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IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Case 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
Cause No. DV 20-0029

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I. <u>STATEMENT OF THE ISSUES</u>

Did the District Court err in granting summary judgment to Defendant/Appellee Dawson County on Plaintiffs/Appellants' claims for nuisance, negligence, breach of contract, and general damages?

II. <u>STATEMENT OF THE CASE</u>

The foregoing claims were asserted by Plaintiffs/Appellants Diamond V. Corporation, Inc., and its individual shareholders, Grant Kubesh, Mary Kubesh, Zach Kubesh and Barbara Kubesh (collectively "Diamond V" or "Kubesh Family") in their Complaint filed April 22, 2020.[1] (*See* Kubesh Appx., pp. 24-33). Appellee Dawson County moved for summary judgment on all claims pled against it on January 14, 2022. Appellee Buckhorn Energy Disposal Services, LLC ("Buckhorn") also moved for summary judgment on all of Plaintiff's claims against it. The District Court granted both respective Defendants/Appellees' Motions for Summary Judgment on September 29, 2022. Plaintiffs filed their Notice of Appeal on December 1, 2022.

[1] The original Complaint was filed by Diamond V Corporation. After the Filing of Appellees/Defendants' Motion for Summary Judgment, Appellants moved to join the individual Shareholders of Diamond V as named Plaintiffs and the District Court granted their motion.

III. FACTS

A. BRIEF OVERVIEW.

This case concerns traffic on County Road 454. Appellant Diamond V owns a ranch in Dawson County. The ranch is located along County Road 454, which has long been used by the public. In 2008, the County formally designated County Road 454 as a county road pursuant to § 7-14-2101, MCA. (*See* Dawson County Appx., pp. 1-6 and 7-10, Resolution No. 1058, March 27, 2008 and Resolution No. 1075, May 1, 2008). The Montana Legislature enacted that statute in 1999 to allow local governments to address such roads as county roads following a public hearing. *Id*. County Road 454 is a public right-of-way which is used by the general public in addition to Buckhorn.

In January 2013, Oaks Disposal applied to the Montana Department of Environmental Quality ("DEQ") for a permit to operate a specialized landfill ("Landfill"). (*See* Dawson County Appx., p. 11, Board of County Commissioners Minutes, January 8, 2013). The DEQ issued a license in February 2013 following public notice and comment. (*See* Dawson County Appx., pp. 12 and 13-18, Newspaper Notice, January 10, 2013 and License to Operate, February 14, 2013).

Appellee Dawson County entered into an Agreement (hereinafter the "Agreement" or "Road Maintenance Agreement") with Oaks Disposal on February 11, 2013, to ensure the integrity and maintenance of County Road 454 and several

other county roads that would be used to access the disposal facility. (*See* Dawson County Appx., pp. 19-20, Road Maintenance Agreement, February 7, 2013); (*See also* Dawson County Appx., pp. 24-25, Excerpts of Joe Sharbono Deposition, October 29, 2021). It entered a similar agreement with Buckhorn in 2014 after Buckhorn acquired the Landfill from Oaks Disposal, which provided that:

a. A maximum speed limit of 35-mph on all trucks travelling to and from the Oaks' Disposal waste disposal site.
b. Oaks Disposal agreed to ensure compliance with the 35-mph speed limit for all of its trucks.
c. If dust control is deemed necessary by Dawson County, Oaks Disposal agreed to be responsible for the purchase and application of dust control "according to the manufacturer's specs." The Dawson County Road Supervisor will deem which form of dust control is necessary and will monitor the application of any administered dust control.
d. Oaks Disposal agreed to provide Dawson County with any necessary material to repair or improve any issues with Road 454 as determined by the Dawson County Road Supervisor.
e. Dawson County agreed to perform regular routine maintenance of Road 454 in accordance with the blade operator's normal routine of the country road maintenance in the area.

(*See* Kubesh Appx., pp. 100-101, Road Maintenance Agreement, April 22, 2014). The Agreement applied to County Road 454 and several other county roads that could be used to access the Landfill. *Id*. There are three separate routes involving other county roads that can be used to access the Landfill and County Road 454 represents one segment of that route. *Id*.

