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STATE OF MICHIGAN

COURT OF APPEALS

EUGENE MCNABB,

Plaintiff-Appellant,

v

ORION TOWNSHIP, AL DAISLEY, DAVID GOODLOE, and DAN'S EXCAVATING, INC.,

Defendants-Appellees.

UNPUBLISHED
November 13, 2026
10:39 AM

No. 371903
Oakland Circuit Court
LC No. 2019-177748-CZ

Before: GADOLA, C.J., and O'BRIEN and MARIANI, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's final opinion and order that dismissed plaintiff's claims against defendants Orion Township (the Township), Al Daisley, David Goodloe, and Dan's Excavating, Inc. Plaintiff on appeal also challenges an earlier order entered by the trial court that dismissed two of plaintiff's other claims. For the reasons explained in this opinion, we affirm.

I. BACKGROUND

Plaintiff owns property, referred to as Lots 9 and 10, adjacent to a sand and gravel mining operation (the pit) in the Township. The pit originated during the construction of I-75. After I-75 was built, Bob Warren of Bob Warren Trucking assumed operation of the pit and entered into an informal arrangement with plaintiff to list plaintiff's property as part of the permit needed to mine the pit. After 2006, Dan's Excavating assumed ownership of the pit and held the permit to mine it. But Dan's Excavating and plaintiff did not continue the informal arrangement that plaintiff had with the prior owners of the pit, which eventually led to a series of lawsuits and appeals that generally centered around how Dan's Excavating went about filling and restoring both the pit and the portion of plaintiff's property that was covered by earlier permits to mine the pit.

In 2008, plaintiff and his wife initiated and settled an action against Dan's Excavating and two nonparties. See *McNabb v Orion Twp*, unpublished per curiam opinion of the Court of Appeals, issued December 28, 2021 (Docket No. 354297) (*McNabb II*), p 1 (discussing history of dispute). In 2011, plaintiff and his wife initiated another action, this one against Dan's Excavating and the Township, which alleged "that while defendant Dan's Excavating, Inc. was in the process of filling

and restoring the pit it 1) overfilled certain areas in excess of the permitted elevation; and 2) failed to engage in progressive restoration of the pit in violation of defendant Township of Orion's 'Earth Balancing & Excavation Ordinance,' referred to as Ordinance 99, and the permit issued thereunder." *McNabb v Dan's Excavating, Inc*, unpublished per curiam opinion of the Court of Appeals, issued October 14, 2014 (Docket No. 315941) (*McNabb I*), p 1. Plaintiff's complaint in this 2011 action "sought damages and mandatory injunctive relief against Dan's Excavating to remedy the alleged violations of the ordinance and mandamus relief against the Township to compel enforcement of Ordinance 99 and the permit." *Id*. The trial court in the 2011 action granted the defendants' motions for summary disposition on all of the claims alleged in plaintiff's complaint, and this Court affirmed. *Id*.

In 2015, after this Court affirmed the dismissal of plaintiff's second action, the Township amended Ordinance 99 to add a requirement for permittees to maintain activity logs and take photographs of each truckload of fill, and plaintiff filed the instant action in 2019 based largely on these newly added requirements. *McNabb II*, unpub op at 2. Plaintiff later amended his complaint to include Daisley (a Township code enforcement officer) and Goodloe (a Township building official) in their individual capacities as "Township Zoning Enforcement Officers." *Id*. Thereafter, all defendants moved for summary disposition under MCR 2.116(C)(7) and (8), arguing that plaintiff's claims were barred by res judicata. *Id*. The trial court granted the motions and denied plaintiff's request to file a second amended complaint. *Id*.

Plaintiff appealed, and this Court affirmed in part, reversed in part, and remanded for further proceedings. *Id*. at 1. This Court held that res judicata did not bar plaintiff's claims against Daisley and Goodloe because they were not parties to any prior action and did not have privity with any defendants in those actions. *Id*. at 5. This Court further held that res judicata did not bar plaintiff's claims premised on the 2015 amendment to Ordinance 99 because those claims could not have been brought in 2011 before the amendment was enacted. *Id*. at 5-6. But this Court upheld the trial court's refusal to allow plaintiff to amend his complaint to add a trespass claim against Dan's Excavating because that claim would be barred by res judicata—this Court explained that the "trespasses allegedly committed by [Dan's Excavating took place] in the years 2001 through 2006," so plaintiff could have asserted those claims in either of his prior actions through the exercise of reasonable diligence. *Id*. at 8.

