

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A22-0035**

Robert Sharot, individually and
on behalf of all others similarly situated,
Appellant,

vs.

Water Gremlin Company,
Respondent.

**Filed September 19, 2022
Affirmed
Slieter, Judge**

Ramsey County District Court
File No. 62-CV-20-4911

Jeffrey S. Storms, Newmark Storms Dwarak LLC, Minneapolis, Minnesota; and

Laura L. Sheets (*pro hac vice*), Liddle Sheets Coulson P.C., Detroit, Michigan (for
appellant)

Ben D. Kappelman, Anna K.B. Finstrom, Ian Blodger, Amy Weisgram, Dorsey & Whitney
LLP, Minneapolis, Minnesota (for respondent)

Considered and decided by Slieter, Presiding Judge; Ross, Judge; and Kirk, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

NONPRECEDENTIAL OPINION

SLIETER, Judge

Appellant challenges the district court's summary-judgment dismissal of his negligence and statutory nuisance claims against respondent. Appellant's claim of injury to his property is based on a finding by the Minnesota Pollution Control Agency (MPCA) that respondent, a manufacturer whose plant is within 0.76 miles of appellant's home, exceeded permissible emission levels of trichloroethylene (TCE), a hazardous air pollutant. Appellant alleges that these TCE emissions caused property damage, interfered with his use of the property, and caused property value diminution because of the stigma from public disclosure of the emissions.

The summary-judgment record contains no evidence supporting the fact that TCE contaminated appellant's property or that it interfered with appellant's use of his property. And because Minnesota law does not recognize a stigma-caused diminution in property value as an injury in tort, we affirm.

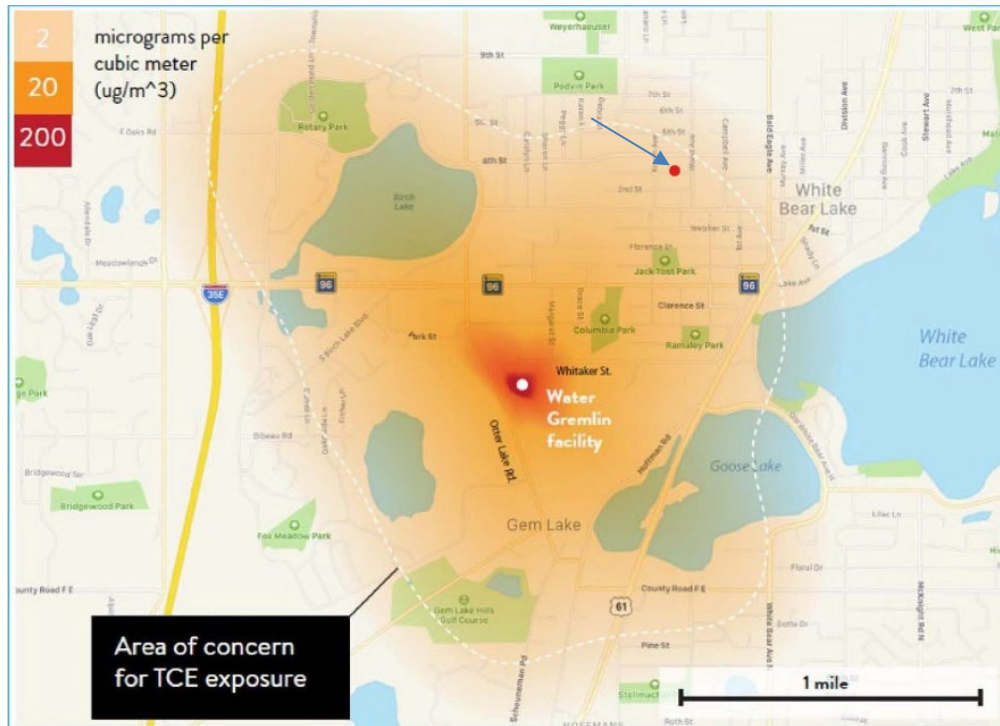
FACTS

Respondent Water Gremlin Company is a manufacturer located in White Bear Township since 1949 and situated within a residential area. Water Gremlin "fabricates lead metal products," such as lead fishing sinkers and battery posts, "from purchased, refined lead materials." In 1992, Water Gremlin began using TCE in its manufacturing process.

