STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL GIBBONS and JUANITA GIBBONS,

Plaintiffs-Appellants,

v

HORSESHOE LAKE CORPORATION,

Defendant-Appellee.

UNPUBLISHED
February 11, 2014

No. 311754
Washtenaw Circuit Court
LC No. 11-000244-NI

Before: SAWYER, P.J., and BECKERING and SHAPIRO, JJ.

PER CURIAM.

Plaintiffs, Michael and Juanita Gibbons, husband and wife, appeal by right from the trial court order that granted summary disposition under MCR 2.116(C)(10) in favor of defendant, Horseshoe Lake Corporation, on their claims of negligence, nuisance, and trespass. Because plaintiffs presented sufficient evidence to establish a genuine issue of material fact as to whether defendant was liable in negligence, but failed to do so as to nuisance and trespass, we reverse in part and affirm in part.

I. FACTS

On the evening of June 18, 2010, Michael Gibbons was in the upstairs study of his home when a large tree branch, approximately two feet in diameter, fell through his roof and caused significant physical injuries to both his person and the home, located near Horseshoe Lake.

Horseshoe Lake is surrounded by four subdivisions – Leocadia, Schrum, Shady Beach, and Lincoln. Each subdivision has its own homeowners' association that elects three members to serve on the board of defendant Horseshoe Lake Corporation. Although the record is devoid of any bylaws or incorporation documents, there is no evidence that the four associations have independent authority or responsibility outside of their participation on defendant's board.

Plaintiffs own Lots 37, 38, and 39 in Schrum's subdivision. Their property is adjacent to Lot 40, one of eight undeveloped lake-access lots scattered throughout the four subdivisions. It is undisputed that the tree from which the branch fell was located on Lot 40. Defendant submitted a land indenture, executed on March 28, 1925, between Harvey and Emma Schrum and E. Frederick and Whilmene Roehm, which transferred what is now Schrum's subdivision to the Roehms. The indenture also provides that Lot 40 lake access is specifically reserved for the owners of Lots 55 through 79 of Schrum's subdivision, which lack lake frontage. A tax

assessment identifies the owner of Lot 40 as "Schrum's Subdivision Assoc[iation]," care of Richard Brannan, the former president of defendant's board. Brannan stated that defendant's responsibilities for access lots consisted of grass cutting, weeding, and fall and spring cleanup, "unless there is a problem that's brought to our attention." He also testified that defendant had responded to other problems at access lots in the past, such as "[b]locking accesses with vehicles," "not picking up trash," and "making too much noise."

Plaintiffs submitted into evidence three letters that they sent to defendant prior to Michael's injuries. In the first letter, plaintiffs expressed their frustration that defendant refused to reimburse them for $700 they claimed to have spent for "Horseshoe Lake access tree maintenance." Plaintiffs continued:

> Matter of fact, there are a few trees that are in dire need of trimming again. We do not have the equipment and it is NOT our obligation anyhow. So someone needs to contact a tree company and have some maintenance done on these trees before we incur any damages. If action is NOT done and we receive damages, we will be sending the bill to the [defendant.]

Presumably in reference to Lot 40, plaintiffs also complained that they had performed maintenance for 16 years, including cutting the grass, weeding, cleaning up after storms, and raking leaves.

In the second letter, plaintiffs again complained about their maintenance of Lot 40, which they claimed was the responsibility of defendant. Plaintiffs continued:

> Last year when we had the ice storm in March and the July 2nd storm. Our home sustained a lot of damage. We ended up having to pay a tree company to come in and trim the access trees. We had them take care of two trees on our property too.
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> * * *
>
> During the two storms of 1997 we had several access tree limbs hit our window. There are still large indentations in it and scratches. We would like to be reimbursed for the money, time and inconvenience from the trees.
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> * * *
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> One night while we were watching TV during a storm luckily we were not sitting on the couch. Without any warning we hear this huge crash on the roof and a limb broke through the roof and we had a hole in the ceiling and had drywall and debris on the couch. We had to go up on the roof and cover it up. We had to fix it the next day. We never asked for any compensation for this and we had to rent a steam cleaner to clean the couch and carpeting. This was from an access tree as well.
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> We have had much [inconvenience] due to the lack of proper maintenance of these trees.

