Circuit Court for St. Mary's County
Case No. C-18-CV-17-000001

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 945

September Term, 2020

J. WHITSON ROGERS, ET AL.

v.

WINDWARD LAND DEVELOPMENT, LLC, ET AL.

Gould,
Ripken,
Eyler, Deborah S.
(Senior Judge, Specially Assigned),
JJ.

Opinion by Eyler, Deborah S., J.

Filed: September 10, 2021

This appeal is a remnant of litigation that lasted for three years in the Circuit Court for St. Mary's County. It concerns a 5,000 square foot parcel of raw land owned by J. Whitson Rogers, the appellant ("the Rogers Property"). The Rogers Property does not have its own address and appears to have been lopped off the adjacent property to the north. That adjacent property, designated 17244 Piney Point Road, is owned by Rogers' company, J. Whitson Rogers, Inc. ("the Corporation"). We shall call it "the Corporation Property." A partially adjacent property to the south of the Rogers Property, designated 17246 Piney Point Road, was at one time owned by Windward Land Development, Inc. ("Windward"), the appellee. Windward built a residential dwelling on that property and in 2015 sold it to Robert and Karrie Shou. We shall refer to that property as "the Shou Property."

All these properties are located on land spanning from Piney Point Road to St. George's Creek in St. Mary's County. The Corporation Property is a strip of land that extends the full distance from the road to the creek. It is improved by a house and garage located near the road. The rear of the Corporation Property is vacant land. Adjacent to and south of the Corporation Property is a property designated as 17242 Piney Point Road. It is owned by people named Harris who are not involved in this litigation, and is improved by a house that fronts on the road. We shall refer to it as "the Harris Property." The Harris Property extends from the road part way to the water.

Even though the Shou Property has a Piney Point Road address, it does not border the road. Rather, it is located behind but not adjacent to the Harris Property and stretches to the creek.

The Rogers Property is a small square lot that borders the rear of the Harris Property, the front of the Shou Property, and the side of the Corporation Property. It has some trees and grass on it. Rogers, who splits his time between Florida and Baltimore, uses the property to store vehicles and some junk items. An easement runs from Piney Point Road along the south side of the Harris Property, continues along the south side of the Rogers Property, and ends at the Shou Property. In building the Shou Property, Windward constructed an asphalt driveway along that easement, to the Shous' house.

These configurations of the various properties make the Shou Property a flag lot. If its front yard extended to the road, the yard would encompass the Rogers Property and the Harris Property. The "flag pole" of the Shou Property is the driveway over the easement from the road, and the "flag" of the Shou Property is the land on which the house was built, which as noted extends to the water.

Rogers and the Corporation filed suit in the Circuit Court for St. Mary's County on four counts, against Windward, the Shous, and others. The only remaining claims at this point are by Rogers against Windward, for negligence and nuisance. Those claims concern Windward's construction of the driveway to the Shous' house, before the Shous purchased it.

Rogers alleges that the driveway Windward constructed on the easement caused stormwater and surface water to be discharged onto the Rogers Property. Based on evidence developed during discovery, he claims that Windward did not build the driveway according to the site plan; instead, it failed to build a grass swale and installed undersized drains with an improper backward slope. He further claims that these construction deficiencies have caused flooding of about three-quarters of the Rogers Property during most rains, making the property unusable and bringing mosquitoes. Rogers' expert witness has prepared a report in which he opines about these deficiencies and estimates that it will cost $44,670 to correct them ("the Wilkerson Report").

Windward filed a motion for summary judgment on both claims on limitations and damages.[1] It attached two exhibits: Rogers' deposition testimony and an affidavit by Windward's owner, which pertains only to the statute of limitations issue. Rogers did not file a response but participated in a hearing the court held on the motion and a motion for summary judgment filed by the Shous.[2] The court granted summary judgment in favor of Windward on both claims on the ground that there was insufficient evidence to support recovery of damages for either claim. It also granted summary judgment in favor of the Shous on both claims.

[1]Windward previously had filed a motion for summary judgment on limitations grounds, which was denied.

[2]Rogers filed an opposition to the Shous' motion for summary judgment.

Rogers noted a timely appeal, originally including the Shous, but has since abandoned any argument concerning them. He asks whether the circuit court erred in granting summary judgment to Windward on the negligence and nuisance claims. For the reasons to follow, we shall vacate the circuit court's order and remand for further proceedings. We shall include additional facts in our discussion of the issues.

STANDARD OF REVIEW

We review the grant of summary judgment to determine (1) whether a dispute of material fact exists and (2) whether the trial court was correct as a matter of law. *Thacker v. City of Hyattsville*, 135 Md. App. 268, 285 (2000). "We construe the factual record in the light most favorable to the non-movants." *Newell v. Runnels*, 407 Md. 578, 607 (2009). "[O]ur analysis 'begins with the determination [of] whether a genuine dispute of material fact exists; only in the absence of such a dispute will we review questions of law.'" *D'Aoust v. Diamond*, 424 Md. 549, 574 (2012) (second alteration in original) (quoting *Appiah v. Hall*, 416 Md. 533, 546 (2010)). "Although this Court may sometimes resolve appeals on alternative grounds, 'an appellate court's review of the grant of a motion for summary judgment is ordinarily limited to the grounds assigned by the trial court.'" *Sutton-Witherspoon v. S.A.F.E. Mgmt., Inc.*, 240 Md. App. 214, 232 (2019) (quoting *Beckenheimer's Inc. v. Alameda Assocs. Ltd. P'ship*, 327 Md. 536, 545 n.5 (1992)).

