STATE OF MICHIGAN

COURT OF APPEALS

HEATHER VEREMIS and TAD VEREMIS, Plaintiff-Appellee,	UNPUBLISHED June 4, 2013
v	No. 302658 Saginaw Circuit Court
GRATIOT PLACE, LLC, Defendant-Appellant.	LC No. 07-063269-NI

Before: M. J. KELLY, P.J., and CAVANAGH and MURRAY, JJ.

PER CURIAM.

In this case involving the liability for injuries sustained in a car accident, defendant Gratiot Place, LLC appeals by right the trial court's entry of judgment in favor of plaintiffs Heather and Tad Veremis[1] after a jury trial. The jury found that Gratiot Place's creation and maintenance of a hazardous intersection proximately caused 60% of Veremis' injuries. On the basis of this finding, the trial court entered a judgment against Gratiot Place for $223,024.36. On appeal, Gratiot Place argues that, for various reasons, this case should never have gone to the jury. It also argues that, even if the trial court properly submitted the case to the jury, the jury's verdict was tainted and it is entitled to a new trial. For the reasons explained below, we conclude that there was no error warranting relief from the jury's verdict, for that reason we affirm.

I. BASIC FACTS

Gratiot Place owns and operates a shopping plaza with areas for parking and an access easement that grants the general public the right to use the plaza's roadways.

In December 2005, Veremis and a co-worker, Sharon Murray, decided to go to lunch with other co-workers. At the time, there was snow and ice on the roadways and in the parking lot. Murray drove and Veremis accompanied her in the front passenger seat.

[1] Because Tad Veremis' claims are derivative, we shall use Veremis to refer solely to Heather Veremis.

Murray and Veremis worked at a business located to the east of Gratiot Place's plaza and Murray decided to drive west along a roadway that crossed Gratiot Place's plaza. Murray drove along the roadway until she reached an unmarked intersection that she had to cross in order to continue on her way. Testimony established that the intersection had no traffic control devices and that the approaches to the intersection were partially obscured by a building, a bank of mailboxes for the plaza's tenants, a federal mailbox, and a newspaper box. Murray said she stopped a little past the intersection, which she stated was necessary in to see "what was going on" because of the "stuff" that blocked her view. She said it was her habit to "pull out a little bit" because it was necessary to see "if there's traffic coming." She then slowly proceeded to cross the intersection. At that point, another car hit her car on the passenger's side and spun her car around.

Mary Mroz testified that she visited Gratiot Place's plaza for the first time on the day at issue. She drove north through the plaza on her way in and realized that the intersection was unmarked, but did not notice the obstructed view. After concluding her visit, Mroz drove south along the roadway toward the intersection. Mroz said she saw "out of the corner of my eye, a speck of red coming from the east, going west." She only saw a speck of red because there was "a bank of mailboxes," the building, and other obstructions, which created a blind spot. Mroz said she tried to brake, but her wheels locked and she slid into Murray.

In January 2007, Heather and Tad Veremis sued Murray, Murray's husband (as the car's owner), and Mroz for the damages she suffered in the accident. After a time, Heather and Tad Veremis amended their complaint to include claims of premises liability, public nuisance, nuisance in fact, and intentional nuisance against Gratiot Place. The Murrays settled before trial and the trial court dismissed them from the suit.

At the conclusion of the trial, the jury determined that Mroz was 5% at fault for Veremis' injuries, that Murray was 35% at fault for Veremis' injuries, and that Gratiot Place was 60% at fault for Veremis' injuries. The jury awarded Heather and Tad Veremis $386,000 in present damages and $114,000 in future economic damages. The total included $36,000 for economic damages, $300,000 for Heather Veremis' noneconomic damages, and $50,000 for Tad Veremis' derivative claims. The trial court reduced the future damages award to a present value of $75,982.09. And, after applying setoffs, the trial court entered a judgment against Gratiot Place for $223,024.36.

This appeal followed.

