This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).

STATE OF MINNESOTA
IN COURT OF APPEALS
A20-1594

Docks of White Bear Lake, LLC,
Appellant,

vs.

Dockside Waterski Company, d/b/a Tally's Dockside,
Respondent,

and

City of White Bear Lake,
Respondent.

Filed July 12, 2021
Affirmed
Bryan, Judge

Ramsey County District Court
File No. 62-CV-20-2273

Nathan M. Hansen, North St. Paul, Minnesota (for appellant)

Christopher L. Olson, Peter J. Frank, Timothy R. Geck, GDO Law, White Bear Lake, Minnesota (for respondent Dockside Waterski Company, d/b/a Tally's Dockside)

Jessica E. Schwie, Joshua P. Devaney, Kennedy & Graven, Chartered, Minneapolis, Minnesota (for respondent City of White Bear Lake)

Considered and decided by Reilly, Presiding Judge; Slieter, Judge; and Bryan, Judge.

NONPRECEDENTIAL OPINION

BRYAN, Judge

Appellant challenges the summary-judgment dismissal of his claim of nuisance. Because there is no genuine issue of material fact regarding whether appellant suffered an actionable injury, we affirm the district court's decision to dismiss appellant's claim.

FACTS

The facts in this case are mostly undisputed. Respondent Dockside Waterski Company known as Tally's Dockside (Tally's) is a full-service marina located on White Bear Lake. Tally's leases a neighboring parcel of land (the parcel) from respondent City of White Bear Lake (the City). Tally's has maintained an aboveground fuel tank on the parcel since 1991 and uses the fuel tank to store gasoline that it sells to boaters. The location of the fuel tank does not comply with the general Minnesota Fire Code setback regulations, which require that the fuel tank be at least 15 feet from the property line of the parcel. Directly next to the parcel, appellant Docks of White Bear Lake, LLC, (DWBL) operates a marina. DWBL leases this land from a third party, the White Bear Shopping Center, Inc.

In 2004, Tally's sought to replace the 500-gallon fuel tank that had been on the parcel with a 2,000-gallon fuel tank. After city council meetings and inspections by the fire marshal, the City approved a permit for Tally's to install a 2,000-gallon aboveground tank on the same location as the previous 500-gallon tank. The permit noted that the fuel tank was approved under "permit" and "zoning." A fire inspector also inspected the fuel tank location and listed it as "approved." After receiving approval from the City, Tally's

installed the larger fuel tank. In 2005, the owners of the White Bear Shopping Center alerted Tally's that the fuel tank was placed across the parcel property line and partially on the White Bear Shopping Center's land. In November 2005, Tally's relocated the fuel tank fully onto the parcel, where it remained for the next 14 years.

In fall 2018, Tally's sought to update the grounds and dispenser line for the fuel tank. Tally's also requested an extension of its lease of the parcel with the City. The City agreed to extend the lease and to reinforce the retaining wall for the parcel.[1] Work on the fuel tank site began in fall 2019 when the City requested that Tally's temporarily remove the fuel tank for them to repair the retaining wall. Tally's removed the fuel tank, made it inoperable, and the City completed the retaining wall maintenance. In the spring of 2020, Tally's replaced the concrete slab on which the fuel tank rested and proceeded with the planned reinstallation of the same fuel tank in its previous location.

DWBL sought a temporary injunction, claiming that the location of the fuel tank constituted a nuisance. The district court denied the temporary injunction because DWBL failed to show harm. Tally's and the City subsequently moved for summary judgment,

[1] On appeal, DWBL briefly mentions that the City's reinforcement of the retaining wall was also a nuisance because it did not comply with regulations promulgated by the Minnesota Department of Natural Resources. The district court rejected this argument because the amended complaint made no explicit reference to the retaining wall or any injury resulting from the reinforcement of the retaining wall. DWBL does not cite to any legal authority or further argue this separate nuisance theory on appeal. We decline to review this portion of the district court's decision. *Scheffler v. City of Anoka*, 890 N.W.2d 437, 451 (Minn. App. 2017) ("An assignment of error on mere assertion, unsupported by argument or authority, is forfeited and need not be considered unless prejudicial error is obvious on mere inspection."), *review denied* (Minn. Apr. 26, 2017); *Ganguli v. Univ. of Minn.*, 512 N.W.2d 918, 919 n.1 (Minn. App. 1994) (stating court of appeals declines to address allegations unsupported by legal analysis or citation).