In the third letter, plaintiffs responded to defendant's request that they pay their back dues. Plaintiffs claimed that they withheld their dues payments "due to the lack of normal maintenance of Horseshoe Lake property access next to our property." Plaintiffs again described the damage to their home caused by tree branches described in the second letter.

Defendant's board meeting minutes from September 13, 2009, reveal that defendant received at least one of plaintiffs' letters, as evidenced by the notation that "Gibbons sent a letter in complaint about the tree failing on there [sic] house a few years ago and cleaning of the access site next to there [sic] house (took that upon themselves)." Brannan also recalled defendant receiving "more than one" letter from plaintiffs complaining about the maintenance of Lot 40.

Defendant has a "tree committee" consisting of Steven Francoeur and George Brown. Francoeur, the secretary of defendant's board, testified that defendant formed the committee around 2007 in response to an emerald ash borer invasion and that he has served on the committee since 2010. He stated that the committee surveys the area for dead and diseased trees that require removal and that, "our *responsibilities* have been to look for – well, to look in the roadways and *access lots* . . . for dead and diseased trees." (Emphasis added). Francoeur was aware that "the board [i.e., defendant] has surveyed for dead and diseased trees before [2010]." Although the tree committee was ostensibly started in response to an emerald ash borer invasion, "we looked for dead and diseased tress regardless of what the species might have been."

Francoeur testified that defendant paid for the identified trees to be removed. He admitted that, "I'm not a tree person[,]" but nonetheless attempted to identify trees that were "[s]uffering from some sort of obvious disease or problem that you think it could make the tree unsound or could fall or big branches could come off, something like that." Brown agreed that the committee looked for "branches falling off, you know, the bigger branches and so on like that, if there's any spots on it, that bring it to our attention or something like that." When Francoeur identified a potential problem, "We are either going to bring out an arborist or take the tree down." When asked about the priority of tree inspection, Francoeur stated that, "our first priority is obviously the ones that are in the roadways and the – the access lots, the ones that we very well might be responsible for." Brannan stated:

> I remember the two individuals that we spoke about, [Francoeur] and [Brown], traveling throughout the Horseshoe Lake Corporation, and visibly bringing back information that they collected on particular trees that were visibly diseased and recommending that they be taken down.
>
> * * *
>
> . . . They brought back their findings to the board, the two of them, and then the board made the decision on what trees should be addressed.

Brown confirmed Brannan's account, stating that defendant had the ultimate responsibility to determine which trees were cut down.

Plaintiffs submitted an affidavit from James Kielbaso, Ph.D., an emeritus faculty member of Michigan State University's Forestry Department with a doctorate in forest recreation, among many other professional qualifications. Kielbaso averred that he "examined the subject silver

maple tree on September 30, 2010 and October 7, 2010." "In the subject silver maple, [Kielbaso] observed significant included bark and rot in the joint area between the branch that fell off and the branch with which it had shared an unacceptable 'v-crotch' before it broke off." He stated that the "included bark in the dangerous joint" formed over at least 10 to 15 years. "The included bark caused significant swelling and a visible seam to form at the joint where the two branches split apart from one another. Those clues alone were sufficient notice of a problem to require follow up by going up into the tree and examining the included bark area more closely." Kielbaso believed that any tree service person would conclude that the included bark was a danger upon inspection and possibly choose to stabilize the branches with cables or rods, although "removal of the outermost branch at the weak joint would have likely been the most efficient and safest means to remedy the danger." Kielbaso also averred that he reviewed the correspondence between plaintiffs and defendant and concluded that, "[g]iven the complaints about the dangerous condition of the tree, requests for maintenance, and the visible swelling and seam at the problem joint, the tree should have been serviced long before this injury and the danger the tree presented should have been averted."

