STATE OF MICHIGAN

COURT OF APPEALS

JAMES BISHOP,

Plaintiff-Appellant,

v

NORTHWIND INVESTMENTS, INC.,

Defendant/Cross-Defendant,

and

BURGER KING CORPORATION,

Defendant/Cross-Plaintiff/Third-Party Plaintiff,

and

HYLER CONSTRUCTION COMPANY,

Defendant-Appellee.

UNPUBLISHED
September 16, 2004

No. 250083
Mackinac Circuit Court
LC No. 00-005183-NO

Before: Whitbeck, C.J., and Griffin and Borrello, JJ.

PER CURIAM.

I. Overview

Plaintiff James Bishop appeals as of right the trial court's July 2003 order granting defendant Hyler Construction Company summary disposition under MCR 2.116(C)(8) and (10). This case arises out of Bishop's claim based on physical injuries he sustained when he slipped and fell on ice as a result of a defective building condition created by Hyler. Defendant Northwind Investments Inc., as a franchisee of defendant Burger King Corporation, owned the building. We affirm in part, reverse in part, and remand for further proceedings.

II. Basic Facts And Procedural History

In 1997, Northwind purchased a building located in St. Ignace that was formerly a Hardee's restaurant, but as a franchisee of several Burger King restaurants, Northwind intended

to renovate the building for use as a Burger King. To complete these renovations, Northwind hired Paul Greene Associates, an architect firm, and Hyler Construction. Northwind had developed a course of dealing with the two companies for the purpose of renovating buildings for use as Burger Kings. Paul Greene Associates was responsible for preparing site drawings, which were based on criteria provided by Burger King. Hyler Construction would then use the drawings to complete the construction.

As part of the renovations necessary to bring the building into conformance with Burger King criteria, the roof had to be modified into a "mansard" roof. Contrary to the drawings provided, Hyler Construction built the roof so that it contained a "valley" right above the main east entrance. This valley created a place for snow and ice to consistently accumulate, then drip onto the walkway below. Hyler Construction's manager admitted that the way the roof was constructed was "unbelievable," that it was not constructed according to the design specifications, and that the valley should not have been located over the doorway without a gutter or similar drainage device. Further, Hyler Construction was on notice that at least one other Burger King had to be partially reconstructed because of the same problem.

On January 8, 2000, at approximately 9:30 a.m., Bishop went to the Burger King to buy breakfast. It was not snowing or raining that day, the roads were not slippery, and it was warmer than usual. As Bishop approached the sidewalk, he noticed that it looked damp, but he did not notice any ice. As he reached for the door handle to enter the restaurant, he slipped and fell, injuring his back, hip, and knee. Bishop stood up and noticed that there was a small, clear, thin, glazed-over patch of ice no larger than six inches around on the sidewalk. According to Bishop, the ice was the same color as the sidewalk and was "super slippery." He further described the ice as "very deceitful as far as . . . recognizing it."

Bishop then went into the Burger King and told an employee about the hazard. As he left the building after purchasing his breakfast, he noticed that there was water dripping off the roof right onto the spot where he fell. By that time, an employee was salting the area. The employee whom Bishop had notified about his fall later went outside to look at the sidewalk and described seeing a little bit of thin, clear ice.

In November 2000, Bishop filed a complaint against Northwind, alleging that Northwind breached its duty to use reasonable care in keeping its premises in a reasonably safe condition by allowing ice to accumulate in front of the main entrance to the restaurant, a condition that was caused by the defective design of the building. Bishop then amended his complaint to add negligence claims against Burger King and the building architect, Paul Greene Associates, Inc., on the ground that Burger King mandated that the building have a mansard roof and that Paul Greene Associates prepared the design specifications for the necessary changes to the roof.

Paul Greene Associates filed a notice of non-party fault alleging that Hyler Construction failed to construct the roof in accordance with the drawings provided by Paul Greene Associates, and that Paul Greene Associates had based the drawings on specifications provided by Burger King. The parties stipulated to add Hyler Construction as a defendant, and Bishop amended his complaint accordingly, alleging that Hyler Construction negligently failed to construct the roof in conformance with the design specifications. The parties stipulated to extend all the existing pretrial scheduling order deadlines by ninety days.