According to the MPCA, TCE “is an industrial solvent used to degrease metal parts. You can’t see or smell it in most cases,” and “[b]reathing TCE, especially at high levels or over long periods of time, can cause negative health effects.” TCE is a volatile organic compound and a hazardous air pollutant. “When TCE is emitted as a gas into the air, it spreads out and mixes in all directions,” and “[l]ocal weather conditions affect the speed and direction of TCE movement.” Typically, TCE in the air “does not settle on the soil or surface water,” but “[i]f it does, it would evaporate back into the air quickly.” “TCE does not stay in the air at a location very long” and it “breaks down in a matter of days to weeks.”

Water Gremlin is regulated by state and federal air emission rules. According to MPCA records, Water Gremlin disclosed “permit violations to [the] MPCA in July 2018.” Upon investigation, the MPCA discovered that “Water Gremlin greatly exceeded the intended permit limit of 9.5 tons of TCE emissions a year” and, as a result, the “MPCA requested that Water Gremlin shut down operations that emitted TCE.” “Water Gremlin agreed to voluntarily shut down” on January 14, 2019 and, “[i]n February, Water Gremlin committed to permanently discontinuing the use of TCE.”

In 2019, the MPCA created and made public an “area of concern” map representing likely airborne TCE exposure, which is here shown. The dot in the upper right quadrant of the map indicates where appellant Robert Sharot’s home is located.



The “area of concern” map is a geographic map showing “the range of estimated annual average amounts of TCE in outdoor air at different locations,” and shows areas affected by Water Gremlin’s TCE emissions in excess of Minnesota Department of Health’s (MDH) health standard of two micrograms per cubic meter of air.¹ The map is “based on MPCA air dispersion modeling data”² and relies on “[m]eteorological data, such as temperature, wind direction, and wind speed” obtained from “surface weather observation stations . . . [at] the Minneapolis/St. Paul International Airport.” And in February 2019, the MPCA and MDH indicated that “[t]he shutdown has stopped the TCE

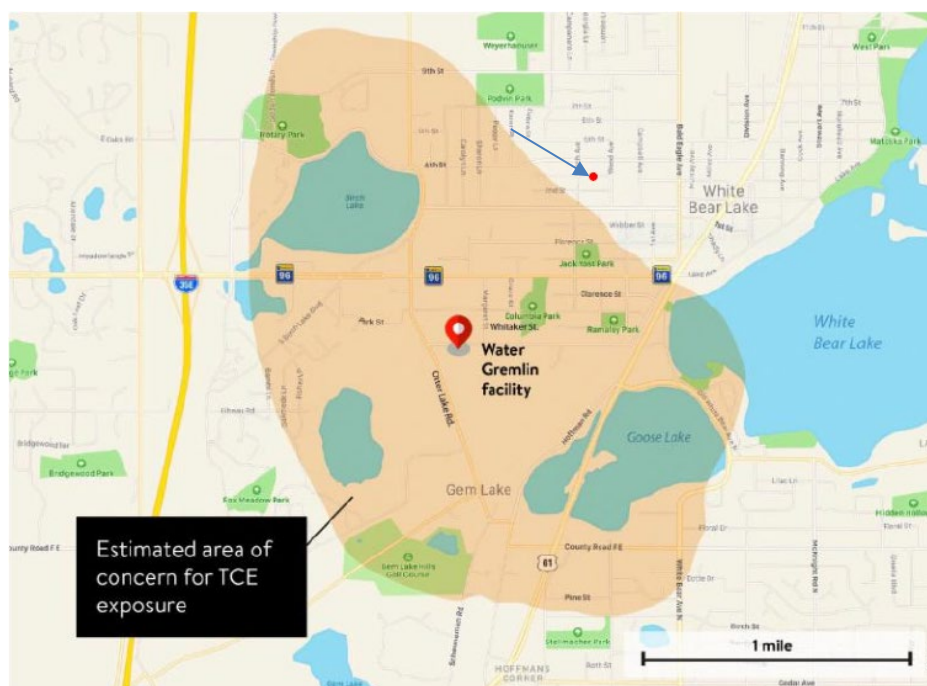
¹ TCE in this amount or less “is unlikely to lead to health effects even if sensitive members of the population are exposed to it 24 hours a day, 7 days a week, for a lifetime.”

² “Air quality dispersion modeling uses computer simulation to predict the amount of a pollutant in air at different locations and distances from a source.”

emissions and **exposures are no longer occurring.**” The parties agree that Sharot’s home was located in this “area of concern.”

On January 31, 2019, the *White Bear Press* published an article which included the MPCA’s January 2019 “area of concern” map for TCE emissions. The map was presented at a community meeting hosted by the MPCA and MDH in February 2019. In August 2019, the MPCA and MDH hosted a town hall meeting to discuss the TCE emissions.

