IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

EVERETT HUFFMAN,
Plaintiff/Appellant,

v.

MAGIC RANCH ESTATES HOMEOWNERS ASSOCIATION,
AN ARIZONA NON-PROFIT CORPORATION,
Defendant/Appellee.

No. 2 CA-CV 2022-0055
Filed April 19, 2023

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Pinal County
No. CV202100976
The Honorable Jason Holmberg, Judge

AFFIRMED IN PART;
VACATED IN PART AND REMANDED

COUNSEL

Everett Huffman, Florence
In Propria Persona

Hill, Hall & DeCiancio PLC, Phoenix
By R. Corey Hill, Ginette M. Hill, and Christopher Robbins
Counsel for Defendant/Appellee

MEMORANDUM DECISION

Presiding Judge Eppich authored the decision of the Court, in which Chief Judge Vásquez and Judge Gard concurred.

E P P I C H, Presiding Judge:

¶1 Everett Huffman appeals from the trial court's dismissal with prejudice of his complaint alleging nuisance, negligence, and wrongful initiation of civil proceedings by Magic Ranch Homeowners Association, Snow Properties Services LLC, and Clint and Amy Goodman (collectively "defendants"). [1] Huffman argues the court erred in determining his nuisance claim was barred by the doctrine of claim preclusion and by dismissing his claims for negligence and wrongful initiation of civil proceedings. He also challenges the court's order designating him a vexatious litigant and denying his motion to amend the complaint. For the following reasons, we affirm in part, vacate in part, and remand for further proceedings.

Factual and Procedural Background

¶2 In 2015, in a separate proceeding, Magic Ranch asserted a breach-of-contract claim against Huffman for alleged violations of Magic Ranch's declaration of covenants, conditions, and restrictions (CC&Rs), requesting injunctive relief. Huffman counterclaimed, and after being granted leave to amend, alleged intentional infliction of emotional distress. Finding Huffman's amended counterclaim procedurally deficient and that it "fail[ed] to state an actionable claim," the trial court granted Magic Ranch's motion to dismiss as to all allegations. On appeal, we agreed with the court's conclusion that Huffman had failed to state claims upon which relief could be granted. *Magic Ranch Ests. Homeowners Ass'n v. Huffman*, No. 2 CA-CV 2018-0142, ¶ 34 (Ariz. App. Nov. 22, 2019) (mem. decision).

¶3 In 2016, Huffman filed an action against Magic Ranch, Snow Properties, and Clint Goodman. He alleged claims of nuisance and breach of quiet enjoyment, intentional infliction of emotional distress, fraud and misrepresentation, negligent infliction of emotional distress, violations of the Fair Debt Collection Practices Act, and "derivative action" claims. Due

[1]Snow Properties and the Goodmans have not appeared on appeal.

to deficiencies in the initial complaint, he later amended it, removing his claim of nuisance. Huffman asserted he had omitted his nuisance claim by mistake, but did not request leave to again amend his complaint. The amended complaint was involuntarily dismissed with prejudice in a final judgment. We affirmed. *Huffman v. Jackson*, No. 2 CA-CV 2018-0181, ¶ 21 (Ariz. App. Oct. 17, 2019) (mem. decision).

¶4 In 2021, Huffman initiated this action for nuisance and breach of quiet enjoyment, negligence, and wrongful initiation of civil proceedings against defendants. Defendants moved to dismiss Huffman's claims for failure to state a claim pursuant to Rule 12(b)(6), Ariz. R. Civ. P., alleging that Huffman could have asserted his claims in the earlier suits and because the current claims arose from the "same nucleus of facts" as the 2015 and 2016 litigation, the action was barred by the doctrine of claim preclusion. They also asserted Huffman's tort claims were barred by a two-year statute of limitations and his statutory causes of action were barred by a one-year statute of limitations. The Goodmans asked the trial court to designate Huffman a vexatious litigant pursuant to A.R.S. § 12-3201.

¶5 In granting the motion to dismiss, the trial court determined Huffman was precluded from asserting his nuisance and breach of quiet enjoyment claim and he had failed to state a claim for wrongful initiation of civil proceedings and negligence. It dismissed his complaint with prejudice.

