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NO. 4-16-0146

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Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

ROB BEDOWS and TRUDY GORDON, Plaintiffs-Appellants, v. JOHN R. HOFFMAN and ROSE HOFFMAN, Defendants-Appellees.	)))))))	Appeal from Circuit Court of Champaign County No. 15CH156 Honorable Michael Q. Jones, Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.
Presiding Justice Knecht and Justice Holder White concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed the trial court's dismissal of all four counts of plaintiffs' second amended complaint under section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2014)).

¶ 2 In 2002, plaintiffs, Rob Bedows and Trudy Gordon, purchased a home in the Devonshire neighborhood of Champaign. In 2012, defendants, John R. Hoffman and Rose Hoffman, moved into the house next door to Rob and Trudy. Both parties' properties were governed by the restrictive covenants of the Devonshire South VIII subdivision (Covenants). In 2013, the Hoffmans installed a poured-concrete patio and basketball court in their yard, along with an accompanying basketball hoop and light. The basketball court abutted Rob and Trudy's side-lot property line.

¶ 3 In June 2015, Rob and Trudy filed a complaint requesting the trial court to order the Hoffmans to (1) abate a portion of the basketball court that was allegedly encroaching on

Rob and Trudy's property; (2) abate the basketball court 10 feet from Rob and Trudy's property, as allegedly required by the Covenants; and (3) stop playing basketball on the court because the noise of the bouncing ball created a nuisance under both the common law and as defined by the Covenants. In response, the Hoffmans removed the portion of the basketball court that was encroaching on Rob and Trudy's property but continued using the court to play basketball.

¶ 4 In September 2015, Rob and Trudy filed a second amended complaint, which eventually included four claims, alleging, in general, that (1) the basketball court and hoop violated the Covenants and (2) the Hoffmans' use of the basketball court was a nuisance under both the common law and the Covenants. The Hoffmans' responded by filing a combined motion to dismiss under section 2-619.1 of the Code of Civil Procedure (735 ILCS 5/2-619.1 (West 2014)). The trial court dismissed all four counts pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2014)). Rob and Trudy appeal. We affirm.

¶ 5 I. BACKGROUND

¶ 6 A. Devonshire

¶ 7 In 1997, developers created the Devonshire VIII subdivision. At Devonshire's inception, the Covenants were established and recorded. In 2002, Rob and Trudy built and moved into a home in Devonshire.

¶ 8 In June 2012, the Hoffmans—John, Rose, and their six children—relocated from Jasper, Indiana, and purchased the home next door to Rob and Trudy. In April 2013, the Hoffmans began constructing a concrete patio and basketball court in their backyard. The project consisted of a concrete patio, a concrete basketball court, a 12-foot high basketball hoop, and a light. The project was completed in November 2013.

¶ 9 Because Rob and Trudy were bothered by the noise the Hoffman children made

while playing basketball on the court, they asked the Hoffmans to move the basketball goal to the other side of their property, away from Rob and Trudy's property. The Hoffmans declined. However, in an apparent attempt to appease Rob and Trudy, the Hoffmans installed a 12-foot net behind the basketball goal to catch errant shots. (According to John Hoffman, the net was later lowered to eight feet after Rob complained to the City of Champaign that the net violated the city's eight-foot fence restriction.)

¶ 10 B. Litigation

¶ 11 1. *Rob and Trudy's Original Complaint*

¶ 12 In June 2015, Rob and Trudy filed a three-count complaint, raising the following claims: encroachment (count I); violation of the "Nuisances" provision of the Covenants (count II); and private common-law nuisance (count III). Attached to the complaint was a copy of the Covenants, among other attachments.

¶ 13 Count I alleged that the Hoffmans had constructed an "open porch" that (1) intruded across the shared side-lot property line onto Rob and Trudy's property and (2) was in violation of the "Building Location" covenant, which mandated that any "main or accessory building" be set back at least 10 feet from the "side lot [line]" of any adjacent property. Rob and Trudy requested an injunction ordering the Hoffmans to abate their "open porch" so that it no longer extended within 10 feet of Rob and Trudy's property line.

¶ 14 In count II, Rob and Trudy alleged that the Hoffmans had constructed an "outdoor patio," along with a basketball goal on the side of the patio that abutted Rob and Trudy's property. Rob and Trudy alleged further that when the Hoffmans used the patio to play basketball, they created a nuisance in violation of the Nuisances covenant. Rob and Trudy requested that the trial court enter both a preliminary and a permanent injunction prohibiting the Hoffmans from using

their “outdoor patio” and basketball goal for playing basketball.

¶ 15 Count III alleged that the sound of basketballs colliding with the basketball goal's backboard created a nuisance under the common law. Similar to the relief requested in count II, Rob and Trudy asked for both a preliminary and a permanent injunction prohibiting the Hoffmans from playing basketball on the “outdoor patio.” In addition, Rob and Trudy requested (1) a monetary award for the cost of an acoustic fence, (2) court costs, and (3) attorney fees.

