IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

JOHN PAVLAK, et al., *Plaintiffs/Appellants*,

v.

FUNK FAMILY ENTERPRISES LLC, *Defendant/Appellee*.

No. 1 CA-CV 25-0891

FILED 08-28-2026

Appeal from the Superior Court in Maricopa County
No. CV2025-009180
The Honorable Randall H. Warner, Judge

AFFIRMED

COUNSEL

Combs Law Group, PC, Scottsdale
By Christopher A. Combs
Counsel for Plaintiffs/Appellants

Ellsworth Cobb PLC, Phoenix
By Richard L. Cobb
Counsel for Defendant/Appellee

OPINION

Presiding Judge Samuel A. Thumma delivered the opinion of the Court, in which Judge Andrew J. Becke and Judge Kent E. Cattani joined.

T H U M M A, Judge:

¶1 Plaintiffs Tina and John Pavlak appeal from a judgment dismissing their common law nuisance claim against defendant Funk Family Enterprises LLC for failure to state a claim. Because the Pavlaks have shown no error, the judgment is affirmed.

FACTS AND PROCEDURAL HISTORY

¶2 In 2014, the Pavlaks purchased residential property in Mesa called Lot 11, which is part of the Mountain Ranch Homeowners Association (HOA). The Pavlaks have lived there ever since. When they bought Lot 11, an adjacent property (Lot 10), which is also part of the HOA, was vacant. The Pavlaks claim they purchased Lot 11 relying on the original "building envelope" for Lot 10 shown in the City of Mesa's plat. The City of Mesa defines a building envelope as "the specified area on a lot within which all areas of disturbance, including structures, driveways, walkways, patios, pools, walls, construction work access, grading, slopes, and riprap are located." Mesa City Code § 9-6-6(J)(1) (2026).[1]

¶3 A few years later, the Pavlaks learned that the owner of Lot 10 obtained HOA design approval for a house within the original building envelope for Lot 10. The Pavlaks allege they made significant improvements to their Lot 11 in reliance on the expectation that any house built on Lot 10 would be within the original building envelope for Lot 10. No house, however, was built on Lot 10.

¶4 In 2023, Funk purchased Lot 10. In 2024, the HOA and the City of Mesa approved Funk's requests to modify the Lot 10 building envelope to move it uphill to improve the view for a home on Lot 10. In March 2025, Funk applied for a permit to build a house on the modified Lot 10 building envelope.

¶5 The Pavlaks then filed this action against Funk. The superior court denied the Pavlaks' request for a preliminary injunction and granted Funk's motion to dismiss the Pavlaks' claims for fraudulent schemes and artifices under Arizona Revised Statutes (A.R.S.) section 13-2310; unjust enrichment; and fraudulent misrepresentation.

[1] Absent material revisions after the relevant dates, statutes and rules cited refer to the current version unless otherwise indicated.

¶6 The Pavlaks then filed an amended complaint, alleging violations of the Arizona Consumer Fraud Act (ACFA), A.R.S. § 44-1521 et seq., and a private nuisance claim. The Pavlaks again sought a preliminary injunction to prevent any construction on Lot 10. Funk moved to dismiss, alleging the amended complaint failed to state a claim upon which relief could be granted. *See* Ariz. R. Civ. P. 12(b)(6). Asserting the Pavlaks' claim "boils down to a single issue – [the Pavlaks'] backyard can be seen from Funk's property," Funk argued that "[a]s a matter of law, this is insufficient to establish that a nuisance exists."

¶7 After an evidentiary hearing, the superior court denied the Pavlaks' request for a preliminary injunction. The court then granted Funk's motion to dismiss the amended complaint. After rejecting the ACFA claim as frivolous, the court then rejected the nuisance claim:

> The facts alleged, if true, are that the home Funk plans to build will adversely affect the Pavlaks' use and enjoyment of their home. But a home next door that impedes one's view or which—like most two-story homes—allows a neighbor to see into one's back yard is not alone substantial and unreasonable interference with the use and enjoyment of property. The Pavlaks cite no Arizona case in which a nuisance claim has been upheld on facts like these.

