STATE OF MICHIGAN

COURT OF APPEALS

RESIDENTS OF FRESH AIR PARK SUBDIVISION, KATHLEEN DECKERT, DEBRA YERKE, FRED HENNEKAM, LISA HENNEKAM, MICHELLE DEW, JAMES HUSKISSON, HENRY BELCHER, RYAN MUYOL, JANET STEPHENS, THOMAS BAGNASCO, GIOVANNI RENNA, REBECCA SMITH, TROY DRISKELL, LEROY DAVIS, MERRILL DAVIS, DANIEL GRUSECKI, BONNIE GRUSECKI, PAUL MILIOTO, TOM MITCHELL, DANIEL MCBRIDE, PATRINA BUSH, LAWRENCE GALLO, JOE LONG, GREGORY PROCTOR, MATTHEW FISHER, MOSHEN KAMBOD, and DEBORAH HENDERSON,

Plaintiffs-Appellants,

v

POINTE ROSA HOMEOWNERS ASSOCIATION, INC., VICKI CONWELL, LARRY LEE, ARIANNE LEE, WILLIAM OPATICH, PATRICK OPATICH, THEODORE BANK, THOMAS PALKA, SETTLER PROPERTIES, LLC, GARY WILLERHAUSEN, KARA WILLERHAUSEN, RICHARD DEGRANDE, SUSAN DEGRANDE, ETHAN CUENY, STEVEN RICHTER, GILLIAN RICHTER, CRAIG BARDILL, ROY RILEY, JACQUELINE RILEY, JOHN SWOFFER, MARK POLENZ, LINDA BROWNING, JAMES WROBEL, DEPARTMENT OF TREASURY, and JOHN BROOKES,

Defendants-Appellees.

UNPUBLISHED
September 23, 2021

No. 355011
Macomb Circuit Court
LC No. 2019-001255-CH

Before: CAVANAGH, P.J., and K. F. KELLY and REDFORD, JJ.

PER CURIAM.

Plaintiffs, lot owners in the Fresh Air Park Subdivision in Harrison Township, appeal as of right the trial court's opinion and order granting summary disposition in favor of defendants, lot owners in the neighboring Pointe Rosa Subdivision No. 1, and thereby dismissing plaintiffs' claims for nuisance, negligence, and declaratory relief pursuant to MCR 2.116(C)(10).[1] Finding error warranting reversal, we reverse and remand for further proceedings.

I. BASIC FACTS AND PROCEDURAL HISTORY

Defendants are residents of the Pointe Rosa Subdivision No. 1 in Harrison Township. Defendants' lots abut a man-made canal, Channel 1. Plaintiffs are residents of the Fresh Air Park Subdivision, which is located on the other side of Channel 1. To access their homes, plaintiffs are required to travel along Elm Lane, a private road that runs adjacent to Channel 1. A five-foot strip of land (the "five-foot strip"), which is owned by the state of Michigan, separates Elm Lane from Channel 1. At issue in this case is the extent to which defendants are responsible for maintaining the western seawall of Channel 1, which abuts the five-foot strip along Elm Lane. Plaintiffs allege that defendants' failure to repair and maintain the western seawall has allowed water to infiltrate the five-foot strip adjacent to Elm Lane, thereby causing erosion and damage to Elm Lane and plaintiffs' properties.

An appeal involving ownership and property rights to Channel 1 and the adjacent five-foot strip was previously before this Court in *Fry v Kaiser*, 60 Mich App 574; 232 NW2d 673 (1975), in which the homeowners of both Pointe Rosa Subdivision No. 1 and Fresh Air Park Subdivision were defendants. *Id.* at 576. The plaintiff in that case was one of the original developers and a successor in interest of Pointe Rosa Subdivision No. 1. This Court held that the plaintiff developer was the owner of the land beneath Channel 1 and the five-foot strip,[2] but that the defendant homeowners of Pointe Rosa Subdivision No. 1 had "an easement right of way to use the channels for navigational purposes." *Id.* at 577, 580. This Court also addressed who was responsible for maintaining Channel 1, including the seawalls, and held that the defendant homeowners, as the dominant lot owners having an easement right of way to use the channels for navigational purposes, were required to "maintain channel one and the sea walls abutting it." *Id.* at 580.