The “area of concern” map was updated in January 2020 based upon data from the airport in Crystal, Minnesota, “which yield[ed] a slightly different shape than the previous map.” MDH indicated that “[t]he Crystal airport data are thought to represent conditions near Water Gremlin better.” The parties agree that, as a result, the new map shows that Sharot’s home is no longer in the “area of concern.” Again, the dot in the upper right quadrant of the map, but outside the “area of concern,” indicates where Sharot’s home is located.



Sharot sued Water Gremlin claiming negligence, statutory nuisance pursuant to Minn. Stat. § 561.01 (2020), and two other causes of action. Water Gremlin moved to dismiss all four claims.

In its rule 12 order denying the motion to dismiss the negligence and nuisance claims, the district court expressed “concerns with respect to Sharot’s ability to present proof of any injury in fact” “[g]iven the sparse allegations regarding injury and damages.”³ Therefore, the district court said that it would “significantly limit discovery to first address the issue of injury and damages in the negligence and private nuisance claims.” It ordered discovery to “be completed within 90 days” of the order, and a summary-judgment hearing was scheduled.

The district court granted summary judgment and dismissed the negligence claim because Sharot “produced no evidence that his property was in fact contaminated with TCE” and, on the same basis, dismissed Sharot’s nuisance claim. The district court also concluded that Sharot’s alternative damages claim, “pure stigma,” is not a harm recognized in Minnesota for tort claims. Sharot appeals.

DECISION

We review a grant of summary judgment *de novo* to determine “whether there are any genuine issues of material fact and whether the district court erred in its application of the law.” *Stringer v. Minn. Vikings Football Club, LLC*, 705 N.W.2d 746, 754 (Minn. 2005). “Summary judgment is appropriate when the evidence, viewed in the light most

³ Although the district court denied the motion to dismiss the negligence and nuisance claims, it granted dismissal of two other claims.

favorable to the nonmoving party, shows that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” *Id.* at 753; *see also* Minn. R. Civ. P. 56.03. “We do not weigh facts or determine the credibility of affidavits and other evidence.” *Stringer*, 705 N.W.2d at 754 (citing *DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997)).

“[S]ummary judgment is a blunt instrument and is inappropriate when reasonable persons might draw different conclusions from the evidence presented.” *Osborne v. Twin Town Bowl, Inc.*, 749 N.W.2d 367, 371 (Minn. 2008) (quotations omitted). “[T]he nonmoving party has the benefit of that view of the evidence most favorable to him.” *Lowry Hill Props., Inc. v. Ashbach Constr. Co.*, 194 N.W.2d 767, 774 (Minn. 1971). “All doubts and factual inferences must be resolved against the moving party.” *Nord v. Herreid*, 305 N.W.2d 337, 339 (Minn. 1981). “Expert testimony . . . at the summary judgment stage may create genuine issues of fact.” *Anderson v. State, Dep’t of Nat. Res.*, 693 N.W.2d 181, 191 (Minn. 2005).

“The party moving for summary judgment under Rule 56 . . . must demonstrate no genuine issue of material fact exists.” *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988); *Anderson*, 693 N.W.2d at 191 (“The moving party has the burden of showing an absence of factual issues before summary judgment can be granted.”). Once the burden shifts, the nonmoving party cannot merely rest on averments or denials of the adverse party’s pleading to defeat summary judgment. Minn. R. Civ. P. 56.05; *DLH*, 566 N.W.2d at 71; *Doe 175 v. Columbia Heights Sch. Dist.*, 873 N.W.2d 352, 359 (Minn. App. 2016) (“To defeat summary judgment, the nonmoving party must do more than merely create a

metaphysical doubt as to a factual issue or rest on mere averments.” (quotations omitted)). And the nonmoving party “cannot defeat a summary judgment motion with unverified and conclusory allegations or by postulating evidence that might be developed at trial.” *Funchess v. Cecil Newman Corp.*, 632 N.W.2d 666, 672 (Minn. 2001) (citation omitted). “Rather, the nonmoving party must offer substantial evidence to support each essential element of its cause of action,” and “[s]peculation and innuendo” are insufficient. *Doe* 175, 873 N.W.2d at 359 (quotation omitted).

I. Negligence

To succeed on a negligence claim, a plaintiff must prove four elements: “(1) the existence of a duty of care; (2) a breach of that duty; (3) an injury; and (4) the breach of the duty being the proximate cause of the injury.” *Engler v. Ill. Farmers Ins. Co.*, 706 N.W.2d 764, 767 (Minn. 2005). “A defendant in a negligence suit is entitled to summary judgment when the record reflects a complete lack of proof on any of the four essential elements of the negligence claim” *Funchess*, 632 N.W.2d at 672. The district court based its dismissal solely on element three, that Sharot presented no evidence of an injury.