Plaintiffs also submitted an affidavit from William Pickhardt, a board-certified arborist, who averred that he has worked in the tree-care industry for over 30 years. He stated that he inspected the tree during its removal on October 7, 2010 and had his associates gather information prior to that date, including an inspection on September 10, 2010. Pickhardt observed "a great deal of decay in the joint area weakened over many years by included bark." "The owner/possessor of the subject tree should have observed the swelling caused by included bark at the joint which failed in the subject tree, causing these injuries. The swelling at the weakened joint was visible and noticeable from the ground." Pickhardt averred that, "[a]s recommended by the International Society of Arboriculture, the Defendant should have examined the tree once a year under all circumstances[,]" and that, "[i]f a professional had serviced the tree within at least the past five years, the bad union between the two branches and the potential danger would have been obvious." Pickhardt concluded that "[d]efendant knew or should have known of the hazard presented by this tree."

Defendant presented no expert witness testimony.

On February 24, 2011, plaintiffs sued defendant in circuit court, asserting claims of negligence, nuisance, and trespass. Plaintiffs alleged that defendant had breached its duty to maintain the tree to prevent the limb from falling, that a defect that caused the branch to fall constituted a nuisance, and that the facts constituted a trespass. Defendant moved for summary disposition under MCR 2.116(C)(10). In granting defendant's motion, the trial court stated:

> First, as defendants – defendant argues, plaintiff does not dispute that the tree is located on Lot 40 and present no evidence contrary to defendant's position that Lot 40 is not owned or possessed in any way be defendant . . . . Therefore, plaintiff's legal conclusion that it is defendant's tree is clearly flawed, as a result, plaintiff cannot demonstrate the element of a duty owed by the defendant to the plaintiff, and specifically that defendant had a duty to maintain the tree on Lot 40.
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> Next [it] is well established Michigan law that an intervening independent and in – and efficient cause severs whatever connection exists between the

plaintiff's injuries and defendant's negligence . . . . Without considering the weather reports, the uncontroverted testimony of residents in the neighborhood, including one the plaintiffs, demonstrates that the tree did not fall over on its own, which would be indicative of a rotted tree; rather the tree was blown down in – in a heavy storm, thus, if – if the defendant had a duty to maintain the tree, the intervening storm conditions that damaged the tree severed any connection between plaintiff's injuries and alleged negligence of the defendant.

Finally, as defendant argues, the evidence demonstrates that an inspection of the tree on Lot 40, just weeks before the June 18th storm hit, showed no signs of rot, disease, or damage that would suffice as actual or constructive notice to the defendant of a potentially dangerous condition of the tree, nor have the letters plaintiff relies on given defendant sufficient notice that this particular tree, or even any of the other tr – two trees on the lot, were diseased or dangerous merely, that they occasionally created maintenance issues for unhappy homeowners.

For all the reasons stated by defendant, defendant's motion for summary disposition is granted. This is a final order that resolves the last pending claim and closes the case.

II. NEGLIGENCE

Plaintiffs first argue that the trial court erred by granting summary disposition in favor of defendant on their negligence claim.[1] We agree.

Plaintiffs' negligence theory is twofold. First, plaintiffs argue that defendant had control and possession of Lot 40 and was therefore required to exercise reasonable care in controlling the lot. Plaintiffs allege that defendant breached that duty by failing to inspect or remove the tree at issue. Second, plaintiffs argue that, even if defendant did not possess Lot 40, it specifically

[1] We review de novo a trial court's grant of summary disposition under MCR 2.116(C)(10). *Ernsting v Ave Maria College*, 274 Mich App 506, 509; 736 NW2d 574 (2007). "When deciding a motion for summary disposition under MCR 2.116(C)(10), a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party." *Id.* at 509-510. All reasonable inferences are to be drawn in favor of the nonmoving party. *Dextrom v Wexford Co*, 287 Mich App 406, 415; 789 NW2d 211 (2010). "Summary disposition is proper under MCR 2.116(C)(10) if the documentary evidence shows that there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Ernsting*, 274 Mich App at 509. "This Court is liberal in finding genuine issues of material fact." *Jimkoski v Shupe*, 282 Mich App 1, 5; 763 NW2d 1 (2008). "A genuine issue of material fact exists when the record, giving the benefit of any reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ." *Ernsting*, 274 Mich App at 510.