II. MOTIONS FOR DIRECTED VERDICT AND JNOV

A. STANDARDS OF REVIEW

Gratiot Place first argues that the trial court erred when it allowed the jury to "assess premises liability negligence" where Veremis was a licensee and testified that she knew about the dangerous intersection. Although Gratiot Place did not discuss the basis for granting relief under this claim and did not identify the applicable standard of review, we shall assume for purposes of this appeal that Gratiot Place argues that the trial court erred when it denied Gratiot Place's motion for a directed verdict. Gratiot Place also argues that the trial court erred when it

denied its motion for a directed verdict or judgment notwithstanding the verdict (JNOV) of Veremis' public nuisance claim; specifically it argues that this claim failed as a matter of law because there was no evidence that the intersection constituted an unreasonable interference with a public right. Similarly, Gratiot Place argues that the trial court should have directed a verdict in its favor or granted its motion JNOV on the basis that the open and obvious danger doctrine applied to bar all liability under the nuisance claims.

This Court reviews de novo a trial court's decision on a motion for a directed verdict or JNOV. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 131; 666 NW2d 186 (2003). For both motions, the trial court should only grant the motion if, after reviewing the evidence and all legitimate inferences in the light most favorable to the non-moving party, the evidence fails to establish a claim as a matter of law. *Wilkinson v Lee*, 463 Mich 388, 391; 617 NW2d 305 (2000); *Prime Financial Services LLC v Vinton*, 279 Mich App 245, 255-256; 761 NW2d 694 (2008). We also review de novo the trial court's selection and application of the common law. *Brecht v Hendry*, 297 Mich App 732, 736; 825 NW2d 110 (2012).

B. PREMISES LIABILITY CLAIM

The parties initially operated under the assumption that Veremis was an invitee at the time of the accident. However, Gratiot Place argued in its motion for summary disposition that Veremis was a licensee. Although the trial court determined before trial that there was a question of fact as to whether Veremis was an invitee or licensee at the time of the accident, the trial court determined on the basis of the evidence actually presented at trial that Veremis was a licensee for purposes of the premises liability claim. Therefore, we must determine whether the trial court properly submitted the premises liability claim to the jury after it concluded that Veremis was a licensee.

Under premises liability law, the possessor of land has a limited duty to protect or warn licensees about dangerous conditions on the possessor's land: the premises possessor "owes a licensee a duty only to warn the licensee of any hidden dangers the [premises possessor] knows or has reason to know of, *if* the licensee does not *know* or *have reason to know* of the dangers involved." *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596; 614 NW2d 88 (2000) (emphasis added). Here, the undisputed evidence showed that both Veremis and, more importantly, Murray, actually knew that the intersection was dangerous before or on the day at issue.

Veremis testified that she made "daily" use of this roadway at issue and knew that the intersection was dangerous. She stated that it was dangerous because it had no "signs directing who had the right-of-way" and there were obstructions that made it difficult to see whether there was on-coming traffic. Similarly, although Murray testified on redirect examination that she "never really went down that way that often," on direct examination she stated that she "would always pull out a little bit" at that intersection to see. She explained that you had to in order to see "the traffic coming out." She also stated that she stopped on the day at issue—even though there was no stop sign—and looked both ways before proceeding. Additionally, another co-

worker, Sally Webber, testified that she and Murray had discussed how dangerous the intersection was while at work.[2]

It was clear from their testimony that both Veremis and Murray knew that the intersection was dangerous because it was unmarked and, given the direction they were travelling, it was difficult to see if there was oncoming traffic as a result of several obstructions on the side of the roadway. That is, they both knew that oncoming traffic might not stop because there were no traffic controls and that it was difficult to determine whether there was oncoming traffic as a result of improvements on the side of the roadway. Because the undisputed evidence showed that they both knew about the danger posed by the intersection, Gratiot Place had no duty to warn Murray or Veremis about the danger. *Id.* Accordingly, we agree that the trial court should have directed a verdict on this claim. *Wilkinson*, 463 Mich at 391.

