IN THE SUPREME COURT OF THE STATE OF MONTANA

Cause No. DA 22-0685

DIAMOND V CORPORATION, INC., a Montana corporation, GRANT KUBESH, MARY KUBESH, ZACK KUBESH and BARBARA KUBESH,

Plaintiffs/Appellants,

-vs-

BUCKHORN ENERGY OAKS DISPOSALSERVICES, LLC, a foreign limited liability company, and DAWSON COUNTY, a political subdivision of the STATE OF MONTANA,

Defendants/Appellees.

Appeal from the Montana Seventh Judicial District Court, Dawson County
Hon. Ashley Harada Presiding
DV 20-0029

APPELLEE BUCKHORN ENERGY OAKS DISPOSAL SERVICES, LLC'S RESPONSE BRIEF

Adam J. Tunning
Jordan W. FitzGerald
MOULTON BELLINGHAM PC
27 North 27th Street, Suite 1900
P. O. Box 2559
Billings, MT 59103-2559
406-248-7731
Adam.Tunning@moultonbellingham.com
Jordan.FitzGerald@moultonbellingham.com

Attorneys for Appellee Buckhorn Energy Oaks Disposal Services, LLC

Ben T. Sather
SATHER LAW, PLLC
100 North 27th Street, Suite 450
P O Box 1115
Billings, MT 59103
406-294-1700
ben@satherlawfirm.com

Attorneys for Appellants

Harlan Krogh
Benjamin J. Alke
CRIST, KROGH, ALKE & NORD, PLLC
2708 First Avenue North, Suite 300
Billings, MT 59101
hkrogh@cristlaw.com
balke@cristlaw.com

Attorneys for Appellee Dawson County

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF FACTS

There were no genuine issues of material fact in this case. Appellants Diamond V Corporation, and its shareholders Zach, Mary, Grant, and Barbara Kubesh,[1] sued with the hopes of preventing non-parties from using a public road to access a nearby business they do not like. As Judge Harada properly determined, there was no factual or legal basis for such claims.

Diamond V's ranch is located in Dawson County about 15-20 miles northwest of Glendive. The Kubeshes are its shareholders. Grant and Mary currently live on the ranch while their son Zach helps operate the ranch. Grant's sister Barbara grew up on the ranch but has lived out of state for years. (*See* Appellants' Brief, pp. 1-2.) County Road 454 runs through Diamond V's ranch. (*See* Appellants' Appx., p. 1.)

Appellee Buckhorn Energy Oaks Disposal Services, LLC ("Buckhorn") owns and operates a special use landfill approximately ten miles down the road from Grant and Mary Kubeshes' house on the ranch. (*See id.*, pp. 2-3.) Buckhorn is heavily regulated by the DEQ. It is not open to the general public and only accepts waste from qualified oil and gas producers. This lawsuit is just the latest example of the Kubeshes levying unsubstantiated complaints against the landfill and its customers.

[1] The Appellants may be referred to collectively hereafter as "Diamond V" or the "Kubeshes".

Buckhorn's customers travel to the landfill in one of three ways: (1) from the West on County Road 454, (2) from the South on County Road 437, and (3) from the East on County Road 454. The only route in which the trucks driving to the landfill pass the Diamond V ranch is when they are coming from the East on County Road 454. (*See e.g.* Dkt. 18, Buckhorn's Brief in Support of Summary Judgment, pp. 2-3.)

In 2021, Buckhorn averaged just 3.1 total trucks per day visiting the landfill, with many of those trucks using one of the two other routes that do not pass the Diamond V ranch. (*Id*., p. 5.) In other words, only 1-2 trucks per day use the public road past the Kubesh property to access the landfill. Nevertheless, Diamond V is arguing the traffic on the public road past their ranch is negligent, a breach of contract, and constitutes a nuisance. The Kubeshes never submitted any evidence to support such claims. (*See* Appx., pp. 8-9, 11-13.)

Just as they did in the lower court, the Kubeshes' Opening Brief relies on nothing more than their own conclusory statements, set forth in their discovery responses, that the traffic on the road is generally disagreeable to them. (*See* Appellants' Brief, pp. 2-5.) A closer look at the record, however, shows the Kubeshes were unable to set forth "particularized facts" sufficient to avoid summary judgment. *See e.g. Wallace v. Law Offices of Bruce M. Spencer, PLLC,* 2021 MT

252N, ¶ 8, 405 Mont. 541, 496 P.3d 545 (citing *Thomas v. Hale*, 246 Mont. 64, 67, 802 P.2d 1255, 1257 (1990).

For starters, Diamond V expressly admits it has not kept track of the trucks using the road past their place to access the landfill. (Dkt. 18, Exhibit 11 at p. 95:7-9.) Nevertheless, their Brief begins with an unsupported and demonstrably false statement that "Since 2013, more than 71,000 semi-truck trips" have passed their ranch on the way to the landfill. (Appellants' Brief, p.2.) Seventy-one thousand, though, refers to the number of *pages* Buckhorn produced in discovery relating to "load tickets" which Buckhorn used to track the trucks entering the landfill. (*See e.g.* Appx., p. 35.) It went undisputed in the lower court, however, that only 26,000 trucks entered the landfill from 2014-2021 (as each truck had a few pages of paperwork attached to each visit) and, of course, many of those trucks would have used the other two routes that do not even pass the Diamond V ranch. (Dkt. 27, p. 2; *see also* Dkt 18, Exhibit 17, Affidavit of Mark Franks.)

Diamond V's false statement that 71,000 trucks have passed their ranch over the past ten years is a prime example of the exaggerated, unsupported, and fanciful statements the Kubeshes relied upon to avoid summary judgment. The actual undisputed and material facts show the Kubeshes do not have a claim.

The Kubeshes admitted they had no actual economic harm from the road or the traffic. (Dkt. 18, Exhibit 15, at Request for Production No. 11.) Instead, they only seek "general damages such as loss of enjoyment of life." (Appellants' Brief, p. 16.)

