S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

THOMAS ROBARGE and ROBERT ROBARGE,

Plaintiffs-Appellants,

v

TECUMSEH PRODUCTS COMPANY,

Defendant-Appellee.

UNPUBLISHED
February 22, 2011

No. 295418
Lenawee Circuit Court
LC No. 09-003438-CZ

Before: BORRELLO, P.J., and JANSEN and FORT HOOD , JJ.

PER CURIAM.

Plaintiffs appeal as of right from a circuit court order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(8) in this action involving alleged contamination of ground water. For the reasons set forth in this opinion, we reverse the trial court's order with respect to plaintiffs' nuisance claims, but affirm the dismissal of plaintiffs' remaining claims, which plaintiffs do not effectively challenge on appeal, and remand for further proceedings.

Plaintiffs' complaint alleges that plaintiffs own real property in Tecumseh, Michigan, and that defendant is the owner of nearby real property on which defendant manufactures compressors and other items. Plaintiffs alleged that various chemicals are released and discharged during defendant's manufacturing process, and that an environmental investigation at the site detected the existence of hazardous chemical concentrations in soil ground water. Plaintiffs further alleged that the chemicals in the ground water "have the potential to migrate" into the ground water "beneath adjacent properties and properties down gradient in the natural easterly flow of subsurface [ground water]." Plaintiffs were advised "that their property is likely to be within the area where the chemicals have migrated." They alleged that "the existence of hazardous substances in the ground water below their property" "significantly diminished" the value of their property.

In their first amended complaint, plaintiffs alleged that "the impacted groundwater has come in contact with the Plaintiffs' soil resulting in contamination of Plaintiffs' land." Plaintiffs added that their "use and enjoyment of the property has been diminished by the uncertainty about the effects of the contamination." The first amended complaint included counts styled as "Negligence," "Nuisance Per Se," "Intentional Nuisance in Fact," "Negligent Nuisance in Fact," "Public Nuisance," "Intentional Infliction of Emotional Distress," "Negligent Infliction of

Emotional Distress," "Trespass," and "Class Action." Although the trial court dismissed all of plaintiffs' claims, only the nuisance claims are at issue on appeal.[1]

Relying on *Adkins v Thomas Solvent Co*, 440 Mich 293; 487 NW2d 715 (1992), defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(8), contending that plaintiffs' nuisance claims as a whole were subject to dismissal because plaintiffs "failed to allege that the subsurface groundwater contamination has had any affect [sic] on their use and enjoyment of their property, except to allege diminishment of the market value of the property [and] do not claim that they have been deprived of any use or enjoyment of their property apart from its alleged diminution in value." The trial court granted the motion, reasoning:

> Although plaintiff alleges the diminution of their property value, I see no evidence of that, and certainly no claim that it is substantiated or substantial. And I'm not sure what could be amended that would allow that to happen that would satisfy the case law presiding or precedent set.
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> The [*Henry v Dow Chemical Co*, 473 Mich 63; 701 NW2d 684 (2005)],[2] which is a 2005 case, very clearly says the plaintiff must show or demonstrate a present physical injury to person or property in addition to economic loss resulting from that injury. I don't find that. I don't find present physical injury to person of plaintiff or the property of plaintiff that is substantiated, nor can I, without speculation, identify economic loss. I don't know that I would like it either, but I also don't know that the fact that I don't like it is going to give me a cause of action, and I don't want to--and I see nothing that would suggest we want to disturb MDEQ's obligation to give notice. And I think that their duty and their obligation to provide notice is certainly worth protecting.
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> A closer look at the [*Adkins*], I think a '92 case, very clearly identifies substantial interference with use or enjoyment. And again, I don't see either plaintiff indicating where that has happened, and they can specifically state that their use or enjoyment has been substantially interfered with. Now, I agree, and I hear comments about gardening, but if we're talking about groundwater, I know of nothing that makes that pertinent or relative [sic?] to what they're using their property for that would suggest again that they have a cause of action. And I

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[1] Plaintiffs' isolated sentence in their brief that they "rely on" an unpublished decision of this Court "with regard to the trespass claim in the complaint" is insufficient to effectively challenge the dismissal of the trespass claim. *Silver Creek Twp v Corso*, 246 Mich App 94, 99; 631 NW2d 346 (2001).

[2] In *Henry*, 473 Mich 63, the Court affirmed summary disposition of a claim seeking medical monitoring for possible negative health effects pursuant to MCR 2.116(C)(8), concluding that a plaintiff alleging a negligence claim must allege a present injury, not the mere potential for injury. The decision does not address any nuisance claims.

> can't find supporting case law that allows this case to go forward absent certainly those features. I don't find substantial interference with use or energy [sic]. I think, again, that in 2004, although the [*Postma v County of Ottawa*, unpublished opinion per curiam of the Court of Appeals, issued September 2, 2004 (Docket No. 243602)] case, and I agree with--both of you have indicated it is not published as precedent, but I think that it found clear property diminution. And although I can speculate again, I don't think the world cares about my speculation. I do, but I don't think that what I think about that in regard is what our high court intended to be precedent when I took the bench. And for those reasons, I feel compelled to grant defendant's motion for summary judgment, and do so at this time, and would sign an order accordingly.