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[1] In an earlier order, the trial court granted summary disposition in favor of defendant Pointe Rosa Homeowners Association. Plaintiffs have not challenged that decision. Accordingly, Pointe Rosa Homeowners Association is not a party to this appeal. Plaintiffs also filed this action against the state of Michigan and the Michigan Department of Treasury (the "state defendants"). The state defendants filed a notice of transfer to the Court of Claims, and therefore, the state defendants also are not parties to this appeal.

[2] The parties do not dispute that the five-foot strip, including the western seawall, are now owned by the state of Michigan pursuant to a deed following a 1984 tax sale.

In 2019, plaintiffs filed the instant action against the defendant lot owners, the state defendants, and the Pointe Rosa Homeowners Association, alleging that they "failed and refuse[d] to maintain Channel 1 and the [western] seawall," causing significant erosion and water damage to Elm Lane. Plaintiffs raised claims for nuisance, negligence, and declaratory relief. The trial court dismissed the claims against the Pointe Rosa Homeowners Association,[3] and the state defendants filed a notice of transfer to the Court of Claims. Thereafter, the remaining defendant lot owners filed a renewed motion for summary disposition under MCR 2.116(C)(7), (8), and (10), alleging that plaintiffs' nuisance claim was deficient as a matter of law because the state of Michigan was the owner of Channel 1, but was no longer a party to the litigation, and therefore, defendants did not have ownership and control of the western seawall. Defendants also questioned plaintiffs' attempt to equate defendants' easement for navigational purposes with a duty owed to plaintiffs. Defendants claimed that an easement holder is not permitted to make improvements to the servient estate that are unnecessary for the effective use of the easement and because the purpose of the easement was for navigation, they were not required to make any improvements to the western seawall that were unnecessary to the effective use of Channel 1 for navigation purposes. Additionally, defendants argued that their easement rights were contractual in nature, and plaintiffs lacked standing to enforce the easement because they were not parties to it. Lastly, defendants submitted that plaintiffs failed to demonstrate that defendants owed them a duty of care independent of any contractual duties under the easement.

Plaintiffs opposed this dispositive motion, alleging that defendants' easement provided defendants with possession or control of Channel 1 and the seawalls abutting it, and that defendants had allowed the western seawall to fall into a state of disrepair. Plaintiffs submitted evidence to demonstrate that the condition of the western seawall was causing damage to plaintiffs' properties and to Elm Lane, and they also presented evidence detailing the impact of the damage on Elm Lane, their homes, and the community.

The trial court ruled that plaintiffs lacked standing to directly enforce the easement under a contractual theory because they were not parties to the easement. In addressing plaintiffs' nuisance claim, the court recognized that to prevail under a theory of nuisance, plaintiffs were required to prove that defendants "owned or controlled the property from which the nuisance arose." The court noted that it was undisputed that defendants did not own Channel 1 or the western seawall, and that they were granted an easement only for navigational purposes. The court concluded that, "[t]o this *limited* end, defendants are obligated to dredge and maintain the canals, including the repair and maintenance of the western seawall," and therefore, had "limited control over the property for a specified purpose pursuant to the easement." The trial court held that plaintiffs had "not proffered a factual or legal basis to establish that the western seawall is necessary to the effective use of Channel 1 for navigational purposes," and even assuming such a necessity, plaintiffs had "not proffered any evidence to establish that the current condition of the western seawall impairs the use of Channel 1 for navigational purposes." The court additionally held that plaintiffs "failed to cite any legal or factual authority for their argument that defendants

[3] The trial court ruled that plaintiffs could not maintain their claims against the homeowners association because the homeowners association neither owned nor controlled the five-foot strip of land or the western seawall.

are additionally required to maintain the western seawall to provide lateral support to the five-foot strip of land and Elm Lane as part of the effective use or proper enjoyment of the *navigational* easement." Accordingly, the court dismissed plaintiffs' nuisance claim, reasoning that because "reasonable minds could only conclude defendants do not owe a duty of lateral support to Elm Lane, defendants' actions or inactions in repairing and maintaining the western seawall could not be unreasonably interfering with plaintiffs' use of Elm Lane, or by extension their (plaintiffs') properties."