The Kubeshes alleged "general damages," though, arise solely out of their speculative fear and personal distaste towards the landfill, not an actual condition imposed by the traffic on this public road. (*See* Appx., pp. 11-13.) They explained that the truck traffic affects them through:

> The dust that it creates, I guess the noise, the unknown of what is in these trucks going to the disposal that could affect our property from a pollution standpoint later on or our own personal health, so...
>
> (Dkt. 23, Exhibit 1 at p. 65:9-15.)

Of course, the Kubeshes' speculation about the "unknown" is easily dismissed as speculation. Their objections to the tactile road conditions like dust, noise, etc., arising from the 1-2 trucks per day using the road, though, are baseless too.

During discovery, they failed to submit any evidence showing unreasonable dust, noise, or light coming from trucks headed to the landfill. (*See* Appx., p. 12.) In fact, they expressly admitted the road is in the same "condition that it was prior to" the landfill opening. (Dkt. 18, Exhibit 11 at pp. 84:13-85:12; 88:12-15.) Grant Kubesh even acknowledged the road conditions were irrelevant – his family was simply objecting to these non-party trucks' ability to use this public road in the first place:

> Q: I thought you testified earlier that additional maintenance wouldn't help alleviate any of the issues. Do I have that right?
>
> A: Yes
>
> …
>
> Q: Would you agree with me that there's ways to maintain a road that would allow for the amount of truck traffic that this road takes?
>
> A: Yes. I guess my mind is still in the fact of our deeded property is where this road is. It is not on a county section line.
>
> Q: So, Grant, the issue is it's not the condition of the road. You just don't like these trucks driving through your yard. Is that fair for me to say?
>
> A: That's fair.

(Dkt. 18, Exhibit 14 at p. 40:3-6, 41:7-16.)

Indeed, the Kubeshes were pressed time and time again to explain what exactly Buckhorn or the County were doing wrong or how they could fix the situation. Diamond V did not have a response:

> Q. You said you're concerned of the unknown about the landfill. Is that right?
> A. Right.
>
> Q. And again, you have no evidence that it's contaminated anything. Is that accurate?
> A. No evidence has been given to us.
>
> Q. And you have no evidence that the landfill is not compliant with all governmental regulations?
> A. No evidence has been given to us about that, no.
>
> …

Q. But again, you told me you don't have any evidence that it's a health hazard.
A. We have not been provided any evidence of the disposal being a health hazard.

…

Q. Do you have any evidence that [the DEQ is] not doing their job [regulating the landfill]?
A. I've never had any evidence provided to me.

…

Q. Do you have any evidence that [the County is] not doing their part?
A. I've never had any evidence provided to me.

…

Q. Do you have any evidence Buckhorn is not operating safely?
A. I've never had any evidence of them not doing that.

…

Q. Do you have any evidence that the dust suppressant being used on your road has any poisonous toxins or carcinogens?
A. We have not been provided any evidence of that.

(Dkt. 23, Exhibit 1 at pp. 64-74.)

In the end, the Kubeshes cannot hide from the fact this case had nothing to do with the negligent use or operation of the road by anyone. Instead, their case was simply a self-serving attempt to prevent Buckhorn's customers from using a public road by their ranch:

Q: Yeah, I need to understand better what you – in your mind what it means to eliminate the nuisance.

> A: To eliminate the nuisance, we have to be compensated monetarily, and the truck traffic needs to disappear. We don't see any way that Buckhorn or the County could relieve us from the trauma that has been placed on us because of the truck traffic, the constant fear of safety, the materials that they're hauling into the disposal itself.

(Dkt. 18, Exhibit 11 at p. 24:4-25:12.)

This campaign by the Kubeshes to shut the landfill down is nothing new and has been ongoing since it first opened in 2013. In January of that year, a local farmer submitted an application to the DEQ to open the landfill. (Dkt. 18, Exhibit 2.) The application was publicly noticed, public comment was taken, concerns over the comments were addressed, and the DEQ issued the license in February 2013. (*Id*., Exhibit 3; *see also* Appx., pp. 2-3.)

The landfill opened in June 2013 and the Kubeshes immediately began harassing the drivers of the trucks passing their ranch and submitting complaints to the Dawson County Commissioners. (*See e.g.* Dkt. 18, Exhibits 4 and 5.) The County Commissioners investigated the Kubeshes' complaints and took all reasonable measures to resolve them. (*Id*., Exhibit 6; *see also* Appx., pp. 2-3.)

Buckhorn purchased the landfill in 2014 and has owned and operated it ever since.

On February 20, 2015, with the two-year statute of limitations for a nuisance approaching, the Kubeshes filed a lawsuit against the DEQ, specifically complaining about the impact of Buckhorn's customers using the road by its ranch:

> Prior to opening of the Oaks Landfill the volume of traffic on the road 454 near the Kubeshes' land average less than 20 vehicle trips per day, mainly pickup trucks and a few cattle or grain trucks. Almost immediately upon the opening of the Oaks Landfill, Kubeshes noticed a significant increase in the volume and character of the traffic. Kubeshes conservatively estimate that the frequency of traffic on the road past their house has increased by a factor of three or more, or to at least 60 trips per day. In addition, the type of vehicle and type of driver has changed. In the past most vehicles were pickup trucks driven by neighbors and an occasional farm truck. Now, overloaded oilfield semis with lost and speeding drivers are the norm, and traffic occurs all twenty-four hours of the day. Almost all of the Oaks Landfill-bound traffic on Road 454 exceeds 35 miles per hour, in violation of the permit. This increase in the amount and type of traffic due to opening of the new industrial facility on Road 454 - the Oaks Landfill – has adversely affected Kubeshes' use and enjoyment of their property and has caused damage to the Kubeshes' property.

(Dkt. 18, Exhibit 7, ¶ 29; *see also* Appx., p. 3.) Diamond V's 2015 complaint pointed out that Buckhorn was subject to a DEQ approved "Operations and Maintenance Plan" which addressed travel to the landfill so they sought to compel the DEQ to "regulate the transport of E&P waste" and "devise a [different] traffic management plan" that bound Buckhorn and the County. (Dkt. 18, Exhibit 7, ¶¶ 20-27 & 40-47.)