¶6 Huffman moved the trial court to reconsider and for leave to amend the complaint. The court denied his motions and, after oral argument, designated him a vexatious litigant and entered final judgment. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1).

Discussion

Motion to Dismiss

¶7 Huffman challenges the trial court's dismissal of his complaint with prejudice. We review de novo a court's grant of a Rule 12(b)(6) motion to dismiss, *Cox v. Ponce*, 251 Ariz. 302, ¶ 7 (2021), taking as true the well-pled facts alleged in Huffman's complaint, *see Shepherd v. Costco Wholesale Corp.*, 250 Ariz. 511, n.1 (2021). We will affirm if, as a matter of law, Huffman is not entitled to relief "under any interpretation of the facts susceptible of proof." *Fid. Sec. Life Ins. Co. v. State*, 191 Ariz. 222, ¶ 4 (1998).

Nuisance and Breach of Quiet Enjoyment

¶8 Huffman first asserts the trial court erred in granting the motion to dismiss because his claim under the theory of "nuisance/quiet enjoyment" was not barred by the doctrine of claim preclusion. We review the court's application of claim preclusion de novo. *See Lawrence T. v. Dep't of Child Safety*, 246 Ariz. 260, ¶ 7 (App. 2019).

¶9 In the 2016 litigation, Huffman brought a claim of "nuisance; breach of quiet enjoyment." As in the current litigation, he alleged that in 2014 Magic Ranch had installed community mailboxes and park benches outside his bedroom window, resulting in noise and light at all hours of the night, odors, and garbage.[2] He alleged that, as a result of Magic Ranch's actions, he "has suffered loss of sleep, anxiety, high blood pressure, [s]tress, worry, nausea, grief, nervousness, mental anguish, [and] anger." The trial court denied defendants' motion to dismiss the nuisance claim, finding that Huffman "ha[d] alleged a valid claim." However, because Huffman had failed to adequately allege jurisdiction, and due to deficiencies in other claims he asserted, the court granted Huffman leave to amend his complaint. The 2016 amended complaint raised intentional infliction of emotional distress, fraud and misrepresentation, negligent infliction of emotional distress, negligence, and a "derivative action." It did not raise a nuisance claim. The complaint was involuntarily dismissed with prejudice in a final judgment.

¶10 Under the doctrine of claim preclusion, also known as res judicata, "a final judgment on the merits in a prior suit involving the same parties or their privies bars a second suit based on the same claim." *Dressler v. Morrison*, 212 Ariz. 279, ¶ 15 (2006), *abrogated on other grounds by Coleman v. City of Mesa*, 230 Ariz. 352, ¶¶ 7-8 (2012). In other words, "a party seeking to invoke the doctrine must establish '(1) an identity of claims in the suit in which a judgment was entered and the current litigation, (2) a final judgment on the merits in the previous litigation, and (3) identity or privity between parties in the two suits.'" *Lawrence T.*, 246 Ariz. 260, ¶ 8 (quoting *In re Gen. Adjudication of All Rts. to Use Water in Gila River Sys. & Source*, 212 Ariz. 64, ¶ 14 (2006)). An involuntary dismissal operates as an

[2]Huffman's 2021 complaint asserted that the facts underlying it had been pled in the 2016 litigation. In 2021, he additionally asserted that, in 2015, Magic Ranch had installed a community bulletin board at the same location, resulting in additional noise and stated that these actions had been taken to "get rid of [him]" and to get him to "move out."

adjudication on the merits unless otherwise specified.[3] Ariz. R. Civ. P. 41(b); *Airfreight Express Ltd. v. Evergreen Air Ctr., Inc.*, 215 Ariz. 103, ¶ 13 (App. 2007).

¶11 Huffman asserts the trial court erred in applying claim preclusion because his "nuisance/quiet enjoyment" claim as pled in 2016 was "never litigated" and there was no "identity of claims." Unlike issue preclusion, actual litigation is not required for claim preclusion. *Pettit v. Pettit*, 218 Ariz. 529, ¶ 10 (App. 2008). Therefore, Huffman's argument that the court erred because the claim was "never litigated" is without merit. *See id.*

¶12 However, we agree with Huffman that under Arizona law, there was no "identity of claims" permitting claim preclusion. Citing *Howell v. Hodap*, 221 Ariz. 543 (App. 2009), Magic Ranch asserts that the transactional approach, or whether the claims arise from a common nucleus of operative facts, is the proper test to determine whether there is identity of claims precluding an action. Thus, it asserts, the nuisance claim was properly precluded because it could have been raised in the prior litigation, even though not identical to the claims adjudicated.