asserting that the claimed nuisance did not cause an actionable injury. In support of their motion, Tally's and the City submitted evidence that the appropriate permits and variances were granted for Tally's to operate the fuel tank despite the general fire code regulations, that the city council approved the fuel tank location, that fire officials inspected the fuel tank, and that the fuel tank had not experienced spills or leaks in the past 15 years.

DWBL opposed summary judgment, arguing that the location of the fuel tank resulted in an injury because it violates the Minnesota State Fire Code setback requirements. In support of this position, DWBL relied on a report attached to the amended complaint (the expert report). At the summary judgment hearing, DWBL reiterated that the nuisance claim did not stem from the maintenance work completed in 2019 or from temporary removal and replacement of the fuel tank. Instead, DWBL argued that the nuisance resulted from the "existence and location" of the fuel tank alone. The district court determined that DWBL's nuisance claim failed as a matter of law because the alleged code violation, by itself, could not constitute an actionable injury. In addition, the district court concluded that "[t]here have been no spills or accidents related to the fuel tank during the time it has been situated on [the parcel]," and "the fuel tank is located in a safe and practical location." In the alternative,[2] the district court also concluded that because the fuel tank had been in the same location for 14 years, the statute of limitations barred

[2] DWBL argues that we must reverse because the district court's order is "internally inconsistent." This argument, however, mischaracterizes the district court's order. The district court provided two, independent, alternative grounds for granting summary judgment. Assuming that a nuisance exists for the sake of addressing the statute-of-limitations argument does not preclude the alternative conclusion that the alleged code violation does not constitute an actionable injury.

DWBL's nuisance claim. The district court granted Tally's and the City's motion for summary judgment on these two, independent grounds.

DWBL appeals, arguing that the record contains disputed facts regarding injury and directing us to ten subparagraphs in the expert report labeled as "[n]uisance findings."[3] In subparagraphs 1, 2, 4, and 5, the expert opines that the location of the fuel tank and the City's decision to lease the parcel failed to comply with various regulations. In subparagraph 3, the expert raises a concern about the risk of future gas leaks or explosions: "vehicle impact could cause immediate leak or explosion hazard to property, or enjoyment of lake use to affected property or public." In subparagraphs 6 and 7, the expert observes that DWBL cannot install additional safety measures absent a permanent easement and cannot easily record an easement. In subparagraph 8, the expert refers to unspecified "injurious actions" and appears to criticize the City for its decision to lease the parcel: "Deliberate or predetermined injurious actions to owner and general public known to City due to placement of [the fuel tank] in designated 'town' areas subject to a 'lease' and the public revenues associated with the continued leased Marina fueling operation." In subparagraph 9, the expert states the possibility that the fuel tank is a public nuisance: "it is likely the 'Nuisances' could also be applied to the general public for each year of [fuel tank] operation." In subparagraph 10, the expert opines that the municipal code itself

[3] DWBL did not make this argument to the district court. Instead, DWBL used the report only to support its proposition that the location of the fuel tank violated the fire code. DWBL argues that it has not forfeited this argument because it attached the expert report to the amended complaint. We assume without deciding that the statements in the expert report fall within our scope of review.

constitutes a nuisance: "the current City Code standards for properties located within the *Lake Village Mixed Use* district would create 'nuisance' to the owner or general public."

DECISION

DWBL argues that the record shows disputed questions of fact regarding its asserted injury. Because the record cannot support a finding that the existence and location of the fuel tank materially and substantially interfered with DWBL's property interests, we affirm the district court's decision to grant summary judgment.