The Kubeshes, though, chose not to name Buckhorn or the County in this lawsuit. (*See* Appx., p. 3) Nevertheless, on October 5, 2015, Buckhorn updated its Operations and Maintenance Plan which included a section addressing Diamond V's concerns about road maintenance and use. (Dkt. 18, Exhibit 9, page 10 and Appendix D.)

Following this update to Buckhorn's Operations and Maintenance Plan, on April 28, 2016, Diamond V and the DEQ entered into a settlement agreement dismissing the lawsuit "with prejudice." (Dkt. 18, Exhibit 10.) Under the terms of the agreement, the DEQ paid Diamond V a cash sum and implemented new regulations on trucks traveling to the landfill to ensure they were covered by a tarp. (*Id*.; *see also* Appx., p. 3.)

Conspicuously, the Kubeshes never identified a single event from April 28, 2016 (the dismissal of their first lawsuit), through the initiation of this current lawsuit on April 22, 2020, to justify the filing of more litigation.[2] The Kubeshes' own Appendix on appeal is illustrative of this fundamental defect. For example, they continue to rely on pictures of a truck spill which occurred way back in 2013 or 2014 and which did not even take place on their ranch. (*See e.g.* Appx., pp. 72 and 76.)

STANDARD OF REVIEW

This Court reviews an order granting summary judgment *de novo*. *Oliver v. Stimson Lumber Co.*, 1999 MT 328, ¶ 21, 297 Mont. 336, 993 P.2d 11 (citation omitted). It first determines whether issues of material fact exist and, if not, whether the moving party is entitled to judgment as a matter of law. *Id.*

[2] In fact, the undisputed facts derived in this case show traffic to the landfill has been significantly and consistently decreasing since 2016 and this might now be the "best" road in the county thanks to Buckhorn and the County's investment. (*See, e.g.,* Dkt. 18, pp. 5-6.)

The burden is on the movant to demonstrate that no genuine issue of material fact exists. *Abraham v. Nelson*, 2002 MT 94, ¶ 10, 309 Mont. 366, 46 P.3d 628. Once this has been accomplished, the burden then shifts to the non-moving party to "come forward with substantial evidence raising a genuine issue of material fact." *Thomas, supra*, 246 Mont. at 66-67, 802 P.2d at 1257 (citations omitted). "[T]he non-moving party must set forth *specific facts* and cannot simply rely upon their pleadings, nor upon speculative, fanciful, or conclusory statements." *Id.* at 67, 802 P.2d at 1257 (emphasis in original) (citation omitted).

SUMMARY OF ARGUMENT

The Kubeshes are seeking to expand Montana law by creating a new cause of action which would allow them to usurp the County's regulation of its roads and the DEQ's regulation of landfills and impose unprecedented restrictions on a private business's customers who are not even parties to the lawsuit.

Prior to this action, the Kubeshes had already made complaints to the County when this landfill opened in 2013 and sued the DEQ to initiate additional regulations on Buckhorn's customers in 2015. These issues were resolved and there are no facts supporting a new lawsuit now.

As Judge Harada discussed in her Order, the Kubeshes generalized complaints about traffic on a public road to a private business do not give rise to a colorable

claim. Even if they did, the statutes of limitations and doctrines of claim and issue preclusion would bar the Kubeshes' claims.

ARGUMENT

I. The District Court correctly granted Buckhorn and the County summary judgment.

Judge Harada issued a detailed and thoughtful Order granting summary judgment. It should be affirmed.

A. The *Simpkins* case does not support the Kubeshes' nuisance claim.

The Kubeshes begin their appeal by arguing the District Court erred in failing to evaluate the nuisance claim under the standards set forth in *Simpkins v. Speck*, 2019 MT 120, 395 Mont. 509, 443 P.3d 428. *Simpkins*, though, does not support the Kubeshes' position on appeal. In fact, the case reinforces the very reasons summary judgment had to be granted here.

In *Simpkins*, a dispute arose between neighbors concerning the overfeeding of birds on a small urban lot in Helena. *Id.* at ¶ 2. The claimants presented "photographic and video evidence" that they "regularly found bird excrement on their property and on vehicles parked in their driveway, endured bird calls from dawn to dusk, and discovered feathers, dismembered birds, and bird carcasses in their yard. [They also] witnessed pigeons, magpies, and crows coming to and from a large patch of ground along their shared property line where [the neighbor] spread feed on the ground." *Id.* at ¶¶ 3 and 5.

Following a bench trial, the Justice Court determined the neighbor was "negligent in her bird feeding and caused a nuisance" and enjoined her from feeding birds within 100 feet of the shared property line. *Id.* at ¶ 5.

On appeal, this Court reviewed the factual finding for clear error and determined the lower "court did not manifestly abuse its discretion in deciding to issue injunctive relief." *Id.* at ¶¶ 11-16. But, this Court did find error in the lower court issuing such a broad injunction on the neighbor's private property right to feed birds. Citing *Kasala v. Kalispell Pee Wee Baseball League*, this Court stated:

> …if a nuisance is private and arises out of the particular manner of the operation of a legitimate enterprise the court should [do] no more than to point to the nuisance and decree methods of adoption calculated to eliminate the injurious features.

Simpkins, ¶ 20. Accordingly, it held "[p]rohibiting all feeding was unnecessarily burdensome" to the owner's "reasonable enjoyment of her property and overly broad" and remanded for the consideration and entry of a more limited injunction. *Id.* at ¶ 21.