C. PUBLIC NUISANCE

Gratiot Place also argues that Heather and Tad Veremis also failed to establish their public nuisance claim as a matter of law. Specifically, it contends that there was no evidence from which a jury could find that the intersection unreasonably interfered with a common right enjoyed by the general public.

A public nuisance is an unreasonable interference with a common right enjoyed by the general public. *Bronson v Oscoda Twp*, 188 Mich App 679, 684; 470 NW2d 688 (1991). Courts have long recognized that the general public has a common right to travel ways that are open to the public and that unreasonable interferences with that right may constitute a nuisance. See *Garfield Twp v Young*, 348 Mich 337, 342; 82 NW2d 876 (1957) (stating that a public nuisance can be an activity that interferes with the public's use of a way of travel); *Macomber v Nichols*, 34 Mich 212, 216-217 (1876) (stating that the public has the right to use a way open to the public without undue interference). 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." *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 190; 540 NW2d 297 (1995). Whether something amounts to unreasonable use or interference so as to constitute a nuisance is generally a question of fact. *Gerzeski v Dept of State Highways*, 403 Mich 149, 160; 268 NW2d 525 (opinion by Moody, J., with four justices concurring) (1978); *Garfield Twp*, 348 Mich at 342.

Here, the undisputed evidence showed that Gratiot Place or its agents created the intersection, were responsible for the failure to place traffic controls on the intersection, and were responsible for the obstructions at issue or owned or controlled the land on which these features existed. Although an unmarked intersection is not a nuisance per se, when the fact that the intersection is unmarked is coupled with evidence that various structures significantly obstruct

[2] Murray did state that she had no "opinion" as to the danger posed by the intersection. But the fact that she had no opinion on the matter did not contradict her testimony that she had encountered the intersection before and usually proceeded with extra caution when crossing it.

drivers' views, a jury could reasonably find that the intersection was a nuisance in fact. See *Gerzeski*, 403 Mich at 159 (stating that a nuisance in fact is one where the circumstances and surroundings permit a finding that a particular condition or act constitutes a nuisance). Testimony established that the intersection was unmarked and, as a result, drivers did not know who had the right-of-way. Moreover, the evidence showed that, because of the obstructions at the intersection, drivers might not realize that the opposing traffic was not subject to a traffic control device and, for that reason, might not stop. For those drivers that realized the danger, in order to ensure that there was no oncoming traffic, a driver would have to creep out into the intersection to look both ways. Even then, the driver still risked being hit by a driver who did not realize that the intersection was completely unmarked. There was also evidence that several accidents and near-accidents had occurred there. Indeed, the risk was so significant that Veremis and her coworkers had discussed it at work. Moreover, to the extent that the intersection constituted a nuisance in fact, there was no dispute that Gratiot Place intentionally created the conditions at issue. For that reason, it was an intentionally created public nuisance in fact. *Id.* at 162 (stating that the government's creation of a pond in the path of a warm water flow constituted an intentional nuisance because the "governmental agency intended to bring about the conditions which are in fact found to be a nuisance."); see also *Wagner v Regency Inn Corp*, 186 Mich App 158, 164; 463 NW2d 450 (1990) ("A nuisance in fact is intentional if the creator *intends* to bring about the *conditions* which are in fact found to be a nuisance.") (emphases added).

Given this evidence, the trial court did not err by submitting the matter to the jury.

D. OPEN AND OBVIOUS DANGER DOCTRINE

Gratiot Place also argues that the trial court should have directed a verdict on the nuisance claims because the evidence showed that the danger posed by the intersection was open and obvious. For that reason, Gratiot Place maintains, it had no duty to Veremis. At trial, the trial court determined that the open and obvious danger doctrine applied to nuisance claims, but refused to direct a verdict because it concluded that there were questions of fact as to whether that doctrine barred the nuisance claims. We do not agree that the open and obvious danger doctrine applies to nuisance claims.