undertook to identify and remove diseased trees from access lots around Horseshoe Lake. Plaintiffs assert that defendant was required to exercise due care once it undertook that specific task and failed to do so. In sum, plaintiffs argue that they established genuine issues of material fact with regard to whether defendant had control and possession of Lot 40 and whether defendant breached its duty to exercise due care in inspecting and removing dangerous trees from its access lots.

A. NATURE OF PLAINTIFFS' CLAIM

Defendant argues that plaintiffs' claim is exclusively one of premises liability, and that, therefore, defendant was entitled to summary disposition. Defendant asserts that because "the plaintiff's injury arose from an allegedly dangerous condition on the land, the action sounds in premises liability rather than ordinary negligence[.]" *Buhalis v Trinity Continuing Care Servs*, 296 Mich App 685, 692; 822 NW2d 254 (2012).

As a preliminary matter, a claim of premises liability "does not preclude a separate claim grounded on an independent theory of liability based on the defendant's conduct[.]" *Laier v Kitchen*, 266 Mich App 482, 493; 702 NW2d 199 (2005). Moreover, plaintiffs do not style their claim as one of premises liability.[2] Plaintiffs' negligence argument is not limited to premises liability because, while the tree may have constituted a "dangerous condition," it was not "on the land" where plaintiff was injured. *Buhalis*, 296 Mich App at 692. Analysis of a premises liability claim begins with the initial determination of whether the injured plaintiff was a trespasser, licensee, or invitee on the land – each of which charges the landowner with a specific duty. See *James v Alberts*, 464 Mich 12, 18-19; 626 NW2d 158 (2001); *Laier*, 266 Mich App at 493. Because Michael was injured in his own home, he was not a trespasser, licensee, or invitee when he was injured. Thus, contrary to defendant's assertion, plaintiffs' claim sounds in ordinary negligence, not premises liability.

In any event, to establish a prima facie case of premises liability or ordinary negligence, "a plaintiff must prove the elements of negligence: (1) the defendant owed the plaintiff a duty, (2) the defendant breached that duty, (3) the breach was the proximate cause of the plaintiff's injury, and (4) the plaintiff suffered damages." *Benton v Dart Props Inc*, 270 Mich App 437, 440; 715 NW2d 335 (2006) (premises liability); *Latham v Nat'l Car Rental Sys, Inc*, 239 Mich App 330, 340; 608 NW2d 66 (2000) (negligence). "[T]he existence of a legal duty is a question of law for the court to decide." *Anderson v Wiegand*, 223 Mich App 549, 554; 567 NW2d 452 (1997). In this case, the trial court ruled that defendant owed no duty to plaintiffs for two reasons: first, defendant did not have possession or control over Lot 40, and; second, even if defendant did possess and control Lot 40, it had no actual or constructive notice of any disease or decay that would render the tree a potentially dangerous condition.

B. POSSESSION AND CONTROL

[2] However, "[c]ourts are not bound by the labels parties attach to their claims." *Buhalis*, 296 Mich App at 691.

"Possession" is defined "in this context, as '[t]he right under which one may exercise control over something to the *exclusion of all others*' (emphasis added)." *Derbabian v S & C Snowplowing, Inc*, 249 Mich App 695, 703; 644 NW2d 779 (2002), quoting Black's Law Dictionary (7th ed). "*Random House Webster's College Dictionary* (1995), p 297, defines 'control' as 'exercis[ing] restraint or direction over; dominate, regulate, or command.' Similarly, Black's Law Dictionary defines 'control' as 'the power to . . . manage, direct, or oversee.'" *Derbabian*, 249 Mich App at 703-704.

