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UNPUBLISHED
December 28, 2021

No. 354297
Oakland Circuit Court
LC No. 2019-177748-CZ

Before: M. J. KELLY, P.J., and STEPHENS and REDFORD, JJ.

PER CURIAM.

This appeal arises out of plaintiff, Eugene McNabb's, lawsuit involving the "sand mining pit" that was at issue in *McNabb v Dan's Excavating, Inc*, unpublished per curiam opinion of the Court of Appeals, issued October 14, 2014 (Docket No. 315941) (*McNabb I*). Plaintiff now appeals as of right the trial court's order granting summary disposition of all claims to defendants Orion Township (the "Township"), Al Daisley, David Goodloe, and Dan's Excavating, Inc. ("DE") under MCR 2.116(C)(7) and (C)(8). We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

I. FACTUAL AND PROCEDURAL BACKGROUND

This case arises out of the third lawsuit initiated by plaintiff concerning a mining pit ("the pit") operated by defendant DE on plaintiff's land and parcels adjacent to it. In 2008, plaintiff and his wife, Ora McNabb, initiated the first such action (the "2008 action") against defendant DE and two nonparties to the instant action: C.P. Ventures Limited Partnership ("CP Ventures") and Charter Township of Orion Zoning Board of Appeals (the "ZBA").[1] After a settlement was reached, the 2008 action was dismissed per stipulation with prejudice.

[1] The 2008 action actually consisted of *two* consolidated cases in the circuit court.

In April 2011, plaintiff and his wife initiated a second suit concerning the pit. They named DE and the Township as defendants. That decision was appealed and, as this Court noted in *McNabb I*, unpub op at 1, plaintiff and his wife alleged

> that while [DE] 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. In their complaint, [plaintiff and his wife] sought damages and mandatory injunctive relief against [DE] to remedy the alleged violations of the ordinance and mandamus relief against the Township to compel enforcement of Ordinance 99 and the permit. Both the Township and [DE] sought summary dismissal . . . under MCR 2.116(C)(10), which the trial court granted. The trial court subsequently denied plaintiffs' motion for reconsideration.

Plaintiff and his wife unsuccessfully appealed as of right in *McNabb I.* unpub op at 2-6. That opinion was issued on October 14, 2014.

The parties agree that Ordinance 99 addressed in *McNabb I* was amended, in April 2015. In pertinent part, the amendment added the following language to the ordinance:

> **Section 10 – Requirements: Filling Operations** *(added 04.20.15)*
>
> A. All filling operation permittees must comply with the following:
>
> * * *
>
> 4. In addition to the requirements set forth in Section 5, at the cost to the permittee, all permittees must:
>
> a. maintain a log of each fill material and one photograph of each truckload which shall depict the contents of the fill material, and, including the date and time of the delivery and the contents of the truckload.
>
> i. The permittee will forward to the Township Building Department copies of all logs and photographs on a monthly basis or earlier if requested by the Building Official or his designee.

On November 4, 2019, plaintiff filed a verified complaint against defendants DE and the Township. Plaintiff subsequently amended that complaint and added defendants Daisley and Goodloe, as "Township Zoning Enforcement Officers," in their individual capacities. Plaintiff's first amended complaint included eight counts: governmental taking, declaratory judgment, two counts nuisance per se, gross negligence, civil conspiracy, mandamus, and superintending control.

All of the defendants moved for summary disposition under MCR 2.116(C)(7) and (C)(8). They argued, among other things, that plaintiff's claims in this action were barred by res judicata. The court granted the motion and denied plaintiff's motion to file a second amended complaint

adding a trespass claim against DE, reasoning that the requested amendment was futile because plaintiff's new proposed claim was barred by res judicata. This appeal ensued.

II. STANDARD OF REVIEW

On appeal, plaintiff raises several claims of error, which we review under varying standards. "[A] trial court's decision on a motion to amend a complaint is reviewed for an abuse of discretion." *Aguirre v Michigan*, 315 Mich App 706, 713; 891 NW2d 516 (2016). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes" or founded upon "an error of law." *Pirgu v United Servs Auto Ass'n*, 499 Mich 269, 274; 884 NW2d 257 (2016). We review de novo, as questions of law, "whether a claim is barred by the applicable statute of limitations," *In re Pollack Trust*, 309 Mich App 125, 134; 867 NW2d 884 (2015), or res judicata, *Adam v Bell*, 311 Mich App 528, 530; 879 NW2d 879 (2015). A trial court's ruling regarding a motion for summary disposition is also reviewed de novo. *Heaton v Benton Constr Co*, 286 Mich App 528, 531; 780 NW2d 618 (2009).