Hyler Construction then moved for summary disposition under MCR 2.116(C)(8) and (10), arguing that it owed no duty to Bishop to remove or prevent the ice accumulation because at no time did it exercise possession or control over the building at issue. Further, according to Hyler Construction, to the extent that Bishop's claim alleged premises liability against it, the claim failed as a matter of law because Hyler Construction owed no common-law duty to Bishop to construct the roof properly. Bishop admitted that Hyler Construction did not exercise possession or control over the premises but indicated that he was not alleging premises liability against Hyler Construction; rather, he was alleging negligent construction. Further, Bishop argued that there was a common-law duty to perform a contract with ordinary care.

Northwind and Burger King also moved for summary disposition under MCR 2.116(C)(10), arguing that they owed no duty to Bishop because the alleged hazard was open and obvious, and it did not present an unreasonable risk of harm on the date he allegedly fell. Bishop responded that there was a genuine issue of material fact with respect to whether the ice was open and obvious.

In early April 2003, Bishop again moved to amend his complaint. Bishop sought the amendment in part to reflect the dismissal of Paul Greene Associates, but also to add six new claims against the remaining defendants. The trial court denied the motion on the ground that there was no need to amend the caption to remove Paul Greene Associates when there was already a stipulated order dismissing it as a defendant. Regarding the additional claims, the trial court agreed that this was a slip and fall case, and "[o]n top of the other causes of action which have been plead, makes it look like babbling pleadings . . ."

In late May 2003, the court heard oral arguments on both pending motions for summary disposition. With respect to Hyler Construction's motion, the trial court stated that this was essentially a slip and fall case, and it was conceded that Hyler Construction was not in possession or control of the property at the time of the incident. Further, to the extent that Bishop alleged negligent construction, the trial court found that there was no legal duty owed to him, commenting that imposing a duty under the circumstances would be "just too attenuated." Thus, the trial court granted Hyler Construction's motion for summary disposition.

With respect to the motion for summary disposition of Northwind and Burger King, the trial court found that they were on notice of the problem, and there was a question of fact regarding the unreasonable risk of harm posed by the hazard; nevertheless, according to the trial court, it was clear that the condition was open and obvious. Thus, the trial court found that there was no duty to Bishop and granted the motion for summary disposition.

After Bishop filed his claim of appeal as of right, he, Northwind, and Burger King entered into a settlement agreement, which led to a stipulation dismissing Northwind and Burger King from this appeal. Bishop now pursues this appeal against Hyler Construction only.

III. Amendment Of The Complaint

A. Standard Of Review

Bishop argues that the trial court abused its discretion by denying his motion for leave to amend his complaint because the amendment would not have caused any undue delay, the

amendments would not have been futile, and the trial court did not give a particularized reason for the denial. We will not reverse a trial court's decision on a motion to amend absent an abuse of discretion that results in injustice.[1]

B. Particularized Reasons For Denial

Bishop argues that the trial court committed error requiring reversal by not specifying a valid ground for denying his motion to amend.[2]

As the Michigan Supreme Court has explained:

> A motion to amend ordinarily should be granted, and should be denied only for the following particularized reasons:
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> "[1] undue delay, [2] bad faith or dilatory motive on the part of the movant, [3] repeated failure to cure deficiencies by amendments previously allowed, [4] undue prejudice to the opposing party by virtue of allowance of the amendment, [and 5] futility . . . ."
>
> If a trial court denies a motion to amend, it should specifically state on the record the reasons for its decision.[3]

The trial court stated its reasons for denying the motion as follows:

> The Court is going to deny the motion to amend [to include claims of] nuisance[,] implied contract, and Consumer Protection. On top of the other causes of action which have been plead [sic], makes it look like babbling pleadings in this matter, and I believe, too, in English under what oblivia [sic] is. It's gone too far under the theories that were espoused and through mediation to change.
>
> In addition, it could also be very, very confusing to draft the instructions to a Jury where those additions to it and get away from the fact that I have to agree with [defense counsel] Mr. Paul. This is a slip and fall case.