Our review of the record reveals that plaintiffs presented sufficient evidence to create a genuine issue of material fact as to whether defendant "possessed" and "controlled" Lot 40. Brannan testified that defendant was responsible for cutting grass and the general cleanup of access lots, including Lot 40, and was responsible for responding to homeowner concerns about the lots. Francoeur, Brown, and Brannan testified that defendant's tree committee's responsibilities included looking for dead and diseased trees in access lots such as Lot 40. In its June 9, 2008 meeting minutes, defendant referred to a different access lot as "Horseshoe Lake [i.e., defendant's] property." Defendant used general dues to pay for the maintenance of access lots, including lawn care and tree removal, both before and after Michael's injuries. In fact, defendant paid to have the tree at issue removed after Michael's injuries.[3]

Further, defendant's meeting minutes reveal that it was willing to, and did, pursue legal action against its members when they encroached on access lots. This fact demonstrates that, at least in certain circumstances, defendant believed that it possessed and controlled the access lots to the exclusion of others.[4] The tax assessment for Lot 40 was addressed to Brannan, who was, at that time, defendant's president.

Defendant, and the trial court, rely on the 1925 land indenture to support the argument that defendant did not possess or control Lot 40. We find the indenture unpersuasive and certainly not dispositive. First, the indenture was executed between two parties that are not party to this action and defendant has not demonstrated how the agreement between two presumably dead parties is relevant to the instant case. At best, the indenture shows that Lot 40 was reserved for lake access on behalf of several lot owners, including plaintiffs. This reservation does not prevent defendant from having possessed and controlled Lot 40. Second, as plaintiffs note, the indenture contains a patently illegal racially restrictive covenant. See *Shelley v Kraemer*, 334 US 1; 68 S Ct 836; 92 L Ed 1161 (1948). Considering the absence of a severability clause or

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[3] While not admissible to establish negligence, evidence that defendant paid to remove the tree at issue would be admissible for purposes of determining whether defendant possessed and controlled Lot 40. MRE 407.

[4] However, this fact is not dispositive because we have held that, at least in the context of riparian rights, "a voluntary [homeowner's] association whose sole purpose is to represent the interest of its members . . . may bring suit to effectuate that purpose, regardless of whether the association itself owns any land." *Civic Ass'n of Hammond Lake Estates v Hammond Lake Estates No. 3 Lots 126-135*, 271 Mich App 130, 135; 721 NW2d 801 (2006) (quotation marks and citation omitted).

evidence that the original parties to the indenture intended the racially restrictive clause to be severable, the indenture is at least arguably void in its entirety. See *Prof Rehabilitation Assoc v State Farm Mut Auto Ins Co*, 228 Mich App 167, 174; 577 NW2d 909 (1998). In any event, given the evidence presented by plaintiffs to support their contention that defendant possessed and controlled Lot 40, the trial court erred in apparently relying exclusively on the indenture.

Lastly, from a policy perspective, defendant is the party in the best position to be able to prevent harm to others arising from the access lots. See *Derbabian*, 249 Mich App at 704. It would be inefficient for each homeowner with access to Lot 40 to identify any dangerous or diseased trees and provide for their inspection or removal. Defendant, as the central organization of Horseshoe Lake homeowners, was presumably organized specifically to handle such situations for the common benefit of its members. This view is consistent with the common-law understanding that a landlord is in the best position to control and remedy potential harms in common areas open to its tenants. See *Bailey v Schaaf*, 494 Mich 595, 614-615; 835 NW2d 413 (2013).

Accordingly, viewed in the light most favorable to plaintiffs, the evidence would allow a reasonable factfinder to conclude that defendant possessed and controlled Lot 40.

C. VOLUNTARY ASSUMPTION OF DUTY

Plaintiffs also assert that defendant's tree committee, after undertaking to identify and remove dead and diseased trees, breached their common-law duty of due care by failing to adequately inspect and remove the tree that eventually injured plaintiffs. "Every person engaged in the performance of an undertaking has a duty to use due care or to not unreasonably endanger the person or property of others." *Hills v Sears, Roebuck & Co*, 492 Mich 651, 660; 822 NW2d 190 (2012). "Generally, the duty that arises when a person actively engages in certain conduct may arise from a statute, a contractual relationship, or by operation of the common law . . . ." *Id.* at 660-661.