B. **APPELLANTS COMPLAINED ABOUT TRAFFIC AS EARLY AS 2013 AND FILED SUIT AGAINST THE MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY IN 2015.**

The Landfill opened in June 2013. Diamond V and its owners, the Kubesh Family, raised complaints to the County regarding traffic on County Road 454 shortly thereafter. (*See* Dawson County Appx., pp. 21-23, Board of County Commissioners Minutes, September 3, 2013). Appellants, through counsel, also wrote a letter to the County in 2015 raising certain complaints concerning the road, including traffic and dust. (*See* Dawson County Appx., pp. 26-30, Letter to Dawson County from Diamond V's Counsel, March 27, 2015).

Appellants filed suit against the Montana Department of Environmental Quality ("DEA") in 2015. (*See* Dawson County Appx. pp. 31-52, Second Amended Complaint, August 6, 2015). Appellants and the DEQ settled the dispute in 2016. (*See* Dawson County Appx., pp. 53-55, Settlement Agreement, April 28, 2016). As a result of the settlement, DEQ implemented a new regulation on trucks traveling to the Landfill to ensure loads were covered while in transit. *Id.*; *see also* ARM § 17.50.523(2).

C. **APELLANTS ALLEGE ONLY A VAGUE, UNSPECIFED CLAIM FOR GENERAL DAMAGES.**

Appellants admit there is no evidence the Landfill or trucks have caused any contamination that needs to be cleaned up. (*See* Dawson County Appx., pp. 58-59, Excerpts of Diamond V Deposition, November 22, 2021). Moreover, traffic on

County Road 454 has significantly decreased in recent years. (*See* Dawson County Appx., p. 63, Loads Per Year, July 2014-2019). Buckhorn tracks the number of loads deposited at the Landfill. *Id*. Not all of the loads received by Buckhorn come via County Road 454, however, because there are other routes to access the Landfill. (*See* Kubesh Appx., pp. 100-101, Road Maintenance Agreement, April 22, 2014).

Appellants filed this suit in April 2020. (*See* Kubesh Appx., pp. 24-33, Plaintiff's Complaint for Declaratory Judgment, Injunctive Relief and Damages, April 22, 2020). Appellants alleged they suffered economic damages, including costs associated with relocating ranch operation in order to fully use and enjoy property. *Id*. at ¶¶ 41, 47, 57, 64, 70. However, subsequently, Appellants dropped any claim for special and/or economic damages. In supplemental responses to written discovery requests provided on October 21, 2021, Appellants represented that they "revised their damages claim in this matter and [are] not seeking special damages of any kind." (*See* Dawson County Appx., p. 66, Diamond V's Second Supplemental Responses to Buckhorn's First Discovery Requests, October 12, 2021). Appellants now seek an award of only general damages parasitic to their tort claims such as emotional distress and loss of enjoyment of life.

SUMMARY OF ARGUMENT

The District Court's Order granting summary judgment to Appellee Dawson County should be affirmed because no genuine issues of material fact exist as to any

of Appellants' claims. Appellants characterize each of their claims on appeal as presenting issues of material fact to support their contention that the issues should have been submitted to a jury. Appellee Dawson County disputes the presence of any jury questions in this case and maintains that all of Appellants' claims were properly dismissed by the district court as a matter of law.

Taking each of Appellants' claims on appeal in turn, Appellants' claim for nuisance against Dawson County is barred by statute and does not present any issues of fact necessitating presentation to a jury; Appellants' claim for negligence against the County is barred by the public duty doctrine and by the fact that Appellant has failed to establish a breach on the part of Dawson County; Appellants' breach of contract fails because Appellants are not third-party beneficiaries to the Road Maintenance Agreement between Appellees and because Appellant has provided no evidence of a breach; and, Appellants' claim for general damages and injunctive relief is moot because Appellants have not established a cognizable claim establishing liability on the part of Dawson County. Finally, although not relied on by the District Court in granting summary judgment to Appellees, the statutes of limitations provide an additional standalone basis to bar Diamond V's claims.

For the reasons contained herein, Dawson County respectfully requests that this Court affirm the District Court's grant of summary judgment on all of Appellants' claims against it.

IV. STANDARD OF REVIEW

A district court's summary judgment ruling is reviewed *de novo*. *Rolan v. New West Health Services*, 2022 MT 1, ¶ 17, 407 Mont. 34, 504 P.3d 464. Summary judgment is appropriate "when no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law." *Id*.; Mont. R. Civ. P. 56(c).