The trial court also dismissed plaintiffs' negligence claim, ruling that "[d]efendants' alleged failure to perform their easement obligations is a contract issue," plaintiffs were not parties to the easement, and plaintiffs failed to establish a duty of care "separate and distinct" from defendants' contractual easement obligations. Similarly, the trial court held that plaintiffs did not provide legal or factual support for their claim that defendants' obligations with respect to their navigational easement required them to maintain and repair the easement not only for the safe navigational use of Channel 1, "but also to prevent the injuries alleged by them including to provide lateral support to Elm Lane." In light of the dismissal of the nuisance and negligence claims, the court also dismissed the request for declaratory relief. This appeal followed.

II. ANALYSIS

Plaintiffs submit that the trial court erred by granting defendants' motion for summary disposition and thereby dismissing plaintiffs' claims for nuisance, negligence, and declaratory relief. We agree.

A. STANDARD OF REVIEW

The trial court granted summary disposition in favor of defendants under MCR 2.116(C)(10). A trial court's ruling on a motion for summary disposition is reviewed de novo. *Bennett v Russell*, 322 Mich App 638, 642; 913 NW2d 364 (2018). Summary disposition is appropriate pursuant to MCR 2.116(C)(10) where there is "no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10). When reviewing a motion for summary disposition challenged under MCR 2.116(C)(10), the court considers the affidavits, pleadings, depositions, admissions, and other admissible documentary evidence then filed in the action or submitted by the parties. MCR 2.116(G)(4), (G)(5); *Puetz v Spectrum Health Hosps*, 324 Mich App 51, 68; 919 NW2d 439 (2018).

The scope of an easement and the extent of the rights of a party under an easement are questions of fact. *Schumacher v Dep't of Natural Resources*, 275 Mich App 121, 130; 737 NW2d 782 (2007). However, if reasonable minds could not disagree regarding the scope of an easement and the rights of the parties under the easement, the trial court may decide the issues on summary disposition as a matter of law. *Wiggins v City of Burton*, 291 Mich App 532, 550; 805 NW2d 517 (2011). Whether a defendant owes a plaintiff a duty of care is a question of law that we review de novo. *Powell-Murphy v Revitalizing Auto Communities Environmental Response Trust*, 333 Mich App 234, 243; ___ NW2d ___ (2020). The application of a legal doctrine, such as collateral estoppel, also presents a question of law subject to de novo review. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008).

B. DEFENDANTS' EASEMENT AND THE DOCTRINE OF COLLATERAL ESTOPPEL

The parties do not dispute that defendants hold an express easement over Channel 1. The trial court recognized that this easement obligated defendants to repair and maintain the western seawall. However, applying easement law, the court then examined the scope of the easement and defendants' attendant rights under the easement to conclude that plaintiffs could not maintain claims for nuisance and negligence. It was appropriate for the trial court to first determine the scope of defendants' easement rights and obligations. This was necessary to determine whether defendants had the requisite possession and control of Channel 1, and the abutting seawalls, to give rise to a duty of care and thereby subject defendants to potential liability for nuisance or negligence. However, the trial court erred by then analyzing any liability for nuisance or negligence solely by focusing on the scope of defendants' easement and any attendant rights and obligations under easement law, rather than by applying the law of nuisance and negligence to determine whether plaintiffs could prove the elements of their claims.

The Pointe Rosa Subdivision No. 1 plat provides that "the channels as shown on said plat are hereby dedicated to the use of the lot owners."[4] In *Fry*, 60 Mich App at 580, this Court characterized this as an express easement. An easement is the right to use the land that is burdened by the easement, as opposed to the right to occupy and possess the land as an estate owner. See *Schumacher*, 275 Mich App at 131. The land "burdened by the easement" is referred to as the servient estate, and the land that benefits from the easement is called the dominant estate. *Smith v Straughn*, 331 Mich App 209, 215; 952 NW2d 521 (2020). "The use of an easement must be confined to the purposes for which it was granted, including any rights incident to or necessary for the reasonable and proper enjoyment of the easement, which are exercised with as little burden as possible to the fee owner of the land." *Schumacher*, 275 Mich App at 131.

In *Fry*, 60 Mich App at 580, this Court recognized the obligation of the servient tenant to maintain and repair an easement, but noted that its research of Michigan law had not yielded authority with respect to *which party* carries the obligation to maintain a water easement, which is the nature of defendants' property interest in the present appeal. Examining the law of other jurisdictions, this Court stated:

> The rule generally accepted in the absence of special circumstances or a contract providing otherwise, is that the dominant owners of a water easement which does not benefit the servient estate not only have the right to maintain and repair the easement but have a duty to do so. See *Durfee v Garvey*, 78 Cal 546, 21 P 302 (1889); *Hogan v Cowart*, 182 Ga 145, 184 SE 884 (1936); *Bowman v Bradley*, 127 Or 45; 270 P 919 (1928). It has also been held that where the servient estate receives no benefit from the water easement, he is under no duty to maintain or repair it. *Moffett v Berlin Water Co*, 81 NH 79; 121 A 22 (1923); *Joslin v Sones*, 80 Iowa 534; 45 NW 917 (1890). [*Fry*, 60 Mich App at 580.]