¶13 To determine "identity of claims," the transactional approach is applied by most federal courts and analyzes whether the action "'could and should have been asserted in the first action' because it 'arises out of the same events.'" *Lawrence T.*, 246 Ariz. 260, ¶ 17 (quoting *Phx. Newspapers, Inc. v. Dep't of Corrs.*, 188 Ariz. 237, 241 (App. 1997)). In *Howell*, we considered the preclusive effect of a federal judgment and, accordingly, applied federal law. 221 Ariz. 543, ¶¶ 17-21 (recognizing that federal law dictates federal judgment's preclusive effect). As we recently clarified, however, our supreme court has not yet adopted the transactional approach, and so when considering the "identity of claims" to determine the preclusive effect of a state court judgment, we apply the same evidence test.[4] *Lawrence T.*, 246 Ariz. 260, ¶¶ 17-18 (considering recent supreme court

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[3]An involuntary dismissal will not operate as an adjudication on the merits if it is for "lack of jurisdiction, improper venue, or failure to join a party." Ariz. R. Civ. P. 41(b). Huffman's complaint was dismissed for failure to state a claim, facial deficiency, and failure to comply with statutory requirements; thus the dismissal was an adjudication on the merits. *See id.*

[4]However, as evidenced by prior opinions of this court, there has been confusion concerning which test applies. *See Tumacacori Mission Land*

case law suggesting inclination towards transactional approach, but not explicitly adopting).

¶14 The same evidence test is more restrictive: "For an action to be barred, it must be based on the same cause of action asserted in the prior proceeding." *Phx. Newspapers, Inc.*, 188 Ariz. at 240. "If no additional evidence is needed to prevail in the second action than that needed in the first, then the second action is barred." *Id.* "Rights, claims, or demands—even though they grow out of the same subject matter—which constitute separate or distinct causes of action not appearing in the former litigation, are not barred in the latter action because of res judicata." *Pettit*, 218 Ariz. 529, ¶ 8 (quoting *Rousselle v. Jewett*, 101 Ariz. 510, 512 (1966)).

¶15 A private nuisance is the "nontrespassory invasion of another's interest in the private use and enjoyment of land." *Armory Park Neighborhood Ass'n v. Episcopal Cmty. Servs. in Ariz.*, 148 Ariz. 1, 4 (1985) (quoting Restatement (Second) of Torts § 821D (1979)). To establish a claim of private nuisance, a plaintiff must show that a defendant's conduct substantially, intentionally, and unreasonably, under the circumstances, interfered with the use and enjoyment of his property, causing significant harm. *Nolan v. Starlight Pines Homeowners Ass'n*, 216 Ariz. 482, ¶ 32 (App. 2007).

¶16 The 2021 complaint "grow[s] out of the same subject matter," and, alleges substantially the same facts as the 2016 amended complaint. But nuisance is a "separate or distinct cause[] of action" from intentional infliction of emotional distress, fraud and misrepresentation, negligent infliction of emotional distress, negligence, and a "derivative action." *Rousselle*, 101 Ariz. at 512. The dismissal of those claims did not necessarily adjudicate the private nuisance action because none of those claims put at issue the question of interference with property. *See Phx. Newspapers, Inc.*, 188 Ariz. at 241 (same evidence test allows litigants to recast claims under new theories that implicate somewhat different facts). Evidence of interference with Huffman's property is needed to sustain the private nuisance claim, and, although alleged in the 2016 complaint, it was not necessary to support the claims in that complaint. *See Lawrence T.*, 246 Ariz. 260, ¶ 21 (no preclusion where evidence necessary to support second action would not sustain the first). Thus, although "[t]he transactional test

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Dev., Ltd. v. Union Pac. R.R. Co., 231 Ariz. 517, ¶ 8 (App. 2013) (applying same transaction test); *Peterson v. Newton*, 232 Ariz. 593, ¶ 8 (App. 2013) (applying same transaction test from second restatement).

prevents what virtually all courts agree a plaintiff should not be able to do: revive essentially the same cause of action under a new legal theory," the same evidence test, which continues to be Arizona law, does not bar the claim if the legal claims are distinct even if they may be supported by similar facts. *Phx. Newspapers, Inc.*, 188 Ariz. at 241; *see Lawrence T.*, 246 Ariz. 260, ¶¶ 17-18. Accordingly, the trial court erred in determining the 2016 judgment had preclusive effect as to Huffman's nuisance claims.

