DA 22-0685

IN THE SUPREME COURT OF THE STATE OF MONTANA

2023 MT 186N

DIAMOND V. CORPORATION, INC., a Montana corporation, GRANT KUBESH, MARY KUBESH, ZACH RUBESH and BARBARA KUBESH,

Plaintiffs and 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 and Appellees.

APPEAL FROM: District Court of the Seventh Judicial District,
In and For the County of Dawson, Cause No. DV 20-029
Honorable Ashley Harada, Presiding Judge

COUNSEL OF RECORD:

For Appellants:

Ben Sather, Sather Law, PLLC, Billings, Montana

For Appellee Buckhorn Energy Oaks Disposal Services, LLC:

Adam J. Tunning, Jordan W. FitzGerald, Moulton Bellingham, PC, Billings, Montana

For Appellee Dawson County:

Harlan B. Krogh, Benjamin Alke, Crist, Krogh, Alke & Nord, PLLC, Billings, Montana

Submitted on Briefs: July 19, 2023
Decided: October 3, 2023

Filed:

Clerk

Justice James Jeremiah Shea delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion, shall not be cited, and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 Appellant Diamond V Corporation, Inc., and its individual shareholders, Grant, Mary, Zach, and Barbara Kubesh (collectively "Diamond V") appeal from the Seventh Judicial District Court order granting summary judgment in favor of Appellees Buckhorn Energy Oaks Disposal Services, LLC ("Buckhorn") and Dawson County.

¶3 Diamond V commenced this action, alleging nuisance, breach of contract, and negligence by both Buckhorn and the County; trespass by Buckhorn; and inverse condemnation by the County.[1] The claims arise from the operation of a landfill owned and operated by Buckhorn that is situated north of the Diamond V Ranch. County Road 454 (CR 454) passes through the Diamond V Ranch, and landfill customers have used CR 454 as one of three access routes to the landfill since its opening in June 2013. Diamond V asserts the landfill has caused loss of the use and enjoyment of their property and emotional distress due to increased traffic on CR 454, and the resulting noise, light, and dust from that traffic.

[1] Diamond V conceded its inverse condemnation claim before the District Court. On appeal, Diamond V fails to substantively address the District Court's ruling on its trespass claim. We confine our review to Diamond V's claims that have been properly presented.

¶4 Buckhorn and the County both moved for summary judgment. The District Court granted the motions, relying on "the lack of empirical data, expert testimony, or investigation to substantiate [Diamond V's] claims, and the lack of testimony as to specific elements related to nuisance, negligence, trespass, and damages."

¶5 We review a district court's decision to grant summary judgment de novo, using the same criteria applied by the district court under M. R. Civ. P. 56. *GRB Farm v. Christman Ranch*, *Inc*., 2005 MT 59, ¶ 7, 326 Mont. 236, 108 P.3d 507. Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." M. R. Civ. P. 56(c)(3). If the moving party meets its initial burden of proving a lack of any genuine issue of material fact, with all reasonable inferences being drawn in favor of the opposing party, "the burden shifts to the nonmoving party to establish otherwise." *Schmidt v. Washington Contractors Group*, 1998 MT 194, ¶ 7, 290 Mont. 276, 964 P.2d 34.

¶6 Pursuant to § 27-30-101(1), MCA, "[a]nything that 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 use and enjoyment of life or property, . . . is a nuisance." Section 27-30-101(2), MCA provides that "nothing that is done or maintained under the express authority of statute may be deemed a public or private nuisance." Activities undertaken under express statutory authority "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." *Barnes v. City of Thompson Falls*, 1999 MT 77, ¶ 26, 294 Mont. 76, 979 P.2d 1275.

¶7 Parties alleging negligence must prove the defendant: (1) owed plaintiff a duty; (2) defendant breached that duty; and (3) defendant's breach caused plaintiff's injury. *Dubiel v. Mont. Dep't of Transp.*, 2012 MT 35, ¶ 12, 364 Mont. 175, 272 P.3d 66. When a breach of a duty of care is alleged, a plaintiff must establish the standard of care by which to measure the defendant's actions; that is, a plaintiff "must establish the degree of prudence, attention, and caution the defendant must exercise in fulfilling that duty of care." *Dubiel*, ¶ 14 (citing *Dalton v. Kalispell Reg'l Hosp*., 256 Mont. 243, 247, 846 P.2d 960, 962 (1993)).