[4] To the extent that this language amounted to a private dedication, dedications of land in a recorded plat give the grantees of the private dedication, at a minimum, an irrevocable easement in the dedicated land. *Redmond v Van Buren Co*, 293 Mich App 344, 354; 819 NW2d 912 (2011).

Applying this law to the case before it, this Court held:

> In the instant case plaintiff, the servient tenant, receives no benefit from the easement granted to defendants. Defendants, dominant lot owners, have an easement right of way to use the channels for navigational purposes. They must maintain channel number one and the sea walls abutting it.
>
> Using either analysis, we determine that defendant lot owners must maintain both eastern and western sea walls of channel number one. [*Id.*]

In light of this Court's decision in *Fry*, defendant lot owners are collaterally estopped from denying that they are responsible for the maintenance of Channel 1, including the abutting seawalls. There are three elements that must be satisfied to invoke the doctrine of collateral estoppel:

> (1) "a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment"; (2) "the same parties must have had a full [and fair] opportunity to litigate the issue"; and (3) "there must be mutuality of estoppel." *Storey v Meijer, Inc*, 431 Mich 368, 373 n 3; 429 NW2d 169 (1988). [*Monat v State Farm Ins Co*, 469 Mich 679, 682-683; 677 NW2d 843 (2004).]

For mutuality of estoppel to apply, the same party must have been a party, or in privy with a party, in the prior action. *Monat*, 469 Mich at 684. As explained in *Monat*, "[t]he estoppel is mutual if the one taking advantage of the earlier adjudication would have been bound by it, had it gone against him." *Id*. at 684-685 (citations and quotation marks omitted.)

Analyzing the first element of collateral estoppel, this Court in *Fry*, 60 Mich App at 580, held that the defendant lot owners in Pointe Rosa Subdivision No. 1 were responsible for maintaining the easement over Channel 1. Specifically, this Court unequivocally held that the defendant lot owners "have an easement right of way to use the channels for navigational purposes" and "[t]hey must maintain channel number one and the sea walls abutting it." *Id.*

The second element is satisfied because the lot owners of Pointe Rosa Subdivision No. 1 were parties to the *Fry* litigation, they were directly interested in the subject matter of who was responsible for maintaining and repairing the Channel 1 easement, they had a full and fair opportunity to litigate that issue in the earlier litigation, and the instant defendants are in privity with the defendants in *Fry*. As explained in *Wells Fargo Bank, NA v Null*, 304 Mich App 508, 521; 847 NW2d 657 (2014), quoting *Husted v Auto–Owners Ins. Co*, 213 Mich App 547, 556; 540 NW2d 743 (1995), aff'd 459 Mich 500 (1999):

> A party is one who is directly interested in the subject matter and has a right to defend or to control the proceedings and to appeal from the judgment. A person is in privy to a party if, after the judgment, the person has an interest in the matter affected by the judgment through one of the parties, such as by inheritance, succession, or purchase.

Defendants, as subsequent purchasers of lots in Pointe Rosa Subdivision No. 1, were in privity with their predecessors, who were parties to and participated fully in the litigation in *Fry*. Notably,

defendants do not argue to the contrary. Indeed, in their brief on appeal, while contesting the scope of their obligation to maintain the easement, defendants concede that they "may have a duty to maintain [Channel 1] and the seawall so that the channel remains navigable[.]"

Finally, the third element, mutuality of estoppel, has also been satisfied because plaintiffs, who seek to estop defendants from relitigating this issue, are in privity with the lot owners of the Fresh Air Park Subdivision who were also parties to the litigation in *Fry*, see *id.*, 60 Mich App at 576, and therefore, plaintiffs are also bound by this Court's earlier decision. Again, defendants do not argue to the contrary.