DISCUSSION

I.

Negligence Claim

"[T]o succeed on a negligence claim, a plaintiff must prove four well-established elements: (1) that the defendant was under a duty to protect the plaintiff from injury, (2) that the defendant breached that duty, (3) *that the plaintiff suffered actual injury or loss*, and (4) that the loss or injury proximately resulted from the defendant's breach of the duty." *Wash. Metro. Area Transit Auth. v. Seymour*, 387 Md. 217, 223 (2005) (quotation marks and citations omitted) (emphasis added). Here, the court granted summary judgment to Windward solely on the third element, concluding that Rogers failed to demonstrate an actual injury or loss. The court reasoned that Rogers' deposition testimony that there was "some ponding . . . or some flooding" on the Rogers Property was insufficient as a matter of law to show an injury given that he still can use the unimproved property as he always had, to store junk.[3]

Rogers contends the court erred in so ruling. He points to his testimony that three quarters of the Rogers Property routinely floods and that the property is unusable when flooded, and to his expert witness's opinion, set out in the Wilkerson Report, that it will cost nearly $45,000 to repair the improperly constructed driveway to alleviate the

[3]Although Rogers did not clearly testify to this in his deposition, at the hearing on the motion for summary judgment he argued that his property "became a storage yard when it became a wet area" due to the flooding.

stormwater management problems. In his view, this is evidence of an injury to real property sufficient to generate a dispute of material fact on damages.

Windward responds that because the Wilkerson Report is unsigned and not made under oath, it may not be considered on review of the grant of summary judgment. It maintains that this Court only may consider facts set out in the two exhibits to its motion for summary judgment – as mentioned, an affidavit by Windward's owner[4] and Rogers' deposition testimony – in determining whether Rogers generated a genuine dispute of material fact on the issue of damages. Although Windward acknowledges that Rogers' deposition testimony establishes that there was "an issue with rainwater on the [Rogers Property,]" it maintains that he failed to explain how the flooding harmed him or to quantify the damages resulting from the alleged injury to his property.

As a threshold matter, we conclude that the Wilkerson Report is part of the record that we may consider on review of the grant of summary judgment. That report was prepared by Rogers' designated expert; was served upon defense counsel during discovery; was attached to the Shous' motion for summary judgment; and was relied upon by Rogers *and* by the circuit court throughout the summary judgment hearing. Windward did not interpose an objection to the report's being considered with reference to its motion nor did it object on the ground that the form of the report was deficient. On

[4] As Mr. Rogers' attorney pointed out during argument in this Court, this affidavit was not made on personal knowledge as required by Rule 2-501(c). In any event, the affidavit pertains only to the statute of limitations issue not decided by the circuit court and no objection was raised to its form in the circuit court.

this record, we conclude that the Wilkerson Report was properly before the circuit court and likewise is properly before us on appeal.

As set out in the Wilkerson Report, if called at trial, Rogers' expert witness would testify that repairs to the driveway and construction of a grass swale would cost nearly $45,000.[5] This plainly is evidence of the cost to restore the Rogers Property to the condition it was in before Windward's substandard construction of the driveway caused the property to flood regularly. *See Sainato v. Potter*, 222 Md. 263, 270 (1960) (the measure of damages for injuries to real property is the cost to restore the damaged property "to the condition it was in prior to the injury," or, if that cost is "disproportionate to the actual injury" or repair is "impracticable, then the difference between the value of the property before and after the injury[.]") (citing *Superior Constr. Co. v. Elmo*, 204 Md. 1, 10 (1954)).

Even if the Wilkerson Report were not properly before this Court, we nevertheless would conclude that a genuine dispute of material fact on damages was generated based on Rogers' deposition testimony, standing alone. Rogers testified that ever since Windward built the driveway over the easement, three-quarters of his property floods almost every time it rains. When the Rogers Property is flooded, he cannot enter it to get to items he stores there because it is "too wet to drive across." For the same reason, he

[5] We are not persuaded that Rogers was obligated to quantify his damages at the summary judgment stage and, in any event, the circuit court did not grant summary judgment on the ground that he failed to do so. Nevertheless, he did so.

cannot access the Corporation Property from the Rogers Property, as had been his past practice. Prior to this flooding, Rogers regularly mowed the lawn on the Rogers Property, but now he no longer can do so. When flooded, the Rogers Property is unusable until the water subsides. The ponding in the swale creates a breeding ground for mosquitos. These conditions diminish the value of the Rogers Property. These facts, if credited by a factfinder, would support a finding of an actual injury to the Rogers Property, for which damages could be awarded. Accordingly, on this record, the court erred by granting summary judgment on the negligence claim.