We believe it is beyond cavil that avoiding "babbling pleadings," "oblivia," and the necessity of drafting confusing jury instructions are not among the sanctioned grounds for denying leave to amend. However, the trial court's observation that the case had "gone too far under the theories that were espoused" correlates with the notion of delay, which can justify a denial of leave under some circumstances. Accordingly, the trial court fulfilled its obligation to state a valid reason for denying leave on the record.

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[1] *Phillips v Deihm*, 213 Mich App 389, 393; 541 NW2d 566 (1995).

[2] *Terhaar v Hoekwater*, 182 Mich App 747, 751; 452 NW2d 905 (1990).

[3] *Weymers v Khera*, 454 Mich 639, 658-659; 563 NW2d 647 (1997) (internal citation omitted), quoting *Ben P Fyke & Sons, Inc v Gunter Co*, 390 Mich 649, 656; 213 NW2d 134 (1973).

However, while delay can be a major source of prejudice, delay alone does not warrant denial of a motion to amend.[4] Rather, the delay must have been in bad faith or the opposing party must have suffered actual prejudice as a result.[5] Here, Bishop moved to amend his complaint to add several new theories of liability 2½ years after his first amended complaint was filed, after the case evaluation hearing, and after Hyler Construction filed its motion for summary disposition. However, especially in light of Hyler Construction's participation in the delay, Hyler Construction would not have been actually prejudiced where discovery was still open and no trial date was set. In light of our conclusion that the delay in the case was not undue, we hold that the trial court abused its discretion in denying the motion to amend on this ground.

We hold further that denying the motion to amend unjustly deprived Bishop of the opportunity to add a claim that may have merit, and therefore requires reversal. We are not convinced that the claim of implied warranty of workmanlike service was viable, because Hyler Construction's contractual duty to perform in a workmanlike manner ran to Northwind, not Bishop.[6] However, in our view, Bishop's nuisance claim would not have been futile.

Bishop sought to amend his complaint to include a claim of intentional nuisance in fact. A nuisance in fact is a nuisance by reason of circumstances and surroundings, and has the natural tendency to create danger and inflict injury on person or property.[7] An "intentional" nuisance does not mean that the creator intended the nuisance itself; rather, it means that the creator intended to bring about the conditions that are in fact found to be a nuisance.[8] Because the proposed claim does not relate to an invasion of Bishop's interest in the private use and enjoyment of land, the claim sounds in public rather than private nuisance.[9]

The Michigan Supreme Court has held that a public nuisance is an activity that "create[s] an interference in the use of a way of travel, or affect[s] public morals, or prevent[s] the public from the peaceful use of their land and the public streets."[10] As this Court has defined it:

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[4] *Fyke*, *supra* at 663.

[5] *Weymers*, *supra* at 659-661.

[6] See *Co-Jo, Inc v Strand*, 226 Mich App 108, 114; 572 NW2d 251 (1997) ("Where a party to a contract fails to comply with the implied duty to perform in a workmanlike manner, the other party may be entitled to damages resulting from the deficient performance.") We note that the case Bishop cites in support of this claim involves indemnification between the contracting parties, not the injured third party. See *Feaster v Hous*, 137 Mich App 783; 359 NW2d 219 (1984).

[7] *Wagner v Regency Inn Corp*, 186 Mich App 158, 164; 463 NW2d 450 (1990).

[8] *Radloff v State*, 116 Mich App 745, 757; 323 NW2d 541 (1982).

[9] See *Adkins v Thomas Solvent Co*, 440 Mich 293, 302-304; 487 NW2d 715 (1992).

[10] *People ex rel Wayne County Prosecutor v Bennis*, 447 Mich 719, 731-732; 527 NW2d 483 (1994), quoting *Garfield Twp v Young*, 348 Mich 337, 342; 82 NW2d 876 (1957).