In its order granting summary disposition, the court also ordered that Counts II –V "are deemed to include an allegation of substantial interference with the use and enjoyment of their property[.]"

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). The following standards apply to review of a motion brought under MCR 2.116(C)(8):

> A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." When deciding a motion brought under this section, a court considers only the pleadings. MCR 2.116(G)(5). [*Id*. at 119-120 (citations omitted).]

Although defendant and the trial court both concluded that *Adkins*, 440 Mich 293, supported the dismissal of plaintiffs' nuisance claims, we agree with plaintiffs that this case is clearly distinguishable from *Adkins*.

Adkins involved a sub-group of plaintiffs whose properties were near an area of contamination but "were not and would never be subject to ground water contamination." *Id*. at 297. The plaintiffs alleged that hazardous wastes had been released at sites owned by the defendants and contaminated underground water in the area. *Id*. at 298-299, 305. However, discovery revealed that because of a divide in the flow of the ground water, the contaminants allegedly discharged by the defendants never reached some of the plaintiffs' property. *Id*. In fact, the plaintiffs' expert testified that "no contaminants from the Thomas Solvent facilities had any effect on the properties of these plaintiffs, which were located south of the divide." *Id*. at 299-300. The plaintiffs involved in the appeal had stipulated to the dismissal of all their claims "except to the extent that they claimed damages for property depreciation." *Id*. at 300. Although the plaintiffs had conceded that no contaminants ever reached their properties, they "urged the [trial] court to impose liability on the defendants for any loss in property values due to public concern about the contaminants in the general area." *Id*. at 300.

Our Supreme Court held that "[p]ollution of ground water may constitute a public or private nuisance." *Id*. at 303-304. The Court noted that the case had been considered in the lower courts under a theory of private nuisance, which "is a nontrespassory invasion of another's interest in the private use and enjoyment of land." *Id*. at 302, 305-306.[3] The Court agreed that the claim did not require a physical intrusion of another's interest in the private use and enjoyment of land. *Id*. at 306. The Court explained that "the gist of a private nuisance action is an interference with the occupation or use of land or an interference with servitudes relating to the land," but does not require entry or an effect on the land. *Id*. at 303. Rather,

> [t]here are countless ways to interfere with the use and enjoyment of land including interference with the physical condition of the land itself, disturbance in the comfort of conveniences of the occupant including his peace of mind, and threat of future injury that is a present menace and interference with enjoyment. [*Id*. at 303.]

The Court explained, however, that

> an interference that is not substantial and unreasonable does not give rise to an action for damages against the person causing it . . . . Stated otherwise, while nuisance may be predicated on conduct of a defendant that causes mental annoyance, it will not amount to substantial injury unless the annoyance is significant and the interference is unreasonable in the sense that it would be unreasonable to permit the defendant to cause such an amount of harm without paying for it. [*Id*. at 309-310.]

In *Adkins*, the plaintiffs made no claim for relief arising from their own fears. *Id*. at 311. Although the plaintiffs' counsel had asserted "claims of personal discomfort or annoyance" with respect to other plaintiffs, *id*. at 316, the plaintiffs at issue in the appeal had stipulated to the dismissal of all claims except those based on the alleged depreciation of the market values of their properties "because of the unfounded fears of purchasers." *Id*. at 311. The Court observed that the plaintiffs at issue "do not contend that the condition created by the defendant causes them fear or anxiety. Thus, not only have these plaintiffs not alleged significant interference with their use and enjoyment of property, they do not posit any interference at all." *Id*. at 313-314.

The Court determined that property depreciation alone caused by negative publicity and "wholly unfounded fears of third parties," *Id*. at 314-316, is insufficient to show a significant

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[3] The Court briefly explained that recovery was unavailable under a theory of public nuisance because to prevail in such a claim, the plaintiffs "must show harm of a kind different from that suffered by other members of the general public exercising the right common to the general public that was the subject of interference." *Id*. at 306 n 11. Because the plaintiffs had conceded that contaminated ground water had not reached their property, "there exists no evidence of harm of a different kind than that suffered by members of the general public." *Id*.

interference with the use and enjoyment of a person's property. The Court concluded that "reasonable minds cannot differ that diminished property value based on unfounded fear is a not a substantial interference in and of itself." *Id*. at 313. But the Court also recognized that "when some significant interference with the use and enjoyment of land causes the property value loss, courts of law accommodate conflicting interests by recognizing claims designed to shift the loss." *Id*. at 313.

