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, ZACH KUBESH, and BARBARA KUBESH

Plaintiffs / Appellants

v.

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

Defendants / Appellees.

Appeal from the Seventh Judicial District Court, Dawson County
Cause No. DV-20-0029
The Honorable Ashley Ann Harada, Presiding.

APPELLANTS' REPLY BRIEF

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I. THE DISTRICT COURT ERRED IN GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT.

APPELLANTS' REPLY TO BUCKHORN ENERGY

A. The *Simpkins* Case Supports the Appellants' Nuisance Claim.

In *Simpkins v. Speck*, 2019 MT 120, 395 Mont. 509, 443 P.3d 428, the Montana Supreme Court clarified that even legal activities can ripen into a nuisance. Just as Speck was negligent in feeding the birds and attracting the birds to her property in such a way as it created a nuisance on Simpkins' and Gustin's property, *Simpkins*, ¶¶ 2-5, Buckhorn's landfill brings large semi-truck traffic on to the Kubeshes' property. That traffic results in noise, light and dust. These facts are not in dispute. The question is whether the facts as set forth by the Kubeshes constitute a nuisance. A genuine issue of material fact exists on that question.

Yes, the traffic traveling to the Buckhorn site is travelling legally, "[b]ut an action that is otherwise lawful may create a nuisance depending on the circumstances and surroundings." *Simpkins*, ¶ 16. Buckhorn cites in its Response Brief to several facts which serve to minimize the amount and/or effects of the traffic on Road 454 or divert the Court's analysis from what is actually at issue here. Buckhorn Resp. (Apr. 26, 2023) at 13. The issues cited by Buckhorn—the "toxic waste" issue, the "safety" issue and "odor" issue—are not the focus of the Kubeshes' complaints against Buckhorn. As set forth in the Appellants' Opening Brief with

reference to deposition testimony, the excessive traffic and the noise, light and dust constitute a nuisance under Montana law. The Appellants direct the Court to the specific reference to this testimony in the record. Buckhorn cannot dispute whether their traffic causes noise, light and dust to enter the Kubesh property. The question for the jury is whether these conditions constitute a nuisance. The District Court erred in not allowing the jury to answer this question.

B. All Elements of Negligence Are Not Lacking.

Questions of negligence are poorly suited to adjudication by summary judgment and are better left for jury determination. *Dick Irvin Inc. v. State*, 2013 MT 272, ¶ 17, 372 Mont. 58, 310 P.3d 524. Appellants assert pursuant to *Simpkins*, genuine issues of material fact exist as to whether the excessive use of Road 454, as complained by the Kubeshes, is negligent to constitute a nuisance and entitle Appellants to damages and/or injunctive relief.

C. Appellants' General Damages Claim Was Not Defective.

The Appellants are not seeking economic damages. They are seeking general damages such as loss of enjoyment of life and emotional distress. As the individual shareholders of Diamond V have been joined in this action as individual plaintiffs, those individuals are entitled to seek emotional distress or loss of enjoyment of life damages. No underlying economic loss is required to seek these damages. The plain language of Montana's nuisance statute provides no requirement for underlying

property damage. Rather, by its plain language, the nuisance statute requires "interfere[nce] with the comfortable enjoyment of life or property[.]" *See* § 27-30-101(1), MCA. This understanding is consistent with the history of nuisance actions. *Rubin v. Hughes,* 2022 MT 74, ¶ 30, 408 Mont. 219, 507 P.3d 1169.

The fact the Appellants have not lost money or lost appraised value on the property does not change the fact the Kubesh Family has lost the ability to enjoy their property. Buckhorn is arguing that without an underlying economic loss, any claim for general damages is speculative. The Supreme Court has made it clear – "anything" that interferes with the enjoyment of life and property can be considered a nuisance. The Appellants should be able to present their claims for emotional distress and loss of enjoyment of life at trial pursuant to the standards set forth in *Christian v. Atl. Richfield Co.,* 2015 MT 255, ¶ 18, 380 Mont. 495, 358 P.3d 131. Appellants agree any damage claim will be limited based on the continuing tort standard set forth in *Christian*.

D. There is a Breach of Contract Claim.

The Kubeshes use Road 454 and live along Road 454. The maintenance of the Road directly benefits them. A stranger to a contract cannot sue for breach of contract unless he or she is the intended third-party beneficiary of that contract. *Dick Anderson Constr., Inc. v. Monroe Constr. Co., LLC*, 2009 MT 416, ¶ 46, 353 Mont. 534, 221 P.3d 675. The Montana Supreme Court, relying upon the *Restatement*

(Second) of Contracts § 302 (1981), has described an intended third-party beneficiary 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."