The purpose underlying the doctrine of collateral estoppel is to relieve parties of multiple relitigation, conserve judicial resources, prevent inconsistent decisions, and encourage reliance on adjudication. *Wells Fargo*, 304 Mich App at 520. These purposes are applicable here and, because the elements of collateral estoppel have been satisfied, defendants are precluded from relitigating the settled issue regarding their responsibility for maintaining the western seawall as part of their obligation to maintain the easement over Channel 1.

Next, we must determine whether the responsibility for maintaining the easement can provide a basis for establishing liability for plaintiffs' claims of nuisance, negligence, and declaratory relief. In *Blackhawk Dev Corp v Village of Dexter*, 473 Mich 33, 41-42; 700 NW2d 364 (2005), our Supreme Court observed:

> A fundamental principle of easement law is that the easement holder . . . cannot "make improvements to the servient estate if such improvements are unnecessary for the effective use of the easement or they unreasonably burden the servient tenement." *Little v Kin*, 468 Mich 699, 701; 664 NW2d 749 (2003), citing *Crew's Die Casting Corp v Davidow*, 369 Mich 541; 120 NW2d 238 (1963), *Unverzagt* [*v Miller*, 306 Mich 260, 265; 10 NW2d 849 (1943)], and *Mumrow v Riddle*, 67 Mich App 693, 700; 242 NW2d 489 (1976). Stated differently, " 'It is an established principle that the conveyance of an easement gives to the grantee all such rights as are incident or necessary to the reasonable and proper enjoyment of the easement.' " *Unverzagt, supra* at 265, quoting 9 RCL, p 784. And "[t]he use exercised by the holders of the easement must be reasonably necessary and convenient to the proper enjoyment of the easement, with as little burden as possible to the fee owner of the land." *Id.*

A two-step inquiry has arisen to determine the allowable scope of repair and maintenance of an easement. *Little*, 468 Mich at 701; *Blackhawk Dev Corp*, 473 Mich at 42. The first inquiry is whether the repair and maintenance is necessary for the effective use of the easement. The second inquiry is whether the improvements and repairs would "unreasonably burden the servient estate." *Little*, 468 Mich at 701; *Blackhawk Dev Corp*, 473 Mich at 42. As our Supreme Court further observed, "the need to answer the second question is obviated where the first question is answered in the negative." *Id.* In considering these questions, a court will consider what is reasonable under the circumstances. *Mumrow*, 67 Mich App at 699.

The trial court analyzed plaintiffs' claims solely by focusing on whether any repairs or maintenance were necessary for the effective use of Channel 1 *for navigational purposes*. This

approach is flawed because the relevant inquiry in this case does not concern the scope of an easement or defendants' obligations under easement law, but rather, whether defendants' easement interest in Channel 1 can give rise to liability for nuisance or negligence for the damage to plaintiffs' property. The trial court observed that plaintiffs are not parties to the easement, and therefore, do not have standing to enforce the easement. However, plaintiffs are not seeking to enforce the easement. They are merely relying on the existence of defendants' undisputed property interest—an easement in Channel 1—as a basis for imposing liability on defendants under theories of nuisance and negligence, given defendants' control of the condition that allegedly is causing the damage to Elm Lane and plaintiffs' properties. In this context, it is not appropriate to examine the scope of defendants' potential liability under easement law. The relevant inquiry is whether defendants' easement interest in Channel 1, and any attendant rights and obligations related to that interest, can provide a basis for imposing liability on defendants for the injuries to plaintiffs' property under theories of nuisance or negligence.

C. NUISANCE

Plaintiffs submit that the trial court erred by dismissing their nuisance claim on the basis of its conclusion that defendants' express easement for navigational purposes precluded plaintiffs from maintaining an action for nuisance for the alleged injuries to plaintiffs' property. We agree.

In *Wolfenbarger v Wright*, ___ Mich App ___, ___; ___ NW2d ___ (2021) (Docket No. 350668); slip op at 8, this Court, quoting *Adkins v Thomas Solvent Co*, 440 Mich 293, 302; 482 NW2d 715 (1992), explained that a private nuisance is " 'a nontrespassory invasion of another's interest in the private use and enjoyment of land.' " In *Wolfenbarger*, ___ Mich App at ___; slip op at 8, this Court highlighted the circumstances under which a defendant could be held liable for the tort of private nuisance:

> [A party] is subject to liability for private nuisance for a nontrespassory invasion of another's interest in the private use and enjoyment of land if (a) the other has property rights and privileges in respect to the use or enjoyment interfered with, (b) the invasion results in significant harm[,] (c) the actor's conduct is the legal cause of the invasion, and (d) the invasion is either (i) intentional and unreasonable, or (ii) unintentional and otherwise actionable under the rules governing liability for negligent, reckless, or ultrahazardous conduct. [Citations omitted.]