Negligence

¶17 Huffman argues that the trial court erred by dismissing his negligence claims, specifically his "negligence per se" claims. Magic Ranch contends that to the extent Huffman alleged facts that occurred after the prior judgment, the claims were barred by the statute of limitations and Huffman failed to allege injury.

¶18 The trial court observed that Huffman alleged facts under his negligence claims that had not been included in the prior litigation. The court concluded that these allegations were not precluded, but that Huffman was urging a legal conclusion that "any violation of A.R.S. §§ 33-1801 to 33-1807 is negligence per se" which was "an improper statement of law."[5] It further determined that Huffman failed to state any injury stemming from a violation of those statutes.

¶19 Huffman contends the trial court erred in concluding that a violation of §§ 33-1801 to 33-1807 is not negligence per se because the statutes provide "certain and specific acts" that Magic Ranch was required to complete. "Negligence per se is limited to situations involving a violation of a specific legal requirement, not a general standard of care." *Ibarra v. Gastelum*, 249 Ariz. 493, ¶ 9 (App. 2020). For a negligence per se claim, a statute "must proscribe certain or specific acts . . . . Therefore, if a statute defines only a general standard of care . . . negligence *per se* is inappropriate." *Id.* (first alteration in *Ibarra*, second alteration in original) (quoting *Hutto v. Francisco*, 210 Ariz. 88, ¶ 14 (App. 2005)).

¶20 Huffman quotes certain sections of §§ 33-1801 to 33-1807, but does not develop an argument as to how those sections "proscribe certain or specific acts," *id.*, permitting a negligence per se claim. In any event, Huffman failed to allege any injury from Magic Ranch's alleged violation

[5] These statutes govern planned communities. *See* §§ 33-1801 to 33-1807.

of those statutes. *See Beaty v. Jenkins*, 3 Ariz. App. 375, 376 (1966) ("[N]egligence per se does not establish liability unless there be a causal relationship between the violation and the claimed injury."). Huffman cites to paragraphs in his complaint that he asserts plead injury, but those sections either allege solely a violation of the statute or injury unrelated to such violations. Accordingly, the trial court did not err in dismissing the claims.[6] *See* Ariz. R. Civ. P. 12(b)(6).

Wrongful Initiation of Civil Proceedings

¶21 Huffman next contends the trial court erred in dismissing his wrongful initiation of civil proceedings claim because defendants made "false" allegations which they "failed to prove" and "were without legal or factual basis." Magic Ranch responds that the court was correct in determining the claim failed as a matter of law because Huffman could not demonstrate the required elements of a wrongful initiation of civil proceedings claim.

¶22 To sustain a wrongful prosecution of a civil action claim, the plaintiff must prove the defendant: "(1) instituted a civil action which was (2) motivated by malice, (3) begun without probable cause, (4) terminated in plaintiff's favor and (5) damaged plaintiff." *Bradshaw v. State Farm Mut. Auto. Ins. Co.*, 157 Ariz. 411, 416-17 (1988). We agree with Magic Ranch that Huffman's claim fails as a matter of law because Magic Ranch was successful in the prior litigation, proving that it had probable cause to institute the civil action. *Huffman*, No. 2 CA-CV 2018-0142, ¶¶ 3, 11, 41. Moreover, Huffman failed to allege, and could not reasonably allege, that the prior cases terminated in his favor. *Huffman*, No. 2 CA-CV 2018-0142, ¶¶ 1, 7, 41-42; *Huffman*, No. 2 CA-CV 2018-0181, ¶¶ 1, 20. Accordingly, his wrongful initiation of civil proceedings claim fails as a matter of law, and the trial court did not err in dismissing it. *See* Ariz. R. Civ. P. 12(b)(6).

