fact. Defendants requested both monetary damages and equitable relief.

The parties were prepared to proceed to trial. However, the trial court entered its Stipulated Order of Dismissal on December 21, 2007. The brief order explained that the action was being dismissed so that Hamburg Township could first address defendants' allegations that plaintiff was in violation of several zoning ordinances. The order stated that the parties could renew their causes of action after the completion of the Hamburg Township review.

On July 28, 2008, defendants filed a motion to reinstate their cause of action and to add Hamburg Township as a party. Defendants stated that they sought to have the township review the alleged zoning ordinance violations and that they were told that their request was untimely. Consequently, they asserted that the reinstatement of their cause of action was the only available means of redress and they filed a petition for the court to review the township's conclusion that their request was untimely. The trial court ultimately granted the motion for reinstatement on April 9, 2009.

Plaintiff filed a motion for summary disposition on June 24, 2010. Plaintiff first argued that it was entitled to summary disposition regarding the nuisance claim because defendants failed to show that plaintiff's conduct resulted in an increased burden on Island Shore Drive and because defendants failed to show that they suffered special damages. Plaintiff next argued that summary disposition was proper regarding the trespass claim because plaintiff had a prescriptive easement to the portion of Island Shore Drive in question and had been granted a license by Island Shore Drive's fee holder. Finally, plaintiff argued that the allegations of zoning ordinance violations were not properly before the court because defendants failed to exhaust their administrative remedies by appealing Hamburg Township's decision to the circuit court. Defendants filed a short response to plaintiff's motion, in which they argued that Hamburg Township's actions, or lack thereof, had no bearing on her right to seek a remedy. They further argued that plaintiff could not claim the existence of a prescriptive easement where it failed to first bring a cause of action against the fee holders to quiet title.

Defendants also filed a motion for summary disposition on June 24, 2010, solely in relation to their claim of nuisance per se. Defendants argued that a violation of a zoning ordinance constitutes a nuisance per se for which any person suffering special damages can seek

a remedy. Defendants stated that because Island Shore Drive was zoned as a Waterfront Residential district, commercial use of that property is prohibited and plaintiff's use of the road constituted a nuisance per se. Defendants further argued that plaintiff's use could not qualify as a non-conforming use because non-conforming use status could only be conferred if the property's use was initially lawful. Because Island Shore Drive was never zoned for commercial use, plaintiff could not be declared to be a lawful nonconforming user. In plaintiff's response to the motion, it maintained that the township, not defendants, was the only party that could attempt to abate the alleged nuisance. It further asserted that any alleged zoning violation predated the existence of the ordinance and qualified as a preexisting nonconforming use.

The trial court held a hearing on the motions for summary disposition on August 12, 2010, at which the parties reiterated the arguments from their briefs. At the close of the hearing, the trial court issued a ruling from the bench. The court stated that it believed defendants did have standing to bring their trespass claim. However, the court determined that plaintiff was entitled to summary disposition because the evidence established that a prescriptive easement had been established as far back as the 1960s, when the property was occupied by a restaurant. The court classified the license plaintiff had obtained from the two nearby property owners as placing a belt with the suspenders of the prescriptive easement. Regarding the nuisance per se claim, the court determined that plaintiff was entitled to summary disposition where Hamburg Township had consistently said that plaintiff's use of Island Shore Drive did not violate any zoning ordinances and where that use predated the zoning ordinances in question. The trial court issued a written order dismissing the counts of trespass and nuisance per se on August 30, 2010.<sup>1</sup> Defendants now appeal as of right.

Defendants first argue that the trial court erred in granting plaintiff's motion for summary disposition regarding defendants' trespass claim.<sup>2</sup> We disagree. This Court reviews a trial court's decision regarding summary disposition pursuant to MCR 2.116(C)(10) de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Summary disposition is proper when, upon examining the affidavits, depositions, pleadings, admissions and other documentary evidence, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Quinto v Cross and Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1997).

The trial court determined that plaintiff was entitled to summary disposition regarding the claim of trespass after concluding that plaintiff had a prescriptive easement and was permitted to utilize Island Shore Drive as an access point for its customers. As this Court has previously

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<sup>1</sup> We note that defendants' claim of nuisance in fact ultimately proceeded to a bench trial. After the trial concluded, the court found that plaintiff's conduct did not amount to a nuisance in fact. The trial court's verdict in that matter is not at issue in this appeal, nor does that verdict impact the resolution of the issues properly before us.