> A public nuisance is an unreasonable interference with a common right enjoyed by the general public. The term "unreasonable interference" includes conduct that (1) significantly interferes with the public's health, safety, peace, comfort, or convenience, (2) is proscribed by law, or (3) is known or should have been known by the actor to be of a continuing nature that produces a permanent or long-lasting, significant effect on these rights.[11]

"A private citizen may file an action for a public nuisance against an actor where the individual can show he suffered a type of harm different from that of the general public."[12]

To be held liable under a nuisance theory, the defendant must have either created the nuisance[13] or have possession or control of the land.[14] This Court has held that a defendant's creation of a nuisance suffices to sustain a nuisance cause of action against that defendant. In *Traver Lakes Community Maintenance Ass'n v Douglas Co*,[15] the plaintiff sued the owner, contractor, and subcontractor responsible for building an apartment complex for negligence after the erosion control and drainage system they installed proved to be faulty.[16] After the defendants moved for summary disposition, the plaintiff moved to amend the complaint to include a claim of nuisance; however, the trial court denied the motion on the ground of futility because there was no evidence to indicate that the defendants exercised possession or control of the system.[17] On appeal, this Court reversed on the ground that the plaintiff had alleged facts showing that the defendants "either owned the land from which the excess silt was coming or that they controlled the implementation of soil erosion controls during construction of the apartment complex."[18]

In this case, Hyler Construction built the roof with a "valley" directly above the main entrance and did not install a gutter below it, which caused snow and ice to accumulate and drip onto the walkway below. Because Hyler Construction created this condition, they may be held liable if it is found to be a nuisance.[19] Whether a condition is a nuisance "is generally a question of fact."[20] Here, Bishop presented sufficient evidence to create a factual question whether the

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[11] *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 190; 540 NW2d 297 (1995), citing *Wagner v Regency Inn Corp*, 186 Mich App 158, 163; 463 NW2d 450 (1990).

[12] *Cloverleaf*, *supra* at 190, citing *Adkins*, *supra* at 306 n 11; 487 NW2d 715 (1992).

[13] See *Traver Lakes Community Maintenance Ass'n v Douglas Co*, 224 Mich App 335, 345-346; 568 NW2d 847 (1997).

[14] *Wagner*, *supra* at 163.

[15] *Traver Lakes*, *supra*.

[16] *Id*. at 339.

[17] *Id*. at 339-340.

[18] *Id*. at 346.

[19] See *id*. at 346.

[20] See *Bluemer v Saginaw Central Oil & Gas Service, Inc*, 356 Mich 399, 411; 97 NW2d 90 (1959), quoting 66 CJS, Nuisances, § 3, pp 733-734.

unguttered roof valley created an unreasonable interference in the use of a way of travel by allowing snow and ice to drip unchecked in front of the door of a business that was open to the public. Bishop also suffered a harm that differed from that of the general public, to wit, he was actually injured by the condition alleged to be a nuisance. Accordingly, we conclude that his nuisance claim would not have been futile.

The open and obvious doctrine does not bar the potential nuisance claim for two reasons. First, the open and obvious doctrine applies to the peril that caused the harm, which, in this case, was the ice on which Bishop slipped. The subject of the proposed nuisance claim is not the ice, but rather the shape of the roof and its lack of a gutter or other drainage device. The essence of the nuisance claim is that the roof, as constructed, will continue to create hazardous conditions in the future, and we cannot assume that these conditions will be either open or obvious. In other words, the same characteristics that created an open and obvious patch of ice – that is, a sloped valley where snow and ice accumulate directly above a door – create the potential for dangers that are neither open nor obvious, such as a sudden slide of snow or ice directly onto an entering or exiting customer.

Second, even if we could assume that the roof's condition would create nothing but open and obvious dangers in the future, the open and obvious doctrine has no application to a nuisance action. The open and obvious doctrine is not a blanket defense to all actions arising on a landowner's premises. Rather, it is "an integral part of the definition of th[e] duty" that a landowner owes to invitees.[21] Under the open and obvious doctrine, a landowner owes no duty to protect or warn invitees of open and obvious dangers.[22] Thus, the open and obvious doctrine may preclude a plaintiff from recovering on a negligence theory, because a negligence claim requires a plaintiff to establish that the defendant owed him a duty. Stated another way, "the 'no duty to warn of open and obvious danger' rule is a defensive doctrine that attacks the duty element that a plaintiff must establish in a prima facie negligence case."[23] Because nuisance, unlike negligence, does not require a plaintiff to establish that defendant owed him a duty, the open and obvious doctrine does not bar Bishop's potential nuisance claim.