¶ 16 In June 2015, the Hoffmans removed the portion of the court that Rob and Trudy alleged had been encroaching onto their property; however, the remaining court was still located within 10 feet of the side-lot property line.

¶ 17 2. *Rob and Trudy's Amended Complaint*

¶ 18 In July 2015, Rob and Trudy filed an amended complaint. The amended complaint excised that part of the claim previously contained in count I, which had alleged that the Hoffmans’ patio intruded onto Rob and Trudy’s property. However, the amended count I continued to allege that the Hoffmans' “outdoor patio” was in violation of the Building Location covenant because it was a “main or accessory building” located within 10 feet of Rob and Trudy's property line. (The amended count I referred to the basketball court as an “outdoor patio” instead of an “open porch,” as the original complaint had referred to it.) As to relief on count I, Rob and Trudy continued to request an injunction ordering the Hoffmans to abate their patio 10 feet from Rob and Trudy’s property line.

¶ 19 Counts II and III remained essentially unchanged.

¶ 20 3. *The Hoffmans' Original Motion To Dismiss*

¶ 21 In August 2015, the Hoffmans filed a combined motion to dismiss pursuant to section 2-619.1 of the Code (735 ILCS 5/2-619.1 (West 2014)).

¶ 22 As to count I, the Hoffmans requested that the trial court dismiss on the following grounds: (1) under section 2-615 of the Code for failure to state a claim that the basketball court violated the Building Location covenant and (2) under section 2-619(a)(9) of the Code based on the doctrines of *laches* (for not objecting while the basketball court was being constructed), unclean hands (for building a fence that violated the Covenants), and abandonment of their claim.

¶ 23 In support of their section 2-619(a)(9) motion to dismiss count I on the basis of *laches*, the Hoffmans attached to their motion an affidavit of John Hoffman. In it, John stated that construction of the basketball court began in April 2013 and ended in November 2013. During construction, John spoke with Rob and Trudy a "few times" about the project and explained to them that he was constructing an outdoor patio, a basketball court, and a basketball hoop. John also informed Rob and Trudy of the location of the court and hoop. During construction, Rob and Trudy never expressed any concern or objection to John about the project. John averred that the project as a whole cost approximately $12,000, including $10,000 for the basketball court and $900 for the hoop.

¶ 24 As to count II, the Hoffmans asked the trial court to dismiss based on: (1) section 2-615 for failing to state a claim that the basketball court violated the Nuisances covenant and (2) section 2-619(a)(9) for abandonment and unenforceability of the allegedly unreasonable Covenants.

¶ 25 Finally, as to count III, the Hoffmans requested dismissal under section 2-615 for failure to state a claim of common-law nuisance.

¶ 26 4. *The August 2015 Hearing on the Hoffmans' Motion To Dismiss the Amended Complaint*

¶ 27 Later that month, the trial court conducted a hearing on the Hoffmans' section 2-619.1 combined motion to dismiss the amended complaint.

¶ 28 At the hearing, the Hoffmans argued that Rob and Trudy's amended complaint contained "very, very few actual facts." The Hoffmans made the following arguments that the complaint ought to be dismissed under section 2-615. As to count II, the Hoffmans argued that Rob and Trudy failed to allege that the noise created by the Hoffmans' use of their basketball court created "an annoyance or nuisance *to the neighborhood*" (emphasis added), as required by the Nuisances covenant. Similarly, as to count III (the common-law nuisance claim), the Hoffmans argued that Rob and Trudy failed to allege that a reasonable person would find the complained-of noise physically offensive to the extent that it made life uncomfortable. In response, as to count III, Rob and Trudy argued that they need not allege that a reasonable person would be offended in order to survive a section 2-615 motion to dismiss.

¶ 29 After hearing the parties' arguments, the trial court granted the following relief. As to count I, the court dismissed with prejudice on the following grounds: (1) under section 2-615 for failing to state a claim that the basketball court violated the Building Location covenant and (2) under section 2-619(a)(9) based on *laches*.

¶ 30 As to count II, the trial court dismissed with prejudice under section 2-615 for failing to state a claim that the basketball court violated the Nuisances covenant, concluding that "an activity such as typical children's sporting activities objectively isn't noxious or offensive."

¶ 31 As to count III, the trial court dismissed *without* prejudice under section 2-615 for failing to state a claim of common-law nuisance. The court explained that the nuisance issue turns on "whether this would be deemed a nuisance by a reasonable person." The court determined that "unless you can plead that they play basketball at one o'clock at night, or that they're swearing and cursing, or undesirables are congregating there, smoking illegal substances," children playing basketball in a residential neighborhood cannot constitute a nuisance, as a matter of

law. The court also noted the following:

> "The problem isn't playing basketball[.] *** [I]t's that [the Hoffmans are] playing basketball on the part of their property closest to [Rob and Trudy's property], and that it wouldn't be—I think the suggestion is being made—a legitimate concern if they would move the basketball court to the far reaches of their property. This is not what they've pled, but that's something that could be cured."