III. ANALYSIS

The motions which gave rise to plaintiff's claims of error were based upon two separate provisions of MCR 2.116: (C)(8) and (C)(7). In our analysis of the claims of error we are cognizant of the analytical framework for each provision. As our Supreme Court explained in *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999):

> A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. When deciding a motion brought under this section, a court considers only the pleadings. [*Id*. (Quotation marks and citations omitted).]

On the other hand, the moving party

> may support a motion under MCR 2.116(C)(7) by affidavits, depositions, admissions, or other documentary evidence. If such material is submitted, it must be considered. MCR 2.116(G)(5). Moreover, the substance or content of the supporting proofs must be admissible in evidence. . . . Unlike a motion under subsection (C)(10), a movant under MCR 2.116(C)(7) is not required to file supportive material, and the opposing party need not reply with supportive material. The contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant. [*Id*. at 119 (citation omitted)].

A. LIMITATION PERIODS

On appeal, plaintiff argues that the trial court erred by granting defendants summary disposition of "all" claims on the basis that those claims were barred by the applicable limitation periods. We are not persuaded that the court committed any such error.

The trial court's ruling did not rely on the applicable statutes of limitations for dismissal of each of the eight causes of action pled by the plaintiff. It is axiomatic "that a court speaks through its written orders and judgments, not through its oral pronouncements." *In re Contempt of Henry*, 282 Mich App 656, 678; 765 NW2d 44 (2009). In ruling on defendants' motions for summary disposition, the trial court was not required to issue an opinion explaining its ruling. See MCR 2.517(A)(4); *Yakowich v Dep't of Consumer & Indus Servs*, 239 Mich App 506, 510; 608 NW2d 110 (2000). Nevertheless, it did so, issuing a written opinion and order explicitly detailing its reasoning. Although the trial court held that plaintiff's proposed trespass claim against DE would be barred under the applicable limitations period, the court did so only in support of its conclusion that plaintiff's motion to file a second amended complaint was futile. The trial court did not state that it was granting defendants *summary disposition* of some or all of plaintiff's claims based on the applicable limitation period(s). Thus, we reject plaintiff's argument that the trial court erred by doing so.[2]

B. RES JUDICATA

Plaintiff next argues that the trial court erred by granting defendants summary disposition of all claims in this action under the doctrine of res judicata. We agree that the trial court's application of res judicata was erroneous in several respects.

"The doctrine of res judicata is intended to relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and encourage reliance on adjudication, that is, to foster the finality of litigation." *Bryan v JPMorgan Chase Bank*, 304 Mich App 708, 715; 848 NW2d 482 (2014) (quotation marks and citation omitted). For res judicata to preclude a claim, three elements must be satisfied: "(1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first." *Adair v Michigan*, 470 Mich 105, 121; 680 NW2d 386 (2004). "[T]he burden of proving the applicability of . . . res judicata is on the party asserting it." *Baraga Co v State Tax Comm*, 466 Mich 264, 269; 645 NW2d 13 (2002).

Our Supreme Court "has taken a broad approach" to this preclusion doctrine, embracing the "transactional" test, under which res judicata "bars not only claims already litigated, but also every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not." *Adair*, 470 Mich at 121. "[T]he determinative question is whether the claims in the instant case arose as part of the same transaction as did the claims in" the prior actions. See *id*. at 125. "Whether a factual grouping constitutes a transaction for purposes of res judicata is to be determined pragmatically, by considering whether the facts are related in *time, space, origin or motivation*, [and] whether they form a convenient trial unit. . . ." *Id*. (alteration and emphasis in original), quoting 46 Am Jur 2d, Judgments 533.

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[2] To the extent defendants raise statute-of-limitation arguments here as *appellees*, we find those arguments unpersuasive and premature where the parties dispute both when plaintiff's claims actually accrued for purposes of MCL 600.5827 and whether defendants engaged in any fraudulent concealment that would warrant an extension of the applicable limitation periods under MCL 600.5855.

In this case, the prior action in 2011 was decided on the merits for purposes of res judicata. The trial court's grant of summary disposition in the 2011 lawsuit was a final order as to the parties to that suit. This Court affirmed the trial court's grant of summary disposition in favor of DE and the Township on the second lawsuit, *McNabb I*, unpub op at 1, 7, which also constituted a final decision on the merits for purposes of res judicata. See *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 414; 733 NW2d 755 (2007). Thus the court's determination that there was a final determination on the merits was correct.