Diaz v. Blue Cross and Blue Shield of Montana, 2011 MT 322, ¶ 18, 363 Mont. 151, 267 P.3d 756. A party cannot assume he or she is a third-party beneficiary merely because he or she has benefitted from a contract between two other parties. *Diaz*, ¶ 21 (citing *Gilmour v. Gates, McDonald & Co*., 382 F.3d 1312, 1315 (11th Cir. 2004)). Instead, the party must be able to "show from the face of the contract that it was intended to benefit [him or] her." *Gilmour*, 382 F.3d at 1315. *Diaz*, ¶ 21. The Supreme Court further held in *Kurtzenacker* that a purchaser of property was not an intended third-party beneficiary of her predecessor's survey contracts even though the surveys were done in contemplation of future sales. Rather, at most, the future purchasers were "incidental beneficiaries" of the survey contracts, a status insufficient to give them standing to seek the contracts' enforcement. *Turner v. Wells Fargo Bank, N.A.*, 2012 MT 213, ¶ 18, 366 Mont. 285, 291 P.3d 1082 (citing

Kurtzenacker v. Davis Surveying, Inc., 2012 MT 105, ¶ 22, 365 Mont. 71, 278 P.3d 1002).

There is a clear distinction between a promise, the performance of which *may* benefit a third-party, and a promise made expressly for a third-party. *Diaz*, ¶ 19. Again, as the Supreme Court explained in *Diaz*, just because a party may benefit from the performance of a contract between two parties does not automatically mean that party was an intended third-party beneficiary of the contract. This evidence must be shown from the face of the contract. *Kurtzenacker*, ¶ 20; *Turner*, ¶ 18. The party seeking to establish third-party beneficiary status must prove from the contract itself that the contracting parties intended to benefit the third-party. Without meeting that burden, the party does not have standing to seek relief based on the contract itself. *Turner*, ¶ 19.

The language of the agreement between Buckhorn and Dawson County provides the framework for how Road 454 is maintained. The maintenance of the Road is done to benefit and protect all users of the Road. The face of the agreement sets forth the requirements of Buckhorn and Dawson County to maintain the Road. Clearly, that benefit extends to third parties such as users of the Road and landowners along the Road. Appellants are intended third-party beneficiaries of the contract at issue.

E. The Statute of Limitations and Doctrines of Claim Preclusion and Issue of preclusion Are Not Additional Justifications for Granting Summary Judgment.

The District Court did not address the issues of statute of limitations and/or claim and issue preclusion. However, Buckhorn has addressed these issues in its Response Brief. As a result, Appellants will address these issues here:

1. Statute of Limitations.

Each time a truck travelling to Buckhorn's landfill uses Road 454 the claim for nuisance is refreshed. This is a "continuing nuisance" situation. There is no dispute that drivers go up and down Road 454 and continue to do so to this day. The Appellants' complaints exist each time a truck uses the Road. This is the essence of a temporary nuisance versus a permanent nuisance claim. If a nuisance or trespass is temporary, its repetition or continuance "gives rise to a new cause of action, and recovery may be had for damages accruing within the statutory period next preceding the commencement of the action...." *Christian v. Atl. Richfield Co.,* 2015 MT 255, ¶ 19, 380 Mont. 495, 358 P.3d 131. This concept is applied in the context of "continuing tort." A continuing tort is one that is "not capable of being captured by a definition of time and place of injury because it is an active, progressive and continuing occurrence. It is taking place at all times." *Floyd v. City of Butte,* 147 Mont. 305, 312, 412 P.2d 823, 826 (1966); *Christian v. Atl. Richfield Co.,* 2015 MT 255, ¶ 17, 380 Mont. 495, 358 P.3d 131.

Permanent nuisances have a stricter statute of limitations analysis. That is, if a nuisance or trespass 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. *Christian*, ¶ 18. The Appellants have alleged the traffic here is terminable and that Buckhorn could direct the drivers at any time to use a different route. The Appellants have cited to deposition testimony from Buckhorn's site manager who reports Buckhorn has the ability to direct traffic. Thus, each time this temporary nuisance occurs, a new statute of limitations arises. There is no dispute the traffic occurs nearly every day, oftentimes several times a day. The character of the traffic is such that the Buckhorn traffic continues and is constantly changing (but not ceasing), and the continuing tort doctrine creates a new statute of limitations each time a truck traveling to the Buckhorn cross the Appellants' property on Road 454. The Appellants' have thus complied with the applicable statute of limitations.