<sup>2</sup> Plaintiff asserts that defendants do not have standing to maintain a claim for trespass because they are not the fee holders for the property in question. However, this Court has previously acknowledged the right of an easement holder to bring an action for trespass. See *Marathon Pipe Line Co v Nienhuis*, 31 Mich App 407; 188 NW2d 120 (1971).

explained, “[a] prescriptive easement results from open, notorious, adverse, and continuous use of another's property for a period of 15 years. A prescriptive easement requires elements similar to adverse possession, except exclusivity. The plaintiff bears the burden to demonstrate entitlement to a prescriptive easement by clear and cogent evidence.” *Matthews v Dep't of Natural Resources*, 288 Mich App 23, 37; 792 NW2d 40 (2010) (citations omitted). Defendants contend that the trial court erred in concluding that plaintiff had a prescriptive easement to utilize Island Shore Drive. According to defendants, the court’s ruling was precluded because plaintiff failed to establish that its use of Island Shore Drive was continuous and adverse. We will address each of the challenged elements in turn.

Regarding the element of continuity, we are not persuaded by defendants’ argument that plaintiff was precluded from claiming the existence of a prescriptive easement where it failed to demonstrate that it could tack its usage to the usage of the previous property owners. While the trial court did focus on the prior owners’ use of Island Shore Drive before declaring the existence of a prescriptive easement, we find that any such analysis was unnecessary. As stated above, a prescriptive easement may arise after 15 years of continuous use. Here, the evidence demonstrates that plaintiff has operated at its current location since 1987 and that it has continually allowed its customers to access Island Shore Drive. Consequently, plaintiff satisfied the continuity requirement in 2002. Defendants did not file their complaint until 2005. As a result, it is irrelevant whether plaintiff is permitted to tack its use to the use of its predecessors.

Similarly, we find no merit in defendants’ assertion that plaintiff could not establish the existence of a prescriptive easement where its use of Island Shore Drive was not hostile or adverse. As this Court has explained:

The term ‘hostile’ as employed in the law of adverse possession is a term of art and does not imply ill will. Nor is the claimant required to make express declarations of adverse intent during the prescriptive period. Adverse or hostile use is use inconsistent with the right of the owner, without permission asked or given, use such as would entitle the owner to a cause of action against the intruder. [*Mumrow v Riddle*, 67 Mich App 693, 698; 242 NW2d 489 (1976), citing *Rose v Fuller*, 21 Mich App 172; 175 NW2d 344 (1970) and 25 Am Jur 2d, Easements and Licenses, s 51, pp. 460-461.]

Defendants assert that plaintiff cannot claim a prescriptive easement because such a claim is inconsistent with plaintiff's argument that it was granted licenses to use Island Shore Drive for commercial purposes. However, the licenses in question were not issued until 2005, around the time that litigation commenced. While it is true that a license is an express grant of permission that would defeat a claim of prescription, there is no evidence that plaintiff was expressly granted permission during the first 15 years of its open use of Island Shore Drive. During that 15 year period, the evidence indicates that plaintiff used Island Shore Drive in a manner that would have entitled the fee owners to a cause of action. The licenses that were ultimately granted merely served as additional legal support for plaintiff's use of Island Shore Drive in place of plaintiff bringing a formal action to quiet title.

We likewise reject defendants’ declaration that the trial court could not acknowledge the existence of a prescriptive easement where plaintiff failed to join the fee owners as parties to its

cause of action. Defendants offer no legal support for the notion that the fee owners of a parcel must be involved in a cause of action before a court determines the existence of a prescriptive easement. Defendants' assertion would perhaps be meritorious if the present action was an action to quiet title that was initiated by plaintiff. While it may be true that the initial recognition of the existence of a prescriptive easement ordinarily occurs in a cause of action involving the fee holder, we cannot say that the trial court erred where defendants have failed to present any case law that precluded the trial court's conclusion.

Similarly, defendants have offered no legal support for their claim that the existence of a prescriptive easement would not defeat their claim of trespass. Defendants' brief declares that where there are two "competing easement users," this Court must compare the reasonableness of the competing uses and should give preference to the easement that has existed for the greater period of time. "It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001), quoting *Mitcham v Detroit*, 355 Mich 182; 94 NW2d 388 (1959).

The evidence properly submitted to the trial court adequately demonstrates that plaintiff utilized Island Shore Drive in an open, notorious and adverse manner for a continuous period in excess of 15 years. Consequently, the court properly determined that plaintiff obtained an easement right through prescription. Because defendants have presented no authority to demonstrate that their trespass claim can prevail in light of plaintiff's prescriptive easement, we cannot conclude that the trial court erred in granting plaintiff's motion for summary disposition relating to the trespass claim.

Defendants next assert that the trial court erred in granting plaintiff's motion for summary disposition regarding defendant's nuisance per se claim. Defendants assert that the trial court should have granted summary disposition on this claim in their favor. As stated above, this Court reviews a grant of summary disposition pursuant to MCR 2.116(C)(10) de novo. Further, "[w]hether an allegedly injurious condition constitutes a nuisance per se is a question of law." *Ypsilanti Charter Twp v Kircher*, 281 Mich App 251, 269; 761 NW2d 761 (2008).