"There 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 or conveniences of the occupant including his peace of mind, and threat of future injury that is a present menace and interference with enjoyment." *Adkins*, 440 Mich at 303. A defendant cannot be held liable for the tort of nuisance unless it is established that he had possession and control of the land on which the condition allegedly causing the nuisance exists or the challenged activity takes place. *Sholberg v Truman*, 496 Mich 1, 7; 852 NW2d 89 (2014).

Plaintiffs' complaint alleges that defendants' refusal to repair and maintain the western seawall in Channel 1 "has caused and continues to cause substantial damage to Plaintiffs' properties." Specifically, the complaint alleges that defendants' failure and refusal to repair and maintain the western seawall has (1) allowed water to damage Elm Lane, making it inaccessible

to emergency and utility vehicles and affecting plaintiffs' access to their properties, (2) allowed a guardrail along Elm Lane to become submerged into Channel 1, (3) allowed water to damage utilities under Elm Lane, and (4) eliminated lateral adjacent support to Elm Lane and plaintiffs' properties.

The trial court ruled that plaintiffs could not establish a claim for nuisance because there was no evidence that the current condition of the western seawall was impairing the use of Channel 1 for *navigational* purposes and defendants did not owe a duty of lateral support to Elm Lane. However, the express language of the dedication giving rise to this easement merely established that the channels were for the use of the lot owners. It did not limit the purpose and maintenance of the easement to navigational purposes only. Additionally, the *Fry* Court held that the dominant lot owners "must maintain channel number one and the sea walls abutting it." *Fry*, 60 Mich App at 580. Moreover, this litigation does not involve any claim that defendants have exceeded the permissible scope of their easement, i.e., their right to use Channel 1 for navigational purposes, and there is no claim that defendants are using Channel 1 for purposes other than for navigation. Instead, the issue is whether defendants are responsible for a condition that is unreasonably interfering with plaintiffs' use and enjoyment of their property and Elm Lane. In this context, defendants' easement is relevant only insofar that it demonstrates their possession and control of the property from which the condition allegedly causing the nuisance exists. *Sholberg*, 496 Mich at 7. Defendants' interest is sufficient to show that defendants have control of the condition that allegedly is causing significant interference with plaintiffs' use and enjoyment of their property.

In opposing defendants' motion for summary disposition, plaintiffs presented substantial evidence to factually support their claim that defendants' failure to repair and maintain the western seawall of Channel 1 was causing damage to Elm Lane. For example, plaintiffs submitted the Elm Lane Engineering Evaluation performed by Brent LaVanway, P.E., of Boss Engineering. LaVanway noted that a timber seawall that had been constructed along the east side of Elm Lane when it was first developed had "deteriorated to the point that it is nearly completely gone[.]" Although LaVanway attributed erosion alongside Elm Lane to "rising water levels in the Great Lakes and Lake St. Clair," he also stated that the "existing steel seawalls are . . . in a state of disrepair." His report states:

> Corrosion of the steel has resulted in many area that have significant holes which allow the channel water to penetrate the wall and inundate Elm Lane periodically . . . . Even in lower water conditions stagnant water is present between the seawall and Elm Lane.
>
> The lack of maintenance of existing seawall or the lack of installation of new seawall where the original timber seawall deteriorated beyond repair has resulted in significant public health and safety concerns to all persons using Elm Lane. The channel water level is within a few feet horizontal measure to the edge of asphalt for Elm Lane with no barrier to prevent a person or vehicle from entering the channel should they veer off of the pavement. In a related matter the stagnant water between Elm Lane pavement and the steel seawall is a breeding ground for mosquitos and could result in contraction of a disease such as West Nile Virus or Eastern Equine Encephalitis.

In an addendum, LaVanway stated that "[c]ontinued deterioration of the seawall that is in place is the primary factor in the periodic inundation of Elm Lane and adjacent driveways and yards." The foregoing evidence factually supports a causal connection between defendants' failure to repair and maintain the western seawall and the damage to Elm Lane and plaintiffs' properties. To the extent that defendants suggest that there are other causes for the damage to Elm Lane (e.g., naturally occurring rising water levels), plaintiffs presented ample evidence that the disrepair and deterioration of the seawall was a cause, if not the primary cause, for the condition that was causing erosion and damage to plaintiffs' properties and Elm Lane sufficient to establish a question of fact regarding causation.