2. Claim Preclusion and Issue Preclusion.

The Kubeshes sued the Montana Department of Environmental Quality in 2015. The claims for relief presented in that lawsuit were: (1) Declaratory Judgment – Public Right to Know; (2) Declaratory Judgment – Failure to Regulate Transport of E&P Waste; (3) Declaratory Judgment – Determination of Changed Conditions and the Requirement to Update the Operation and Maintenance Plan; (4) Montana

Environmental Policy Act; (5) Mandamus; and (6) Constitutional Challenge. Plaintiffs were seeking enforcement of state law related to the tarping of toxic waste in the vehicles travelling to Buckhorn's facility. All the claims above were either against the Montana DEQ or forcing the DEQ to take action against Buckhorn and/or enforce existing rules against Buckhorn. As opposed to the claims in this case, there was no claim for nuisance, negligence or breach of contract in the 2015 action.

A final judgment can have a preclusive effect on future litigation by way of either claim preclusion (res judicata) or issue preclusion (collateral estoppel). *See Baltrusch v. Baltrusch,* 2006 MT 51, ¶ ¶ 15–18, 331 Mont. 281, 130 P.3d 1267. The two doctrines prevent parties from waging piecemeal, collateral attacks on judgments, thereby upholding the judicial policy that favors a definite end to litigation. *Baltrusch,* ¶ 15. Claim preclusion and issue preclusion also "conserv[e] judicial resources and encourag[e] reliance on adjudication by preventing inconsistent judgments." *Baltrusch,* ¶ 15. Although similar, the two doctrines are not the same.

Under claim preclusion, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action. *Baltrusch,* ¶ 15; *see also Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 326 n. 5, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979). This includes those issues that could have been litigated in the prior cause of action. *Wiser II,* ¶ 17. The elements of claim

preclusion are: (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 parties are the same to the subject matter and issues between them; and (5) a final judgment on the merits has been entered. *Wiser II,* ¶ 9.

Issue preclusion, on the other hand, bars the same parties or their privies from relitigating issues in a second suit that is based upon a different cause of action. *Baltrusch,* ¶ 15; *see also Parklane Hosiery,* 439 U.S. at 326 n. 5, 99 S.Ct. 645. 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. *Baltrusch,* ¶ 18.

a. Claim Preclusion.

Buckhorn cannot meet the requirements of claim preclusion, most notably the issues of privity and final judgment. The concept of privity in the context of a judgment "applies to one whose interest has been legally represented at trial." *Holtman v. 4–G's Plumbing & Heating,* 264 Mont. 432, 437, 872 P.2d 318, 321 (1994); *see also Taylor v. Sturgell,* 553 U.S. at 894, 128 S.Ct. 2161 (2008)("a

nonparty may be bound by a judgment because she was 'adequately represented by someone with the same interests who [wa]s a party' to the suit.") (citation omitted). Privity exists where "two parties are so closely aligned in interest that one is the virtual representative of the other...." *Nordhorn v. Ladish Co.,* 9 F.3d 1402, 1405 (9th Cir.1993); *see also United States v. ITT Rayonier, Inc.,* 627 F.2d 996 (9th Cir.1980) (EPA could not sue to enforce Water Pollution Control Act, where same issue had been litigated in state court by the Washington Department of Ecology). Although our precedent regarding privity in this context is limited, other courts instruct that privity is a "factual determination of substance, not mere form" that requires a "consideration of the realities of litigation." *Denturist Ass'n of Montana v. State, Dep't of Lab. & Indus.,* 2016 MT 119, ¶ 14, 383 Mont. 391, 372 P.3d 466.

Buckhorn was not a party in the 2015 action. The relief sought in 2015 was enforcement of the DEQ rules. A settlement was reached between Diamond V and the DEQ. Although the allegations contained in the 2015 lawsuit discuss the traffic, the substance of the actual claims brought are not nuisance, negligence and breach of contract. Buckhorn and the DEQ are not "so closely aligned" as to establish privity. Diamond V is now seeking permanent injunctive relief and damages based on these claims. Injunctive relief and damages against Buckhorn were not available to Diamond V in the 2015 case. The relief is different. The parties are different. Privity is not present.

