STATE OF MICHIGAN

COURT OF APPEALS

CAPITOL PROPERTIES GROUP, LLC, Plaintiff/Counter-Defendant-Appellant,	FOR PUBLICATION April 16, 2009
v	No. 281112 Ingham Circuit Court
1247 CENTER STREET, LLC, and THOMAS DONALL d/b/a X-CEL, Defendants/Counter-Plaintiffs-Appellees.	LC No. 2007-000330-CZ Advance Sheets Version

Before: Sawyer, P.J., and Servitto and M. J. Kelly, JJ.

M. J. KELLY, J. (*concurring in part and dissenting in part*).

Although I do not join in the majority's reasoning, I agree with its conclusion that the trial court properly granted summary disposition of plaintiff Capitol Properties Group, LLC's (Capitol), complaint to the extent that it stated claims based on an ordinance violation and public nuisance. However, because I conclude that Capitol established a question of fact regarding whether defendants' operation of the club at issue substantially and unreasonably interfered with Capitol's use and enjoyment of its property, I must respectfully dissent from the majority's decision to affirm the dismissal of Capitol's claim premised on private nuisance.

It is well-settled that a property owner's unreasonable generation of noise can constitute a nuisance. See *Smith v Western Wayne Co Conservation Ass'n*, 380 Mich 526, 537; 158 NW2d 463 (1968); *Grzelka v Chevrolet Motor Car Co*, 286 Mich 141, 146; 281 NW 568 (1938) (noting that the trial court properly instructed the jury on the plaintiff's theory that vibration and noise constituted a nuisance). Generally, whether the generation of noise constitutes a nuisance is a question of fact that must be determined after considering the totality of the circumstances:

> No one is entitled, in every location and circumstance, to absolute quiet, or to air utterly uncontaminated by any odor whatsoever, in the use and enjoyment of his property; but when noises are unreasonable in degree, considering the neighborhood in which they occur and all the attending circumstances, or when stenches contaminate the atmosphere to such an extent as to substantially impair the comfort and enjoyment of adjacent premises, then an actionable nuisance may be said to exist; and in applying these tests the question presented is one of fact

> rather than law. [*deLongpre v Carroll*, 331 Mich 474, 476; 50 NW2d 132 (1951).]

As the majority notes, Capitol adequately stated a claim for relief premised on private nuisance. Nevertheless, the majority concludes that the trial court properly dismissed that claim, given the trial court's factual findings concerning the harm to Capitol and whether the level of noise was reasonable. I do not agree that the trial court could properly grant summary disposition based on its factual findings. Capitol presented evidence that, if believed, demonstrates that defendants' operation of the club caused both substantial and unreasonable interference with Capitol's use of the property. Hence, to the extent that there were factual disputes, the trial court should not have resolved the disputes on a motion for summary disposition. See *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994) ("The court is not permitted to assess credibility, or to determine facts on a motion for summary judgment."); MCR 2.116(C)(10).

Moreover, it appears that the trial court erroneously determined that Capitol failed to make out a claim for nuisance based on noise because the noise did not interfere with its use, but rather interfered with its tenants' use. Capitol leases its property to commercial and residential tenants—that is, its use and enjoyment is derived from its ability to make its property attractive to potential and current tenants. Capitol presented evidence that its current tenants are not happy about the volume of noise coming from defendants' property and that this interfered with Capitol's ability to satisfy its tenants' needs. Capitol also presented evidence that, because of the noise, it cannot lease its property at the going market rate. Although it is true that a mere depreciation in property value is insufficient to constitute a nuisance, this is because the diminution in value does not normally constitute interference with the use and enjoyment of property. See *Adkins v Thomas Solvent Co*, 440 Mich 293, 311-315; 487 NW2d 715 (1992) (holding that depreciation in value caused by *unfounded* fears cannot, *by itself*, constitute an actionable nuisance). In this case, Capitol has not relied on a mere depreciation in its property value based on the existence of a club next door; rather, it has presented evidence that defendants' unreasonable operation of the club caused actual and substantial harm to its ability to lease its property for commercial and residential purposes. The diminished revenue from the property and complaints by tenants are evidence that Capitol's use of the property has been affected by the noise emanating from the club.

The trial court also appears to have erroneously determined that Capitol could not make out a claim for nuisance because a club had existed at that location for some time and—presumably—had always generated noise. Capitol presented evidence from which a trier of fact could conclude that the noise generated by the club is excessive under the totality of the circumstances. See *deLongpre*, 331 Mich at 476. Specifically, Capitol presented evidence that the noise generated by the club causes vibrations on Capitol's property, causes lights to flicker, and physically affects Capitol's tenants. The trial court apparently discounted the evidence concerning the degree of disruption caused to Capitol's property because the club and its predecessor have generated noise for some years. But it does not follow from the fact that this club or its predecessor has generated noise in the past—and may properly generate some level of noise now—that it may generate noise whenever it wishes and to whatever degree that it wishes. See *Smith*, 380 Mich at 537, citing *Warren Twp School District No 7 v Detroit*, 308 Mich 460; 14 NW2d 134 (1944) (noting that an airport is not a nuisance per se, but that it can be a nuisance

if improperly operated); *Waier v Peerless Oil Co*, 265 Mich 398, 401; 251 NW 552 (1933) ("But extraordinary or unnecessary noises or smells which introduce serious annoyances, above those which arise from the ordinary and proper conduct of the business, are actionable."); *McMorran v Cleveland-Cliffs Iron Co*, 253 Mich 65, 69; 234 NW 163 (1931) (stating that whether a business's operations constituted a nuisance depended on whether the "dust, noise, and vibration are more than merely incident to the proper and skilful operation of the business"). Defendants only have the right to operate their club in a reasonable manner—not any manner that they deem fit. Likewise, Capitol is not without redress merely because the club existed before Capitol decided to lease its property. See *McMorran*, 253 Mich at 69 (stating that a plaintiff who comes to the nuisance is not deprived of all redress—the plaintiff need only submit to the noise incident to the *proper* operation of the business) (emphasis added). Hence, if the noise generated by the club is in excess of that necessary to its proper operation, Capitol would be entitled to relief.

The trial court erred when it granted summary disposition of Capitol's complaint to the extent that it stated a claim based on private nuisance. Capitol has adequately alleged and supported that claim and, for that reason, is entitled to have a trier of fact determine whether defendants' operation of the club has substantially and unreasonably interfered with Capitol's use of the property after a full trial on the merits. For these reasons, I would reverse the trial court's order granting summary disposition and remand for trial on the merits consistent with this opinion.

/s/ Michael J. Kelly