V. ARGUMENT

A. APPELLANTS DO NOT HAVE ANY COGNIZABLE CLAIMS AGAINST DAWSON COUNTY BASED SOLELY ON INCREASED TRAFFIC.

1. Diamond V's claim for nuisance is barred by statute.

Diamond V asserts that issues of material fact exist as to whether the traffic on County Road 454 is sufficient to constitute a nuisance, and that the district court erred by neglecting to analyze their nuisance claim under *Simpkins*, which provides, "an action that is otherwise lawful may create a nuisance depending on the circumstances..." *Simpkins v. Speck*, 2019 MT 120, ¶ 16, 395 Mont. 509, 443 P.3d 428 (citing *Barnes* v. City of Thompson Falls, 1999 MT 77, ¶ 16, 294 Mont. 76, 979 P.2d 1275).

In the Order Granting Defendants' Motions for Summary Judgment (the "Order") (*See* Kubesh Appx., pp. 1-17) on the claim of nuisance, the District Court first noted that "[a]ll the parties agree and concede that the licensing and operation of the landfill, the maintenance of road 454, and the trucks travelling on road 454

are statutorily authorized activities." (*See* Kubesh Appx., p. 6). In Montana, statutorily authorized activities are protected from being deemed a nuisance. *See* § 27-3101(2), MCA ("Nothing that is done or maintained under the express authority of a statute may be deemed a public or private nuisance."). The District Court then acknowledged, what Diamond V now claims the Court failed to acknowledge in its Opening Brief—that an otherwise lawful activity may constitute a nuisance in certain instances, if done negligently. (*See* Kubesh Appx., p. 7). (Citing *Barnes*, ¶ 25). The Court further reasoned that, since it is undisputed that we are dealing with a statutorily authorized activity in this case, "Diamond V must show that the behavior and/or actions of the County and Buckhorn either completely exceeded its statutory authority, resulting in a nuisance, <u>or that the defendants were negligent in carrying out their statutory authority, resulting in a qualified nuisance.</u> (*See* Kubesh Appx., p. 6) (citing Barnes, ¶ 26) (emphasis added). Because Diamond V. has not alleged that Dawson County exceeded its statutory authority in this case, the court analyzed Diamond V's claims under a qualified nuisance theory, again citing *Barnes*:

> …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 at ¶ 25. (*See* Kubesh Appx., p. 7).

As such, the District Court correctly noted that the burden shifts to Appellants to establish "beyond mere conclusory statements that Defendants' use or maintenance of the road and the landfill is negligent." (*See* Kubesh Appx., p. 7). In other words, to maintain a cognizable claim against Dawson County for nuisance liability, Diamond V must prove some sort of improper conduct or a failure to act. *See e.g.*, *Simpkins* at ¶ 15 (setting forth the elements of nuisance and negligence).

It is undisputed that the public has a right to use County Road 454 and that the traffic occurring on County Road 454 is legal. Mere traffic alone cannot form the basis of an actionable claim for relief under these circumstances. *See also* § 7-14-2101, MCA, *et seq.*; § 7-14-2127, MCA (counties may only *temporarily* limit or prohibit traffic, and only under certain circumstances). Because Appellants do not allege Dawson County exceeded its statutory authority, it must prove negligence to survive summary judgment. Because Diamond V failed to do so, the District Court should be affirmed.

2. Diamond V's Negligence Claim Fails Because Negligence Requires Proof of Duty and Breach.

Diamond V argues the District Court erred in granting summary judgment to Appellees on Diamond V's claim of negligence by holding that expert testimony is required to establish the standard of care for Appellees' use and regulation of County Road 454. (*See* Appellants' Opening Brief, p. 13). Diamond V proffers that whether

the road is negligently used, maintained, and regulated is a simple issue of fact better left in the hands of a jury. *See Id.*

Irrespective of that issue, Diamond V fails to address the fact that the District Court first analyzed the duty prong and found that Defendants owed no duty to Diamond V. (*See* Kubesh Appx., p. 8). The Court then noted, "[e]ven if the Court found that there was a duty owed to Diamond V by the County, the negligence analysis does not end there. The Court must then examine whether this duty has been breached…" before ultimately determining that the lack of expert testimony establishing standard of care provided further justification for granting summary judgment to Defendants. (*See* Kubesh Appx., pp. 8-9). Diamond V presents no argument on appeal as to why the District Court erred in finding that no special relationship existed between Defendants and Diamond V sufficient to establish a legal duty.

