STATE OF MICHIGAN

COURT OF APPEALS

MARY MARBLE,

Plaintiff-Appellant,

v

STEVE DOBSON, individually, and
STEVE DOBSON d/b/a SYCAMORE BEND
APARTMENTS,

Defendant-Appellee.

UNPUBLISHED
September 18, 1998

No. 204535
Branch Circuit Court
LC No. 95-011636 NI

Before: Smolenski, P.J., and McDonald and Saad, JJ.

PER CURIAM.

Plaintiff appeals as of right from a judgment of no cause of action. We affirm.

Plaintiff was injured when she stepped into a pothole in a driveway located at an apartment complex owned by defendant Steve Dobson. Plaintiff brought a lawsuit against defendant sounding in premises liability. The jury found that defendant was not negligent.

On appeal, plaintiff first argues that the jury's finding that defendant was not negligent was against the great weight of the evidence. We agree with plaintiff that evidence was submitted from which the jury could have found that the potholes constituted a dangerous condition that had existed for several years. However, evidence was also submitted from which the jury could have found that plaintiff, the manager of the apartment complex, was well aware of the potholes and that any danger posed by the potholes was known or obvious. *Bertrand v Alan Ford, Inc*, 449 Mich 606; 537 NW2d 185 (1995); *Riddle v McLouth Steel Products Corp*, 440 Mich 85; 485 NW2d 676 (1992). Accordingly, we conclude that the trial court did not abuse its discretion in denying plaintiff's motion for a new trial because the verdict was not against the great weight of the evidence. *Phinney v Perlmutter*, 222 Mich App 513, 525; 564 NW2d 532 (1997).

Next, plaintiff argues that the trial court erred in refusing to give her requested supplemental instruction on nuisance. We disagree. First, plaintiff's requested instruction was not sustained by the pleadings where plaintiff's complaint alleged only negligence. *Murdock v Higgins*, 454 Mich 46, 60;

559 NW2d 639 (1997). Second, we cannot say that the requested supplemental instruction was applicable and accurately stated the law where it was based on cases construing the nuisance exception to governmental immunity and included no reference to the type of interest invaded by the alleged nuisance, i.e., an invasion of public rights or an invasion of plaintiff's interest in the use and enjoyment of her land.[1] See e.g., *Hadfield v Oakland Co Drain Comm'r*, 430 Mich 139, 205-206; 422 NW2d 205 (1988) (Boyle, J., concurring). Finally, plaintiff contends on appeal that her nuisance instruction should have been given because the potholes were dangerous and could have been eliminated through reasonable and ordinary care. This argument sounds in negligence. The jury was adequately instructed on the law of negligence. Accordingly, we conclude that the trial court did not err in refusing to give plaintiff's requested supplemental instruction on nuisance. *Murdock*, *supra*; *Phinney*, *supra* at 530.

Finally, we conclude that the trial court did not err in refusing to admit into evidence certain photographs, which even plaintiff admits on appeal were not a fair and accurate depiction of the scene of plaintiff's accident, and certain prior acts of alleged negligent maintenance by defendant. MRE 401; MRE 402; MRE 403; *Hottmann v Hottmann*, 226 Mich App 171, 177; 572 NW2d 259 (1997).

Affirmed.

/s/ Michael R. Smolenski
/s/ Gary R. McDonald
/s/ Henry William Saad

[1] Clearly, in this case, plaintiff would have no cause of action for a private nuisance where no land owned by plaintiff is involved in this case.