The Pavlaks relied on *O'Neil v. Atwell*, 598 N.E.2d 110 (Ohio Ct. App. 1991), which the superior court found was "not persuasive." Noting the HOA and the City approved Funk's request to modify the Lot 10 building envelope, the court concluded:

> The Pavlaks object that the home they bargained for had a next-door neighbor with one building envelope, and now the home being built is different. But because the HOA has a process for modifying building envelopes, a homeowner has no reasonable expectation that a neighbor's building envelope is unchangeable. Rather, they buy their home with notice that existing building envelopes can be changed through the process set forth in the CC&R's.

¶8 This court has jurisdiction over the Pavlaks' timely appeal from the resulting final judgment pursuant to Article 6, Section 9, of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1) and -2101(A)(1).

DISCUSSION

¶9 The Pavlaks do not challenge the dismissal of their claims in their original complaint, the dismissal of their ACFA claim, or the denial of their preliminary injunction requests. Instead, their argument on appeal is limited to the dismissal of their private nuisance claim. They argue that dismissal was error "absent any Arizona" case dismissing such a claim "under similar circumstances," and was contrary to *O'Neil*, the "Ohio case granting a nuisance claim under similar circumstances."

¶10 This court reviews de novo the grant of a motion to dismiss for failure to state a claim. *See Coleman v. City of Mesa*, 230 Ariz. 352, 355-56 ¶¶ 7, 9 (2012). This court accepts as true all well-pled factual allegations and indulges all reasonable inferences from those facts. *Id.* at ¶ 9. Dismissal is appropriate "if, 'as a matter of law . . . plaintiffs would not be entitled to relief under any interpretation of the facts susceptible of proof.'" *CVS Pharmacy, Inc. v. Bostwick*, 251 Ariz. 511, 515–16 ¶ 10 (2021) (citation omitted).

I. The Standard for a Private Nuisance Claim Under Arizona Law.

¶11 "A private nuisance is strictly limited to an interference with a person's interest in the enjoyment of real property. The Restatement defines a private nuisance as 'a nontrespassory invasion of another's interest in the private use and enjoyment of land.'" *Armory Park Neighborhood Ass'n v. Episcopal Cmty. Servs. in Ariz.*, 148 Ariz. 1, 4 (1985) (quoting Restatement (Second) of Torts (Restatement) § 821D (1979)). The noninvasive nature of a private nuisance claim distinguishes it from a trespass claim, recognizing that "[a] trespass is an invasion of the interest in the exclusive possession of land, as by entry upon it." Restatement § 821D cmt d.

¶12 A party seeking to press a cognizable private nuisance claim under Arizona law must plead and prove "actions" that "unreasonably interfered with their use and enjoyment of their property, causing significant harm." *Nolan v. Starlight Pines Homeowners Ass'n*, 216 Ariz. 482, 489 ¶ 32 (App. 2007) (citations omitted). "[T]he complained-of interference must be substantial, intentional and unreasonable under the

circumstances." *Armory Park*, 148 Ariz. at 7 (citations omitted). "What constitutes an unreasonable interference with another person's use and enjoyment of his property is determined by the injury caused by the condition and is not determined by the conduct of the party creating the condition." *Graber v. City of Peoria*, 156 Ariz. 553, 555 (App. 1988) (citation omitted). "Use and enjoyment" of property includes the "pleasure, comfort and enjoyment that a person normally derives from the occupancy of land." Restatement § 821D cmt. b.