Plaintiffs also submitted evidence demonstrating that the condition of the western seawall and resulting damage to Elm Lane was significantly interfering with their use and enjoyment of Elm Lane and their own properties.[5] They presented evidence that the lack of proper maintenance on the seawall and the resulting conditions of Elm Lane (1) made travel on Elm Lane unsafe, (2) impeded access for emergency, maintenance, and delivery vehicles, (3) created health and safety risks for residents of the subdivision, (4) led to significant declines in property values, and (5) caused substantial stress and anxiety for residents of the subdivision. In light of this evidence, the trial court erred by dismissing plaintiffs' nuisance claim under MCR 2.116(C)(10).

D. NEGLIGENCE

Plaintiffs also contend that the trial court erred by holding that defendants did not owe them a duty of care to support a claim for negligence. We agree.

To prove a prima facie claim of negligence, a plaintiff is required to provide proof to satisfy the following elements:

> (1) the defendant owed the plaintiff a legal duty, (2) the defendant breached the legal duty, (3) the plaintiff suffered damages, and (4) the defendant's breach was a proximate cause of the plaintiff's damages. *Chelik v Capitol Transp, LLC*, 313 Mich App 83, 89; 880 NW2d 350 (2015). [*Nyman v Thomson Reuters Holdings, Inc*, 329 Mich App 539, 552; 942 NW2d 696 (2019).]

Liability in tort cannot be found unless a defendant owes a plaintiff a duty of care. *Hill v Sears, Roebuck, & Co*, 492 Mich 651, 660; 822 NW2d 190 (2012). While every individual engaged in the performance of an undertaking has a duty to exercise due care to not unreasonably place in danger the person or property of others, as a general rule, one person is not obligated to assist or protect another. *Id*. At issue here is whether defendants, because of their responsibility to maintain and repair the western seawall under the water easement, owed plaintiffs a duty of care. In *Powell-Murphy*, 333 Mich App at 243-244, this Court stated:

[5] With regard to the conclusion that defendants were not required to install a steel seawall to provide lateral support, a determination on this issue is premature, contingent on plaintiffs' success in establishing a nuisance, and addresses abatement.

> A duty of care may be one that the defendant owes specifically to the plaintiff, or it may be one that the defendant owes to the general public of which the plaintiff is a member. *Clark v Dalman*, 379 Mich 251, 261, 150 NW2d 755 (1967), impliedly overruled on other grounds by *Fultz v Union-Commerce Assocs*, 470 Mich 460; 683 NW2d 587 (2004). While one person generally does not have an obligation to help or protect another, a duty of care may arise by way of statute, a contractual relationship, or the common law. *Hill*, 492 Mich at 661; *Clark*, 379 Mich at 261. The common law imposes on "every person engaged in the prosecution of any undertaking an obligation to use due care, or to so govern his actions as not to unreasonably endanger the person or property of others." *Clark*, 379 Mich at 261.

In dismissing plaintiffs' negligence claim, the trial court reasoned that "[d]efendants' alleged failure to perform their easement obligations is a contract issue." Citing *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157; 809 NW2d 553 (2011), and *Fultz*, 470 Mich 460, it held that plaintiffs, who were not parties to the easement contract, could not rely on defendants' alleged failure to perform their contractual obligations to repair and maintain the western seawall because plaintiffs failed to establish that defendants owed them a duty of care separate and distinct from defendants' contractual obligations. We disagree.

In *Fultz*, 470 Mich at 467, our Supreme Court held that:

> the lower courts should analyze tort actions based on a contract and brought by a plaintiff who is not a party to that contract by using a "separate and distinct" mode of analysis. Specifically, the threshold question is whether 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 will lie.