The court dismissed count III under section 2-615 but granted Rob and Trudy leave to amend that count.

¶ 32 5. *Rob and Trudy's Second Amended Complaint*

¶ 33 In September 2015, Rob and Trudy filed a second amended complaint. In it, they amended their former count III common-law nuisance claim to allege that the basketball playing "occurs from 7 am until after 10 pm on any given day and occurs year round."

¶ 34 Attached to Rob and Trudy's second amended complaint was a document purporting to be a log kept by Rob and Trudy of the dates and times when the Hoffmans had used their basketball court. The dates of the log entries range from December 2013 to September 2015. The log contained only one occasion in which the Hoffmans had used the basketball court after 10 p.m.: on August 12, 2014, the log states that the Hoffmans used the court for "about 10 minutes" beginning at 9:55 p.m.

¶ 35 That same day, Rob and Trudy filed a motion for leave to file count IV of their second amended complaint. Attached to the motion was a proposed count IV, which alleged that the basketball court was in violation of the "Allowable Structure" covenant. Rob and Trudy alleged that the Allowable Structure covenant provided the following:

> "*No structure* shall be erected, altered, placed or permitted to remain on

> any building site other than one detached single family dwelling, not to exceed two stories in height above ground level at any point adjacent to the structure, a private garage for not more than four (4) cars …, and *other accessory buildings* incidental to residential use of the premises." (Emphases added.)

Rob and Trudy alleged in count IV that the Hoffmans' "outdoor patio/basketball court" was a "structure" prohibited by the Allowable Structure covenant. The Hoffmans requested the trial court to enter an injunction ordering the Hoffmans to remove their "outdoor patio/basketball court and hoop."

¶ 36 6. *The Hoffmans' Motion To Dismiss the Second Amended Complaint*

¶ 37 In December 2015, the Hoffmans filed a combined motion to dismiss Rob and Trudy's second amended complaint under section 2-619.1 of the Code.

¶ 38 The Hoffmans argued that count III should be dismissed on the following grounds: (1) under section 2-615 for failing to state a claim of common-law nuisance because count III alleged only a "lawful and ordinary" use of the Hoffmans' property and (2) under section 2-619(a)(9) based on the doctrine of *laches* and for failing to mitigate damages. The Hoffmans argued further that, even if Rob and Trudy had sufficiently pleaded a claim of common-law nuisance to survive a section 2-615 motion to dismiss, they had nonetheless failed to plead sufficient facts to support injunctive relief of any kind.

¶ 39 As to count IV, the Hoffmans argued that the trial court should dismiss on the following grounds: (1) under section 2-615 of the Code for failing to state a claim that the basketball court violated the Allowable Structure covenant and (2) under section 2-619(a)(9) of the Code based on *laches* and a failure to mitigate damages.

¶ 40 7. *The January 2016 Hearing on the Hoffmans' Motion To Dismiss the Second Amended Complaint*

¶ 41 In January 2016, the trial court conducted a hearing on the Hoffmans' combined motion to dismiss the second amended complaint pursuant to section 2-619.1 of the Code. The court clarified that it "[was] not resolving facts today," but, instead, was deciding whether to grant the Hoffmans' motion to dismiss count III (as amended) and count IV on the pleadings.

¶ 42 At the hearing, the trial court questioned Rob and Trudy about the Hoffmans' use of the basketball court after 10 p.m., noting that the log attached to the second amended complaint showed only one such instance. Rob and Trudy responded that the log did not purport to include all the occasions the Hoffmans had used the basketball court. Rob and Trudy further argued that their nuisance allegations were less about the nature of the activity—playing basketball—and more about the "time, place, and reasonableness" of that activity; in particular, the location of the basketball goal so close to Rob and Trudy's bedroom window.

¶ 43 As to Rob and Trudy's amended count III, the trial court granted the Hoffmans' section 2-615 motion to dismiss, with prejudice. The court explained, "I have nothing in front of me that suggests it's a nuisance or annoyance to the neighborhood. *** Subjectively this is a nuisance, objectively, it isn't." The court explained, "This is a neighborhood. People choose to live in a neighborhood. Other people choose to live isolated because they want more quiet and they're willing to trade a longer trip to the grocery store for more quiet because of neighbors not being close to them." The court concluded that, unless Rob and Trudy could plead special circumstances, children playing basketball was not a nuisance. The court determined that Rob and Trudy had failed to plead any such special circumstances. Therefore, the court dismissed count III pursuant to section 2-615. (The court also dismissed count III under section 2-619(a)(9), pursuant to the doctrine of *laches*.)

¶ 44 The trial court dismissed count IV with prejudice under both (1) section 2-615 of the Code and (2) section 2-619(a)(9) of the Code.

¶ 45 This appeal followed.