Defendants assert that the trial court erred when it determined that plaintiff could not be held liable under a theory of nuisance per se in light of the fact that Hamburg Township repeatedly concluded that plaintiff had not violated any zoning ordinances. However, as this Court has previously explained, the violation of a zoning ordinance constitutes a public nuisance, which may be the subject of an action by a private individual who has incurred special damages that are "distinct and different from the injury suffered by the public generally." *Towne v Harr*, 185 Mich App 230, 232; 460 NW2d 596 (1990). Where a zoning ordinance has been violated, a plaintiff who has not suffered special damages may not maintain a cause of action against the offender, but must seek recourse through its township's officials. *Id.* at 233. Consequently, the lower court was required to determine whether plaintiff had violated a zoning ordinance and, if so, whether the violation of the ordinance resulted in special damages to defendants. By simply deferring to the Hamburg Township conclusion regarding plaintiff's compliance with its zoning ordinances, the trial court failed to independently analyze defendants' claim of nuisance per se.

While we conclude that the trial court did not conduct the requisite analysis before granting plaintiff's motion for summary disposition, we find that the court reached the proper outcome. As stated above, an individual can only maintain a nuisance per se cause of action if she demonstrates that she suffered special damages different than the general public. When describing the notion of special damages, this Court has previously explained that a party must demonstrate more than a mere increase in traffic. *Unger v Forest Home Twp*, 65 Mich App 614, 617; 237 NW2d 582 (1975).<sup>3</sup> Likewise, a showing of "general economic and aesthetic losses" is also insufficient when attempting to demonstrate special damages. *Id.*

In the present case, defendants' brief on appeal simply alleges that plaintiff, through modifications to its site plan, has "caused a significant increase in the public use of Island Shore Drive" and that the increased use has damaged defendants because Island Shore Drive is their only means to access their property. When viewing the evidence in the light most favorable to defendants and accepting their allegations as true, we cannot conclude that they have demonstrated that they have suffered special damages that grant them standing to assert a nuisance per se claim. The increase in traffic on Island Shore Drive, while perhaps bothersome to defendants, does not meet the threshold established by this Court's previous decisions. Therefore, the trial court did not err in granting plaintiff's motion for summary disposition regarding the nuisance per se cause of action. Likewise, it naturally follows that the trial court did not err in denying defendants' motion for summary disposition regarding that same claim. We note that our conclusion regarding defendants' standing should not be read as an indication that plaintiff is not in violation of any zoning ordinances. That question, which is one on which we offer no opinion, cannot be resolved until it is addressed by the proper Hamburg Township authorities or in a nuisance per se cause of action initiated by a plaintiff who has suffered special damages.

Defendants' brief on appeal maintains that the trial court, in focusing on whether the commercial use of Island Shore Drive amounted to a zoning violation, failed to consider numerous alleged zoning ordinance violations that were detailed in defendant's complaint. We note that while defendants have generally pled and argued that plaintiff has committed several different zoning violations, they have typically focused on the commercial use of Island Shore Drive. The other alleged violations, which relate to things such as the number of parking spaces available for plaintiff's customers and the orientation of plaintiff's front door, have not been argued in detail. However, even if those violations had been addressed in detail, we fail to see

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<sup>3</sup> *Unger* did not involve a nuisance per se claim. Rather, it dealt with an attempt by an individual to seek review of a zoning board determination that related to a third-party's property. We find the discussion of special damages in that instance to be instructive because, like the present case, it dealt with whether a private individual had standing to utilize the courts to challenge the application of a zoning ordinance, or whether such enforcement was a duty relegated to a zoning board. Furthermore, we note that a published decision of this Court has previously cited to *Unger* when setting forth the special damages requirement in a nuisance per se action. *Ken Cowden Chevrolet, Inc v Corts*, 112 Mich App 570; 316 NW2d 259 (1982).

how defendants could demonstrate that the other alleged violations caused them special damages that afford them standing to maintain their cause of action.

Finally, because we have concluded that defendants have not established the existence of special damages, we need not address whether plaintiff's use of Island Shore Drive constitutes a non-conforming use. However, we note that we are not necessarily persuaded by defendants' argument that a party can only claim a nonconforming use if it is a landowner, as opposed to a mere holder of an easement interest. "A prior nonconforming use is a vested right in the use of particular property that does not conform to zoning restrictions, but is protected because it lawfully existed before the zoning regulation's effective date." *Heath Twp v Sall*, 442 Mich 434, 439; 502 NW2d 627 (1993). While prior nonconforming use status is typically bestowed upon landowners as opposed to easement holders, this Court has previously recognized the nonconforming use of an easement. *Hart v Ward*, unpublished opinion of per curiam of the Court of Appeals, issued October 26, 2003 (Docket No. 248725).

Affirmed.

/s/ Jane M. Beckering  
/s/ E. Thomas Fitzgerald  
/s/ Cynthia Diane Stephens