Nuisance and premises liability are distinct causes of action that involve distinct duties. The common law actions for nuisance protect a person's right to exercise those rights common to the public as a whole (public nuisance) and a person's right to use and enjoy his or her own property (private nuisance), both free from unreasonable interference by conditions or activities on another's land. See *Adkins v Thomas Solvent Co*, 440 Mich 293, 303; 487 NW2d 715 (1992) (noting that private nuisance claims arose as a doctrine to resolve conflicts between neighboring land uses and stating that the "gist of a private nuisance action is an interference with the occupation or use of land."); *Garfield Twp*, 348 Mich at 341-342 (stating that a public nuisance is an act or condition that unreasonably interferes with the public's common interests, such as interfering with the public's right to use a way of travel). With common law nuisance, a person has a duty to refrain from creating or maintaining conditions or activities on land that unreasonably interfere with the exercise of public rights or private rights in property other than the premises possessor's property; that is, common law nuisance does not necessarily involve a visit to the premises possessor's property. Moreover, an action for nuisance does not necessarily

involve negligent conduct. See *Rosario v Lansing*, 403 Mich 124, 132; 268 NW2d 230 (1978) (stating that nuisance is primarily a condition on land and liability does not depend on tortious conduct through action or inaction by those responsible for the condition). Rather, it is the possession and control of a condition (or activity) on land, which interferes with public or private rights, that gives rise to liability. See *Disappearing Lakes Ass'n v Dep't of Nat'l Resources*, 121 Mich App 61, 67; 328 NW2d 570 (1982) (explaining that liability for a nuisance typically arises from ownership or control of the land from which the nuisance arose).

The common law doctrine of premises liability, however, secures the rights of individuals to be free from exposure to unreasonable dangers while visiting property that the premises possessor controls. See *Bertrand v Alan Ford, Inc*, 449 Mich 606, 614; 537 NW2d 185 (1995) (noting that premises liability arises from the relationship between a premises possessor and persons coming onto his or her land, which gives rise to a duty to take steps to protect the visitors from unreasonable risks of harm). Moreover, the open and obvious danger doctrine is not a general common law defense applicable to every tort; rather, it is "an integral part" of the *duty* applicable to premises liability claims. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). The open and obvious danger doctrine applies to premises liability because a premises possessor normally has no duty to protect a visitor from dangers that are open and obvious. *Bertrand*, 449 Mich at 616-617. In contrast, no one has the right to create or maintain a nuisance on his or her property—not even an open and obvious one. *Gundy v Village of Merrill*, 250 Mich 416, 418; 230 NW 163 (1930) (stating that a village has no right to create a nuisance and no one can obtain a prescriptive right to maintain a public nuisance). And, while nuisance law recognizes that the degree of danger imposed by a particular condition or activity is relevant to determining whether the condition or activity constitutes an unreasonable interference, it is but one factor to be weighed by the finder of fact—it is not dispositive.[3] See 4 Restatement Torts, 2d, § 826 (stating that the fact finder must weigh the utility of the actor's conduct against the harm imposed) and § 827, comment e (noting that the gravity of the harm will be less where the other can avoid the harm with very little trouble or expense). It is, therefore, clear that a condition on land that interferes with the rights of another can constitute a nuisance even when its dangerous character is obvious.

For these reasons, we conclude that the open and obvious danger doctrine—as that doctrine has been applied to premises liability claims—has no application to claims properly alleging nuisance. Rather, the readily apparent nature of the danger posed by a condition and the ease with which the danger might be avoided are merely factors to be considered by the finder of fact when determining whether a particular hazard constitutes a nuisance. Consequently, the trial

[3] Traditionally, contributory negligence could serve as a defense to nuisances that arose through negligence, but not to per se nuisances or intentional nuisances. See *Dahl v Glover*, 344 Mich 639, 645; 75 NW2d 11 (1956); *Gerzeski*, 403 Mich at 161. It therefore stands to reason that the open and obvious danger doctrine cannot apply to a nuisance per se or an intentional nuisance. In addition, contributory negligence has since been replaced by comparative negligence, which was applied in this case. See MCL 600.2957; see also *Placek v Sterling Hgts*, 405 Mich 638; 275 NW2d 511 (1979).

court did not err when it refused to direct a verdict in favor of Gratiot Place on the grounds that the nuisance claims were barred under the open and obvious danger doctrine.