When the case returned to the trial court, that court allowed plaintiff to file an amended complaint alleging nine counts against defendants. The court later struck two claims (a declaratory-judgment claim and a trespass claim) in which plaintiff alleged that Dan's Excavating was required to restore a portion of plaintiff's property (Lot 10). The court reasoned that the claims related to the pre-2015-amendment version of Ordinance 99, and the court interpreted *McNabb II* to mean that, as far as Ordinance 99 was concerned, only plaintiff's claims alleging violations of the amended portion of Ordinance 99 were not barred by res judicata. Plaintiff later conceded that another claim that asked the trial court to take superintending control of the Township's enforcement of Ordinance 99 was moot and no longer viable.

The parties eventually filed various motions for summary disposition regarding how to dispose of the remaining six claims, and the trial court resolved those motions in an 18-page written opinion and order. The trial court concluded that plaintiff's motion for summary disposition should

be denied and defendants' motions for summary disposition should be granted, and the court accordingly dismissed all of plaintiff's claims.

This appeal followed.

II. RES JUDICATA

Plaintiff first argues that the trial court erred by dismissing his declaratory-judgment and trespass claims (Counts I and IX, respectively) on the basis of res judicata.

A. STANDARD OF REVIEW

Whether res judicata bars a claim presents a question of law, reviewed de novo. *King v Munro*, 329 Mich App 594, 599; 944 NW2d 198 (2019).

B. ANALYSIS

The doctrine of res judicata prevents relitigation of a claim and is broadly applied. *C-Spine Orthopedics, PLLC v Progressive Mich Ins Co*, 346 Mich App 197, 203; 12 NW3d 20 (2023). "Courts use the doctrine of res judicata to prevent multiple suits litigating the same cause of action." *Id*. The doctrine of res judicata "bars a subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the claims in the second case were, or could have been, resolved in the first case." *Id*.

To the extent that plaintiff argues that the trial court erred by dismissing Count I of his second amended complaint, that argument is not properly before this Court. In Count I of the second amended complaint, plaintiff asked the trial court to declare that the Township had a duty to compel Dan's Excavating to restore plaintiff's property next to the pit. After plaintiff filed this complaint, the Township asked the trial court to "clarify" whether it was proper to allow plaintiff to pursue Count I following *McNabb II*. In response, plaintiff "agree[d] that Count I is . . . moot." With this concession in the trial court, plaintiff forfeited the ability to contest on appeal the dismissal of Count I of his second amended complaint. See *Holmes v Holmes*, 281 Mich App 575, 587-588; 760 NW2d 300 (2008) ("A party may not take a position in the trial court and subsequently seek redress in an appellate court that is based on a position contrary to that taken in the trial court.") (quotation marks and citation omitted); *Marshall Lasser, PC v George*, 252 Mich App 104, 109; 651 NW2d 158 (2002) ("A party is not allowed to assign as error on appeal something which his or her own counsel deemed proper at trial since to do so would permit the party to harbor error as an appellate parachute.") (quotation marks and citation omitted).

As for Count IX, plaintiff alleged that Dan's Excavating was required to restore any property included in the permit for its mining operation, which included plaintiff's property, but Dan's Excavating had failed to do so. This argument stems from Orion Township Ordinance 99, § 9(A), which provides in pertinent part:

> All areas within any soil excavation site operating under a single permit shall be restored progressively. Restoration shall be in accordance with the plan as approved by the Board of Appeals at the time the permit is secured.

Plaintiff contends that Dan's Excavating previously received a permit for its mining operation that included plaintiff's Lot 10, so pursuant to Ordinance 99, § 9, Dan's Excavating was required to restore plaintiff's Lot 10.

In plaintiff's 2011 action, he raised this same claim—he alleged in his second amended complaint in that action that Dan's Excavating was required by "Section 9 of Ordinance No. 99" to restore any lot "on which Dan's Excavating Inc. . . . or its predecessor(s)[] engaged in mining," which included plaintiff's Lot 10. The complaint identified the relevant permit governing this restoration as "[t]he Permit granted April 26, 2010," and alleged that "Dan's Excavating has failed to engage in the restoration mandated by the Permit" as required by Ordinance 99, § 9. The trial court dismissed this claim on the merits, and plaintiff did not appeal that dismissal. In plaintiff's 2014 appeal, this Court noted this failure in a footnote and held that it constituted abandonment of the issue:

> We note that, in addition to the alleged overfilling and lack of restoration supporting plaintiffs' claim for mandamus presented on appeal, plaintiffs also sought mandamus relief for alleged noncompliance with specific conditions that the Zoning Board of Appeals attached to the 2010/2011 permit issued to Dan's Excavating. On appeal, plaintiffs do not address or present any argument regarding these conditions attached to the permit, and thus, plaintiffs have abandoned those claims. *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002). [*McNabb I*, pp 2-3, n 1.]

