IN THE IOWA SUPREME COURT

NO. 15-2143

WILMA KELLOGG,

Plaintiff-Appellant,

vs.

CITY OF ALBIA, IOWA

Defendant-Appellee.

APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR MONROE COUNTY
HONORABLE RANDY S. DEGEEST, JUDGE

PLAINTIFF-APPELLANT'S REPLY BRIEF

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ARGUMENT

Two questions remain before the Court; 1) does Iowa Code §670.4(h) prohibit Wilma Kellogg from proceeding with a lawsuit based on nuisance, and 2) is Ms. Kellogg's claim barred by the applicable statute of limitations. As to the later question Ms. Kellogg contends that her claim was filed within the applicable statute of limitations as she has submitted evidence of intermittent harm, notwithstanding the conduct of the City of Albia which prevented Ms. Kellogg from bringing this action until 2015. And to the former question, Ms. Kellogg believes that her lawsuit brought under a nuisance theory of liability has no applicability to Iowa Code §670.4(h).

Summary judgment rulings are reviewed for legal error. *Seneca Waste Solutions, Inc. v. Sheafer Mfg. Co.*, 791 N.W.2d 407, 410–11 (Iowa 2010). The facts comprising the record are viewed in the light most favorable to the non-moving party. *Robinson v. Allied Prop. & Cas. Ins. Co.*, 816 N.W.2d 398, 401 (Iowa 2012). If the record would allow a reasonable jury to return a verdict for the non-moving party, a genuine issue of material fact exists. *Wilkins v. Marshalltown Med. Surg. Ctr.*, 758 N.W.2d 232, 235 (Iowa 2008).

The City of Albia's proof brief states that the essence of Ms. Kellogg's nuisance claim is based on negligent design or construction of the sewer system. (See Appellee's Proof Brief, pg. 17) Ms. Kellogg disagrees with this assessment.

We must understand how a nuisance claim differs from a lawsuit based on negligence in order to understand why Ms. Kellogg's nuisance claim is not based on negligent design.

"There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance.' It has meant all things to all people, and has been applied indiscriminately to everything from an alarming advertisement to a cockroach baked in a pie." *Prosser and Keeton on the Law of Torts* § 86, at 616 (W. Page Keeton ed. 5th ed. 1984).

The preceding lineage of casebooks speaks more pointedly to the issue:

> The courts customarily speak of "a" nuisance as if it were a type of conduct on the part of the defendant or a condition created by him. Actually it is neither. The word has reference to a kind of interest invaded, a type of damage or harm. Nuisance is a field of liability, rather than a particular tort.
>
> Victor E. Schwartz, Kathryn Kelly, & David F. Partlett, *Prosser, Wade and Schwartz's Torts* 799 (11th ed., Foundation Press 2005).

A private nuisance, such as the one at issue in this case, is defined as a "condition that interferes with a person's enjoyment of property, but does not involve a trespass. The condition constitutes a tort for which the adversely affected person may recover damages or obtain an injunction." *Black's Law Dictionary* 1094 (Bryan A. Garner ed., 7th ed., West 1999). When we define nuisance it matters not whether we consider the condition of the property, the

interest invaded, or the type of harm. For our purposes it is important to note that a nuisance claim is not based on the conduct of a person as in a negligence action.

Likewise, the Iowa Supreme Court has discussed the difference between nuisance and negligence:

> Negligence is a type of liability-forming conduct, for example, a failure to act reasonably to prevent harm. In contrast, nuisance is a liability-producing condition. Negligence *may or may not* accompany a nuisance; negligence, however, is not an essential element of nuisance. If the condition constituting the nuisance exists, the person responsible for it is liable for resulting damages to others even though the person acted reasonably to prevent or minimize the deleterious effect of the nuisance.
>
> *Martins v. Interstate Power Co.*, 652 N.W.2d 657, 660 (Iowa 2002) quoting *Bormann v. Bd. of Supervisors*, 584 N.W.2d 309, 315 (Iowa 1998) (emphasis added).

Building on this point, the Martins court added that the "tort concepts of negligence and nuisance 'describe completely distinct concepts, which constitute distinct torts, different in their nature and their consequences....' *Id. at* 660-61 quoting 58 Am. Jur. 2d Nuisances § 9, at 676 (1989).

What Ms. Kellogg maintains is that the condition of her property and the damage that she has suffered has nothing to do with the design of the City's sewer. Hypothetically, the City could design and maintain a contraption that works perfectly, yet if that contraption did nothing but deposit filth on Ms. Kellogg's property she would still have the capability of bringing a nuisance claim. Ms.

Kellogg's nuisance claim does not arise out of negligent design, nor does it have anything to do with generally recognized engineering standards. Her petition in the district court as it regards to nuisance only seeks a remedy to the condition of her property. (App. 8) Therefore, Iowa Code §670.4(h) does not exempt her claim.

Also, courts are not to engage in a search for legislative intent beyond the express language in a statute when the language is plain and the meaning is clear. *Voss v. Iowa Dep't of Transp.*, 621 N.W.2d 208, 211 (Iowa 2001). The plain language of Iowa Code §670.4(h) is devoid of any reference to nuisance claims. Thus, Ms. Kellogg's nuisance claim cannot be precluded by the state-of-the-art defense found under Iowa Code §670.4(h).

The appellant Ms. Kellogg will refrain from further discussion of the statute of limitations issue in this reply brief except to submit that she believes a genuine issue of material fact was presented to the district court in regard to: 1) the intermittent damage sustained on her property, and 2) the conduct of the City of Albia invoking equitable estoppel.

CONCLUSION

The appellant Ms. Kellogg respectfully requests that this Court reverse the ruling of the District Court in granting the City of Albia's Motion for Summary Judgment and remand back to the District Court for further proceedings.

Ms. Kellogg has presented a genuine issue of material fact in regard to the intermittent damage on her property and the conduct of the City of Albia in impeding her legal action. Additionally, Ms. Kellogg believes the record supports her position that her nuisance claim is not precluded by Iowa Code §670.4(h).

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Iowa R. App. 6.903(1)(g)(1) because this brief contains 1052 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and they type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Times New Roman 14.

Zachary Priebe

CERTIFICATE OF FILING

I, Zachary Priebe, hereby certify that I, or a person acting on my direction, did file the attached Appellant's Reply Brief via the Electronic Document Management System with the Clerk of the Iowa Supreme Court on this 13th day of May, 2016.

Zachary Priebe