Because Diamond V has not established that Dawson County owes it a duty, and because, even if Dawson County did owe a duty to Diamond V, it has not provided sufficient evidence of a breach. The District Court's grant of summary judgment should be affirmed.

i. The Public Duty Doctrine Precludes a Claim of Negligence Against Dawson County for Lack of Legal Duty.

"A negligence cause of action entails four elements," specifically, "duty, a breach of that duty, causation and damages." *Eklund v. Trost*, 2006 MT 333, ¶ 32,

335 Mont. 112, 151 P.3d 870 (citation omitted). All four elements are necessary to sustain a cause of action for negligence. *Id*. (citation omitted). "The existence of a legal duty can be determined as a matter of law." *Id*. (citation omitted).

In evaluating negligence claims against a public entity or person, it is necessary to consider the public duty doctrine. *Eklund* at ¶ 33 (citation omitted). The doctrine provides that where a municipality owes a duty to the general public, that duty is not owed to any particular entity. *Prosser v. Kennedy Enterprises, Inc.*, 2008 MT 87, ¶ 18, 342 Mont. 209, 179 P.3d 1178 (citation omitted). The public duty doctrine "derives from the practical conclusions that a municipality would be mired hopelessly in civil lawsuits if it were held responsible for every infraction of the law." *Id*. (citation omitted). The public duty doctrine prevents individual members of the public from using tort liability to constrain unduly a municipality's discretion to use its limited resources to promote the general welfare. *Id*. (citation omitted). The rationale underlying the doctrine is that "a duty owed to all is a duty owed to none." *Nelson v. Driscoll*, 1999 MT 193, ¶ 21, 295 Mont. 363, 983 P.2d 972. Where a tort claim is made against a public body, such as a municipality, the public duty doctrine bars recovery unless a special duty is created by a "special relationship." *Prosser*, ¶ 19; *Nelson*, ¶ 22; *Eklund*, ¶ 34.

Here, the Public Duty Doctrine precludes Diamond V's claim of negligence against Dawson County, and Diamond V fails to address whether the public duty doctrine applies or whether, in its view, a special relationship exists.

Whether a special relationship exists is a question of law when the facts are undisputed. *Nelson*, ¶ 19. (citation omitted). Such a "special relationship" giving rise to a legal duty arises in one of four circumstances:

> (1) by statute intended to protect a specific class of persons of which the plaintiff is a member from a particular type of harm;
> (2) when a government agent undertakes specific action to protect a person or property;
> (3) by governmental actions that reasonably induce detrimental reliance by a member of the public; and
> (4) under certain circumstances, when the agency has actual custody of the plaintiff or of a third person who causes harm to the plaintiff.

Nelson, ¶ 22.

There is no "special relationship" between Dawson County and Diamond V. County Road 454 is a public road open for use by the public. See § 7-14-2101(1)(i), MCA. Diamond V wants Dawson County to reduce or eliminate the traffic on County Road 454. That traffic would then be forced to take one of the other routes to access the landfill, leading to an increase in traffic on other county roads which pass by other landowners. Dawson County does not owe a legal duty to meet the desires of one landowner at the expense of other landowners nearby. No "special relationship" exists. Diamond V does not identify any statute or other governmental

action that would give rise to the existence of a special relationship under the applicable law.

Lacking a "special relationship," the public duty doctrine precludes a claim of negligence against Dawson County for lack of legal duty. "[A] duty owed to all is a duty owed to none." *Nelson*, ¶ 21.

ii. Even if Dawson County Did Owe a Duty to Diamond V, it Has Failed to Establish Breach.

Diamond V presents the issue here as "whether the issue of Buckhorn traffic causing dust, noise, and light to enter Diamond V property is sufficiently beyond the common experience of the trier of fact." (*See* Appellants' Opening Brief, p. 14). It continues, "[i]f the use of Road 454 by Buckhorn traffic causes these conditions, it is reasonable to determine that the Road is negligently maintained. (*See Id*., p. 15). Therefore, it concludes that the District Court erred by granting summary judgment to Appellees because these questions should be presented to a jury. This argument misses the mark.