The absence of actual contamination that was the central to the decision in *Adkins* has not been established here. Summary disposition in *Adkins* was granted pursuant to MCR 2.116(C)(10) and the undisputed evidence indicated that the property of the plaintiffs at issue in that appeal had not been and would not be contaminated by the ground water pollution. In contrast, defendant's motion here was brought under MCR 2.116(C)(8), which considers only the legal sufficiency of a claim and requires the reviewing court to accept all well-pleaded allegations as true. *Maiden*, 461 Mich at 119-120. Plaintiffs here alleged not only that they had been notified by defendant "that their property is likely to be within the area where the chemicals have migrated," but also that "the impacted groundwater has come in contact with the Plaintiffs' soil resulting in contamination of Plaintiffs' land." Defendant asserts that "[l]ike the plaintiffs in *Adkins*, the [plaintiffs] have not demonstrated that the groundwater underneath their land *is* contaminated." This assertion is directed at the factual sufficiency of plaintiffs' claim, i.e., whether there is evidence to factually support plaintiffs' allegation that their property is actually contaminated. Because defendant's motion was brought only under MCR 2.116(C)(8), and not under MCR 2.116(C)(10), plaintiffs were not required to demonstrate factual support for their allegations in order to survive summary disposition.

Because *Adkins* was premised on the undisputed absence of contamination, its discussion has limited value in resolving this case. Our Supreme Court's conclusion that "negative publicity resulting in unfounded fear about dangers in the vicinity of the property does not constitute a significant interference with the use and enjoyment of land," *id*. at 306, does not offer any insight into whether an allegation of migration of hazardous chemicals into the ground water underlying property, by itself, adequately alleges a substantial interference in the use and enjoyment of the property. Furthermore, *Adkins* does not purport to address all categories of nuisance. See *id*. at 305-306.

A second important distinction between this case and *Adkins* is that plaintiffs here have alleged that their "use and enjoyment of the property has been diminished by the uncertainty about the effects of the contamination." In *Adkins*, the Court stated that interference may "consist of disturbance in the comfort of conveniences of the occupant including his peace of mind, and threat of future injury that is a present menace and interference with enjoyment." *Id*. at 303. The Court cautioned that a defendant's conduct that causes mental annoyance will not amount to substantial injury if the annoyance is not "significant" and the interference is not "unreasonable in the sense that it would be unreasonable to permit the defendant to cause such an amount of harm without paying for it." *Id*. at 309-310. The Court emphasized that the plaintiffs at issue in that appeal had not made any claim for relief arising from their own fears. *Id*. at 311, 313-314, 316. In this case, plaintiffs' complaint alleges "substantial interference with the use and enjoyment of their property" due to "uncertainty about the effects of the contamination."

To the extent defendant contends that plaintiffs will not be able to factually establish any claim beyond an alleged diminution in the value to their property based on unfounded fears of third parties, which *Adkins* indicates is insufficient to establish a nuisance claim, a motion under MCR 2.116(C)(8) is not an appropriate method for evaluating such a claim. Rather, such a claim is more appropriately addressed in a motion brought under MCR 2.116(C)(10). Moreover, although *Adkins* indicates that diminished property value based on unfounded fears by third parties is a not a substantial interference in and of itself, the Court also recognized that "when some significant interference with the use and enjoyment of land causes the property value loss, courts of law accommodate conflicting interests by recognizing claims designed to shift the loss." *Id*. at 313. Thus, although *Adkins* indicates that diminution is property value of uncontaminated land based on unfounded third-party fears does not establish a significant interference with the use and enjoyment of land, *Adkins* does not address diminution in value where significant interference is otherwise alleged or where ground water under the land is contaminated.

Defendant contends that even if there is contamination 10 to 25 feet below the surface, it "could not possibly cause a significant interference with [plaintiffs'] use and enjoyment of their property." Defendant states that plaintiffs are connected to the city water supply, cannot touch or inhale any contaminants and are not affected by the presence of any contaminants. Here, defendant asserts that plaintiffs will not be able to provide the trial court with factual support that the alleged contamination is substantially interfering with their use and enjoyment of their property. Questioning whether plaintiffs will be able to provide factual support for their allegation that the alleged contamination is substantially interfering with their use and enjoyment of their property is not a matter for summary disposition under MCR 2.116(C)(8).[4] Rather, such arguments are properly framed in a motion for summary disposition pursuant to MCR 2.116(C)(10).

Because defendant did not show that plaintiffs' nuisance claims were "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery," *Maiden*, 461 Mich at 119-120, the trial court erred in granting defendants summary disposition of the nuisance claims pursuant to MCR 2.116(C)(8). Accordingly, we reverse the dismissal of plaintiffs' nuisance claims. Because plaintiffs do not effectively challenge the dismissal of their remaining claims, we affirm the trial court's order with respect to those claims.

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[4] We are not persuaded by defendant's reliance on this Court's opinion in *ETT Ambluance Serv Corp v Rockford Ambulance, Inc*, 204 Mich App 392; 516 NW2d 498 (1994). In that decision, this Court stated that "[T]he mere statement of a pleader's conclusions, unsupported by allegations of fact, will not suffice to state a cause of action." *Id.* at 399. Here, plaintiffs alleged that they were notified by defendant that their property was likely contaminated and they also affirmatively asserted that their property was contaminated. Despite defendant's invitation for this Court to examine its Exhibit 1, MCR 2.116(C)(8) is limited to allegations in the complaint. Consequently, under MCR 2.116(C)(8), the factual support for this allegation has not been challenged.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. No costs are awarded to any party. MCR 7.219.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Karen M. Fort Hood