Plaintiffs do not assert the existence of a statutory duty or contractual relationship. Rather, they assert that once defendant undertook to identify and remove dead and diseased trees, defendant was required to execute that undertaking with due care. Plaintiffs argue that defendant failed to do so, and, accordingly, breached its duty of ordinary care. See *Zychowski v AJ Marshall Co, Inc*, 233 Mich App 229, 231; 590 NW2d 301 (1998) ("A party may be under a legal duty when it voluntarily assumes a function that it is not legally required to perform.").

Plaintiffs established a genuine issue of material fact as to whether such a duty existed and whether defendant breached that duty. Francoeur, Brown, and Brannan testified that defendant's tree committee's "responsibilities" included the identification and removal of dead or diseased trees in access lots, such as Lot 40. Plaintiffs' experts averred that the defects in the tree at issue had likely been present for between 10 to 15 years and that any person with adequate knowledge of Michigan trees could have identified the danger and would have likely removed the tree or the dangerous branch. The experts also agreed that the danger posed by the tree was visible from ground level and that a reasonable person could have identified that danger and should have called in a tree service.

Accordingly, viewing the evidence in the light most favorable to plaintiffs, a reasonable factfinder could conclude that defendant should have more closely inspected the tree or hired a professional to do so after undertaking the responsibility to protect Horseshoe Lake's access lots from the dangers posed by unsafe trees.

D. ACTUAL OR CONSTRUCTIVE NOTICE

Plaintiffs next argue that defendant had actual or constructive notice of the potential danger posed by the tree by virtue of the letters describing previous damage to their home caused by tree branches falling from Lot 40. Defendant argues that the letters' true purpose was to seek reimbursement for time and resources plaintiffs voluntarily expended in "maintaining" Lot 40.

We find plaintiffs' argument persuasive. Defendant does not dispute that it received plaintiffs' letters; moreover, defendant's meeting minutes of September 13, 2009, and Brannan's testimony, reveal that defendant received at least one of the letters. While defendant's position that the ultimate purpose of plaintiffs' letters was to seek reimbursement may be true, defendant has provided no authority to suggest that the "primary purpose" of plaintiffs' letters must have been to reveal dangerous or diseased trees. The letters need only have been sufficient to establish that defendant was or should have been aware of the existence of the danger posed by the trees on Lot 40.

Plaintiffs' letters are sufficient to create a question of material fact as to whether defendant had actual or constructive notice of the dangers posed by the trees in Lot 40. The letters explicitly state that plaintiffs suffered damage to their home as a result of tree branches that fell from Lot 40 during at least two different storms. Although it appears that at least some the storms occurred as early as 1997, Kielbaso averred that the dangerous condition present in the tree that caused the instant damage had likely been present for 10 to 15 years. Specifically, he stated that the tree had "significant included bark and rot in the joint area between the branch that fell off" with "significant swelling and a visible seam." Pickhardt averred that these conditions were visible from ground level.

Plaintiffs also wrote that the trees were in "dire need of trimming" and that maintenance needed to be "done on these trees before we incur any damages." Plaintiffs further stated that a tree branch had crashed through their roof and caused debris to fall on their couch. Defendant's meeting minutes from September 13, 2009, less than a year before the instant injuries, and Brannan's testimony, demonstrate that defendant was aware of plaintiffs' complaint that trees had fallen on their home in previous years.

Accordingly, viewing the evidence in the light most favorable to plaintiffs, a reasonable factfinder could conclude that defendant had actual or constructive notice of the danger posed by the trees on Lot 40.

E. INTERVENING CAUSE DOCTRINE

Although not argued by defendant below or before this Court, the trial court granted summary disposition in favor defendant on plaintiffs' negligence claim in part because it found that a "heavy storm" constituted an intervening superseding cause that absolved defendant of any negligence liability. This ruling was erroneous.