It follows that, to the extent that plaintiff contends that this Court's 2014 opinion supports that his Count IX could proceed, plaintiff is mistaken. This Court's 2014 opinion explicitly held that plaintiff had failed to raise on appeal the issue related to Ordinance 99, § 9, thereby abandoning the issue. That issue was thus only addressed by the trial court in plaintiff's 2011 action, and that court decided the issue on the merits and dismissed it. Count IX is the same claim that plaintiff failed to appeal in 2011.[1] Because that claim was decided on the merits by the trial court in plaintiff's 2011 action against Dan's Excavating and the Township, plaintiff cannot relitigate the claim as part of this action; the claim is barred by res judicata. See *C-Spine Orthopedics, PLLC*, 346 Mich App at 203.

III. SUMMARY DISPOSITION

Plaintiff next takes issue with the trial court's rulings in its opinion and order granting summary disposition in favor of defendants.

A. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision on a motion for summary disposition. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159; 934 NW2d 665 (2019). The relevant motions for summary disposition were brought under MCR 2.116(C)(7) and (10). A (C)(7) motion is properly

[1] To any extent that Count IX slightly differs from the claim that plaintiff brought in 2011 (such as which permit plaintiff identifies as the relevant permit in his complaint), plaintiff clearly could have brought that claim in his 2011 action, so the analysis is the same. See *C-Spine Orthopedics, PLLC*, 346 Mich App at 203.

granted if a claim is barred by governmental immunity. See *Dextrom v Wexford Co*, 287 Mich App 406, 428; 789 NW2d 211 (2010). When reviewing a (C)(7) motion, a court must accept all well-pleaded allegations as true unless contradicted by substantively admissible evidence. *Id*. See also *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). That evidence can include affidavits, pleadings, and other documentary evidence, and all such evidence must be viewed in the light most favorable to the nonmoving party. *C-Spine*, 346 Mich App at 202. If, after properly considering the pleadings and evidence submitted in support of the motion, "no facts are in dispute, and if reasonable minds could not differ regarding the legal effect of those facts, the question whether the claim is barred is an issue of law for the court." *Dextrom*, 287 Mich App at 429.

A motion filed under MCR 2.116(C)(10) "tests the factual sufficiency of the complaint." *Maiden*, 461 Mich at 120. A (C)(10) motion is properly granted it "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10). A party moving for summary disposition under MCR 2.116(C)(10) "must specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact" and support that assertion with evidence. *Maiden*, 461 Mich at 120. A court reviewing a (C)(10) motion must consider all substantively admissible evidence so submitted in the light most favorable to the nonmoving party. *Id*. A genuine issue of material fact exists when the evidence presented leaves open an issue upon which reasonable minds might differ. *Debano-Griffin v Lake Co*, 493 Mich 167, 175; 828 NW2d 634 (2013).

The trial court here also granted summary disposition in part under MCR 2.116(I)(2). That rule provides that "[i]f it appears to the court that the opposing party, rather than the moving party is entitled to judgment, the court may render the judgment in favor of the opposing party." MCR 2.116(I)(2).

B. GOVERNMENTAL EMPLOYEES

Plaintiff contends that the trial court erred by dismissing plaintiff's claims against Daisley and Goodloe on grounds that neither governmental employee owed plaintiff a duty.

A governmental employee cannot be held liable to a plaintiff if "the employee owed no duty to the plaintiff." *Dougherty v City of Detroit*, 340 Mich App 339, 346; 986 NW2d 467 (2021). A duty can be created by statute or arise under the common law. *Downs v Saperstein Assoc Corp*, 265 Mich App 696, 699; 697 NW2d 190 (2005).

Plaintiff alleged that Daisley and Goodloe are liable to him for allegedly refusing to enforce the log and photograph requirements of Ordinance 99 on Dan's Excavating. While Ordinance 99 required Dan's Excavating to maintain logs and take photographs, it did not require Goodloe or Daisley to maintain logs and take photographs, and enforcement of the ordinance was discretionary. See *Randall v Delta Charter Twp*, 121 Mich App 26, 35; 328 NW2d 562 (1982) (explaining that "the decision whether to enforce a municipal ordinance is a discretionary activity"). See also *Scheurman v Dep't of Transp*, 434 Mich 619, 635; 456 NW2d 66 (1990) ("We agree with the general rule that governmental agencies are not liable for the failure to investigate or enforce an ordinance violation.").