Simpkins actually supports the affirmation of the District Court for two reasons. First, there is a considerable disparity between the factual evidence submitted in *Simpkins* and the evidence submitted by the Kubeshes. In *Simpkins*, there was verifiable and tactile evidence that the claimants' urban home was being unreasonably inundated, within the applicable statute of limitations, with bird carcasses and feces. The Kubeshes did not support their nuisance claim with the

same type of admissible evidence. Rather, they hang their hat on mere conclusory and often misleading statements submitted in discovery. For example:

- The Kubeshes repeatedly assert 71,000 trucks travelled to the landfill prior to 2021. (Appellants' Brief, pp. 2, 10; *see also* Appx. p. 35.) It is undisputed, however, that only 26,000 trucks travelled to the landfill during that time period. (Dkt. 27, p. 2; *see also* Dkt 18, Exhibit 17, Affidavit of Mark Franks.)

- The Kubeshes repeatedly assert "toxic" waste is being transported to the landfill but admit they have no evidence of any environmental contamination or harm done by this supposed toxic waste. (Appellants' Brief, pp. 10, 12; Dkt. 23, Exhibit 1, pp. 64-74; *see also* Appx., pp. 11-12.)

- The Kubeshes assert they are worried about the "safety" of their family, livestock, and pets but they do not cite a single example when any of them have been harmed by the traffic. (Appx., p. 37.)

- The Kubeshes allege their equipment would be covered with a "light layer of dust" during unspecified periods of "booming oilfield activity." (Appx., p. 37.) The Kubeshes did not produce any images of this "light layer" of dust or specify when it accrued, except to make a vague reference to the Bakken boom which ended back in 2015.

- The Kubeshes complain about the "odor of spills" on their property which are "easy to observe" but no images or documentation of such spills were produced. (Appx., p. 37.)

The only materials the Kubeshes submitted to support their conclusory and often misleading statements was an array of random pictures of the road past their ranch. (*See e.g.* Appx. 34-71.) But, it is not clear who took the pictures, when they were taken, or what they represent. Some of the pictures are of truck spills in 2013-2014 on property they do not even own (*see e.g.* Appx. pp., 72 and 76), some pictures

show trucks harmlessly driving on a perfect-looking dirt road (*see e.g.* Appx. pp. 42 and 55), some show the innocuous application of magnesium chloride, which is the standard product for dust suppression on dirt roads (*see e.g.* Appx. p. 58), while some even show dead calves which the Kubeshes initially blamed on the road before retracting that allegation (*see e.g.* Appx. pp. 67-68). The Kubeshes never established the "genuineness, relevance [or] contents" of these exhibits. *See Alfson v. Allstate Prop. & Cas. Ins. Co.*, 2013 MT 326, ¶ 12, 372 Mont. 363, 313 P.3d 107. Therefore, these various exhibits should not be considered and, even if they were, they fail to create a genuine issue of material fact.

While parsing all of this information on an appeal can seem burdensome, this Court's discussion in *Sprunk v. First Bank Sys*., is especially helpful in clarifying the Kubeshes' fundamental failure to submit supporting evidence. 252 Mont. 463, 830 P.2d 103 (1992). In *Sprunk,* a customer sued the parent company of his bank for fraudulent misrepresentations arguing the parent was the agent and alter-ego of the bank. In support of that position, he relied on "a large appendix containing hundreds of pages of depositions, an annual report and other correspondence." *Id*. at 466. Even though he submitted a lot of documented evidence to support his claim, no genuine issue of fact existed. This Court explained:

> The determination of the existence of genuine issues of material fact is one that is not always easily ascertained…

> However, mere disagreement about the interpretation of a fact or facts does not amount to genuine issues of material fact…
>
> Sprunk recites facts with his own interpretations and conclusions that only carry the title of disputed issues of material fact, but do not amount to such…
>
> For example, [Sprunk alleges his correspondence with the bank should be construed as correspondence with the parent company itself. The parent company does not dispute the existence of the correspondence but disputes whether it can be imputed on them]…this is a prime example of a dispute over factual interpretation and one that is properly handled by the District Court in a summary judgment proceeding.
>
> Further, we note that Sprunk regularly paraphrased and quoted various sources in his briefs which were not always accurate…

Id. at 466-468.

Just like the claimant in *Sprunk*, the Kubeshes set forth a bunch of "interpretation and conclusions," cite to a pile of documents in support of those conclusions, often inaccurately report what is in the documents, and then conclude there should be genuine issues of material fact preventing summary judgment.

As set forth in the Statement of Facts, *supra*, though, there are no disputed issues of material fact concerning the amount of trucks using the road or the condition of the road. Further, there is no factual support for a contention that the traffic has contaminated the Kubeshes' property or harmed any of their livestock, pets, or family members. The Kubeshes complain about incidental dust and noise from the extra 2 or 3 trucks that use the road per day, but cannot differentiate such

dust or noise from local ranch traffic and wholly fail to document the dust or noise they complain of.

As a result, the only "dispute" is over the interpretation of whether Buckhorn's few customers per day can use this public county road. That is not a genuine issue of material fact but rather an issue which is "properly handled by the District Court in a summary judgment proceeding." *Sprunk*, 252 Mont. at 466.

Support for that conclusion can also be found within the *Simpkins* case itself. While this Court refused to second guess the factual conclusions reached by the lower court in *Simpkins*, it did take the time to weigh in on what it viewed to be an "unnecessarily burdensome" infringement by the trial court on the neighbor's private property right to feed birds.

Here, the Kubeshes have consistently maintained "the truck traffic needs to disappear" entirely for the alleged nuisance to be resolved. (Dkt. 18, Exhibit 11, p. 24:4-25:12.) In other words, nothing short of closing this public road to Buckhorn's customers would satisfy their demands. Allowing such an affront to Buckhorn's private property rights would be inconsistent with the discussion in *Simpkins* and this Court's historical precedent.

For example, in *Kasala*, *supra*, 151 Mont. 109, (cited to with approval in *Simpkins*), the Court reversed a trial court order which found a Pee Wee baseball

league to be a nuisance. In doing so, this Court noted several critical characteristics about nuisances that are applicable to this case.

First, "it is the ordinary and reasonable person's complaint that should serve as a basis for what is a nuisance." *Id*. at 114. Here, it is telling that the Kubeshes are the only ones along the three routes to the landfill that are complaining about the traffic.