The trial court ruled that even if defendant owed plaintiffs a duty, a heavy storm served as an intervening superseding cause that "severed any connection between plaintiff's injuries and alleged negligence of the defendant." "An intervening cause, one which actively operates to produce harm to another after the negligence of the defendant, may relieve a defendant from liability." *Meek v Dep't of Transp*, 240 Mich App 105, 120; 610 NW2d 250 (2000), overruled on other grounds by *Grimes v Dep't of Transp*, 475 Mich 72; 715 NW2d 275 (2006); see also *McMillian v Vliet*, 422 Mich 570, 576; 374 NW2d 679 (1985). However, "[a]n intervening cause is not a superseding cause if it was reasonably foreseeable." *Meek*, 240 Mich App at 120.

The trial court's conclusion that "the uncontroverted testimony of residents in the neighborhood, including one the plaintiffs, demonstrates that the tree did not fall over on its own" is unsupported by the evidence. Juanita testified that the conditions were "[n]ot necessarily a storm but some wind, because we were – [Michael] was concerned about if I had any umbrellas open on the deck or anything like that." Francoeur stated that he had no "specific memories" of June 18, 2010, and Brown testified that there was a "storm," but did not indicate its severity.

Defendant submitted a forensic weather report prepared for this litigation stating that there were peak wind gusts of between 46 and 52 miles per hour in the general geographic area of plaintiffs' home at the time of the accident. Such winds are classified as a "strong gale" that could result in "slight structural damage." Notably, defendant's own report indicates that winds of over 55 miles per hour are required before "trees are broken or uprooted" on the Beaufort Scale. In contrast, plaintiffs submitted certified records from the state climatologist that recorded wind gusts of up to 26 miles per hour in Ann Arbor and 30 miles per hour in Ypsilanti[5] around the time of the accident. On the Beaufort Scale, such gusts constitute a "strong breeze" that could result in large tree branches moving and difficult holding umbrellas. Thus, the parties' conflicting reports establish a question of fact as to weather a "heavy" storm even occurred. Even if we were to assume that defendant's unauthenticated report is correct, gusts of that magnitude do not provide for the breaking of a large tree branch, certainly not one approximately two feet in diameter.

Moreover, there is no evidence in the record to suggest that the breaking of the tree branch was *caused* by the storm. This alone is sufficient to reverse the trial court's application of the intervening cause doctrine. Lastly, even if we infer, arguendo, that the storm caused the tree branch to fall, a reasonably heavy storm is certainly foreseeable. The trial court's holding, that a relatively common weather event constituted an intervening superseding cause, has no basis in Michigan law. Thus, to the extent that it can even be shown that a heavy storm occurred and at least partially caused the tree to fall on plaintiffs' home, the trial court erred by ruling that it constituted an intervening superseding cause due to its foreseeability. *Meek*, 240 Mich App at 120.

F. CONCLUSION

[5] Ann Arbor is approximately nine miles away from Horseshoe Lake and Ypsilanti is approximately 15 miles away.

Plaintiffs presented sufficient evidence to establish questions of material fact as to whether defendant possessed and controlled Lot 40, whether defendant breached its duty of ordinary care, and whether defendant had actual or constructive notice of the danger posed by the trees on Lot 40. The trial court also erroneously applied the intervening cause doctrine. Accordingly, the trial court erred by granting summary disposition in favor of defendant on plaintiffs' negligence claim.

III. NUISANCE

Plaintiffs next argue that the trial court erred by granting summary disposition in favor of defendant on their nuisance claim.[6] We disagree.