However, the trial court erred in its analysis of of next prong of the res judicata analysis which was whether this action and the second action involved the same parties or their privies. The trial court erred by concluding that the second element for res judicata was satisfied here with regard to *all* of plaintiff's claims against the various defendants.

In the context of res judicata, "the term 'privity' . . . does not embrace relationships between persons or entities," as it does in other areas of law, "but rather deals with a person's relationship to the subject matter of the litigation," denoting "a mutual or successive relationship to the same right or thing." 50 CJS, Judgments, § 1101, p 473. "To be in privity is to be so identified in interest with another party that the first litigant represents the same legal right that the later litigant is trying to assert." *Adair*, 470 Mich at 122. "The outer limit of the doctrine traditionally requires both a 'substantial identity of interests' and a 'working functional relationship' in which the interests of the nonparty are presented and protected by the party in the litigation." *Id*. (quotation marks and citations omitted). The application of privity principles differs between private and governmental parties. *Baraga Co*, 466 Mich at 270.

In 2019 case, the named parties were plaintiff and defendants Daisley, Goodloe, the Township, and DE. Daisley and Goodloe were not parties to the 2011 action, though plaintiff, DE, and the Township were parties to it. In the 2019 case, the trial court did not discuss whether Daisley and Goodloe shared a sufficient privity of interest with any of the named parties in the 2011 action to warrant granting Daisley and Goodloe summary disposition here under the doctrine of res judicata. In this case, while Daisley and Goodloe are named as defendants here in their individual capacities, their privity with the interests of the Township or DE is unproven. On this record, we cannot conclude that Daisley and Goodloe's interests are sufficiently aligned with those the Township (in the 2011 action) to support a finding of privity.

The trial court also erred by concluding that all of plaintiff's claims in this action either regarding the amended Ordinance 99 were or could have been resolved in the prior actions. It is well-settled that res judicata "does not bar a subsequent action between the same parties or their privies when the facts have changed or new facts have developed, or when there has been an intervening change of law that alters the legal principles on which the court will resolve the subsequent case[.]" *In re Bibi Guardianship*, 315 Mich App 323, 334; 890 NW2d 387 (2016) (quotation marks and citations omitted). A careful review of plaintiff's first amended complaint reveals that all of his claims in this action are based, either partly or entirely, on defendants' alleged failures to enforce or comply with requirements added to Ordinance 99 by amendment on April 20, 2015. The trial court's final order in the 2011 action was entered in February 2013, and this Court's decision in *McNabb I* was rendered in October 2014. To the extent that plaintiff's claims are based on violations of requirements added to Ordinance 99 by the April 20, 2015 amendment, alleged failures to enforce those new requirements, res judicata does not bar them. See *In re Bibi*

Guardianship, 315 Mich App at 334; see also *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 383; 596 NW2d 153 (1999) ("The goal of res judicata is to promote fairness, not lighten the loads of the . . . court by precluding suits whenever possible.").

In sum, the claims based upon the amended ordinance as to the Township, Daisley, and Goodloe survive the MCR 2.116C(8) and (7) challenge.

C. ABANDONMENT

Plaintiff also argues that the trial court erred by "finding" that plaintiff's counsel had admitted, at oral argument, that plaintiff "lacked standing to pursue a claim for damages" against DE, thereby abandoning any such claims. Under the applicable standard of de novo review, see *Heaton*, 286 Mich App at 531, we conclude that the trial court did err by holding that plaintiff's counsel had "apparently abandoned" one or more of plaintiff's claims against DE.

The trial court referred to the purportedly abandoned claim as an " 'illegal landfill' claim[.]" "It is well settled that the gravamen of an action is determined by reading the complaint as a whole, and by looking beyond mere procedural labels to determine the exact nature of the claim." *Adams v Adams*, 276 Mich App 704, 710-711; 742 NW2d 399 (2007). Although plaintiff's first amended complaint included allegations that DE was operating an "illegal landfill" on the disputed property, none of the claims were captioned as an "illegal landfill" claim, and we are aware of no such cause of action under existing Michigan law. At the July 8, 2020 motion hearing, DE's counsel argued that it appeared that plaintiff had "dropped" his "illegal landfill" claim because plaintiff had conceded that he did not "have jurisdiction [sic] to claim any damages in terms of the fines that are provided under" Ordinance 99. In response, plaintiff's counsel argued, in relevant part:

> [W]hile we agree we are not entitled . . . to seek those fines from Orion Township or from [DE], the entire basis of the action is one for mandamus or superintending control, and to force Orion Township to enforce its ordinance and collect those fines and take the action that is required under its own ordinance.
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> * * *
>
> Also, while we conceded that we are not the ones entitled to those statutory damages under the ordinance and that it is Orion Township that is compelled to obtain them from [DE] to enforce its own ordinance, there are damages that are associated with the nuisance by [DE] and the taking and the trespass. And those damages emanate from the fact that each time that [DE] failed to maintain a lot and maintain pictures let alone forward them; that every time that that happened, it's a separate cause of action for a nuisance . . . .
>
> Now, the fact that these two entities no longer apparently wish to enforce them despite their obligation to is a mystery, but there are damages associated with that. It's just that we can't be the ones to receive those damages which are penalties under the ordinance.
>
> * * *

> As to the damage question, . . . the damages under the ordinance run to Orion Township, and they have an obligation which is enforced by mandamus to go after [DE] for its violation.

This argument clearly demonstrated that plaintiff's counsel did not intend to abandon any of plaintiff's claims seeking to compel the Township to enforce Ordinance 99 against DE, or to abandon plaintiff's claims for damages against DE under nuisance or trespass theories. Moreover, plaintiff's counsel was correct that, even if plaintiff was not entitled to bring a private cause of action to collect fines against DE *directly* under Ordinance 99, that alone did not prevent him from seeking a writ of mandamus to compel *the Township* to do so. Indeed, one of the essential elements for obtaining the extraordinary remedy of a writ of mandamus is the lack of any other remedy capable of achieving the same result. See *O'Connell v Dir of Elections*, 317 Mich App 82, 90-91; 894 NW2d 113 (2016).

D. AMENDMENT AS TO TRESPASS BY DE

Finally, plaintiff argues that the trial court abused its discretion by denying his motion to file a second amended complaint to add a claim for trespass against DE, which was based on allegations that DE trespassed on plaintiff's property on numerous occasions "[f]rom 2001 through 2006[.]" We do not find an abuse of discretion.

As this Court explained in *Lane v KinderCare Learning Ctrs, Inc*, 231 Mich App 689, 696; 588 NW2d 715 (1998):

> Pursuant to MCR 2.118(A)(2), plaintiff was required to seek leave of the court to amend her complaint a second time. A court should freely grant leave to amend a complaint when justice so requires. The rules governing the amendment of pleadings are intended to facilitate amendment except when prejudice to the opposing party would result. Thus, amendment is generally a matter of right, rather than grace. Ordinarily, a motion to amend a complaint should be granted, and should be denied only for the following particularized reasons: (1) undue delay, (2) bad faith or dilatory motive on the part of the movant, (3) repeated failure to cure deficiencies by amendments previously allowed, (4) undue prejudice to the opposing party by virtue of allowance of the amendment, or (5) *futility of the amendment*. [Citations omitted; emphasis added.]

In this instance, the trial court denied plaintiff leave to amend on grounds of futility, reasoning that the trespass claim he sought to add was barred by the doctrine of res judicata. We agree.

To reiterate, our Supreme Court "has taken a broad approach" to the third element, embracing the "transactional" test, under which res judicata "bars not only claims already litigated, but also every claim arising from the same transaction that the parties, *exercising reasonable diligence*, could have raised but did not." *Adair*, 470 Mich at 121 (emphasis added). "[T]he determinative question is whether the claim[] in the instant case arose as part of the same transaction as did the claims in" either of the prior actions. See *id*. at 125. "Whether a factual grouping constitutes a transaction for purposes of res judicata is to be determined pragmatically,

by considering whether the facts are related in *time, space, origin or motivation*, [and] whether they form a convenient trial unit. . . ." *Id*. (alteration and emphasis in original), quoting 46 Am Jur 2d, Judgments 533.

Plaintiff's proposed claim regarded trespasses allegedly committed by DE in the years 2001 through 2006. In other words, that claim arose out of the same essential "transaction" as did the claims in the prior actions, and it regarded trespasses that allegedly occurred before plaintiff instituted either of the prior actions and before the April 2015 amendment of Ordinance 99. Moreover, on this record, plaintiff cannot rationally contend that he could not have asserted his proposed trespass claim against DE in the prior actions through the exercise of due diligence. On the contrary, in the 2008 action, he and his wife *did* assert a trespass claim against DE arising out of the mining operations at issue here, and he alleged that DE had conducted those operations without the requisite mining permits in certain years. Through the exercise of reasonable diligence, plaintiff could have asserted his proposed trespass claim against DE in either of the prior actions. Accordingly, we find no abuse of discretion in the trial court's denial of plaintiff's motion to file a second amended complaint. Rather, the trial court correctly denied that motion as futile.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Kelly
/s/ Cynthia Diane Stephens
/s/ James Robert Redford