¶13 Under Arizona law, not every interference with use and enjoyment of property is a nuisance. "Since the rules of a civilized society require us to tolerate our neighbors, the law requires our neighbors to keep their activities within the limits of what is tolerable by a reasonable person." *Armory Park*, 148 Ariz. at 7. Because "[t]he law does not concern itself with trifles," a claimed nuisance "must constitute more than slight inconvenience or petty annoyance." *Nolan*, 216 Ariz. at 489 ¶ 32 (quoting Restatement § 821F cmt. c). "[T]here must be a real and appreciable invasion of the plaintiff's interests" to present a cognizable private nuisance claim under Arizona law. *Id.*

¶14 The Pavlaks argue that Funk's modification of the Lot 10 building envelope constitutes a private nuisance because it "would cause the Pavlaks (1) a loss of use and enjoyment of their home, (2) a $300,000 diminution of value of Lot 11 and the loss of $287,107 in recent improvements to their backyard, (3) a loss of privacy, (4) a loss of views, and (5) potential rainwater runoff issues." The first two of these grievances are alleged consequences, not alleged "unreasonable interference," recognizing not every action by a neighbor that alters the use and enjoyment or value of a neighboring home is a private nuisance. *See, e.g.*, *Myrick v. Peck Elec. Co.*, 164 A.3d 658, 664 (Vt. 2017) ("[A] decrease in property value does not mean there has been an interference with that property's use, a requisite for a nuisance claim."); *Oliver v. AT&T Wireless Servs.*, 90 Cal. Rptr. 2d 491, 500 (App. 1999) ("A diminution in value does not interfere with the present use of property and cannot alone constitute a nuisance."); *Nolan*, 216 Ariz. at 489 ¶ 32 (similar). Accordingly, this court addresses the remaining three grievances in determining whether the Pavlaks have stated a cognizable Arizona common law private nuisance claim.

II. Arizona Does Not Recognize Loss of Privacy as Alleged as a Basis for a Private Nuisance Claim.

¶15 The Pavlaks argue that the superior court "failed to follow" *Graber* and *Armory Park*. The record shows otherwise. In applying *Graber* and *Armory Park*, the superior court correctly noted no Arizona case was cited "in which a nuisance claim has been upheld on facts like these."

¶16 *Graber*, unlike this case, affirmed private nuisance verdicts in favor of homeowners when a city allowed "the repeated entry of raw sewage into their homes" for years. 156 Ariz. at 554. Unremarkably, *Graber* affirmed those private nuisance verdicts for a physical intrusion on the homeowners' land. *Graber* did not, however, involve a nuisance claim based on an alleged loss of privacy. Nor did *Graber* suggest that a claimed loss of privacy could provide the basis for a private nuisance claim under Arizona law.

¶17 Although *Armory Park* discussed public and private nuisance claims, it addressed a claim that a food distribution center was a public nuisance, declaring "plaintiff's claim must stand or fall on the public nuisance theory alone." 148 Ariz. at 2, 5. *Armory Park* involved physical intrusion of land as a basis for the public nuisance claim, noting "[t]ransients frequently trespassed onto residents' yards, sometimes urinating, defecating, drinking and littering on the residents' property." *Id.* at 3. As in *Graber*, *Armory Park* did not involve a nuisance claim based on an alleged loss of privacy, or suggest that a claimed loss of privacy could provide the basis for a private nuisance claim under Arizona law.

¶18 Arguing Funk "had the burden of proof," the Pavlaks assert the superior court should have noted that "Funk has not cited any Arizona case in which a nuisance claim has been denied with similar circumstances." The Pavlaks, as plaintiffs, have the burden to plead and prove a cognizable private nuisance claim. *See Nolan*, 216 Ariz. at 489 ¶ 32. Recognizing this court reviews the issue de novo, Arizona has never recognized a private nuisance claim based on an alleged loss of privacy. Moreover, the Pavlaks have not shown that this should be the case to do so.

¶19 Tacitly recognizing that lack of supporting Arizona law, the Pavlaks argue the superior court erred in applying *O'Neil*. Under Ohio law, *O'Neil* found a condominium deck was "an annoyance and a nuisance." 598 N.E.2d at 114. The Pavlaks argue *O'Neil* "shares many similarities with" their allegations. Although noting *O'Neil* is "similar," the superior court

concluded it was "not persuasive." This court agrees, for three primary reasons.