Sharot argues that he presented evidence of material facts to demonstrate his property was injured by Water Gremlin. First, as to property damage, he relies on the “area of concern” map which, he argues, shows that his “property is indisputably within the initial 2019 Area of Concern, which predicted TCE emissions on Mr. Sharot’s property in excess of MDH health standards.” Second, as to stigma injury, Sharot relies on his expert’s report. The expert concluded that “homes within the initial 2019 MPCA Area of Concern, which included [Sharot]’s property, experienced property value diminution ranging from

3% to 8.7% due to the alleged release of TCE from the Water Gremlin Facility.” This property-value diminution resulted in an average decline of \$9,060 to \$26,003.

Water Gremlin first argues that Sharot failed to present any evidence that his property was actually contaminated with TCE and, second, it argues that the district court correctly concluded that stigma is not an injury recognized in tort in Minnesota. We agree with Water Gremlin.

A. Contamination

Water Gremlin demonstrated that no genuine issue of material fact exists which shows that TCE contaminated Sharot’s property, and Sharot produced no evidence that his property was contaminated by TCE. Sharot’s reference to the “area of concern” map as evidence of TCE contamination is unpersuasive. First, the “area of concern” map does not constitute evidence of *actual* contamination on any property, including Sharot’s. Second, the evidence in the record indicates the undisputed fact that “TCE does not stay in the air at a location very long or build up” because TCE “breaks down in a matter of days to weeks.”

Sharot cites several cases for the proposition that he does not need to produce evidence of actual contamination by the TCE emissions to establish a negligence claim. A review of these cases reveals no support for this proposition. Instead, they confirm the need to demonstrate actual contamination in a negligence action. *See Gopher Oil Co. v. Am. Hardware Mut. Ins. Co.*, 588 N.W.2d 756, 766 (Minn. App. 1999) (involving environmental contamination of soil with oil sludge), *rev. denied* (Minn. Apr. 20, 1999); *Ebert v. Gen. Mills, Inc.*, 48 F. Supp. 3d 1222, 1233 (D. Minn. 2014) (involving a motion

to dismiss in federal district court where there was actual “TCE vapor contamination in and around [plaintiffs’] homes”); *80 S. Eighth St. Ltd. P’ship v. Carey-Canada, Inc.*, 486 N.W.2d 393, 395 (Minn. 1992) (involving removal and replacement of a building’s fireproofing which actually contained asbestos), *amended by*, 492 N.W.2d 256 (Minn. 1992). Ultimately, Sharot presents no authority, and we have found none, to support a negligence claim based solely on toxic emissions without actual contamination to his property.

Sharot also argues that the district court erred by placing on him the burden of proof that his property was contaminated with TCE. The legal standard is clear, and the district court correctly applied it. After the moving party demonstrates a lack of material facts, which Water Gremlin did, Sharot must then, as the nonmoving party, produce substantial evidence to support the essential elements of his cause of action. *Doe 175*, 873 N.W.2d at 359. Sharot produced no evidence that his property was contaminated by TCE. Sharot “cannot defeat a summary judgment motion with unverified and conclusory allegations or by postulating evidence that might be developed at trial.” *Funchess*, 632 N.W.2d at 672.

B. Stigma

No authority that Sharot cites, nor any that we can find, supports his argument that stigma-caused property-value diminution is a recognized injury in tort. All the statutes and cases cited by Sharot for this proposition involve either real-estate tax or eminent-domain law. *See Dealers Mfg., Co. v. County of Anoka*, 615 N.W.2d 76, 81 (Minn. 2000) (holding that for tax purposes, a reduction in a property’s value caused by stigma is not subject to value reduction limitations imposed by Minn. Stat. § 273.11, subd. 17 (1998), which

defines contamination values); *Westling v. County of Mille Lacs*, 581 N.W.2d 815, 817 (Minn. 1998) (considering “the constitutionality of an unusual tax provision that functions to recapture property taxes lost when the assessed value of a parcel of property is reduced due to environmental contamination”); *Moorhead Econ. Dev. Auth. v. Anda*, 789 N.W.2d 860, 865 (Minn. 2010) (involving eminent domain and reduction of property value caused by stigma); *Almor Corp. v. County of Hennepin*, 566 N.W.2d 696, 701-02 (Minn. 1997) (considering appropriate tax rate based on actual contamination cleanup costs and contamination stigma rates). Similarly, the statutes Sharot relies on apply to tax regulations. *See* Minn. Stat. §§ 273.11, .12 (2020).