If Dawson County owed a duty to Diamond V, which it does not, the issue is not whether traffic on County Road 454 causes excessive dust, noise, and light as Diamond V asserts in its Opening Brief. (*See Id*., p. 14). Rather, the issue is whether Dawson County has maintained County Road 454 in a manner so outside of the applicable standard of care that it has unreasonably exasperated these alleged causes, resulting in injury to Diamond V. This determination is impossible to make without

expert testimony establishing the standard of care by which to measure Dawson County's actions in maintaining the road.

"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; in other words, she must establish the degree of prudence, attention, and caution the defendant must exercise in fulfilling that duty of care."; *Dubiel v. Montana Dept. of Transp.*, 2012 MT 35, ¶ 14, 364 Mont. 175, 272 P.3d 66; *Romans v. Lusin*, 2000 MT 84, 299 Mont. 182, 997 P.2d 114 (expert testimony was required to establish standard of care applicable to physical therapist's administration of functional capacities evaluation (FCE) on patient); *May v. ERA Landmark Real Estate*, 2000 MT 299, 302 Mont. 326, 15 P.3d 1179 (plaintiff's claim for professional negligence required the submission of expert testimony to prove the standard of care of a real estate broker); *Carlson v. Morton*, 229 Mont. 234, 745 P.2d 1133 (1987) (whether a lawyer breached the applicable standard of care in a legal malpractice suit required expert testimony); *Mont. Deaconess Hosp. v. Gratton*, 169 Mont. 185, 545 P.2d 670 (1976) (whether doctors breached the applicable standard of care in a medical malpractice suit required expert testimony); *Doble v. Lincoln Co. Title Co.*, 215 Mont. 1, 692 P.2d 1267 (1985) (whether a title insurance company breached a standard of care required expert testimony).

Here, Diamond V presented no evidence in the record regarding Dawson County's alleged negligent maintenance of County Road 454. Instead, it continues to dwell on the fact that it is annoyed by the impacts attributable to increased traffic on the public road and asserts that a jury should be able to determine whether such impacts constitute negligence. This misses the mark. Diamond V has not established a standard of care, nor has it pointed to any acts or omissions on the part of Dawson County that are beyond what a reasonable or prudent person would ordinarily have done on another comparable road in Montana. No evidence of negligence exists.

In its Order granting summary judgment to Appellees, the District Court pointed to the undisputed evidence in the record in holding that there were no issues of material fact regarding whether Dawson County's "use and regulation of the road were consistent with what a reasonable and prudent person would ordinarily have done on another comparable road in Montana." Order, p. 8. Citing the words of Grant Kubesh, the Court determined there was not sufficient evidence to support a negligence claim:

> Q. I thought that you testified earlier that additional maintenance wouldn't help alleviate any of the issues. Did I Have that right?
>
> A. Yes.

(*See* Dawson County Appx., pp. 71, Excerpts of Deposition of Grant Kubesh, November 23, 2021).

(*See* Kubesh Appx., p. 8).

It is undisputed that Diamond V conceded that additional maintenance would not help alleviate the impacts of the traffic they complain of. Furthermore, Diamond V has not presented any evidence or testimony—let alone expert testimony—that the road is negligently maintained by Dawson County aside from anecdotal testimony that traffic on the road causes dust, noise, and light. As such, it has failed to establish a standard of care and whether a breach occurred.

> Diamond V has provided no more than anecdotal testimony regarding causation and a link between the Defendants and alleged injuries. All vehicles traveling on dirt roads will cause dirt to be raised from the roadbed. All vehicles traveling on dirt roads using their headlights will cast their beams askance. All vehicles traveling on dirt roads will create noise. It is the role of the expert to identify, quantify, and assess these issues in order to establish whether a tort has been committed. Diamond V has not done so in any matter.

(*See* Kubesh Appx., p. 9).

Because Diamond V failed to establish that Dawson county owed it a duty and failed to establish a link between Dawson County and Diamond V's alleged injuries, the District Court should be affirmed.

3. Diamond V does not Have Standing to Assert a Claim for Breach of Contract nor Does it Present Any Evidence of a Breach.

Diamond V contends it is a third-party beneficiary of the Road Maintenance Agreement between Dawson County and Buckhorn, which it contends is a contract, and asserts that the District Court erred in concluding that Diamond V does not have

standing to sue for breach of the road maintenance agreement. This argument lacks merit and the District Court should be affirmed on this issue.