¶20 First, *O'Neil*, applied Ohio law and is not binding here. *See, e.g.*, *Kotterman v. Killian*, 193 Ariz. 273, 291 ¶ 68 (1999). Second, *O'Neil* primarily defined a private nuisance broadly as anything that "persons of ordinary tastes and sensibilities would regard as an inconvenience or interference materially affecting their physical comfort to a degree which would constitute a nuisance." 598 N.E.2d at 113. That definition is far more expansive than Arizona's definition. *See Armory Park*, 148 Ariz. at 7 (requiring "substantial, intentional and unreasonable under the circumstances"); *Nolan*, 216 Ariz. at 489 ¶ 32 ("The law does not concern itself with trifles."). Third, as an alternative basis for its holding, *O'Neil* noted that the challenged deck violated the applicable CC&Rs. 598 N.E.2d at 114. Here, by contrast, the Pavlaks admit Lot 10's modified building envelope was approved by both the HOA and the City. For these reasons, the Pavlaks have shown no error in the superior court's treatment of *O'Neil*.

¶21 Authority from other jurisdictions shows that the Pavlaks have failed to allege a cognizable private nuisance claim under Arizona's common law based on a claimed loss of privacy. *Armory Park* looks to Restatement § 821D in defining a private nuisance claim under Arizona common law. 148 Ariz. at 4. The Comments to Restatement § 821D do not mention a loss of privacy as a proper basis for a private nuisance claim. *See* Restatement § 821D Comments. The Reporter's Note to Restatement § 821D lists several dozen cases recognizing private nuisances in a wide variety of contexts, none of which include a loss of privacy. *See* Restatement § 821D Reporter's Note (listing cases from various jurisdictions). Nor is loss of privacy listed as a permissible basis for a private nuisance claim in a time-worn secondary source. *See* 58 Am. Jur. 2d *Nuisances* § 159 (2026) ("Other objects or activities that may constitute nuisance.").

¶22 On very rare occasions, a few reported appellate decisions from other jurisdictions recognize potential common law private nuisance liability for repeated, harassing, intrusive undertakings that compromise privacy. *See Borg v. Cloutier*, 239 A.3d 1249, 1256 (Conn. Ct. App. 2020) (affirming counterclaim verdict recognizing plaintiff's liability for private nuisance for "directing flood lights at the defendant's residence for extended periods of time"); *Blevins v. Sorrell*, 589 N.E.2d 438, 439-40 (Ohio Ct. App. 1990) (affirming private nuisance judgment based on "a surveillance scheme which apparently knew no bounds," including a telescope, camera and a "platform ladder in a tree to gain a better vantage point" over a privacy fence, but rejecting an invasion of privacy claim);

Pritchett v. Bd. of Comm'rs, 85 N.E. 32, 35 (Ind. Ct. App. 1908) (jail built over neighbor's objection allowing prisoners to view into plaintiff's residence, "constitute[s] a nuisance. The facts show, too, that appellant's right of privacy has been invaded."). The Pavlaks, however, have alleged no such conduct here.

¶23 Nor do the Pavlaks allege that Funk's modification of the Lot 10 building envelope was done out of spite or malice. That is significant in concluding that Arizona does not recognize loss of privacy as the Pavlaks allege as a basis for a private nuisance claim. *See Coty v. Ramsey Assocs., Inc.*, 546 A.2d 196, 202 (Vt. 1988) ("[T]he great majority of jurisdictions have held that where a defendant has acted solely out of malice or spite, such conduct is indefensible on social utility grounds, and nuisance liability attaches.") (citing Prosser, Law of Torts § 87, 598–99 (4th ed. 1971)); *see also Newton v. MJK/BJK, LLC*, 469 P.3d 23, 33 (Idaho 2020) (similar). For all of these reasons, the Pavlaks have shown no error in the superior court dismissing their Arizona common law private nuisance claim based on their alleged loss of privacy.

III. Arizona Does Not Recognize Loss of View as a Basis for a Private Nuisance Claim.

¶24 The Pavlaks allege that a home built within the Lot 10 modified building envelope would unreasonably interfere with their peaceful use and enjoyment of their home and cause them significant harm because it would deprive them of their scenic view and diminish the value of their property. Relying on several California cases, Funk argues the Pavlaks have no protectable legal interest in the scenic view from their property and, therefore, their claim fails as a matter of law.