Plaintiff does not contend that a duty arose under Ordinance 99, however. He contends instead that a common-law duty existed between himself and the governmental employees because a special relationship existed between himself and them.

Under the common law, "[a] duty may be found if there is a special relationship between the plaintiff and the defendant." *Dykema v Gus Macker Enterprises, Inc*, 196 Mich App 6, 8; 492 NW2d 472 (1992). A duty-creating "special relationship" exists "where a party entrusts himself to the protection and control of another and, in doing so, that party loses the ability to protect himself." *Downs*, 265 Mich App at 701. See also *Dougherty*, 340 Mich App at 347. Typical examples of this type of relationship "include common carrier-passenger, innkeeper-guest, employer-employee, landlord-tenant, and invitor-invitee." *Dykema*, 196 Mich App at 8.

Plaintiff argues that a special relationship existed between himself and the governmental employees because Goodloe and Daisley "assum[ed] the duty to conduct inspections when none were otherwise required in order to satisfy [plaintiff]." Plaintiff has not shown, however, how these inspections gave rise to a distinct relationship and duty sufficient to sustain his claims against Goodloe and Daisley. It is true that "[i]f one voluntarily undertakes to perform an act, having no prior obligation to do so, a duty may arise to perform the act in a nonnegligent manner." *Fultz v Union-Commerce Assoc*, 470 Mich 460, 465; 683 NW2d 587 (2004). But in the context of Goodloe and Daisley "assuming the duty to conduct inspections," this rule simply means that Goodloe and Daisley assumed a duty to perform those inspections in a nonnegligent manner. That is obviously a duty distinct from enforcing the ordinance. And as plaintiff makes clear, his claims against Goodloe and Daisley are based "purely [on] the lack of logs and photos" that resulted from Goodloe and Daisley "[r]eplacing the [ordinance's] log and photo requirement with inspections"—that is, their alleged failure to enforce the ordinance. As noted, plaintiff has not shown an actionable duty in that regard. The trial court therefore properly dismissed plaintiff's claims against Goodloe and Daisley.

C. STANDING

Plaintiff lastly contests the trial court's ruling that plaintiff lacked standing to assert his nuisance per se and abatement claims against Dan's Excavating.

"Generally, a violation of a zoning ordinance constitutes a nuisance per se, and a court must order it abated." *Lima Twp v Bateson*, 302 Mich App 483, 493; 838 NW2d 898 (2013). See also MCL 125.3407. Plaintiff argues that Dan's Excavating's failure to create and maintain activity logs and to take photographs of every truckload of fill that was used in the pit violated Ordinance 99 and thus constituted a a nuisance per se.

The central dispute on appeal, however, is not whether plaintiff has alleged a claim for nuisance per se but whether plaintiff has standing to bring a nuisance claim against Dan's Excavating. This Court has held that private parties "may pursue a nuisance claim against a property owner for violation of a zoning ordinance." *Sakorafos v Charter Twp of Lyon*, 349 Mich App 176, 188; 27 NW3d 329 (2023). But to demonstrate standing to bring such a claim, a private plaintiff must "show damages of a special character distinct and different from the injury suffered by the public generally," which can be done "by showing that the defendant's activities directly affected the plaintiff's

recreational, aesthetic, or economic interests." *Id*. (quotation marks, citations, and alterations omitted).[2]

Plaintiff here has not shown that Dan's Excavating's activities directly affected his interests. Plaintiff contends that Dan's Excavating's failure to log and photograph the truckloads of fill it used in the pit gives rise to a possibility that Dan's Excavating used unclean fill in the pit, which in turn gives rise to the possibility that the soil of plaintiff's adjacent property will eventually get contaminated by the unclean fill, giving plaintiff standing to pursue a nuisance claim. Plaintiff alleged in his complaint that, due to these possibilities, plaintiff "suffered damages in the form of a reduction in the value of his property." He conceded below, however, that he could not demonstrate a reduction in his property's value. The trial court therefore rejected plaintiff's standing argument, concluding that the mere possibility that Dan's Excavating used unclean fill did not damage plaintiff.

Plaintiff argues on appeal that the lack of evidence that his property was affected by Dan's Excavating's activities is irrelevant, and that the possibility that he may be damaged by those activities at some point in the future is enough to give him standing. That is incorrect. A private individual has standing to bring a nuisance per se claim only if they "can show damages of a special character distinct and different from the injury suffered by the public." *Sakorafos*, 349 Mich App at 188 (quotation marks and citation omitted). If a plaintiff cannot show that they were damaged by a defendant's violation of an ordinance, then they obviously cannot show damages of a special character distinct and different from the injury suffered by the public. All that a plaintiff in that situation can show is that the defendant violated the zoning ordinance, which does not confer standing on the individual to pursue a nuisance claim.[3] See *Ansell v Delta Co Planning Comm*, 332 Mich App 451, 461; 957 NW2d 47 (2020) (explaining that the "violation of a zoning ordinance constitutes a public nuisance that, by itself, gives no right of action to an individual") (quotation marks and citation omitted).