Therefore, the district court properly granted Water Gremlin summary-judgment dismissal of Sharot’s negligence claim based on a lack of evidence demonstrating an injury.

II. Statutory Nuisance

Statutory nuisance is “[a]nything which is injurious to health, or indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property.” Minn. Stat. § 561.01 (2020). A nuisance “action may be brought by any person whose property is injuriously affected or whose personal enjoyment is lessened by the nuisance, and by the judgment the nuisance may be enjoined or abated, as well as damages recovered.” *Id.*

“The statute defines a nuisance in terms of the resultant harm rather than in terms of the kind of conduct by a defendant which causes the harm.” *Highview N. Apartments v. County of Ramsey*, 323 N.W.2d 65, 70 (Minn. 1982). However, the conduct causing the harm does not constitute a nuisance unless it is “wrongful.” *Id.* at 70 (quotation omitted).

“This wrongful conduct varies, and may at times be characterized as intentional conduct, negligence, ultrahazardous activity, violation of a statute or some other tortious activity.” *Id.* at 71. “A court measures the degree of discomfort” caused by the harm “by the standards of ordinary people in relation to the area where they reside.” *Citizens for a Safe Grant v. Lone Oak Sportsmen’s Club, Inc.*, 624 N.W.2d 796, 803 (Minn. App. 2001). The degree of discomfort is not measured “by the standards of persons of delicate sensibility.” *Jedneak v. Minneapolis Gen. Elec. Co.*, 4 N.W.2d 326, 328 (Minn. 1942) (quotation omitted). “For an interference with the enjoyment of life or property to constitute a nuisance, it must be material and substantial.” *Citizens for a Safe Grant*, 624 N.W.2d at 803 (citing *Jedneak*, 4 N.W.2d at 329).

As we previously explained, the record reveals no evidence that TCE contaminated Sharot’s property. And the record is undisputed that, to the extent that TCE was airborne over Sharot’s property, it quickly dissipated. Therefore, no wrongful conduct has been shown.

Sharot argues that “[t]he unrebutted record evidence demonstrates triable issues of fact that [Water Gremlin]’s unreasonable use of its property obstructed the free use of Mr. Sharot’s property” because his “expert[’s] testimony establish[ed] that his property values were diminished at a ‘statistically significant’ rate of 3% and 8.7%.”

First, as we note above, absent wrongful conduct there can be no nuisance. Second, Sharot cites no authority for his argument that property-value diminution alone equates to a material and substantial interference with property. And the cases that Sharot cites for this proposition are distinguished because they involve evidence of actual intrusion and

obstruction. *See Robinson v. Westman*, 29 N.W. 2d 1, 4 (Minn. 1947) (involving a nuisance claim against a riding academy whose patrons were alleged to have “on frequent occasions trespassed upon the yards and gardens of the [nearby] homeowners, trampled their lawns and gardens, [and] pounded on their doors and windows,” among other things); *Colstrum v. Minneapolis & St. Louis Ry. Co.*, 24 N.W. 255, 255 (Minn. 1885) (involving a nuisance claim where the defendant “unlawfully entered upon and appropriated [a street] to its own use by excavating, laying down tracks, and maintaining and operating its railroad thereon, thereby depreciating the value of [the plaintiff’s] tract, and the rents and profits thereof.”).

Even if we presume that TCE emissions somehow obstructed or interfered with Sharot’s enjoyment of his property, a person’s degree of discomfort is not measured “by the standards of persons of delicate sensibility.” *Jedneak*, 4 N.W.2d at 328 (quotation omitted). The district court properly concluded that “no reasonable factfinder would be able to conclude that Sharot’s discomfort is reasonable or that an interference occurred” because the record contains no evidence that it is connected to existing contamination.

Sharot also speculates that Water Gremlin may be the source of “elevated levels of the chemical 1,4-dioxane in private wells.” This type of speculation is insufficient to support a nuisance claim at summary judgment. *Funchess*, 632 N.W.2d at 672 (concluding that the nonmoving party “cannot defeat a summary judgment motion with unverified and conclusory allegations or by postulating evidence that might be developed at trial”); *Doe 175*, 873 N.W.2d at 359 (“[T]he nonmoving party must offer substantial evidence to support each essential element of its cause of action. Speculation and innuendo are not sufficient.” (quotation and citation omitted)).

Sharot identifies no evidence that wrongful conduct obstructed or interfered with the use or enjoyment of his property and, therefore, the district court properly concluded that Sharot's statutory nuisance claim fails as a matter of law.

Affirmed.