Second, "the law does not in every instance provide directly for compensation or fiscal redress for every *damnum* a man may sustain as a member of an organized society. It is established law that even an intentional interference with the use and enjoyment of land is not actionable unless the interference be both substantial and unreasonable." *Id*. at 114. In other words, you cannot merely plead a nuisance and expect a jury trial. Traffic on public roads is inescapable. Therefore, evidence of a "substantial and unreasonable" interference is necessary to create a colorable claim. No such showing was made in this case.

Lastly, "[t]he [claimants in *Kasala*] claim that traffic hazards and the improper use of streets and driveways for parking creates a public nuisance. These are matters subject to local police regulation and do not constitute a public nuisance." *Id*. The same can be said of the Kubeshes' complaints. If an isolated third-party truck violates some traffic regulation or other law while travelling along County Road 454, the Kubeshes can call the sheriff's office. Random and isolated traffic violations by

third-parties, though, do not give rise to an actionable nuisance over the entire road upon which they occur.[3]

In Montana, the definition of a nuisance expressly excludes statutorily authorized conduct like operating a regulated landfill or using a public road:

> Nothing that is done or maintained under the express authority of a statute may be deemed a public or private nuisance.

Mont. Code Ann. § 27-30-101(2). As a result, the Kubeshes' had the burden to show "the defendant was negligent in carrying out its statutory authority, resulting in a qualified nuisance." *Barnes v. City of Thompson Falls*, 1999 MT 77, ¶ 26, 294 Mont. 76, 979 P.2d 1275. This Court explained the weight of that burden as follows:

> …in bringing a qualified nuisance action, a plaintiff must do more than simply plead the existence of the statutorily authorized activity or facility claimed to constitute a nuisance; such plaintiff must, in addition, plead and prove the defendant's negligence and the resulting "injurious" consequences of that activity or facility to plaintiff's "comfortable enjoyment of life or property."

Barnes, 1999 MT 77, ¶ 25. In this case, the Kubeshes merely pled the existence of a nuisance but failed to show Buckhorn or the County were "negligent" in carrying out such statutorily authorized activities.

B. All elements of negligence are lacking.

[3] It should also be noted that while the Kubeshes made (and continue to make) various anecdotal allegations about trucks spilling materials near their ranch, trucks driving carelessly, drivers being rude, etc., none of these allegations was supported with admissible evidence.

The Kubeshes proceed to argue this negligence question is better left for the jury because they did not need expert testimony to establish the standard of care. (Appellants' Brief, pp. 14-16.) Judge Harada's order, though, found fundamental defects with all elements of the Kubeshes' negligence claim, not just the lack of expert testimony. (Appx., pp. 7-9.)

First, the Kubeshes were in fact required to retain an expert to "establish the degree of prudence, attention, and caution the defendant must exercise in fulfilling" its duty of care. *Dubiel v. Mont. Dep't of Transp.*, 2012 MT 35, ¶ 14, 364 Mont. 175, 179, 272 P.3d 66. As Judge Harada pointed out, the County's Road Superintendent testified that there was nothing wrong or out of the ordinary with the traffic or maintenance of the subject road. (Appx. pp. 7-8.) The Kubeshes had no evidence to rebut this testimony from a qualified professional in the field.

"To determine if a defendant breached a duty of care, a plaintiff must establish the standard of care by which to measure the defendant's actions." *Dubiel*, ¶ 14. The question presented in this case was whether Buckhorn or the County were being negligent in allowing a few extra trucks per day to use a public road? Defining the standard of care upon which to evaluate that question involves numerous interrelated issues. Landfills are a necessity, and both the public and private sector are tasked with evaluating the scope and location of such facilities. Governments then need to evaluate the budget and maintenance needed to provide access to such locations

based upon the type and amount of traffic using a road or multiple roads. Further, everyone, including private landfills, have property rights which are protected by law and can only be infringed upon certain conditions. These issues are all beyond the common knowledge of a juror.

Indeed, the issues with closing this county road to Buckhorn's customers are very similar to the questions faced by the Montana Department of Transportation in *Dubiel,* which addressed the closure of a public road in bad weather. *Id.* at ¶ 18. Among the factors presented by the DOT in *Dubie*l were:

> …the quantity of traffic that uses the road, the impairment to commerce and movement of goods if the road is closed, the safety concerns raised by diverting traffic to other roads and the capacity of the other roads to handle the increased traffic…

Id. at ¶ 15. Since these issues were "beyond the common experiences of jurors", the *Dubiel* Court required the plaintiff present expert testimony and Judge Harada was justified in requiring it here too.

Second, even if the Kubeshes had presented an adequately defined duty of care and evidence supporting its imposition on the Appellees, there would still need to be evidence of "*specific facts*" beyond mere "speculative, fanciful, or conclusory statements" to establish the remaining elements of breach, causation and damages. *Thomas, supra,* 246 Mont. at 67 (emphasis in original). No such evidence exists in this case.

As set forth in the Statement of Facts and Section I.A., *supra*, the Kubeshes cannot explain what Buckhorn or the County are doing wrong, i.e. how they are *breaching* the ill-defined duty of care. Diamond V's testimony shows there is nothing Buckhorn or the County could do differently, short of blockading all traffic headed for the landfill. (*See e.g.* Appx. p. 8, citing testimony of Grant Kubesh.)

The Kubeshes also have to admit that all trucks and vehicles using the road, whether they are bound for the landfill or not, will emit dust, noise, and light. Yet, as discussed above, there was no evidence the trucks to the landfill are any different than local trucks hauling hay or cattle from a neighboring ranch. In other words, the Kubeshes cannot show these few extra trucks are the cause of any damage when the same incidental dust, noise and light would continue following their removal anyway.

Therefore, the Kubeshes outright failed to present "particularized facts" supporting the elements of breach, causation and damages necessary to proceed with a claim for negligence and/or qualified nuisance. *See e.g. Wallace, supra*.