We reverse the trial court's denial of Bishop's motion to amend because the delay was not undue and the nuisance claim would not have been futile.

IV. Summary Disposition

A. Standard Of Review

Bishop argues that the trial court erred in granting Hyler Construction's motion for summary disposition because it improperly concluded that Hyler Construction had no duty to Bishop in light of his status as a third party to the contract between Hyler Construction and

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[21] *Lugo v Ameritech Corp*, 464 Mich 512, 516; 629 NW2d 384 (2001).

[22] See *id*.

[23] *Riddle v McLouth Steel Products*, 440 Mich 85, 95-96; 485 NW2d 676 (1992).

Northwind. We review a ruling on a motion for summary disposition de novo.[24] Under MCR 2.116(C)(8), all factual allegations in the pleadings are taken as true, and any reasonable inferences or conclusions that can be drawn from the facts are construed in the light most favorable to the nonmoving party.[25] The motion should be denied unless the claim is so clearly unenforceable as a matter of law that no factual development can possibly justify a right to recover.[26] Under MCR 2.116(C)(10), dismissal is based on the assertion that there is no genuine issue with respect to any material fact and the moving party is entitled to judgment as a matter of law.[27] The court must consider all of the documentary evidence in the light most favorable to the nonmoving party.[28]

B. Duty

We conclude that the court did not err in granting Hyler Construction's motion for summary disposition on the ground that Hyler Construction did not owe a duty to Bishop. The Michigan Supreme Court has held that when a plaintiff brings a tort action based on a contract to which the plaintiff is not a party, the plaintiff must show that "the defendant owed a duty to the plaintiff that is separate and distinct from the defendant's contractual obligations. If no independent duty exists, no tort action based on a contract will lie."[29] In this case, Bishop did not allege any duty that Hyler Construction owed him that was "separate and distinct" from those duties contained in the contract. Therefore, the trial court properly granted Hyler Construction's motion for summary disposition.

We affirm the trial court's grant of summary disposition, reverse the denial of Bishop's motion to amend, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Stephen L. Borrello

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[24] *Weymers*, *supra* at 647.

[25] *Lane v Kindercare Learning Centers*, 231 Mich App 689, 692; 588 NW2d 715 (1998); *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999).

[26] *Lane*, *supra* at 692.

[27] *Weymers*, *supra* at 646.

[28] *Id.* at 647.

[29] *Fultz v Union-Commerce Assocs*, 470 Mich 460, 683 NW2d 587 (2004).

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Before: Whitbeck, C.J., and Griffin and Borrello, JJ.

GRIFFIN, J. (*concurring in part and dissenting in part*).

I concur and join in the affirmance of the grant of summary disposition in favor of defendant Hyler Construction Company in regard to plaintiff's claim of negligence and the denial of the proposed amendment alleging breach of implied warranty. However, I respectfully dissent as to the reversal of the lower court's order denying plaintiff's motion to amend to assert a claim of public nuisance.

The law of nuisance has been described as "the great grab bag, the dust bin, of the law," *Awad v McColgan*, 357 Mich 386, 389; 98 NW2d 571 (1959), and "the great marshmallow of the law." *Yarrick v Village of Kent City (On Remand)*, 189 Mich App 627, 628; 473 NW2d 774 (1991). Nevertheless, the law of nuisance does have its parameters.