¶25 No appellate opinion has recognized loss of view as a basis for a private nuisance claim under Arizona common law. Elsewhere, the general rule is that, absent a statute or easement (neither of which are at issue here), loss of view does not provide the basis for a private nuisance claim. *See, e.g.*, *Eisen v. Tavangarian*, 248 Cal. Rptr. 3d 744, 752-53 (Ct. App. 2019) (citing cases); *Blackwell v. Lucas*, 271 So. 3d 638, 640-41 ¶ 7 (Miss. Ct. App. 2018); *Ceynar v. Barth*, 904 N.W.2d 469, 476-78 ¶¶ 26-28 (N.D. 2017) (citing cases); *Bubis v. Kassin*, 733 A.2d 1232, 1240 (N.J. Super. Ct. App. Div. 1999) (citing cases); *Collinson v. John L. Scott, Inc.*, 778 P.2d 534, 538 (Wash. Ct. App. 1989); *Mohr v. Midas Realty Corp.*, 431 N.W.2d 380, 383 (Iowa 1988); *see also* 2 C.J.S. *Adjoining Landowners* § 26 (2026) ("[A] residence is not a private nuisance based solely on fact that it blocks a neighbor's mountain view since the neighbors do not have a property right in the view across

their neighbor's land."); 1 Am. Jur. 2d *Adjoining Landowners* § 100 (2026) (similar).

¶26 As noted elsewhere, "[t]he general rule is that a lawful building or structure cannot be complained of as a private nuisance merely because it obstructs the view of neighboring property." *Kruger v. Shramek*, 565 N.W.2d 742, 747 (Neb. Ct. App. 1997) (citing opinions from Missouri, Washington, Iowa, California, Texas and Indiana). This general rule repudiates "the traditional English doctrine of ancient lights," which "as applied to claims involving views has been repudiated by every state considering it," including to prevent courts from imposing "what is essentially an unwritten negative prescriptive easement over a neighbor's property," which would also frustrate the purpose of real property recording statutes. *Kruger*, 565 N.W.2d at 747 (citations omitted).

¶27 Arizona has never recognized a right to an unobstructed or scenic view across a neighbor's property and this court does not recognize such a right here. Accordingly, the Pavlaks cannot state a nuisance claim based on the loss of a view caused by the construction of a house in the Lot 10 modified building envelope.

IV. The Pavlaks Have Not Alleged an Actionable Private Nuisance Claim Based on Potential Water Runoff Issues.

¶28 The Pavlaks alleged that Funk's construction of a home within the Lot 10 modified building envelope would create "potential[] significant rainwater runoff issues." In a declaration attached to the amended complaint, the Pavlaks stated that they had spent $50,000 to protect their home from storm water intrusion, and that Funk's relocation of the Lot 10 building envelope would generate a new rainwater flow pattern and create a "significant chance" of repeat water intrusions on their Lot 11. Although interference with the flow of surface water may constitute a nuisance, *see* Restatement § 833 cmt. a, the Pavlaks have alleged nothing more than the possibility that a home built within the Lot 10 modified building envelope (which has not yet occurred) could cause surface water to enter their property (which has not yet happened). That is insufficient to state a cognizable nuisance claim under Arizona law. *Nolan*, 216 Ariz. at 489 ¶ 32; Restatement §§ 821D & 821F.

V. Attorneys' Fees and Costs Incurred on Appeal.

¶29 The Pavlaks and Funk both request an award of attorneys' fees as sanctions on appeal, citing A.R.S. § 12-349. Section 12-349 provides that attorneys' fees shall be assessed if an attorney or party engages in any

one of several unjustified actions. Because neither party has shown an entitlement to such sanctions, those requests are denied. Funk, however, is awarded his taxable costs incurred on appeal upon his compliance with ARCAP 21.

CONCLUSION

¶30 The judgment is affirmed.

MATTHEW J. MARTIN • Clerk of the Court
FILED: JR