"We review the grant of summary judgment de novo to determine 'whether there are genuine issues of material fact and whether the district court erred in its application of the law.'" *Montemayor v. Sebright Prods., Inc.*, 898 N.W.2d 623, 628 (Minn. 2017) (quoting *Stringer v. Minn. Vikings Football Club, LLC*, 705 N.W.2d 746, 754 (Minn. 2005)). "In conducting this review, we view the evidence in the light most favorable to the nonmoving party and resolve all doubts and factual inferences against the moving parties." *Fenrich v. The Blake Sch.*, 920 N.W.2d 195, 201 (Minn. 2018) (quotation omitted). When, as here, the defendant moves for summary judgment, the motion must be granted when the record lacks proof of "an essential element of the plaintiff's claim." *Lubbers v. Anderson*, 539 N.W.2d 398, 401 (Minn. 1995).

Minnesota Statutes section 561.01 (2020) codifies a cause of action for nuisance, "which implicitly recognizes a need to balance the utility of [a defendant's] actions against the harm to [a plaintiff]." *Matter v. Nelson*, 478 N.W.2d 211, 214 (Minn. App. 1991); *see also Hagen v. Windemere Township*, 935 N.W.2d 895, 901 (Minn. App. 2019), *review denied* (Minn. Aug. 6, 2019) (defining nuisance as occurring when a person "intentionally

maintains a condition that is injurious to health, or indecent or offensive to the senses, or which obstructs the free use of property" (quotation omitted)). As it relates to this case, the parties dispute whether the record presents a genuine issue of material fact regarding injury to DWBL. Not every asserted harm constitutes an actionable injury, and we must determine whether the record can support a finding that the fuel tank actually, materially, and substantially interfered with DWBL's real property interests. Minn. Stat. § 561.01; *see also, e.g.*, *Anderson v. State, Dep't of Nat. Res.*, 693 N.W.2d 181, 192 (Minn. 2005) ("Private nuisance is limited to real property interests."); *Highview N. Apartments v. County of Ramsey*, 323 N.W.2d 65, 70 (Minn. 1982) (noting that the nuisance statute defines nuisance in terms of a "resultant harm"); *Citizens for a Safe Grant v. Lone Oak Sportsmen's Club, Inc.,* 624 N.W.2d 796, 803 (Minn. App. 2001) ("For an interference with the enjoyment of life or property to constitute a nuisance, it must be material and substantial.").

In its amended complaint and before the district court, DWBL identified its alleged injury: the existence and location of the fuel tank does not comply with the Minnesota State Fire Code. This is not an actionable injury for two reasons. First, DWBL cites no authority to support its proposition that a code violation alone constitutes an actionable injury. Indeed, DWBL's proposed legal rule conflicts with well-established caselaw requiring actual, material, and substantial interference with property, not simply an asserted code violation. For instance, in *Citizens for a Safe Grant*, this court affirmed a finding of nuisance because property owners near a shooting range experienced loud noises, showers of shotgun pellets on their property, and bullets hitting pine trees around their home. 624

N.W.2d at 804. The court did not find a nuisance based on the violations of the Minnesota Environmental Rights Act, which it analyzed as a separate cause of action. *Id.* at 805-06; *see also Anderson*, 693 N.W.2d at 192 (affirming dismissal of nuisance claim for lack of an actionable injury to the plaintiffs' property interests, but reversing summary judgment against plaintiffs on their separate claim of negligence per se stemming from violations of pesticide-use regulations); *Highview N. Apartments*, 323 N.W.2d at 70-71 (finding actionable, "resultant harm" based on flooding caused by a municipality's storm sewer construction project). Pursuant to these and other cases, an alleged code violation, without more, cannot establish the actual, material, and substantial interference with property interests necessary for a private nuisance claim.

Second, DWBL's argument overlooks the effective variance given to Tally's. While the parties agree that the location of the fuel tank does not strictly comply with general code provisions, the record also contains this undisputed fact: Tally's received regulatory permission and approval to operate the fuel tank at that location despite the general code provisions. Even assuming that a code violation constituted a per se injury for purposes of stating a nuisance claim, there can be no genuine issue of material fact in this case because DWBL does not dispute the approval of Tally's variance.[4]

[4] We also note that the approval of the fuel tank's location and its use might defeat DWBL's nuisance claim under the reasonable-use doctrine. *See Matter*, 478 N.W.2d at 215 (affirming finding of nuisance liability and damages only after concluding that plaintiffs suffered an actionable injury and that the injury resulted from defendants' unreasonable use of a water drainage system); *see also Highview N. Apartments*, 323 N.W.2d at 73 (affirming finding of nuisance liability and damages only after concluding that plaintiff suffered actual harm resulting from defendant's unreasonable construction project).