Defendant asserts that plaintiffs' claim is substantively one of negligence and that their nuisance claim is merely a reformulation of their negligence claim. In support of this argument, defendant relies on *Amin v Marino S. Papalas Trust*, unpublished opinion per curiam of the Court of Appeals, issued September 29, 2009 (Docket No. 286502).[7] In that case, a minor was traversing a sidewalk adjacent to the defendant's property when he was killed by falling tree. *Id.* at p 1. The minor's personal representative filed suit, asserting claims of negligence and nuisance. *Id.* After the trial court denied the defendant's motion for summary disposition, we granted leave to appeal. *Id.* at pp 1-2. Defendant cites the following passage, wherein the panel addressed the plaintiff's nuisance claim:

> Plaintiff's nuisance count also fails. Plaintiff argues that, with respect to nuisance claims, negligence is not an element and the exercise of reasonable care is not a defense; therefore, the nuisance claim must survive. We first note that, while count II of plaintiff's complaint is entitled nuisance, the allegations provided that defendants improperly maintained the premises, that "the

[6] As a preliminary matter, plaintiffs' procedural argument that the trial court erroneously granted summary disposition in favor of defendant on plaintiffs' nuisance and trespass claims sua sponte is without merit. While defendant's motion for summary disposition and accompanying brief did not contain arguments regarding nuisance or trespass, it was not styled as a motion for partial summary disposition and, at the summary disposition hearing, defense counsel explicitly stated that defendant sought summary disposition on all counts. Moreover, "a trial court has the authority to grant summary disposition sua sponte" if "the pleadings show that a party is entitled to judgment as a matter of law, or if the affidavits or other proofs show that there is no genuine issue of material fact[.]" *Al-Maliki v LaGrant*, 286 Mich App 483, 485; 781 NW2d 853 (2009), quoting MCR 2.116(I)(1). Thus, even if defendant failed to move for summary disposition on plaintiffs' nuisance and trespass claims, the trial court did not commit procedural error by granting summary disposition.

[7] Unpublished opinions do not constitute binding precedent; however, they may be considered "instructive or persuasive." MCR 7.215(C)(1); *People v Jamison*, 292 Mich App 440, 445 (2011).

> [d]efendants were aware of the condition of the tree and failed to take reasonable action to abate the nuisance, and that the decedent suffered severe injuries culminating in death "[a]s a result of [d]efendants *negligence*." (Emphasis added.) "It is well settled that the 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*, 276 Mich App 704, 710-711; 742 NW2d 399 (2007), citing *David v Sternberg*, 272 Mich App 377, 381; 726 NW2d 89 (2006). Plaintiff's allegations sound in negligence regardless of the nuisance moniker used by plaintiff; therefore, the claim fails for the reasons stated above. Moreover, the facts and circumstances of this case simply do not give rise to a nuisance claim, see *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 190-191; 540 NW2d 297 (1995), and plaintiff's argument is essentially an attempt to have defendants held strictly liable, which is not appropriate in the context of this action. [*Amin*, pp 5-6.]

We find this analysis persuasive. Plaintiffs do not allege that the creation of the alleged nuisance was the result of anything other than defendant's alleged negligence, and cannot alternatively claim nuisance under the same facts and law as their negligence claim. Accordingly, the trial court did not err by granting summary disposition in favor of defendant on plaintiffs' nuisance claim.

IV. TRESPASS

Lastly, plaintiffs argue that the trial court erred by granting summary disposition in favor of defendant on their trespass claim. We disagree.

> A trespass in an unauthorized invasion upon the private property of another. However, the actor must *intend* to intrude on the property of another without authorization to do so. If the intrusion was due to an accident caused by negligence or an abnormally dangerous condition, an action for trespass is not proper. [*Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 195; 540 NW2d 297 (1995) (citations omitted and emphasis added).]

There is no evidence that defendant *intended* to cause the tree branch to fall on plaintiffs' home. Under *Cloverleaf Car Co*, even if defendant was negligent or the tree constituted an abnormally dangerous condition, plaintiffs cannot establish trespass. *Id.* Accordingly, the trial court properly granted summary disposition in favor of defendant of plaintiffs' trespass claim.

Reversed as to plaintiffs' negligence claim. Affirmed as to plaintiffs' nuisance and trespass claims. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Jane M. Beckering
/s/ Douglas B. Shapiro