In *Loweke*, 489 Mich at 159, our Supreme Court clarified this "separate and distinct" mode of analysis by stating "that a contracting party's assumption of contractual obligations does not extinguish or limit separately existing common-law or statutory duties owed to noncontracting third parties in the performance of the contract." The *Loweke* Court summarized its holding as follows:

> Accordingly, . . . we clarify that when engaging in the "separate and distinct mode of analysis" in *Fultz*'s analytical framework, see 470 Mich at 469-470, courts should not permit the contents of the contract to obscure the threshold question of whether any independent legal duty to the noncontracting third party exists, the breach of which could result in tort liability. Instead, in determining whether the action arises in tort, and thus whether a separate and distinct duty independent of the contract exists, the operative question under *Fultz* is whether the defendant owed the plaintiff any legal duty that would support a cause of action in tort, including those duties that are imposed by law. [*Loweke*, 489 Mich at 171.]

In the present case, plaintiffs' complaint alleges that defendants are liable for negligence because they have a duty not to cause damage to plaintiffs' properties and they breached that duty in various ways, including by allowing the western seawall to fall into a state of disrepair so as to

allow water from Channel 1 to erode and damage plaintiffs' properties. Plaintiffs allege that, under the common law, defendants have a separate and distinct duty to exercise reasonable and due care to repair and maintain their easement to avoid causing harm to others.

In *Boylan v Fifty Eight, LLC*, 289 Mich App 709; 808 NW2d 277 (2010), Pamar Enterprises, Inc., constructed a water main pursuant to a contract with Lyon Township. During the construction, Pamar eliminated a swale that protected a nearby residence, owned by Fifty Eight, LLC, from surface-water runoff, which caused flooding and sewage backup damage to the residence. Fifty Eight brought a negligence claim against Pamar. *Id.* at 711. The trial court, relying on *Fultz*, granted Pamar's motion for summary disposition, holding that Pamar did not owe a duty in tort to Fifty Eight because Pamar's activity was carried out pursuant to its contract with Lyon Township. *Id.* at 714. This Court reversed that decision, stating that "*Fultz* does not stand for the proposition that the mere existence of a contract between Pamar and Lyon Township completely 'immunizes' Pamar of any potential tort liability relating to its construction of the water main." *Id.* at 715. This Court held that, irrespective of the contract between Pamar and Lyon Township, there were several sources of a duty of care to Fifty Eight that existed separate and apart from the contract itself. *Id.* at 719. In particular, this Court noted that an undertaking to perform a contract includes a common-law duty to perform with ordinary care the things agreed to be done, and that those foreseeably injured by the negligent performance of a contractual undertaking are owed a duty of care. *Id.* at 718. This Court further noted that the common law recognizes a landowner's right to the full enjoyment of his or her land, and liability in tort may be imposed for an interference with the occupation or use of land. *Id.* at 719. In addition, this Court noted that a party to a contract breaches a duty separate and distinct from the contract when it creates a new hazard that it should have anticipated would impose a dangerous condition to third persons, and Pamar's elimination of an existing swale created a new condition that it should have foreseen could predispose Fifty Eight's property to flooding. *Id.* at 721.

Similarly, in this case, even accepting defendants' contention that their easement interest in Channel 1, and any rights and obligations attendant to that interest, are contractual in nature, plaintiffs have established that defendants owed them a duty of care in tort separate and distinct from those contractual duties. Defendants' contractual easement obligations simply do not extinguish their independent common-law duty to exercise reasonable care to avoid harm to plaintiffs or their property. *Loweke*, 489 Mich at 172.

A defendant may be liable in tort if the defendant negligently performs a contractual undertaking, "or breaches a duty arising by implication from the relation of the parties created by the contract." *Id.* at 166 (citation omitted). In addition, "it is recognized law that a party has a legal duty to adjacent property owners," and liability may be imposed where a defendant's negligent conduct causes injury to an adjacent property owner. *Littell v Knorr*, 24 Mich App 446, 180 NW2d 337 (1970). Thus, defendants' property interest in Channel 1 imposes on them a duty of care to plaintiffs, as neighboring property owners. Therefore, the trial court erred by dismissing plaintiffs' negligence claim on the basis of its determination that defendants did not owe plaintiffs a duty of care. Finally, in light of our conclusion that the trial court erred by dismissing plaintiffs'

nuisance and negligence claims, we also reverse the trial court's dismissal of plaintiffs' claim for declaratory relief.[6]

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly
/s/ James Robert Redford

[6] However, we decline plaintiffs' request to issue a declaratory ruling that defendants owe a legal duty to plaintiffs to prevent the conditions arising from the easement that purportedly are causing damage to plaintiffs' properties. Because genuine issues of material fact exist, any declaratory judgment at this point would be premature.