¶ 46 II. ANALYSIS

¶ 47 Rob and Trudy argue that the trial court erred by dismissing their various counts on the following grounds: (1) dismissing counts I through IV under section 2-615 of the Code; and (2) dismissing counts I, III, and IV under section 2-619(a)(9) of the Code. We conclude that the trial court did not err by dismissing all four counts under section 2-615 of the Code. As a result, we do not reach Rob and Trudy's argument that the court erred by dismissing counts I, III, and IV under section 2-619(a)(9) of the Code (735 ILCS 5/2-619(a)(9) (West 2014)).

¶ 48 A. Section 2-615 and the Standard of Review

¶ 49 A motion to dismiss pursuant to section 2-615 "tests the legal sufficiency of the complaint based on defects apparent on its face." *Reynolds v. Jimmy John's Enterprises, LLC*, 2013 IL App (4th) 120139, ¶ 25, 988 N.E.2d 984. "In ruling on a section 2-615 motion, the court only considers (1) those facts apparent form the face of the pleadings, (2) matters subject to judicial notice, and (3) judicial admissions in the record." *Id.* The determinative question is "whether the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, and taking all well-pleaded facts and all reasonable inferences that may be drawn from those facts as true, are sufficient to state a cause of action upon which relief may be granted." *Id.*

¶ 50 A cause of action should be dismissed under section 2-615 only if "it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to recovery." *Id.* (quoting *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 429, 856 N.E.2d 1048, 1053 (2006)). In essence, by filing a section 2-615 motion to dismiss, a defendant is saying, "So what? The facts

alleged do not state a cause of action against me." *Jimmy John's*, 2013 IL App (4th) 120139, ¶ 25, 988 N.E.2d 984. We review a trial court's decision on a section 2-615 motion to dismiss *de novo*. *Id.*

¶ 51 Illinois is a "fact-pleading" State, meaning that "although pleadings are to be liberally construed and formal or technical allegations are not necessary, a complaint must, nevertheless, contain facts to state a cause of action." *Borcia v. Hatyina*, 2015 IL App (2d) 140559, ¶ 21, 31 N.E.3d 298; see also *City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill. 2d 351, 368, 821 N.E.2d 1099, 1112 (2004) (explaining that "a complaint that would survive a motion to dismiss in a notice-pleading jurisdiction might not do so in a fact-pleading jurisdiction"). That is not to say that a pleader is required to "set out his evidence. To the contrary, only the ultimate facts to be proved should be alleged and not the evidentiary facts tending to prove such ultimate facts." (Internal quotation marks omitted.) *Borcia*, 2015 IL App (2d) 140559, ¶ 21, 31 N.E.2d 298.

¶ 52 However, pleading mere conclusions is insufficient. "When ruling on [a section 2-615 or 2-619 motion to dismiss], a court must accept as true all well-pleaded facts, as well as any reasonable inferences that may arise from them [citation], but a court cannot accept as true mere conclusions unsupported by specific facts [citation]." *Patrick Engineering, Inc. v. City of Naperville*, 2012 IL 113148, ¶ 31, 976 N.E.2d 318. Conclusions of law and conclusory allegations of fact unsupported by specific facts are not deemed admitted. *Hanks v. Cotler*, 2011 IL App (1st) 101088, ¶ 17, 959 N.E.2d 728.

¶ 53 These distinctions—between necessary ultimate facts and superfluous evidentiary facts—are often gray and, making things even more confusing, different causes of action may have different requirements as to how specific the factual allegations must be. See *Borcia*, 2015 IL App (2d) 140559, ¶ 36, 31 N.E.3d 298 (noting that although common-law fraud has a height-

ened pleading specificity requirement, a claim of in-concert tortious conduct under section 876 of the Restatement (Second) of Torts does not). "The degree of specificity required to sufficiently plead a cause of action in any case is difficult to determine and is dependent upon the individual circumstances of each case." *Id.* ¶ 38. When confronting these gray areas, it is important to remember the purpose of pretrial motion practice: "to present, define, and narrow the issues and limit the proof needed at trial." *Id.*, ¶ 37.

¶ 54 B. Construing Restrictive Covenants

¶ 55 Restrictive covenants should be construed and enforced according to their plain and unambiguous language. *Neufairfield Homeowners Ass'n v. Wagner*, 2015 IL App (3d) 140775, ¶ 16, 42 N.E.3d 941. The goal when construing restrictive covenants is to give effect to the intent of the parties when the covenant was made. *Id.* "Covenants should be strictly construed so that they do not extend beyond that which is expressly stipulated; all doubts must be resolved in favor of the free use of property and against restrictions." *Id.* "In the absence of a definition within the covenant, words used in the declaration should be given their ordinary and commonly understood meanings." *Id.* ¶ 17. "The dictionary can be used as a resource to determine the ordinary and popular meaning of a word." *Id.*

¶ 56 C. This Case

¶ 57 Rob and Trudy argue that the trial court erred by dismissing all four counts pursuant to section 2-615 of the Code. We address each count, in turn.