In *Hadfield v Oakland Co Drain Comm'r*, 430 Mich 139, 151-152; 422 NW2d 205 (1988) (opinion by Brickley, J.), overruled on other grounds *Pohutski v City of Allen Park*, 465 Mich 675; 641 NW2d 219 (2002), Justice Brickley delineated the types of common law nuisance that have been recognized in Michigan:

> There are two basic types of nuisance: public and private. They "have almost nothing in common, except that each causes inconvenience to someone . . . ." Prosser & Keeton [Torts (5th Ed), § 87], *supra*, p 618.
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> "A private nuisance is a civil wrong, based on a disturbance of rights in land." Prosser & Keeton, *supra*, p 618. A public nuisance is a "criminal offense, consisting of an interference with the rights of the community at large . . . ." *Id*. The Restatement defines public nuisance as "an unreasonable interference with a right common to the general public." 4 Restatement Torts, 2d, § 821B, p 87. Prosser & Keeton describe the overlap between public and private nuisance: When "the individual interest that the public nuisance is designed to protect is the type protected under tort law, then the conduct that is regarded as a public nuisance will quite often be regarded also as either a private nuisance or some other tort to those who are adversely affected." *Id.*, § 90, p 652.
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> * * *
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> Two additional categories are nuisance per se and nuisance in fact or "per accidens." This Court has explained that difference:
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> > "From the point of view of their nature, nuisances are sometimes classified as nuisances *per se* or at law, and nuisances *per accidens* or in fact. A nuisance at law or 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. Nuisances in fact or *per accidens* are those which become nuisances by reason of circumstances and surroundings, and an act may be found to be a nuisance as a matter of fact where the natural tendency of the act is to create danger and inflict injury on person or property. The number of nuisances *per se* is necessarily limited, and by far the greater number of nuisances are nuisances *per accidens*." [*Rosario* [*v City of Lansing*, 403 Mich 124; 268 NW2d 230 (1978)], *supra*, pp 132-133 (opinion of Fitzgerald, J.), quoting *Bluemer v Saginaw Central Oil & Gas Service, Inc,* 356 Mich 399, 411; 97 NW2d 90 (1959).]
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> Nuisance in fact has been divided into two further subclasses of nuisance: intentional and negligent. *Gerzeski [v Dep't of State Highways*, 403 Mich 149; 268 NW2d 525 (1978)], *supra*, p 158. In *Dahl v Glover*, 344 Mich 639, 644; 75

NW2d 11 (1956), the Court approved jury instructions that described nuisance per se as well as the two types of nuisance in fact. See also *Denny v Garavaglia*, 333 Mich 317, 331; 52 NW2d 521 (1952).

Plaintiff's proposed third amended complaint sought to bring a claim of "intentional nuisance and/or nuisance in fact" against defendant Hyler Construction Company for "constructing the roof valley above the doorway." The majority and I agree that plaintiff's proposed claim "sounds in public rather than private nuisance." However, my colleagues would apparently hold that a slip and fall accident caused by a public nuisance is not subject to the open and obvious defense. No authority is cited for this proposition. While the validity of this legal conclusion is in doubt, I need not decide the issue because plaintiff's proposed complaint lacks an essential element necessary to state a cause of action for public nuisance. In the present case, there is no dispute that at the time of plaintiff's slip and fall, defendant Hyler Construction Company neither controlled nor had a right to control the premises. Thus, it lacked the corresponding authority to abate the alleged public nuisance. On this basis, the lower court correctly denied the motion to amend the complaint because the amendment would be futile. MCR 2.116 (I)(5); *Weymers v Khera*, 454 Mich 639, 658-659; 563 NW2d 647 (1997).[1]

It is well established that in order to allege a cause of action for public nuisance, the defendant must be in control of the alleged nuisance, either through ownership or otherwise.

58 Am Jur 2d (2002 Ed.), § 118, pp 645-646, states:

> To be liable for nuisance, it is not necessary for an individual to own the property on which the objectionable condition is maintained, but rather, liability for damages turns on whether the defendant controls the property, either through ownership or otherwise. A person is liable if he or she knowingly permits the creation or maintenance of a nuisance on premises of which he or she has control, even though such person does not own the property, or even though such person is not physically present, such as where he or she is an absentee owner. A party who has no control over the property at the time of the alleged nuisance cannot be held liable therefor.