C. The Kubeshes' general damages claim was defective.

Even if a viable cause of action existed, the Kubeshes do not have recoverable damages. Judge Harada's summary judgment order devotes an entire section to explaining the Kubeshes' failure to set forth a workable route to an award of damages. (Appx., pp. 10-13.) The Kubeshes counter her conclusion by arguing the

issue of damages should go to the jury or, alternatively, the question of an injunction should be reconsidered. (Appellants' Brief, pp. 15-17.) While Montana law supports a broad array of general damages arising out of an initial injury, there is no support for the damages sought by the Kubeshes in this case.

This Court's recent opinion in *Rubin v. Hughes*, 2022 MT 74, 408 Mont. 219, 507 P.3d 1169, is instructive. In that case, this Court permitted a claim for parasitic general damages by holding: "[a] host nuisance claim demonstrating an interference with the enjoyment of property may support an award of parasitic emotional distress damages." *Id.,* ¶ 34 (emphasis added). But, just like the *Simpkins* case above, *Rubin* can be easily differentiated because it involved an actual tactile and unreasonable infringement of private property rights that was supported by substantial evidence.

In *Rubin*, it was shown through admissible evidence that one of the neighbors along a shared easement:

- cut down trees located on the other neighbors' property;
- ran string and spray painted the area, narrowing the road eight to ten feet and making it difficult to navigate;
- began flagging the property line to irritate the others;
- trespassed on the others' property;
- removed a barrier preventing him from trespassing;
- spied on the others by parking nearby and standing outside his truck listening to a conversation;
- cut the other off on the road and slowed down to "two miles an hour";
- used binoculars to watch the others while he worked on his property;
- continually repainted the property line;
- shouted "he was gonna get" one of the others and "spraying sputum" in his face;

- informed delivery drivers, inaccurately, they could no longer use the others' driveway; and
- followed the others in his truck while they were on a walk and hovered near the property line approximately 45 feet from the only window in the other neighbor's home.

Id., ¶¶ 4-17. The victims of this harassment further testified they suffered anxiety with physical manifestations and incurred actual therapy expenses.

Given this background, the *Rubin* holding which allowed the recovery of emotional distress damages makes sense. In the present case, however, the Kubeshes have not set forth anything remotely similar to the evidence presented in *Rubin*.

As Judge Harada pointed out, there is no evidence Buckhorn or the County have trespassed or otherwise harassed the Kubeshes in any way whatsoever. (Appx., p. 11.) Instead, the Kubeshes claim third-party truck traffic on a public road has traumatized them individually because of the "dust that it creates, I guess the noise, [and] the unknown of what is in these trucks going to the disposal that could affect our property from a pollution standpoint later on or our own personal health." (Dkt. 23, Exhibit 1, p. 65:9-14.)

Other vehicles using this public road cause dust and noise, though, and the Kubeshes never bothered to record the supposed dust or noise problem. Instead, the Kubeshes real claim for damages, in their own words, arises out of the "unknown fear someday that we will have a well contamination" and "a constant unknown that is related to the disposal itself on how it could impact us far out into the future." (*Id*.

at 67:24-68:17.) The Kubeshes acknowledge, however, this fear is not supported by any actual evidence of harm done by the landfill. (*See e.g. id*. at pp. 68-73.)

The Kubeshes' speculation that the landfill presents unknown dangers is not the same as the persistent and direct harassment outlined in *Rubin*. As Judge Harada determined:

> [The Kubeshes'] amorphous, non-severe, undocumented, and unsubstantiated claims are insufficient to support a parasitic emotional distress damage claim.

(Appx., p. 12.) Therefore, it was proper for the District Court to apply this Court's holding in *Kraft v. High Country Motors, Inc*., that "speculative damages that are not clearly ascertainable are not recoverable." 2012 MT 83, ¶ 61, 364 Mont. 465, 276 P.3d 908. Unlike *Rubin*, there simply was no "competent evidence" presented by the Kubeshes upon which an award of damages could be ascertained. *Id*., ¶ 59; *see also Victory Ins. Co.* v. *Mont. State Fund*, 2015 MT 82, ¶ 27, 378 Mont. 388, 344 P.3d 977 (affirming summary judgment award where claimant's damages evidence "lacked the specificity needed to establish a genuine issue for trial").

Lastly, the Kubeshes cannot resurrect their claim by requesting an injunction instead of general damages. As explained to the District Court:

- There is no claim as a matter of law so there is no basis for injunctive relief.
- The injunctive relief the Kubeshes demand (closing the road to Buckhorn's customers) would not affect Buckhorn or the County. Instead, it would force certain non-party trucking companies or oil and gas companies to drive an additional ten miles to get to the landfill (while their competitors that might

use the other routes are unaffected). A court's authority to issue injunctive relief is limited to "the parties to the action." Mont. Code Ann. § 27-19-105.

- It would be a "manifest abuse of discretion" and "unnecessarily burdensome" to tell a private property owner like Buckhorn which public roads its visitors may use. *See Simpkins*, 2019 MT 120, ¶¶ 19-21 ("An injunction should not... impose unnecessary burdens on lawful activity.").

- Redirecting traffic away from this road would consequently force more traffic through the other roads. Presumably, the landowners along those routes would object to Diamond V's selfish attempt to force all traffic by their properties and lead to more litigation.

(*See* Dkt. 27, pp. 17-18.)

D. There is no breach of contract claim.

Lastly, the Kubeshes argue their breach of contract claim should go to a jury because they were a third-party beneficiary of a road maintenance agreement between Buckhorn and the County. (Appellants' Brief, pp. 18-22, *citing* Appx. pp. 100-101.)

Before addressing that issue, it must be noted that the Kubeshes do not cite the contract language that was breached or point to any events supporting an allegation that some part of it was breached. Meanwhile, the County and Buckhorn, the only named parties to the agreement, admit it has never been breached by either party. (*See e.g.* Dkt. 18, Exhibit 12, p. 20:10-14.) Accordingly, it does not matter whether the Kubeshes were a third-party beneficiary of the agreement or not, there is no *prima facie* breach of contract claim under the agreement in the first place. (*See* Appx., p. 13.)