¶ 58 1. *Count I*

¶ 59 Rob and Trudy argue that the trial court erred by dismissing count I pursuant to section 2-615 of the Code. We disagree.

¶ 60 In their amended count I, Rob and Trudy alleged that the basketball court was an

"accessory building" subject to the 10-foot setback rule of the Building Location covenant. At the August 2015 hearing, the trial court disagreed and dismissed count I with prejudice pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2014)). Rob and Trudy argue that the court erred by dismissing count I pursuant to section 2-615. (Notably, Rob and Trudy do not argue that the court improperly denied them leave to amend count I, which they did not request.)

¶ 61 When an attachment to a pleading "is a contract or other instrument, the proper construction of that contract is a matter of law." *CitiMortgage, Inc. v. Parille*, 2016 IL App (2d) 150286, ¶ 24, 49 N.E.3d 869. Here, Rob and Trudy attached the Covenants to their pleading. To determine whether the trial court erred by dismissing count I, we must first construe the Building Location covenant.

¶ 62 The Building Location covenant provided, in pertinent part, the following:

> "No main or accessory building shall be located closer to the side lot lines than a distance of ten (10) feet[.] *** For the purposes of this covenant, eaves, steps and open porches shall not be construed to permit any portions of a building on a lot to encroach upon another lot."

¶ 63 The Covenants provided the following definition of "Accessory Building":

> "Separate building or buildings or portions of the main building located on the same building site and which are incidental to the main building or to the main use of the premises."

¶ 64 To determine whether the 10-foot set-back provision of the Building Location covenant applies to the Hoffmans' basketball court, we must first determine whether the basketball court was a "building." If so, then the 10-foot set-back restriction clearly applies. If not, we must engage in further analysis to determine whether the set-back provision applies under the

"open[-]porches" clause of the Building Location covenant.

¶ 65 Black's Law Dictionary does not include an entry for "building," so we rely on the definition contained in Webster's Dictionary to determine the ordinary meaning of the word. Webster's provides the following definition of "building": "**1:** a usu. roofed and walled structure built for permanent use (as for a dwelling) **2:** the art or business of assembling materials into a structure." Merriam-Webster's Collegiate Dictionary 150 (10th ed. 2000).

¶ 66 According to Webster's definition, the Hoffmans' basketball court is not a building. (Only the first of Webster's two entries for "building" is relevant to this case; the second entry describes, not a physical entity, but the "art or business" of building. *Id.*) Under the relevant first entry, a building is first a "structure." In addition, a building is permanent and usually includes walls and a roof.

¶ 67 Although the Hoffmans' basketball court is permanent, it in no other way resembles a "building." In our view, a building must contain open space within its interior, a quality which a slab of concrete obviously lacks. Nor does a slab have walls or a roof. We conclude that the basketball court—although "built," in the sense that it was constructed—was not a "building." Therefore, the 10-foot set-back provision does not automatically apply to the Hoffmans' basketball court.

¶ 68 Rob and Trudy spend the majority of their argument on this issue taking umbrage with the trial court's statement that, because the basketball court would not be subject to taxation, it was not a "building." This argument is not persuasive. Even if the trial court was mistaken that the court would not be taxed, it does not follow that the basketball court is therefore a building. This court reviews judgments, not reasoning. *Vulpitta v. Walsh Construction Co.*, 2016 IL App (1st) 152203, ¶ 22. We will not reverse a trial court's decision merely because we disagree with

part of the reasoning it used to reach that decision (which, we note in this case, was merely ancillary to the trial court's ultimate decision to dismiss). Instead, we may affirm the trial court for any reason or ground appearing in the record. *Akemann v. Quinn*, 2014 IL App (4th) 130867, ¶ 21, 17 N.E.3d 223. We have made our own determination *de novo* that the Hoffmans' basketball court was not a "building." Rob and Trudy have provided no argument to convince us otherwise.

¶ 69 However, the 10-foot set-back provision might yet apply to the basketball court under the "open[-]porches" clause of the Building Location covenant, which provided the following: "For the purposes of this covenant, eaves, steps and open porches shall not be construed to permit any portions of a building on a lot to encroach upon another lot." The parties disagree about how to construe the meaning of the open-porches clause.

¶ 70 The Hoffmans argue that the open-porches clause prohibits only the actual *encroachment* of porches, etc., onto the property of another and does not include a 10-foot set-back rule. Rob and Trudy disagree and argue that the 10-foot set-back provision applies equally to "open porches," which they claim includes the Hofmanns' basketball court.

¶ 71 We agree with the Hoffmans' interpretation. The wording of the "open[-]porches" clause is ambiguous. Under such circumstances we defer to the rules of covenant construction, which provide that "[c]ovenants should be strictly construed so that they do not extend beyond that which is expressly stipulated; all doubts must be resolved in favor of the free use of property and against restrictions." *Neufairfield Homeowners Ass'n*, 2015 IL App (3d) 140775, ¶ 16, 42 N.E.3d 941. With that principle in mind, and focusing on the plain language of the covenants, we determine that the open-porches clause does not include a 10-foot set-back restriction and, instead, only prohibits open porches from encroaching across a property line. The open-porches clause does not explicitly contain a 10-foot set-back provision. We decline to read one into it.