II.

Nuisance Claim

A private nuisance is "'a nontrespassory invasion of another's interest in the private use or enjoyment of land.'" *Blue Ink, Ltd. v. Two Farms, Inc*., 218 Md. App. 77, 92 (2014) (quoting *Restatement (Second) of Torts* § 821D (1965)). In Maryland, "proof of nuisance focuses not on the possible negligence of the defendant but on whether there has been unreasonable interference with the plaintiff's use and enjoyment of his or her property." *Wash. Suburban Sanitary Comm'n v. CAE-Link Corp*., 330 Md. 115, 126 (1993) (citation omitted). "Virtually any disturbance of the enjoyment of the property may amount to a nuisance so long as the interference is substantial and unreasonable[,] and such as would be offensive or inconvenient to the normal person." *Id.* at 125. "The nuisance must, in the judgment of reasonable individuals, create a condition that is 'naturally productive of actual physical discomfort to persons of ordinary sensibilities,

tastes, and habits' and, in light of the circumstances, is 'unreasonable and in derogation of the rights of the party.'" *Blue Ink*, 218 Md. App. at 93-94 (quoting *Meadowbrook Swimming Club v. Albert*, 173 Md. 641, 645 (1938)).

Rogers contends the same evidence discussed above, viewed in a light most favorable to him as the non-moving party, furnishes proof that the routine flooding of his property created a "substantial and unreasonable" interference with his use and enjoyment of the Rogers Property and that an objectively reasonable person would likewise find the interference to be substantial and unreasonable. Windward responds that the evidence does not show that any "real, substantial, and unreasonable damage" was caused.

This case involves "an action for a private nuisance 'in fact' as opposed to a nuisance *per se*" because Rogers asserts that the driveway constructed by Windward became "'a nuisance by reason of the circumstances, location, or surroundings.'" *Blue Ink*, 218 Md. App. at 93 (quoting *Adams v. Comm'rs of Trappe*, 204 Md. 165, 170, (1954)). In *Blue Ink*, we announced a two-part test for analyzing a claim for a private nuisance in fact: "(1) viewing the defendant's activity, was the interference unreasonable and substantial? and (2) viewing the plaintiff's alleged harm, was the inconvenience or harm caused by the interference objectively reasonable?" *Id*. at 95. In this case, the circuit court ruled that the evidence in the record did not satisfy either prong. We disagree.

As discussed, the record viewed in a light most favorable to Rogers shows that Windward's construction of a driveway with insufficient drainage[6] has caused three-quarters of the Rogers Property to flood almost every time it rains. This is evidence of an unreasonable and substantial interference with the use and enjoyment of that property. *See Wietzke v. Chesapeake Conference Ass'n*, 421 Md. 355 (2011) (evidence that surface water runoff from a parking lot on a church property caused flooding of plaintiff's basement created jury issue on nuisance, but jury properly was instructed to balance the interference against the defendant's reasonable use of its property); *Battisto v. Perkins*, 210 Md. 542, 546 (1956) (reasoning that it was a jury question whether a developer's actions in clearing land to erect houses was unreasonable in light of the foreseeable risk of runoff of surface water onto adjacent lands, amounting to a private nuisance).

Moreover, Rogers testified in deposition that he is unable to mow the lawn, to enter the property, or to access stored items when the property is flooded. He further testified that the flooding has caused a mosquito infestation. An objectively reasonable

[6] Windward no longer owns the Schou Property. In the circuit court, Windward did not raise the question whether any liability it has for nuisance ended when the property was transferred to the Shous or continued thereafter. Consequently, that question is not before us on appeal. *See Sutton-Witherspoon v. S.A.F.E. Mgmt., Inc.*, 240 Md. App. 214, 232 (2019) (we review the grant of summary judgment solely on the grounds decided by the circuit court); *Restatement (Second) of Torts*, § 840A (1979) (stating that "[a] vendor . . . of land upon which there is a condition involving a nuisance for which he would be subject to liability if he continued in possession remains subject to liability for the continuation of the nuisance after he transfers the land" until "the vendee . . . has had reasonable opportunity to discover the condition and abate it").

person would demand that his or her property not be underwater on a routine basis and would be offended by the conditions at the property as Rogers describes them. *See Schuman v. Greenbelt Homes, Inc*., 212 Md. App. 451, 470 (2013) (citing *Harper, James & Gray on Torts* § 1.25 (3d ed. 2006) (plaintiff in a private nuisance action must be able to show that an objectively reasonable person would be offended or harmed by the interference and may not rely upon his or her special sensitivity)). Because the evidence created triable issues of fact, the court erred by granting summary judgment in favor of Windward on the nuisance claim.

JUDGMENT OF THE CIRCUIT COURT FOR ST. MARY'S COUNTY IN FAVOR OF WINDWARD LAND DEVELOPMENT, INC. VACATED. COSTS TO BE PAID BY THE APPELLEE.