Plaintiff contends that there is no substantial difference between his standing argument in this case and this Court's reasoning for why plaintiff had standing to seek injunctive relief against Dan's Excavating in *McNabb I*. We disagree. In *McNabb I*, plaintiff was seeking a mandatory injunction compelling Dan's Excavating to comply with Ordinance 99 and the permit issued thereunder. *McNabb I*, unpub op at 5. The panel explained that to have standing to request injunctive relief, the

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[2] Plaintiff argues that Ordinance 99 itself granted plaintiff standing to pursue his nuisance per se claim because, according to plaintiff, Section 4 of that ordinance "grant[s] standing to anyone who would be 'annoyed or inconvenienced' by the resulting nuisance per se." That is not what Ordinance 99, § 4 says. The pertinent subsection provides in relevant part that "[t]he Board of Appeals shall authorize the issuance of a permit[] only if it finds that the granting of said permit will . . . [n]ot create an unreasonable hazard, annoyance, or inconvenience to the owners or occupants of nearby property[.]" Orion Township Ordinance 99, § 4(D)(3).

[3] To be clear, the result would be different if plaintiff alleged that Dan's Excavating actually used unclean fill in the pit, but he does not. Plaintiff is contesting Dan's Excavating's failure to maintain logs and take photographs of the fill, and he must show that this failure caused plaintiff to suffer damages of a special character distinct from the injury suffered by the public. He cannot satisfy that requirement through rank speculation alone.

litigant must have a substantial interest that will be detrimentally affected in a manner different from the general public. *Id*. This Court elsewhere noted that "the filling and restoration requirements of Ordinance 99" and permits issued thereunder ensured that restoration properly managed "water runoff and soil erosion." *Id*. at 4. The panel accordingly held that plaintiff, as an adjacent property owner, had standing to request that Dan's Excavating be compelled to comply "with Ordinance 99 and the permit issued thereunder" because "plaintiffs have a substantial and distinct interest in ensuring that the permitted property is restored to the proper grade and slope in accordance with the permit and ordinance to prevent soil erosion and water runoff that could detrimentally affect their property." *Id*. at 5. The panel also relied on plaintiff's testimony "that the overfilling in the area of the man-made berm caused surface water run-off onto plaintiffs' property." *Id*.

Plaintiff's current complaint about Dan's Excavating's failure to maintain activity logs and take photographs is clearly distinct from his claim in *McNabb I*—Dan's Excavating's failure to log and photograph the fill placed in the pit did not physically affect plaintiff's property in a direct way. Plaintiff here is also seeking different relief than he was seeking in *McNabb I*—plaintiff here is seeking to abate a nuisance, whereas in *McNabb I*, plaintiff was seeking a declaratory judgment. The standing analysis for these two requests for relief differ slightly—a plaintiff seeking a declaratory judgment need only show that he or she has a "substantial interest" that will be detrimentally affected, but a plaintiff seeking to abate a nuisance must show that he or she was damaged in some way, such as "by showing that the defendant's activities directly affected the plaintiff's recreational, aesthetic, or economic interests." *Sakorafos*, 349 Mich App at 188 (quotation marks, citation, and alteration omitted). For the reasons explained, plaintiff has failed to not only show that he suffered damages of a special character distinct from damages the general public would have suffered but also failed to establish that he suffered any damages at all as a result of Dan's Excavating's failure to log and take pictures of the truckload of fill it put in the pit. The trial court therefore properly concluded that plaintiff lacked standing to bring a nuisance claim against Dan's Excavating.[4]

Affirmed.

/s/ Michael F. Gadola
/s/ Colleen A. O'Brien
/s/ Philip P. Mariani

[4] We also note that it is uncontested that Dan's Excavating began complying with the ordinance in 2019, thus abating the alleged nuisance. It follows that even if the trial court erred by finding that plaintiff did not have standing, plaintiff's claim for abatement is moot because there is no longer a violation of the ordinance that the trial court could compel Dan's Excavating to abate. See *Christenson v Secretary of State*, 336 Mich App 411, 418; 970 NW2d 417 (2021) ("An issue is moot if an event has occurred that renders it impossible for the court to grant relief.") (quotation marks and citation omitted).