¶ 72 In conclusion, the 10-foot set-back provision of the Building Location covenant does not apply to the Hoffmans' basketball court. Therefore, the trial court did not err by dismissing count I pursuant to section 2-615.

¶ 73 2. *Counts II and III*

¶ 74 Rob and Trudy argue that the trial court erred by dismissing counts II and III pursuant to section 2-615 of the Code. We disagree.

¶ 75 Count II alleged that the Hoffmans' playing basketball violated the Nuisances covenant. Count III alleged that the basketball playing constituted a private common-law nuisance. Rob and Trudy combine their arguments on these counts into one section of their brief. As a result, we address both claims under the same heading, while distinguishing our ultimate decisions on these counts, as they involve similar, but not identical, inquiries.

¶ 76 Rob and Trudy argue that the trial court erred by dismissing counts II and III pursuant to section 2-615 "based on the reasonable person standard." Rob and Trudy argue further that the court erred by dismissing those counts pursuant to section 2-615 because "whether an activity constitutes a nuisance is a question of fact."

¶ 77 a. The Relevant Facts

¶ 78 In count II, Rob and Trudy alleged that the Hoffmans' playing basketball constituted "a substantial, intentional and unreasonable invasion of [Rob and Trudy's] use" of their property, in violation of the Nuisances covenant.

¶ 79 The Nuisances covenant provided the following:

> "No noxious or offensive activity shall be carried on upon any lot, nor shall anything be done thereon which may be or may become an annoyance to the neighborhood."

¶ 80 In count III, Rob and Trudy alleged that the Hoffmans' playing basketball on their "large concrete outdoor patio" constituted a private common-law nuisance. In support of that claim, Rob and Trudy alleged that the Hoffmans used the patio as a basketball court and that "[t]his use occurs from 7 am until after 10 pm on any given day and occurs year round." Rob and Trudy alleged further that the noise made by the Hoffmans' playing basketball constituted a "substantial, intentional and unreasonable invasion of the Plaintiffs' use of their own property," sufficient to create a nuisance.

¶ 81 Attached to the second amended complaint was a log, containing a list of times and dates when the Hoffmans had used the basketball court from December 2013 through September 2015. Also attached to the second amended complaint was Rob's affidavit, in which he averred that he kept the log "off and on" and that it was not a complete record of the basketball court's use. The trial court granted the Hoffmans' motion to dismiss count III under section 2-615 of the Code.

¶ 82 As explained earlier, we review a dismissal under section 2-615 *de novo*. *Jimmy John's*, 2013 IL App (4th) 120139, ¶ 25, 988 N.E.2d 984.

¶ 83 b. The Law of Private Common-Law Nuisance

¶ 84 A nuisance "is a substantial invasion of another's interest in the use and enjoyment of his or her land. The invasion must be: substantial, either intentional or negligent, and unreasonable." *In re Chicago Flood Litigation*, 176 Ill. 2d 179, 204, 680 N.E.2d 265, 277 (1997). Private nuisance is "a civil wrong, based on a disturbance of rights in land." (Internal quotation marks omitted.) *Beretta U.S.A. Corp.*, 213 Ill. 2d at 365, 821 N.E.2d at 1111. The invasion complained of must be more than "a question of mere delicacy or fastidiousness arising from elegant and dainty habits of life." (Internal quotation marks omitted.) *Belmar Drive-In Theatre Co. v.*

Illinois State Toll Highway Comm'n, 34 Ill. 2d 544, 547, 216 N.E.2d 788, 791 (1966). The nuisance must be physically offensive to the senses to the extent that it makes life uncomfortable. *Dobbs v. Wiggins*, 401 Ill. App. 3d 367, 375-76, 929 N.E.2d 30, 38 (2010). "The courts will not afford protection to hypersensitive individuals ***." *Belmar Crive-In*, 34 Ill. 2d at 548, 216 N.E.2d at 791. "The standard for determining if particular conduct constitutes a nuisance is the conduct's effect on a reasonable person." *Chicago Flood*, 176 Ill. 2d at 204, 680 N.E.2d at 277.

¶ 85 Excessive noise can constitute a nuisance. *Id.* at 206, 680 N.E.2d at 278. For example, in *Dobbs*, the plaintiffs filed a complaint, alleging that the defendant, their neighbor, was operating a dog kennel and that the barking dogs—sometimes up to 100—were a nuisance. The trial court and appellate court agreed. The appellate court determined that the barking noise was "substantial," as the dogs barked at wildlife at all hours of the day and night, which affected the plaintiffs' use and enjoyment of their land. *Dobbs*, 401 Ill. App. 3d at 377, 929 N.E.2d at 39. The *Dobbs* court held that, when determining whether a noise was substantial, a court should "consider the effect it would have on a normal person of ordinary habits and sensibilities." *Id.* at 377, 929 N.E.2d at 40.