Diamond V is not a party to the Road Maintenance Agreement. (*See* Dawson County Appx., pp. 19-20, Road Maintenance Agreement, February 7, 2013). Generally, "[a] stranger to a contract lack standing to sue for breach of that contract unless he is an intended third-party beneficiary of the contract." *Turner v. Wells Fargo Bank, N.A.*, 2012 MT 213, ¶ 15, 366 Mont. 285, 291 P.3d 1082 (citations and internal quotation marks omitted). An intended third-party beneficiary is described as follows:

> (1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either
>
> (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or
>
> (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.

Turner, ¶ 17 (citations omitted); *See* also *Restatement (Second) of Contracts* §302 (1981).

"There is a plain distinction between a promise, the performance of which may benefit a third party, and a promise made expressly for the benefit of a third party." *Turner*, ¶ 18 (citation omitted). "A plaintiff cannot merely assume that he is an intended third-party beneficiary to a contract; rather, he must show from the face

of the contract that it was intended to benefit him." *Id*. (citations and internal quotation marks omitted). Otherwise, "incidental beneficiaries lack standing to enforce the contract from which they benefit." *St. John v. City of Lewistown*, 2017 MT 126, ¶ 33, 387 Mont. 444, 395 P.3d 486 (citations omitted); *Turner v. Kerin & Associates*, 283 Mont. 117, 127, 938 P.2d 1368, 1375 (1997) (citation omitted).

Diamond V contends it is a third-party beneficiary of the Road Maintenance Agreement between Dawson County and Buckhorn because the Agreement discusses maintenance. (*See* Appellants' Opening Brief, p. 18). Diamond V contends maintenance of the road is done to benefit all users of the road and landowners along the road. *Id*.

As a preliminary matter, Dawson County disputes that the Road Maintenance Agreement constitutes a contract that could impose any obligations on Dawson County. It arose from the effort of Buckhorn's predecessor to obtain a permit from DEQ to operate the Landfill. Regardless, assuming for the sake of argument that it does constitute a contract, Diamond V is not a party to the Agreement and does not fall within the narrow definition of a third-party beneficiary.

The Montana Supreme Court has "generally been reluctant to find that third parties are intended beneficiaries with a right of enforcement." *Deschamps v. Farwest Rock, Ltd*, 2020 MT 270, ¶ 18, 402 Mont. 15, 474 P.3d 1282 *citing Williamson v. Mont. PSC*, 2012 MT 32, ¶ 40, 364 Mont. 128, 272 P.3d 71 (holding

individuals did not have standing to bring complaint against entity providing city street lighting); *Diaz v. Blue Cross & Blue Shield*, 2011 MT 322, ¶¶ 23-24, 364 Mont. 151, 267 P.3d 756 (concluding that insured individuals did not have standing to sue state contractor administering the state's employee healthcare benefit plan); *Dick Anderson Constr., Inc. v. Monroe Constr. Co., LLC*, 2009 MT 416, ¶¶ 48-50, 353 Mont. 534, 221 P.3d 675 (finding no third-party enforcement rights where language of the contract precluded third-party beneficiary claims).

According to Diamond V, anyone who has used County Road 454 and all landowners along the road have standing to bring a claim for breach of contract under the road maintenance agreement. However, "[a] plaintiff cannot simply allege that it is an intended third-party beneficiary," and instead "must show 'from the face of the contract that it was intended to benefit [them].'" *St. John v. City of Lewistown*, 2017 MT 126, ¶ 33, 387 Mont. 444, 395 P.3d 486 (*citing Kurtzenacker v. Davis Surveying, Inc.*, 2012 MT 105, ¶ 20, 365 Mont. 71, 278 P.3d 1002). The Road Maintenance Agreement does not reference Diamond V or mention any third-party beneficiaries. (*See* Dawson County Appx., pp. 19-20, Road Maintenance Agreement, February 7, 2013). It is not apparent from the face of the Agreement that Diamond V is a third-party beneficiary.

This Court's case law "makes clear that simply expecting to benefit from the performance of a contract does not grant a non-party the intended third-party

beneficiary status necessary to enforce a contract." *Deschamps*, ¶ 18 (citations omitted).