E. CONCLUSION AND REMEDY

The trial court should have directed a verdict in Gratiot Place's favor on the question of premises liability. However, the trial court did not err when it denied Gratiot Place's motions for a directed verdict or JNOV of the nuisance claims. Because the trial court properly submitted the nuisance claims to the jury and the jury found that Gratiot Place's creation of the nuisance proximately caused Veremis' injuries, we conclude that any error in submitting the premises liability claim to the jury does not warrant relief. Liability must normally be apportioned according to a *person's* fault—not according to related theories of recovery. MCL 600.2957(1). Here, it is plain that the jury found that Gratiot Place was 60% at fault and merely apportioned Gratiot Place's total fault equally between the three applicable theories. Therefore, Gratiot Place's total fault remains 60%.

III. SUMMARY DISPOSITION

A. STANDARD OF REVIEW

Gratiot Place also argues that the trial court should have granted its motion for summary disposition as to Heather and Tad Veremis' negligent nuisance claim. Specifically, Gratiot Place argues that this claim was in reality a negligence claim premised on the duty owed to a licensee, which was barred because the undisputed evidence showed that Veremis knew about the dangerous condition at issue. This Court reviews de novo a trial court's decision on a motion for summary disposition. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009).

B. ANALYSIS

As Gratiot Place correctly notes, this Court is not bound by the label that a plaintiff applies to his or her claim: "[T]he gravamen of an action is determined by reading the complaint as a whole, and by looking beyond mere procedural labels to determine the exact nature of the claim." *Adams v Adams (On Reconsideration)*, 276 Mich App 704, 710-711; 742 NW2d 399 (2007). The focal point is on the nature of the interest that was harmed. *Id.* at 710. Examining the gravamen of the nuisance in fact claim, it is clear that this claim is premised on Gratiot Place's creation of a hazardous condition—the unmarked and obstructed intersection—which significantly interfered generally with the public's safe use of the roadway as a public way and specifically with Veremis' safe use; these allegations are reminiscent of nuisance claims that have been made since at least the eighteenth century. See 3 Blackstone, Commentaries (facsimile of 1st ed., 1768), p 220 ("As if, by means of a ditch dug across a public way, which is a common nusance, a man or his horse suffer any injury by falling therein; there, for this particular damage, which is not common to others, the party shall have his action."). Although this claim is clearly duplicative of the public nuisance claim, it is nevertheless distinct from a claim of premises liability. And the fact that this claim alleges negligence in the creation of the nuisance does not transform the claim into one for premises liability. See *Wagner*, 186 Mich App at 164 (noting that nuisance in fact claims can be subdivided into intentionally created

nuisances and negligently created nuisances). Because Heather and Tad Veremis properly alleged a nuisance in fact claim that was distinct from their premises liability claim, the trial court did not err when it denied Gratiot Place's motion to dismiss the nuisance in fact claim on the basis of the duty owed to licensees under premises liability law.

IV. JUROR ERRORS

A. STANDARD OF REVIEW

Gratiot Place next argues that the jury was improperly influenced by a deposition transcript that was not admitted as an exhibit and through contact between the jury's foreman and Heather and Tad Veremis. It also argues that the jury foreman improperly failed to disclose that he had been involved in a lawsuit during voir dire and improperly conducted his own research. It contends that these improper influences explain the jury's otherwise inexplicable failure to follow the trial court's instruction—especially its instructions on the open and obvious danger doctrine. These influences, Gratiot Place maintains, warrant a new trial. Gratiot Place raised these issues in its motion for a new trial. Therefore, we shall treat this claim of error as a claim that the trial court erred when it denied Gratiot Place's motion for a new trial. This Court reviews a trial court's decision on a motion for a new trial for an abuse of discretion. *McManamon v Redford Charter Twp*, 273 Mich App 131, 138; 730 NW2d 757 (2006). A trial court abuses its discretion when it selects an outcome that is not within the range of principled outcomes. *Id.*