Even if there was evidence of a breach of a specific term in the contract, this Court has already resolved the issue of whether the Kubeshes can be third-party beneficiaries of such an agreement. In *Williamson v. Montana Pub. Serv. Comm'n*, several individuals sued for breach of contracts between Northwestern Energy and several cities concerning streetlights. 2012 MT 32, ¶ 19, 364 Mont. 128, 272 P.3d 71. Like the Kubeshes here, those individuals argued they were the intended beneficiaries of the lighting contemplated in the agreements. *Id.* at ¶ 40. But just like here, the individuals in *Williamson* failed "to identify specifically what provision of" the agreement they were trying to enforce. *Id.*

Moreover, this Court noted that a "plaintiff cannot assume that he is an intended third-party beneficiary; rather, he must show from the face of the contract that it was intended to benefit him." *Id.* While street lighting ostensibly benefitted the residents of the cities, just as road maintenance has a benefit to the residents of Dawson County, this fact alone was not sufficient to acquire standing to enforce the agreements themselves. *Id.*

Therefore, the Kubeshes cannot enforce the terms of the road maintenance agreement. Even if they could, they present no evidence the agreement was breached.

E. The statutes of limitations and doctrines of claim preclusion and issue preclusion are additional justifications for granting summary judgment.

The statutes of limitations and doctrines of claim preclusion and issue preclusion are also a complete bar to the Kubeshes' claims. (*See e.g.* Dkt. 18, pp. 8-16.) Since there were other valid bases to award summary judgment, Judge Harada did not reach these issues. Nevertheless, this Court will "affirm a district court decision if the right result was reached" even if the result was justified by a different reason. *Brilz v. Metro. Gen. Ins. Co*., 2012 MT 184, ¶ 30, 366 Mont. 78, 285 P.3d 494. Therefore, the following issues also present full and independent bases for affirming the District Court.

1. The Statute of Limitations.

In the Kubeshes' Brief, they specifically argue they should "be permitted to recover both past and prospective damages" by citing this Court's opinion in *Christian v. Atl. Richfield Co.,* 2015 MT 255, ¶ 18, 380 Mont. 495, 358 P.3d 131. (Appellants' Brief, p. 16.) Such prospective damages, however, are only available for a "permanent" nuisance. *Id.* When a nuisance is "permanent", "the limitations period begins to run from the completion of the structure or thing which constitutes or causes the nuisance." *Id*. (internal quotations omitted.)

In this case, there is no dispute the landfill opened in 2013 and trucks immediately began traveling to it on the road past the Kubesh ranch. Therefore, the two-year statute of limitation for nuisance ran in 2015. *See* Mont. Code Ann. § 27-2-207. At worst, the claims were exhausted in 2016 upon the expiration of the three-

year statute applying to tort claims. *See* Mont. Code Ann. § 27-2-204; *see also Tin Cup Cty. Water &/or Sewer Dist. v. Garden City Plumbing & Heating, Inc.*, 2008 MT 434, ¶ 26, 347 Mont. 468, 474, 200 P.3d 60 (applying tort statute to contract claim where "action sounds in tort").

While limited traffic to Buckhorn's landfill continues to this day, that alone is not enough to toll the statutes of limitation under the "continuing tort doctrine." *Christian*, ¶ 18. This Court has stated:

> …the simple fact that the condition constituting a nuisance or trespass continues to exist does not itself suffice to toll the statute of limitations. The continuing tort doctrine requires us to consider whether a nuisance or trespass is temporary or permanent in character. A permanent nuisance or trespass is "one where the situation has 'stabilized'…
>
> …when distinguishing between permanent and continuing nuisances, each case must be determined upon its own peculiar circumstances by applying the considerations of abatability…
>
> …When no further abatement is reasonable, the injury is complete, and the injury is permanent….

Id. at ¶¶ 18, 20, 33. The situation presented here has stabilized and "no further abatement is reasonable" since the Kubeshes admit closing the road is the only option acceptable to them. Therefore, the alleged nuisance should be categorized as "permanent" under the peculiar circumstances of this case (not to mention because the Kubeshes themselves continue to seek "prospective damages" which are only

available for permanent nuisances.) If it is properly categorized as a "permanent" condition, then the statute of limitations ran years ago.

The Kubeshes have no justification for waiting seven years to file this claim when they were levying the same complaints from 2013-2015 (*see e.g.* Dkt. 18, Exhibit 5) and cannot cite a single damaging event which occurred after 2015. Instead, the only explanation for the timing of the current lawsuit is they now have buyer's remorse over the affirmative relief they acquired when they sued the DEQ over the exact same issues in 2015.

2. Claim Preclusion and Issue Preclusion.

The Kubeshes 2015 lawsuit against the DEQ was nearly identical to the current lawsuit. In it, they expressly complained about the traffic to the landfill and sought to prevent it somehow. In response, the DEQ imposed new regulations on trucks traveling to the landfill, revisited Buckhorn's operations and maintenance plan concerning access to the landfill, and even paid the Kubeshes a small cash sum. (Dkt. 18, Exhibits 9-10.) After that, the Kubeshes' complaint against the DEQ about the truck traffic was dismissed with prejudice.

Claim preclusion "bars a party from relitigating a matter that the party already had the opportunity to litigate." *Adams v. Two Rivers Apts., L.L.L.P.*, 2019 MT 157, ¶ 8, 396 Mont. 315, 444 P.3d 415. It includes the following five elements: "(1) the parties or their privies are the same; (2) the subject matter of the present and past

actions is the same; (3) the issues are the same and relate to the same subject matter; (4) the capacities of the persons are the same in reference to the subject matter and to the issues between them; and (5) a final judgment has been entered on the merits in the first action." *Adams*, ¶ 8.