Finally, we observe that before this court, DWBL advances an argument that it did not directly make to the district court: that the expert report includes a list of ten separate injuries in the subparagraphs referred to as "[n]uisance findings." DWBL now argues that each subparagraph establishes a genuine issue of material fact regarding injury. We disagree. Contrary to DWBL's characterization, the subparagraphs do not identify ten different injuries. For example, subparagraphs 1, 2, 4, and 5, reflect the expert's legal opinion regarding noncompliance with various local, state, and federal regulations. They do not explain, however, how any noncompliance materially or actually injured DWBL. Likewise, subparagraphs 6 and 7 do not describe an injury, but rather reflect the expert's opinion that DWBL cannot easily record an easement necessary to install additional safety measures. Subparagraph 8 includes references to unspecified "injurious actions" and faults the City for leasing the parcel, but does not state a separate injury or explain how the City's actions caused an injury to DWBL. Subparagraph 9 contains a vague statement speculating about a potential public nuisance, but DWBL never pleaded a claim under the public nuisance statute.[5] Subparagraph 10 asserts that the municipal code itself is a separate nuisance, also something that DWBL chose not to plead in its amended complaint.

We can characterize only one of the ten listed "[n]uisance findings" as a statement expressing a potential injury under the private nuisance statute: subparagraph 3, which expresses a concern about the risk of a future gas leak or explosion. This speculative

[5] The district court concluded that although the amended complaint "mentions 'public nuisance,'" DWBL did not reference the public nuisance statute, allege the elements of a public nuisance claim, or argue a public nuisance theory. The district court declined to analyze any public nuisance claim, and DWBL does not challenge this decision on appeal.

statement regarding the risk of a future injury cannot create a genuine issue of material fact. *See, e.g.*, *Citizens for a Safe Grant,* 624 N.W.2d at 803 (requiring injuries to be material and substantial, not hypothetical). In addition, the district court concluded that the record contained no evidence of spills or accidents related to the fuel tank during the time it has been situated on the parcel, and that the fuel tank was in a safe location. DWBL does not contest either conclusion or direct this court to any evidence properly before the district court that could indicate a dispute regarding prior leaks, spills, explosions, or accidents.[6]

Viewing the record in the light most favorable to DWBL, we conclude that no genuine dispute exists regarding whether the fuel tank has materially and substantially interfered with DWBL's property interests. DWBL's nuisance claim fails as a matter of law, and we affirm the district court's decision to grant summary judgment.[7]

Affirmed.

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[6] We also note that other jurisdictions have determined that fuel tanks standing alone, despite fear of speculative spills or explosions, do not constitute a nuisance. *See City of Spickardsville v. Terry*, 274 S.W.2d 21, 26 (Mo. Ct. App. 1954) (determining that fear or anticipation of danger due to a fuel tank, without more, is not sufficient to justify an injunction on grounds that it would constitute a nuisance); *Harper v. Standard Oil Co*., 78 Mo. App. 338, 344 (Mo. Ct. App. 1899) (determining that suitable fuel tanks do not constitute nuisance per se and could only become a nuisance because of some neglect or improper use); *Morrison v. Standard Oil Co. of N.J.*, 147 A. 161, 162 (N.J. Ch. 1929) (concluding that apprehension of danger of explosion or fire from fuel tank was insufficient to prevent construction of fuel tanks on basis of nuisance), *aff'd*, 151 A. 906 (N.J. 1930); *Ferriman v. Turner*, 227 P. 443, 446 (Okla. 1924) (rejecting argument that a proposed fuel tank construction near a business establishment constituted a nuisance based on potential fire or explosion).

[7] Because we conclude that DWBL's nuisance claim fails as a matter of law, we decline to address the alternative basis for summary judgment: the statute-of-limitations defense.