B. ANALYSIS

The party may not impeach a jury verdict through the use of postverdict juror affidavits except when there are alleged "'extraneous or outside errors (such as undue influence by outside parties), or to correct clerical errors in matters of form.'" *Hoffman v Spartan Stores, Inc*, 197 Mich App 289, 293-294; 494 NW2d 811 (1992), quoting *Hoffman v Monroe Pub Schs*, 96 Mich App 256, 261; 295 NW2d 542 (1980). In examining juror affidavits, "a trial court should not investigate their subjective content, but limit its factual inquiry to determining the extent to which the jurors saw or discussed the extrinsic evidence." *People v Budzyn*, 456 Mich 77, 91; 566 NW2d 229 (1997).

The trial court in this case held a hearing to look into Gratiot Place's allegations. The trial court heard testimony from Gratiot Place's private investigator, Thomas Murphy, former jury foreman Derrick Meyer, and Heather and Tad Veremis. Murphy testified about copies of Facebook postings that he claimed showed that Meyer and Tad Veremis had communicated before the jury reached its verdict. However, Meyer testified that he did not communicate with Tad or Heather until after the verdict had been delivered and the trial was over. He said the time-stamp for the morning of June 11 was related to a game posting, not the "recent activity" of being friends with Tad Veremis, and that it could have been his daughter playing the game at that time. Heather and Tad Veremis both testified that they did not have personal contact or contact through Facebook with Meyer before the jury was dismissed. Meyer also explained that during voir dire, when asked if he had been involved in lawsuits, he did not mention his bankruptcy proceedings because he did not think of that as a lawsuit, there having been no trial.

The trial court concluded that any misconduct on the part of juror Meyer did not prejudice Gratiot Place because there were six other jurors concurring in the verdict against it.[4] The court noted that during voir dire, Meyer's responses showed more of a likelihood of sympathy for Gratiot Place than for Heather and Tad Veremis and that the statements in the juror's affidavit mostly concerned deliberations that could not be considered. Thus, the allegation that the jury did not consider the "open and obvious" defense cannot be examined postverdict. *Hoffman*, 197 Mich App 293-294. On this record, we cannot conclude that the trial court abused its discretion when it denied Gratiot Place's motion for a new trial premised on purportedly improper conduct by the foreman or the failure to consider the open and obvious danger doctrine.

Gratiot Place's argument that the jury improperly considered an unredacted transcript similarly does not warrant relief. In the juror's affidavit there is an allegation that the unredacted deposition was considered by the jury in deciding to assign 60% fault to the hazardous intersection, but there is also evidence that only one juror read it. As such, there is little evidence that the statement figured significantly in the jury's deliberations. See *Budzyn*, 456 Mich at 91. Moreover, Gratiot Place's lawyer's own failure to prevent the transcript from going into the jurors' room cannot serve as the basis for setting aside the verdict. *Harville v State Plumbing and Heating, Inc*, 218 Mich App 302, 323-324; 553 NW2d 377 (1996).

The trial court did not err when it denied Gratiot Place's motion for a new trial.

V. GENERAL CONCLUSION

There were no errors warranting relief.

Affirmed. As the prevailing parties, Heather and Tad Veremis may tax their costs. MCR 7.219(A).

/s/ Michael J. Kelly
/s/ Mark J. Cavanagh

[4] We share the trial courts concern as to the aggressive tactics employed by Gratiot Place's private investigators. The testimony brought out in the post-trial motion demonstrated that the investigators questioned Meyer's neighbors and co-workers about Meyer's character—all while carrying handcuffs and firearms. This, Meyer testified, gave the impression that he had done something criminal and "was humiliating." In addition to these heavy-handed tactics, Meyer was compelled to return to court and defend against Gratiot Place's allegations by discussing personal matters. In an age when it is increasingly difficult to find citizens willingly to serve as jurors, hectoring jurors following a trial certainly does not foster respect for our jury system. Indeed, it instills contempt.