At most, Diamond V and other users of the road (which includes any member of the public) are incidental beneficiaries of the Road Maintenance Agreement. "There is a plain distinction between a promise, the performance of which may benefit a third party, and a promise made expressly for the benefit of a third party." *Turner*, ¶ 18 (citing *Diaz*, ¶ 19). This Court has addressed arguments similar to that which Diamond V now makes, finding that no third-party beneficiary status can be found under such circumstances. *See St. John*, ¶ 32 (landowners contending the City did not maintain Castle Butte Road properly lacked standing since they were "neither signatories to nor intended beneficiaries of that contract"); *Williamson*, ¶ 40 (residents held not to be third-party beneficiaries of "various street lighting contracts which their local governments entered into with NorthWestern" after failing to identify any statute or contractual provision that would give them standing).

Third-party beneficiary status is rarely found. Diamond V's argument would extend third-party beneficiary status to anyone who has used County Road 454 or who owns land along the road, which could include any member of the public. Diamond V has not established that it qualifies as a third-party beneficiary under the road maintenance agreement.

Furthermore, Diamond V has not presented any evidence Dawson County breached the Road Maintenance Agreement or that it suffered any harm from the alleged breach. The Agreement does not state that Dawson County will limit, provide for, or enable it to direct trucks to use other routes to access the Landfill. With respect to Dawson County, it only provides that the County will conduct routine maintenance in accordance with the blade operator's normal routine for other county roads in the area. Diamond V does not allege Dawson County has failed to conduct routine maintenance. The undisputed facts show Diamond V cannot maintain a breach of contract claim and the District Court's grant of summary judgment to Dawson County on this issue should be affirmed.

B. DIAMOND V DOES NOT HAVE A COGNIZABLE CLAIM FOR DAMAGES.

Diamond V argues the District Court erred in concluding that its claimed damages are speculative and not clearly ascertainable absent "expert testimony to quantify and identify damages, as well as a causal link between the Defendants' actions and the alleged 'injuries...'" (*See* Kubesh Appx., p. 12). Diamond V also asserts, in the alternative, that even if this Court affirms the district court on the issue of damages, that Diamond V can still pursue its claim for injunctive relief. The District Court should be affirmed.

It is undisputed that Diamond V only asserts a claim for general damages. General damages typically constitute damages such as pain and suffering or

emotional distress. *See Tempel v. Benson*, 2015 MT 84, ¶ 16, 378 Mont. 401 ("Pain and suffering, emotional distress, and loss of enjoyment of life are all general damages, and together they comprised [plaintiffs] claim for non-economic damages in this case.") *see also Purington v. Sound West*, 173 Mont. 106, 111, 566 P.2d 795, 798 (1977) (distinguishing between special and general damages).

General damages for emotional distress, pain and suffering, and loss of enjoyment may be awarded for tort claims alleging personal injuries. *See e.g., Jacobsen v. Allstate Ins. Co.*, 2009 MT 248, ¶ 66, 351 Mont. 464, 215 P.3d 649 (adopting standard to recover emotional distress damages for personal injury claims); *Gehnert v. Cullinan*, 211 Mont. 435, 439, 685 P.2d 352, 354 (1984) (holding that jury has duty to award damages for pain and suffering <u>when liability established for serious personal injuries</u>) (emphasis added).

Being that Diamond V failed to establish liability on the part of Dawson County for its tort claims of nuisance and negligence, Diamond V's claim for parasitic damages stemming from such claims is moot, as is its claim for injunctive relief. The District Court's grant of summary judgment on this issue should be affirmed.

C. APPELLANTS' CLAIMS ARE ALSO BARRED BY THE STATUTES OF LIMITATIONS.

The statutes of limitations provide an additional standalone basis to bar Diamond V's claims. The District Court did not address this issue because summary

judgment was awarded to Appellees on other grounds. (*See* Kubesh Appx., p. 15). Nevertheless, the statutes of limitations provide further support for affirming the District Court.

1. Plaintiffs' Claims Accrued in 2013 and the Statute of Limitations Expired before the Filing of their Complaint.

A "claim or cause of action accrues when all elements of a claim or cause exist or have occurred, the right to maintain an action on the claim or cause is complete, and a court or other agency is authorized to accept jurisdiction of the action." §27-2-102(1)(a), MCA. "All civil actions must be commenced with the periods prescribed by [Title 27, Chapter 2, Part 2, MCA] except when another statute specifically provides a different limitation." § 27-2-105, MCA.