¶ 86 Although not a case involving a claim of private nuisance, *Aldrich v. Metropolitan West Side Elevated RR. Co.*, 195 Ill. 456, 466, 63 N.E. 155, 158 (1902)—a case discussed in the trial court and cited by the Hoffmans on appeal—contains the following language, which we find illuminating to the present issue:

> "Whatever damage plaintiff may have suffered in depreciation of the value of her property was of the same kind and character as that suffered by the public generally, and common to the owners of property in a large city, where noise, confusion, and the disturbance of quiet appear to be the necessary results of the activi-

ties of city life."

¶ 87 That language from *Aldrich* tracks the trial court's theory that to properly plead a claim of nuisance involving an activity that is otherwise an accepted part of everyday life within a particular community, a plaintiff must plead specific facts that distinguish the activity from the everyday and commonplace. In *Aldrich*, the plaintiff lived in a city. In this case, the plaintiffs, Rob and Trudy, live in an upscale, residential neighborhood. If they do not plead facts to distinguish the complained-of activity from the otherwise commonplace conditions of daily life in their particular community, they fail to establish a nuisance cause of action.

¶ 88 c. This Case

¶ 89 i. *Count II*

¶ 90 We conclude that the trial court did not err by dismissing count II pursuant to section 2-615. The Nuisances covenant prohibited activity that was either "noxious or offensive" or that "may be or become an annoyance or nuisance to the neighborhood." The court determined that "an activity such as typical children's sporting activities objectively isn't noxious or offensive." We agree. Children playing basketball at reasonable hours is neither "noxious" nor "offensive." Although such playing clearly annoyed Rob and Trudy, their subjective annoyance is insufficient to constitute a violation of the Nuisances covenant. Instead, an objective standard applies, pursuant to which we conclude that no objectively reasonable person would find the basketball playing alleged by Rob and Trudy to be "an annoyance or nuisance," such that the Nuisances covenant would prohibit it. As explained in more depth below, Rob and Trudy did not plead sufficient facts to distinguish the Hoffmans' basketball playing from the sort generally expected in a residential neighborhood such as Devonshire.

¶ 91 The trial court did not err by dismissing count II pursuant to section 2-615 of the

Code.

¶ 92 ii. *Count III*

¶ 93 We conclude that the trial court did not err by dismissing count III pursuant to section 2-615.

¶ 94 Although we agree with Rob and Trudy that a claim of nuisance is generally a fact-based inquiry, we disagree with their further contention that, therefore, a claim of nuisance is *never* appropriate for dismissal under section 2-615. Instead, "The degree of specificity required to sufficiently plead a cause of action in any case is difficult to determine and is dependent upon the individual circumstances of each case." *Borcia*, 2015 IL App (2d) 140559 ¶ 38, 31 N.E.3d 298. Therefore, we evaluate Rob and Trudy's counts II and III to determine whether they pleaded sufficient facts to survive a section 2-615 motion to dismiss, *within the individual circumstances of this case*.

¶ 95 Rob and Trudy argue that the trial court failed to properly apply the standard applicable on a section 2-615 motion, namely, that a cause of action should be dismissed under section 2-615 only if "it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to recovery." (Internal quotation marks omitted.) *Jimmy John's*, 2013 IL App (4th) 120139, ¶ 25, 988 N.E.2d 984. Although we agree with Rob and Trudy's statement of the law, it is incomplete. The cited rule must be read in conjunction with the rule that conclusory statements of fact will not be accepted as true. *Hanks*, 2011 IL App (1st) 101088, ¶ 17, 959 N.E.2d 728; see also *Patrick Engineering*, 2012 IL 113148, ¶ 31, 976 N.E.2d 318 ("[A] court must accept as true all well-pleaded facts, as well as any reasonable inferences that may arise from them [citation], but a court cannot accept as true mere conclusions unsupported by specific facts [citation]."). If a claim does not allege sufficiently specific facts, it is appropriately dismissed pursuant to section

2-615.

¶ 96 The trial court appropriately dismissed Rob and Trudy's nuisance claims because Rob and Trudy failed to plead specific facts that would distinguish the Hoffmans' basketball playing from the normal, everyday play that is expected from neighborhood kids.

¶ 97 The specific facts that Rob and Trudy did plead to distinguish the Hoffmans' play were contradicted by Rob and Trudy's own attachment. Rob and Trudy alleged that the Hoffmans' basketball playing "occurs from 7 am until after 10 pm on any given day and occurs year round." However, the attachment to their second amended complaint—which logged the Hoffmans' basketball playing from December 2013 to September 2015—contained only one instance in which the Hoffmans played basketball after 10 p.m. That entry alleged that on August 12, 2014 (a Tuesday), the Hoffmans played basketball from 9:55 p.m. until "about" 10:05 p.m. The remainder of the entries document normal and healthy outdoor play by the Hoffmans at reasonable hours. Although Rob and Trudy argue that the log was not a complete record of the Hoffmans' basketball playing, that line of reasoning is inapposite. It was Rob and Trudy's burden to plead sufficient facts to distinguish the Hoffmans' play from the normal, everyday occurrences that a person should reasonably expect to encounter in a residential community such as Devonshire. Rob and Trudy failed to meet that burden.