[6] Huffman does not challenge the trial court's applying claim preclusion to the remainder of his negligence claim or its barring that part of his claim based on the statute of limitations. Thus, any argument concerning those conclusions is waived. *See Sholes v. Fernando*, 228 Ariz. 455, n.1 (App. 2011) (insufficient argument waives issue on appeal); *see also* Ariz. R. Civ. App. P. 13(a)(7).

Vexatious Litigant Designation

¶23 Asserting that all of his claims had a basis in law and fact, Huffman next argues the trial court erred by declaring him a vexatious litigant. Magic Ranch responds that "Huffman's conduct fits squarely within the definition of 'vexatious.'" We treat the court's order as one for injunctive relief, *see Madison v. Groseth*, 230 Ariz. 8, n.8 (App. 2012), and review for an abuse of discretion, *see Ahwatukee Custom Ests. Mgmt. Ass'n v. Turner*, 196 Ariz. 631, ¶ 5 (App. 2000).

¶24 "[I]f the court finds [a] pro se litigant engaged in vexatious conduct," it may designate him a vexatious litigant. A.R.S. § 12-3201(A), (C). Arizona courts also have inherent authority to stop a vexatious litigant from filing additional lawsuits. *Madison*, 230 Ariz. 8, ¶ 17. "Vexatious conduct" includes "[r]epeated filing of court actions solely or primarily for the purpose of harassment," "[u]nreasonably expanding or delaying court proceedings," bringing "[c]ourt actions . . . without substantial justification,"[7] or "[r]epeated filing of . . . requests for relief that have been the subject of previous rulings by the court in the same litigation." § 12-3201(E)(1)(a)-(c), (f). Once a pro se litigant is designated vexatious, he "may not file a new pleading, motion or other document without prior leave of the court." § 12-3201(B).

¶25 Given the trial court's error in determining Huffman's nuisance claim was precluded, we vacate the vexatious litigant designation because it was based in part on a finding that Huffman had "repeatedly filed complaints and sought relief that have been the subject of previous rulings by the court in the same litigation." However, on remand, the court may reconsider whether Huffman remains a vexatious litigant absent the finding of claim preclusion.

Motion to Amend

¶26 Huffman's final argument on appeal is that the trial court erred in denying his motion to amend his complaint. Magic Ranch responds that the court was correct to conclude any amendment would be futile. We review the denial of a motion to amend for an abuse of discretion, *Bishop v. State*, 172 Ariz. 472, 474 (App. 1992), but review a determination of

[7]An action is "without substantial justification" if "the claim . . . is groundless and is not made in good faith." A.R.S. § 12-349(F); *see also* § 12-3201(E)(1)(c), (2).

futility de novo, *Worldwide Jet Charter, Inc. v. Toulatos*, 254 Ariz. 331, ¶ 22 (App. 2022).

¶27 While "[l]eave to amend must be freely given when justice requires," Ariz. R. Civ. P. 15(a)(2), a trial court does not abuse its discretion in denying a motion to amend if any amendment would be futile, *Bishop*, 172 Ariz. at 474-75. To the extent Huffman sought to amend his complaint regarding his negligence and wrongful initiation of civil proceedings claims, as explained above, those claims failed as a matter of law. Thus, any amendment would have been futile, and the court did not err. *Id.* But the court may reconsider on remand whether leave should be granted to allow Huffman to amend his complaint concerning his nuisance claim.

Attorney Fees on Appeal

¶28 Citing A.R.S. § 12-349(A) and Rule 25, Ariz. R. Civ. App. P., Magic Ranch requests an award of attorney fees on appeal. It asserts Huffman filed the appeal "without substantial justification and the appeal is frivolous." "'[W]ithout substantial justification' means that the claim . . . is groundless and is not made in good faith." § 12-349(F). However, Huffman prevailed in challenging the trial court's order of dismissal of his nuisance claim on the grounds of claim preclusion, and thus we cannot say that the claim was groundless. Accordingly, we deny Magic Ranch's request for fees.

Disposition

¶29 For the foregoing reasons we affirm the trial court's dismissal of Huffman's negligence and wrongful initiation of civil proceedings claims, but vacate the court's dismissal of his nuisance claim. We also vacate the vexatious litigant designation. We remand for further proceedings consistent with this decision.