See also 66 CJS § 75, p 623:

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[1] The lower court denied the motion to amend based on undue delay and because the proposed amendment to plaintiff's complaint "makes it look like babbling pleadings." Although not clear, the comments by the trial court appear to reflect the court's opinion that the amended pleading would be futile. In any event, we will not reverse the lower court when it reaches the right result for the wrong reason. *Norris v State Farm Fire & Casualty Co*, 229 Mich App 231, 240; 581 NW2d 746 (1998); *Porter v Royal Oak*, 214 Mich App 478, 488; 542 NW2d 905 (1995).

> A party who has no right of possession or control over the property cannot be held liable for nuisance, as he has no ability to create a nuisance or prevent a nuisance from arising on the property. However, one creating nuisance on his premises and then parting with control thereof under circumstances warranting an inference that he authorized the continuance, or profited therefrom, may be held liable for any damage suffered by reason of its continuance thereafter.

In *Stemen v Coffman*, 92 Mich App 595, 598; 285 NW2d 305 (1979), the plaintiff sued the City of Grand Rapids and the city's fire chief and fire inspector alleging that they were liable under a claim of nuisance for their failure to inspect and abate an apartment complex which possessed an inadequate fire protection system. In dismissing the nuisance claim against the governmental defendants, our Court held:

> "*Liability for damage caused by a nuisance turns upon whether the defendant was in control, either through ownership or otherwise*." 58 Am Jur 2d, Nuisances, § 49, p 616. We have found no authority imposing liability for damage caused by a nuisance where the defendant has not either created the nuisance, owned or controlled the property from which the nuisance arose, or employed another to do work which he knows is likely to create a nuisance. The city's relationship with the property alleged to constitute a nuisance in this case falls under none of these headings; indeed, it is far more attenuated. To hold the city liable under the "nuisance exception" in this case would stretch the concept of liability for nuisance beyond all recognition. [Emphasis added.]

Later, in *Disappearing Lakes Ass'n v Dep't of Natural Resources*, 121 Mich App 61, 71; 328 NW2d 570 (1982), aff'd *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567; 363 NW2d 641 (1984),[2] our Court relied on *Stemen v Coffman* to hold that the issuance of a permit to dredge a channel did not create a cause of action in nuisance because the DNR did not control the premises:

> There is no question but that the state granted permits to dredge. They expected channels to be built. It is not alleged and pleaded that the state intended the plaintiffs' lake levels be lowered. It is not alleged and pleaded that the state owned the land, owned the dredging equipment, operated the dredging equipment or in any way controlled the actual dredging except as it exercised the discretionary power to grant or refuse to grant permits to dredge.

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[2] See *Ross, supra* at 657 ("The Court of Appeals conclusion that plaintiffs had insufficiently pleaded a nuisance cause of action is not clearly erroneous. *Plaintiffs essentially asserted only a negligence claim*." [Emphasis added.])

We summarized the holding of *Disappearing Lakes* as follows in *Attorney General v Ankersen*, 148 Mich App 524, 560; 385 NW2d 658 (1986):

> The Court of Appeals in *Disappearing Lakes Ass'n v DNR*, 121 Mich App 61; 328 NW2d 570 (1982), *aff'd Ross v Consumers Power Co (On Rehearing),* 420 Mich 567; 363 NW2d 641 (1984), held that nuisance liability extends only to the party that *owns* or *controls* the property. It is readily apparent from *Disappearing Lakes* and the cases cited therein that "control" of the property means more than issuing a permit or regulating an activity on the property, as is alleged in the present case. We conclude, as did the Supreme Court in affirming this Court in *Disappearing Lakes*, that counterplaintiffs have essentially asserted only a negligence claim.