¶ 98 For the foregoing reasons, we conclude that the trial court did not err by dismissing count III pursuant to section 2-615 of the Code.

¶ 99 3. *Count IV*

¶ 100 Rob and Trudy argue that the trial court erred by dismissing count IV pursuant to section 2-615 of the Code. We disagree.

¶ 101 In count IV, Rob and Trudy alleged that the basketball court was in violation of

the Allowable Structure covenant, which provided the following:

> "*No structure shall be erected, altered, placed or permitted to remain* on any building site other than one detached single family dwelling, not to exceed two stories in height above ground level at any point adjacent to the structure, a private garage for not more than four (4) cars (unless a variance is obtained from the Architectural Committee allowing a different number), *and other accessory buildings incidental to residential use of the premises*." (Emphases added.)

Rob and Trudy argue that the basketball court was a "structure" prohibited by the Allowable Structure covenant because it did not meet any of exceptions for a "single family dwelling," a "garage," or "other accessory buildings."

¶ 102 Rob and Trudy's argument on this point is made in the alternative to their argument concerning count I. As to count I, Rob and Trudy argued that the basketball court was a "building" subject to the 10-foot set-back provision of the Building Location covenant. In their argument on count IV, Rob and Trudy argue that the basketball court is *not* an "accessory buildings," and, therefore, is prohibited by the Allowable Structure covenant's ban on "structure[s]."

¶ 103 To decide this issue, we must first determine whether the basketball court was a structure. Black's Law Dictionary provides the following definition of "structure":

> "**1.** Any construction, production, or piece of work artificially built up or composed of parts purposefully joined together <a building is a structure>. **2.** The organization of elements or parts <the corporate structure>. **3.** A method of constructing parts <the loan's payment structure was a financial burden>." Black's Law Dictionary 1436 (7th ed. 1999).

¶ 104 Whether we refer to the Hoffmans' concrete basketball court as such or, alterna-

tively, as a “patio” or “porch,” makes no difference. It is not a “structure.” According to Black's, a structure is, first of all, a “construction, production, or piece of work.” *Id.* The Hoffmans' basketball court certainly meets at least one of those criteria. However, the basketball court does not meet the definition of “structure” because it was not “built up,” or “composed of parts purposefully joined together.” *Id.* The concrete basketball court was poured flat on the ground. It was not “built up” as, for instance, a building or fire pit or flagpole might be. Nor was the basketball court “composed of parts.” *Id.* Instead, it was a contiguous mass. There were no separate parts to compose. To borrow an analogy from the trial court in this case, the basketball court was basically an enhanced patch of dirt.

¶ 105 The second two definitions of “structure” provided by Black's are inapposite to this case. The second entry—”[t]he organization of elements or parts”—refers to a structure in the abstract sense, *e.g.*, a corporate structure. *Id.* That definition is unhelpful to determining whether a *physical entity* is a structure. For that reason, we disagree with the holding of *Hansen v. Orth*, 247 Ill. App. 3d 411, 414, 617 N.E.2d 357, 360 (1993), which defined a “structure” as “something having a definite or fixed pattern of organization,” on its way to concluding that “a light pole may be a structure wherever English is spoken.” Finally, Black’s third entry for “structure”—”[a] method of constructing parts”—refers to a method or process, which, again, is not a physical thing. Black’s Law Dictionary 1436 (7th ed. 1999).

¶ 106 Further, we disagree with the following argument Rob and Trudy raised at the January 2016 hearing on the Hoffmans’ combined motion to dismiss the second amended complaint:

> “Restrictive covenants don’t specifically say what is restricted. They specifically say under what conditions certain things are allowed. Anything that’s not

necessarily—that's not specifically allowed by those covenants is necessarily restricted. That's the nature of restrictive covenants."

To the contrary, "Covenants should be strictly construed so that they do not extend beyond that which is expressly stipulated; all doubts must be resolved in favor of the free use of property and against restrictions." *Neufairfield Homeowners Ass'n*, 2015 IL App (3d) 140775, ¶ 16, 42 N.E.3d 941.

¶ 107 We conclude, as a matter of law, that the Hoffmans' basketball court, as described in the pleadings, is not a "structure" under the Building Location covenant and, therefore, did not violate that covenant. As a result, we affirm the trial court's dismissal of count IV pursuant to section 2-615 of the Code for failure to state a claim.

¶ 108 III. CONCLUSION

¶ 109 For the foregoing reasons, we affirm the trial court's judgment.

¶ 110 Affirmed.