A binding settlement agreement and dismissing a case with prejudice is a final judgment on the merits, generally. Buckhorn relies on *Adams v. Two Rivers Apartments, LLP*, 2019 MT 157, 396 Mont. 315, 444 P.3d 415, in support of the proposition that the settlement agreement between Diamond V and the DEQ is a final judgment. In *Adams*, Two Rivers Apartments sued Aultco Construction in 2015. Two Rivers and Aultco entered into a settlement agreement. Subsequently, a group of apartment tenants sued Two Rivers and the general partners in Two Rivers. The partners filed a third-party complaint against Aultco. The Supreme Court analyzed the settlement agreement between Two Rivers and Aultco and determined the general partners' claims were included in the language of the settlement agreement. Thus, the doctrine of res judicata (claim prelusion) precluded the general partners from suing Aultco as the general partners were deemed parties to the original settlement agreement. The Supreme Court affirmed. *Adams*, ¶¶ 2-4, 13.

The facts of this case are not on point with *Adams*. The Appellants are not suing the DEQ again. They are suing Buckhorn. There is no settlement between the Kubeshes and Buckhorn. Buckhorn is not referenced in the settlement between the Kubeshes and the DEQ. A review of the Settlement Agreement between the Kubeshes and the DEQ sets forth how the DEQ will amend and enforce its rules. Buckhorn is not a party to the Settlement Agreement and the terms of the Settlement govern the DEQ—not Buckhorn. Buckhorn cannot meet the "final judgment"

element and their argument for claim preclusion fails.

b. Issue Preclusion.

Buckhorn's claim for issue preclusion fails for the same reasons as the claim preclusion argument. Collateral estoppel, or issue preclusion, is a form of res judicata, and bars the reopening of an issue that has been litigated and resolved in a prior suit. *Baltrusch*, ¶ 15. Collateral estoppel has four elements: (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 the plea is now asserted was a party or in privity with a party to the prior adjudication; and (4) the party against whom preclusion is now asserted was afforded a full and fair opportunity to litigate the issue. *McDaniel v. State*, 2009 MT 159, ¶ 28, 350 Mont. 422, 208 P.3d 817. To determine whether the issue decided in the prior adjudication is identical to the issue raised in the present case, the Court must compare the pleadings, evidence, and circumstances surrounding the two actions. *Adams*, ¶ 9.

To establish issue preclusion, Buckhorn must show that the "identical issue" was raised in a prior action. Again, these issues are not identical. Appellants are seeking damages and injunctive relief based on negligence, nuisance and breach of contract against Buckhorn – not the DEQ. Those claims were not brought in the DEQ action, Buckhorn was not a party and there is no final judgment benefitting Buckhorn. The elements of issue preclusion are not established.

APPELLANTS' REPLY TO DAWSON COUNTY

A. Appellants Have Cognizable Claims Against Dawson County.

Dawson County can be held liable for claim for damages. A governmental entity is liable for nuisance torts:

> We have long held that the duty of a city in connection with the maintenance of its streets is an administrative function of the city. Griffith v. City of Butte, (1925), 72 Mont. 552, 234 P. 829; Sullivan v. City of Helena, (1890), 10 Mont. 134, 25 P. 94; Snook v. City of Anaconda, (1901), 26 Mont. 128, 66 P. 756; Ford v. City of Great Falls, (1912), 46 Mont. 292, 127 P. 1004. We have also consistently held that a governmental entity is entitled to no more deference than a private citizen in matters of creating a public nuisance. Murray v. City of Butte, (1907), 35 Mont. 161, 88 P. 789; Lennon v. City of Butte, (1923), 67 Mont. 101, 214 P. 1101; Walton v. City of Bozeman, (1978), 179 Mont. 351, 588 P.2 518. 'There is no doubt that a city is liable for damages with respect to maintaining a nuisance in the same manner as a private person.' Walton, 179 Mont. At 356, 588 P.2d 518."

Knight v. City of Missoula, 827 P.2d 1270, 1278-79, 252 Mont. 232, 246 (1992). Pursuant to the agreement between Buckhorn and the County, the County is legally bound to maintain Road 454. From the Kubeshes' perspective, this includes ensuring that a nuisance does not occur on Road 454. The County must take measures to maintain the roadway in such a way that excessive traffic does not occur. Questions of fact exist as to whether the County has appropriately maintained Road 454.

1. Appellants' Claim for Nuisance is Not Barred by Statute.

The Montana Supreme Court has dealt with the question of how much a nuisance claim can be limited:

> Montana's definition of nuisance, which applies to both public and private nuisance claims, states clearly that "[a]nything which is injurious to health, indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property ... is a nuisance." Section 27–30–101(1), MCA. Except for limitations on farming operations and activities authorized by statute, the additional nuisance statutes set forth in Chapter 30 of the Montana Code Annotated do not provide further limitations on what may or may not constitute a nuisance in Montana. *See* Sections 27–30–101(2) through—(3), MCA.