Issue preclusion "bars the reopening of an issue that has been litigated and determined in a prior suit." *Baltrusch v. Baltrusch*, 2006 MT 51, ¶ 15, 331 Mont. 281, 130 P.3d 1267. "The elements of issue preclusion are: (1) the identical issue raised was previously decided in a prior adjudication; (2) a final judgment on the merits was issued in the prior adjudication; (3) the party against whom collateral estoppel is now asserted was a party or in privity with a party to the prior adjudication; and (4) the party against whom preclusion is asserted must have been afforded a full and fair opportunity to litigate any issues which may be barred." *Denturist Ass'n of Mont. v. State, Dep't of Lab. & Indus.*, 2016 MT 119, ¶ 12, 383 Mont. 391, 372 P.3d 466.

Both doctrines apply in this case. In 2015, the Kubeshes expressly alleged the "increase in the amount and type of traffic due to the opening of the new industrial facility on Road 454 – the Oaks Landfill – has adversely affected Kubeshes' use and enjoyment of their property and has caused damage to Kubeshes' property." (*See* Dkt. 18, Exhibit 7, ¶ 29.) The gravamen of their current complaints is the same as it was in 2015. The Kubeshes contend the same truck traffic is adversely affecting their

use and enjoyment of the property. As a result, the Kubeshes are once again seeking to impose more regulations on the truck traffic to the landfill.

In 2015, though, the Kubeshes agreed to dismiss their claims against the DEQ with prejudice after securing new regulations on the traffic. The doctrines of claim preclusion and issue preclusion would be meaningless if they were allowed to bring new claims they admittedly "*could have"* brought in 2015 and also reopen the seminal issue of how to regulate truck traffic to landfills. *Adams*, ¶ 8. This Court has been clear that a "litigant cannot avoid preclusion simply by reframing the same issues." *Baltrusch*, ¶ 25.

The 2015 litigation directly confronted the increase in truck traffic, the traffic's impact on the Kubeshes, and how to regulate it going forward. Today, the Kubeshes are just reframing those same issues with claims of nuisance, negligence, and breach of contract against the County and Buckhorn. They are still claiming an effect on its use and enjoyment of the ranch and are still seeking further regulation of the traffic. Therefore, the "judicial policy that favors a definite end to litigation, whereby we seek to prevent parties from incessantly waging piecemeal, collateral attacks against judgment" is properly applied in this case. *Brilz,* 2012 MT 184, ¶ 18.

Claim preclusion applies because (1) the Plaintiffs were identical to the first action and Buckhorn/Dawson County were in privity with the DEQ since the landfill's Operations and Maintenance Plan, challenged in the first lawsuit,

incorporated their road maintenance agreement, (2) the subject matter of the first lawsuit mirrored the Kubeshes current complaints about the truck traffic on the Road, (3) the Kubeshes pursued the same issues to restrict the truck traffic to the landfill in the first lawsuit, (4) the capacities of the persons have not changed since the first lawsuit, and (5) the settlement and stipulation to dismiss with prejudice in the first lawsuit constitutes a final judgment. *Adams*, 2019 MT 157, ¶ 8.

Issue preclusion also applies because (1) the identical issue of regulating truck traffic to the landfill was resolved in the first lawsuit; (2) the stipulated dismissal with prejudice constitutes a final judgment; (3) the Kubeshes were parties to the prior adjudication; and (4) the Kubeshes were afforded a full and fair opportunity to litigate any issues concerning the use and regulation of the Road. *Denturist Ass'n of Mont.*, 2016 MT 119, ¶ 12, 383 Mont. 391, 372 P.3d 466.

These issues were not reached by the District Court because it found other reasons meriting summary judgment. In the event this Court determines any of those reasons were not sufficient to grant summary judgment, the doctrines of claim preclusion and issue preclusion, or the statutes of limitations, should be applied to reach the same result.

CONCLUSION

The Kubeshes have been complaining about the existence of a landfill down the road from their ranch since it opened in 2013. Despite all those years of

complaints, they failed to present admissible evidence supporting a claim for nuisance, negligence, or breach of contract. The nominal use of a public road by private citizens accessing a private business, without more, does not give rise to a claim. The District Court fully evaluated these issues in awarding Buckhorn and the County summary judgment. The order should be affirmed.

RESPECTFULLY SUBMITTED this 26th day of April, 2023.

MOULTON BELLINGHAM PC

/s/ Adam J. Tunning
By _____
Adam J. Tunning
Jordan W. FitzGerald
27 North 27th Street, Suite 1900
P. O. Box 2559
Billings, Montana 59103-2559

ATTORNEYS FOR APPELLEE
BUCKHORN ENERGY OAKS
DISPOSAL SERVICES, LLC

CERTIFICATE OF COMPLIANCE

Pursuant to Mont. R. App. P. 11, I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced, with left, right, top, and bottom margins of one inch; and that the word count calculated by Microsoft Word is 8,079 words, excluding the Table of Contents, Table of Authorities, Certificate of Compliance, and Certificate of Service.

/s/ Adam J. Tunning

_____

Adam J. Tunning or Jordan W. FitzGerald

4880-4362-9918, v. 2

CERTIFICATE OF SERVICE

I, Adam Tunning, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 04-26-2023:

Jordan Walter FitzGerald (Attorney)
27 North 27th Street, Suite 1900
P.O. Box 2559
Billings MT 59103-2559
Representing: Buckhorn Energy Oaks Disposal Services, LLC
Service Method: eService

Benjamin J. Alke (Attorney)
2708 1st Avenue North, Suite 300
Billings MT 59101
Representing: Dawson County
Service Method: eService

Harlan B. Krogh (Attorney)
2708 1st Avenue North
Suite 300
Billings MT 59101
Representing: Dawson County
Service Method: eService

Ben T. Sather (Attorney)
P.O. Box 1115
Billings MT 59103
Representing: Diamond V Corporation, Inc., Barbara Kubesh, Grant Kubesh, Mary Kubesh, Zach Kubesh
Service Method: eService

Electronically signed by Carrie Nance on behalf of Adam Tunning
Dated: 04-26-2023