STATE OF MICHIGAN

COURT OF APPEALS

HEATHER VEREMIS and TAD VEREMIS, Plaintiffs-Appellees,	UNPUBLISHED June 4, 2013
v	No. 302658 Saginaw Circuit Court
GRATIOT PLACE, L.L.C., Defendant-Appellant.	LC No. 07-063269-NI

Before: M. J. KELLY, P.J., and CAVANAGH and MURRAY, JJ.

MURRAY, J. (*concurring in part, dissenting in part*).

I concur in the majority's decision to reverse the trial court's order denying defendant's motion for directed verdict on plaintiffs' premises liability claim, but dissent from its affirmance of the order denying a directed verdict on the nuisance claims.

I. PUBLIC NUISANCE

In looking at the evidence in the light most favorable to plaintiff,[1] I would conclude that the trial court erred in denying defendant's motion for a directed verdict on the public nuisance claim. "[U]nder a nuisance theory, liability is based on a dangerous, offensive, or hazardous condition of the land or on activities of similar characteristics which are conducted on the land." *Wagner v Regency Inn Corp*, 186 Mich App 158, 163; 463 NW2d 450 (1990). For a defendant to be held liable for a nuisance, he must possess or control the land. *Id*.

> 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. 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. [*Cloverleaf Car Co v*

[1] The singular "plaintiff" refers to Heather Veremis, the plaintiff injured in the automobile accident.

Phillips Petroleum Co, 213 Mich App 186, 190; 540 NW2d 297 (1995) (citations omitted).]

A public nuisance includes "activity . . . [that is] harmful to the public health, or 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[.]" *Garfield Twp v Young*, 348 Mich 337, 342; 82 NW2d 876 (1957) (citations omitted).[2] This case does not raise a typical public nuisance claim, such as when there is an actual obstruction of a public highway that precludes the public's use of the roadway. See, e.g., *Long v New York Central R Co*, 248 Mich 437, 439; 227 NW 739 (1929) and *Neal v Gilmore*, 141 Mich 519, 522; 104 NW 609 (1905). Indeed, the alleged public nuisance is a not a condition that impedes traffic or otherwise prevents the public's use of the parking lot or public easement. Rather, plaintiff alleges that it is the potential danger of the blind spot that creates a public nuisance. This raises the question whether the blind spot constitutes an unreasonable interference with a common right enjoyed by the general public. *Cloverleaf Car Co*, 213 Mich App at 190.

The 2 Restatement of Torts 2d, § 821B, p 92, contains a good discussion of what constitutes interference with a public right:

> Conduct does not become a public nuisance merely because it interferes with the use and enjoyment of land by a large number of persons. There must be some interference with a public right. A public right is one common to all members of the general public. *It is collective in nature and not like the individual right that everyone has not to be assaulted or defamed or defrauded or negligently injured*. Thus the pollution of a stream that merely deprives fifty or a hundred lower riparian owners of the use of the water for purposes connected with their land does not for that reason alone become a public nuisance. If, however, the pollution *prevents* the use of a public bathing beach or kills the fish in a navigable stream and so deprives *all members of the community* of the right to fish, it becomes a public nuisance. [Emphasis added.]

As the Supreme Court has stated, "[t]o be considered public, the nuisance must affect an interest common to the general public, rather than peculiar to one individual, or several . . . ." *Garfield Twp*, 348 Mich at 342, quoting Prosser, Torts, § 71, pp 401-402.