Finally, in *Stevens v Drekich*, 178 Mich App 273, 277-278; 443 NW2d 401 (1989), this Court held that the plaintiff did not set forth a viable claim in nuisance against private landowners for an automobile accident involving a tree that was located on their premises but within the public's right of way. Although the defendants were the owners in fee of the property in which the tree was located, it was held that the claim of nuisance against the defendants did not lie due to their lack of control because of the highway easement:

> Plaintiffs argue that Count III of the complaint states a legally adequate claim based on a nuisance theory. Nuisance liability is predicated upon a dangerous, offensive, or hazardous condition in the land or an activity of similar characteristics conducted on the land. *Buckeye Union Fire Ins Co v Michigan*, 383 Mich 630, 636; 178 NW2d 476 (1970). *It requires that the defendant liable for the nuisance have possession or control* of the land. *Attorney General v Ankersen*, 148 Mich App 524, 560; 385 NW2d 658 (1986). Thus, the absence of any right of possession on the part of defendants to the berm area defeats liability predicated upon nuisance theory. [Emphasis added.]

Two cases have been relied on for the proposition that "control can be found where defendant created the nuisance." However, neither *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186; 540 NW2d 297 (1995), nor *Baker v Waste Management of Michigan, Inc*, 208 Mich App 602; 528 NW2d 835 (1995), supports the principle of law advocated by the majority. The cited quotation in *Cloverleaf Car Co* is dicta for the reason that, in that case, our Court held that none of the theories alleged in plaintiff's complaint alleged a viable claim of nuisance, and, therefore, the trial court properly granted summary disposition in defendant's favor. As to the element of control, our Court stated:

> Because a seller in a commercial transaction relinquishes ownership and control of its products when they are sold, *it lacks the legal right to abate* whatever hazards its products may pose. *Gelman Sciences, [Inc v Dow Chemical Co,* 202 Mich App 250; 508 NW2d 142 (1993)], *supra* at 252. Because Phillips had no control over what happened to the gasoline after it was delivered, it cannot

> incur liability as the supplier of the gasoline. [*Cloverleaf, supra* at 192, emphasis added.]

In the second case, *Baker v Waste Management of Michigan, supra,* our Court also affirmed the grant of summary disposition on a claim of nuisance based on lack of control:

> Plaintiffs have not alleged facts that would show that defendants created or were under a statutory obligation to abate the nuisance, controlled the property where the nuisance arose, or employed another to do work that they knew was likely to create a nuisance. Plaintiffs' claim, that defendants could have withheld the delivery of yard waste to the site, is simply insufficient to establish control over the nuisance, particularly in light of their acknowledgment that others could have continued to send yard waste to the facility. In other words, because defendants' withholding of waste would not necessarily have eliminated the nuisance, defendants may not be considered to have had control over the nuisance. [*Baker, supra* at 606-607.]

Finally, *Traver Lakes Community Maintenance Ass'n v Douglas Co*, 224 Mich App 335; 568 NW2d 847 (1997), is clearly distinguishable on the basis that *Traver Lakes* involved "elements of both trespass and a private nuisance," neither of which exists in the present case. *Id*. at 345.

In the instant case, the trial judge noted that this is a premises liability slip and fall case. Unlike *Traver Lakes,* plaintiff's proposed claim does not allege a trespass or a private nuisance. In this regard, "Too often, 'nuisance' terminology is used to mask what are, in fact, simple negligence claims for the purpose of avoiding some effects of calling it what it is, a negligence claim." *Schroeder v Canton Twp,* 145 Mich App 439, 441; 377 NW2d 822 (1985). Here, plaintiff has relabeled a negligence action as a public nuisance claim in the transparent attempt to avoid the "open and obvious" defense. However, a cause of action upon which relief can be granted is not stated against defendant Hyler Construction Company because it lacked control of the premises. Control of the premises at the time of the slip and fall rested exclusively with the property owner, Northwind Investments. At the time of plaintiff's accident, it was Northwind that could have *warned* of the condition, *restricted* access to the area, or *corrected* the alleged defect. Due to its control of the premises, Northwind, not defendant Hyler Construction Company, has the legal right to *abate* the alleged public nuisance. *Cloverleaf, supra*. For these reasons, I would hold that, because the amendment would be futile, the trial court did not abuse its discretion in denying plaintiff's motion to amend the complaint to allege a claim of public nuisance.

I would affirm.

/s/ Richard Allen Griffin