Tarlton v. Kaufman, 2008 MT 462, ¶ 24, 348 Mont. 178, 199 P.3d 263. The Supreme Court has made it clear – "anything" that interferes with the enjoyment of life and property can be considered a nuisance.

Appellants assert the County is liable for allowing the nuisance to occur on Road 454. A nuisance claim against the County can be made if the Kubeshes show that the County had been negligent in the operation of maintaining the Road. The Kubeshes assert the County, by virtue of allowing this nuisance to proceed, has acted negligently. Although the County disagrees, this is a genuine issue of material fact which precludes summary judgment.

2. Appellants' Negligence Claim Does Not Fail.

i. The Public Duty Doctrine.

Montana law recognizes nuisance actions against governmental entities under certain circumstances:

> To recap, a statutorily authorized activity or facility cannot be a nuisance unless the plaintiff can show: (1) that the defendant completely exceeded its statutory authority, resulting in a nuisance; or

> (2) that the defendant was negligent in carrying out its statutory authority, resulting in a qualified nuisance. Thus, the plaintiffs in *Wilhelm* could have prevailed on their nuisance claim if the jury found *either* that the city was liable for a nuisance because it had acted entirely outside the scope of its legislatively authorized power in operating the landfill, *or* that the city was liable for a qualified nuisance because it had been negligent in its operation or maintenance of the landfill.

Barnes v. City of Thompson Falls, 1999 MT 77, ¶ 26, 294 Mont. 76, 979 P.2d 1275. A nuisance claim against the County can be made if the Kubeshes show that the County had been negligent in the operation of maintaining the Road. The Kubeshes assert the County, by virtue of allowing this nuisance to proceed, has acted negligently. This is a genuine issue of material fact which precludes summary judgment.

The Montana Supreme Court, in *Knight*, stated "[t]here is no doubt that a city is liable for damages with respect to maintaining a nuisance in the same manner as a private person." Here, pursuant to the contract between Buckhorn and the County, the County is failing to maintain Road 454 in a manner to prevent the nuisance which occurs nearly every day on Plaintiffs' property. There is no evidence that Dawson County is doing anything to curtail the excessive traffic on Road 454. The County is required to maintain the Road and there is a question of fact as to whether a nuisance exists on the Road due to Buckhorn's negligence. The County is part of this equation, and this question should go to the jury.

3. Appellants Have a Standing to Assert a Claim for Breach of Contract.

Appellants have standing to pursue a breach of contract claim against both Buckhorn and Dawson County. *See* Argument I(d), above.

B. Appellants Have a Cognizable Claim for Damages.

Appellants are not required, pursuant to *Rubin*, to present a claim with an underlying economic loss. See Section I(C), above. The same analysis for damages set forth above with respect to Buckhorn applies to Dawson County. Material questions of fact exist as to whether the Kubeshes have been damaged and the amount of any damages.

The fact Appellants have not lost money or lost appraised value on their property does not change the fact the Kubeshes have lost the ability to enjoy the property. The County is arguing that without an underlying economic loss, any claim for general damages is speculative. This is not a personal injury action. In a personal injury case, it makes sense that without an underlying injury which results in medical bills, general damages such as pain and suffering could not be had. That is not the case here. As "anything" can constitute a nuisance under Montana law, it does not follow that there must be an economic loss in every claim for general damages. Thankfully, Appellees' actions have not caused Appellants' economic losses. This, by itself, does not mean that Diamond V and its shareholders, the Kubeshes, have

not suffered a loss of enjoyment of property due to the thousands of vehicles that pass-through Appellants' front yard several times a day, nearly every day.

C. Appellants' Claims Are Not Barred by the Statute of Limitations.

Appellants refer the Court to their analysis above related to the statute of limitations issues. The District Court did not address this issue, but both Appellees here have. The statute of limitations analysis is the same for both Appellees and the Kubeshes refer the Court to the analysis above on this issue.

CONCLUSION

Appellants respectfully request this Court reverse 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, and remand this matter to the District Court for a jury trial.

DATED this 23rd day of May, 2023.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that Appellants' Reply Brief is proportionately spaced with Times New Roman Text with a typeface of 14 points, is double-spaced except for lengthy quotations or footnotes, and contains 4,239 words, excluding the Cover Page, Table of Contents, Table of Authorities and Certificate of Compliance.

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