There was no material factual question regarding whether the mailboxes and newspaper stand constituted a public nuisance. The evidence presented by plaintiff at best established that a few minor accidents and "close calls" occurred at the intersection. Thus, the nuisance did not affect the general public, but rather only a few individuals. There was also no evidence that the general public was always endangered every time-or even most of the time-vehicles drove in this

[2] We have previously cautioned that it would "be a mistake to read this description of public nuisance too broadly[,]" for not just "any interference with public safety is sufficient to establish a public nuisance." *Askwith v City of Sault Ste Marie*, 191 Mich App 1, 6; 477 NW2d 448 (1991).

area. Indeed, the only time an accident would occur at this location was when one of the drivers entering the intersection was not paying attention, a fact admitted to by plaintiff. Additionally, to the extent the blind spot limited the view of the intersection when travelling westbound or southbound towards the intersection, needing to yield when approaching an intersection in a parking lot does not significantly interfere with the public's safety. See *Rand v Knapp Shoe Stores*, 178 Mich App 735, 742; 444 NW2d 156 (1989) (holding that a blind spot existing at a corner in a strip mall did not constitute an attractive nuisance because the blind spot between the alley and sidewalk created by the building was a typical design and not inherently dangerous, and to hold otherwise would require "property owners to post warnings at almost every building corner."). After all, even when on private property a driver must always exercise ordinary and reasonable care in the operation of a motor vehicle. *Zarzecki v Hatch*, 347 Mich 138, 141; 79 NW2d 605 (1956).

Consequently, the mailboxes and newspaper stand at the corner of the intersection were not a dangerous condition of the land that created an unreasonable interference with a common right enjoyed by the general public.[3] The trial court should have granted defendant's motion for directed verdict on plaintiff's public nuisance claim.

II. NEGLIGENT NUISANCE IN FACT

Again, reviewing the evidence in the light most favorable to plaintiff, I would hold that the trial court erred in denying defendant's motion for a directed verdict on the negligent nuisance in fact claim. As previously indicated, a nuisance is "a dangerous, offensive, or hazardous condition of the land" or "activities of similar characteristics which are conducted on the land." *Wagner*, 186 Mich App at 163. "[A] nuisance in fact is a nuisance by reason of circumstances and surroundings. An act may be found to be a nuisance in fact when its natural tendency is to create danger and inflict injury on person or property." *Id*. at 164. "A negligent nuisance in fact is one that is created by the landowner's negligent acts, that is, a violation of some duty owed to the plaintiff which results in a nuisance." *Id*.

There was no factual question regarding whether the mailboxes and newspaper stand constituted a negligent nuisance in fact. As the majority correctly held, defendant did not owe a duty to warn plaintiff as a licensee on the premises because the condition was not a hidden danger on the land. Because defendant did not violate a duty owed to plaintiff that resulted in a

[3] *Li v Feldt (On Second Remand)*, 187 Mich App 475; 468 NW2d 268 (1991) rev'd 439 Mich 457 (1992), relied upon by plaintiff, is not persuasive. For one, it was reversed on appeal. *Li v Feldt (After Second Remand)*, 439 Mich 457; 487 NW2d 127 (1992). Additionally, the facts at issue in that case—a traffic light placed by the city at an intersection that was improperly timed—is much more of an unreasonable interference with the rights enjoyed by the general public than a blind spot in a parking lot. A traffic light is deployed for safety purposes, and one that is improperly timed such that two cars simultaneously enter the intersection with the drivers believing they each have the right of way is unquestionably more dangerous in kind than a limited blind spot at an obvious intersection in a parking lot.

nuisance, the claim for negligent nuisance in fact should have been dismissed.[4] *Wagner*, 186 Mich App at 163-164. The trial court should have granted defendant's motion for directed verdict on the nuisance in fact claim.

Because I would hold that the trial court should have granted defendant's motion for directed verdict on all of plaintiffs' claims, I would not consider defendant's remaining issues on appeal.

/s/ Christopher M. Murray

[4] On a separate issue, while plaintiff asserts that defendant had a duty to provide unobstructed passage through the premises pursuant to the access easement, plaintiff fails to explain how the mailboxes and newspaper stand at the northeast corner of the intersection obstructed passage through the easement. There was no evidence suggesting that the mailboxes and newspaper stand actually impeded traffic from proceeding through the easement, and thus, there was no evidence that defendant violated a duty.