Even if Diamond V stated cognizable tort claims against Dawson County, those claims all accrued in 2013. It is undisputed that the Landfill opened, and truck traffic began passing by the Diamond V ranch to reach the Landfill in 2013. Diamond V started registering complaints with Dawson County in 2013 about Road 454 and, by 2015, it had legal counsel writing a letter to Dawson County about issues with Road 454. (*See* Dawson County Appx., pp. 21-23 and 26-30, Board of County Commissioners Minutes, September 3, 2013 and Letter to Dawson County from counsel for Diamond V, March 27, 2015). Diamond V filed a separate lawsuit against DEQ in 2015. (*See* Dawson County Appx., pp. 31-52, Second Amended Complaint, August 6, 2015).

Diamond V's tort claims are subject to two or three-year statutes of limitation. Regarding the claims brought against Dawson County, the applicable statutes of limitations bar nuisance is two years. *Christian v. Atlantic Richfield Co.*, 2015 MT 255, 16, 380 Mont. 495, 358 The statute of limitation for a claim of negligence is three years. *Pederson v. Rocky Mountain Bank*, 2012 MT 48, ¶ 10, 364 Mont. 258, 272 P.3d 663.

Here, Diamond V filed suit in April 2020—7 years after it first registered a complaint with Dawson County, and 5 years after it filed its lawsuit against DEQ levying the same allegations it does against Buckhorn and Dawson County in the present action. While the traffic continues to pass by the Diamond V property presently, the situation has stabilized, and the "continuing tort doctrine" exception to the statute of limitations does not apply.

2. The Continuing Tort Exception to the Statutes of Limitations is Inapplicable.

The Montana Supreme Court has applied the "continuing wrong" exception except to certain torts. *Christian v. Atlantic Richfield Co.*, 2015 MT 255, 380 Mont. 495, 358 P.3d 131 (continuing tort theory could apply to nuisance, trespass, strict liability, negligence, and wrongful occupation claims but not unjust enrichment claims). The continuing tort doctrine requires the court to consider whether the condition is temporary or permanent in character. *Christian*, ¶ 18 A permanent condition "is one where the situation has stabilized, and the permanent damage is

reasonably certain." *Id*. (citations and internal quotation marks omitted). If the situation "is permanent, the limitations period begins to run "from the completion of the structure or thing which constitutes or causes the nuisance," and all damages caused by the nuisance or trespass must be recovered in a single action." *Id*. (citation omitted). The continuing tort doctrine does not toll the statute of limitations in cases of a permanent situation. *Id*. When the Supreme Court refers to a continuing situation "for purposes of the continuing tort doctrine, [it is] actually referring to a temporary" situation. *Christian*, ¶ 19. In that regard, "[t]he terms "continuing" and "temporary" are often used synonymously or interchangeably by courts." *Id*. (citation omitted).

Under certain conditions, a road nuisance can be considered a temporary injury since the government could "readily abate the problems" through additional road maintenance. *Knight v. City of Missoula*, 252 Mont. 232, 244, 827 P.2d 1270, 1277 (1992). In this matter, however, Diamond V does not want Dawson County to perform additional road maintenance, it wants Dawson County to require trucks that access the Landfill to use different public roads. As such, the situation has stabilized, no further abatement is reasonable, and the alleged nuisance should be considered permanent. Appellants presented no authority that Dawson County can direct trucks or other vehicles to use different public roads. There are no steps that could be taken by Dawson County to abate the traffic issues. Therefore, summary judgment was

also appropriate on Diamond V's claims for nuisance and negligence based on the statutes of limitation.

VI. CONCLUSION

For the reasons described herein, Appellee Dawson County respectfully requests that this Court affirm the District Court's Order Granting Defendants' Motions for Summary Judgment entered on September 29, 2022, and the Final Judgment entered on November 14, 2022.

DATED this 26th day of April, 2023.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e) of the Montana Rules of Appellate Procedure, I certify that this brief is printed with proportionally spaced Times Roman text typeface of 14 points; is double spaced (except for footnotes and quoted and indented material which are single spaced); with left, right, top and bottom margins at one inch; and the word count as calculated by Microsoft Word does not exceed 10,000 words, excluding the Table of Contents, Table of Authorities and Certificate of Compliance.

DATED this 26th day of April, 2023.

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CERTIFICATE OF SERVICE

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