¶8 There is no dispute that the licensing and operation of the landfill, and the maintenance and operation of CR 454, are statutorily authorized activities. Diamond V does not allege that either Buckhorn or the County has exceeded their statutory authority. Diamond V's claim is therefore a qualified nuisance action. To prevail on a qualified nuisance action,

> a plaintiff must do more than simply plead the existence of the statutorily authorized activity or facility claimed to constitute a nuisance; such plaintiff must, in addition, plead and prove the defendant's negligence and the resulting "injurious" consequences of that activity or facility to plaintiff's "comfortable enjoyment of life or property."

¶9 *Barnes*, ¶ 25. Since proving negligence is an essential part of a qualified nuisance action, the failure to establish negligence on the part of the defendants in this case is fatal to both Diamond V's qualified nuisance action and its standalone negligence claim.

¶10 Because both Buckhorn's and the County's conduct was statutorily authorized, the District Court correctly noted that "Diamond V needs to do much more than claim that lawful truck traffic is a nuisance, it needs to present substantial and concrete evidence showing Defendants were negligent in carrying out their lawful operations." In that regard, Buckhorn and the County assert Diamond V failed to establish a standard of care by which Buckhorn and the County's maintenance of the road is to be measured by the jury, which is essential to prove they acted negligently. The District Court agreed, reasoning:

> All vehicles traveling on dirt roads will cause dirt to be raised from the roadbed. All vehicles traveling on dirt roads using their headlights will cast their beams askance. All vehicles traveling on dirt roads will create noise. It is the role of the expert to identify, quantify, and assess these issues in order to establish whether a tort has been committed. Diamond V has not done so in any manner.

¶11 We have upheld a district court's grant of summary judgment on this basis in other cases regarding claims against state authorities and their administration of public roads. Dubiel, ¶ 18 (expert testimony was required to establish the standard of care applicable to the Montana Department of Transportation's decision-making process for closing a road); Not Afraid v. State, 2015 MT 330, ¶¶ 16-19, 381 Mont. 454, 362 P.3d 71 (placement, installation, and maintenance of concrete barriers is "sufficiently beyond the common experiences" of laypeople, thus requiring expert testimony). Diamond V asserts this case is distinguishable from these cases because the maintenance of the road is simple enough

for a jury to understand without expert testimony. But driving a dirt road does not make one an expert in road maintenance. Assessing whether even one discrete task (e.g., dust control) was performed adequately requires examination of environmental and administrative factors such as the quantity and nature of traffic, effectiveness and practicability of maintenance measures, and road composition.

¶12 Diamond V argues the existence of the alleged nuisance proves negligence. But even accepting Diamond V's allegations as true for summary judgment purposes, the mere existence of an alleged injury does not establish that the injury resulted from any negligence on the defendants' part. In order to prevail on a qualified nuisance claim, the plaintiff must "prove the defendant's negligence *and* the resulting 'injurious' consequences." *Barnes*, ¶ 25 (emphasis added). Diamond V failed to establish any negligence on the part of Buckhorn or the County. Buckhorn and the County were entitled to summary judgment on Diamond V's negligence and nuisance claims.

¶13 Diamond V argues that a jury question exists as to whether Buckhorn and Dawson County breached their duties under their road maintenance agreement. In granting summary judgment on Diamond V's breach of contract claim, the District Court observed:

> Diamond V's breach of contract claim in Count IV is not supported by any cognizable information. Diamond V alleges that Buckhorn and the County breached their road maintenance agreement but fails to identify any provision(s) that was violated or when. Diamond V has not presented evidence to demonstrate what actions of the County or Buckhorn have caused a breach of the terms of the contract.

¶14 The District Court further noted that Diamond V is neither a party to the road maintenance agreement nor did it point to any language in the contract designating it an

intended third-party beneficiary. Accordingly, the District Court held that Diamond V did not have standing to sue for breach of the maintenance agreement between Buckhorn and the County.

¶15 As it did before the District Court, Diamond V fails to identify any provision of the road maintenance agreement that was allegedly violated. As to the District Court's conclusion that Diamond V lacked standing to sue for breach of contract because it was not an intended third-party beneficiary, Diamond V asserts on appeal that the agreement between the County and Buckhorn was intended to benefit "third parties such as users of the Road and landowners along the road, including [Diamond V]." Diamond V's assertion is both correct and illustrates the infirmity of its position.

¶16 Montana law has long established that a stranger to a contract lacks standing to enforce the terms of a contract between its original parties, absent proof the original parties intended the performance of the contract to benefit the third party. *McKeever v. Oregon Mortgage Co*., 60 Mont. 270, 273, 198 P. 752, 753 (1921). In simpler terms, "there is a plain distinction between a promise, the performance of which may benefit a third party, and a promise made expressly for the benefit of the third party." *McKeever*, 60 Mont. at 273-74, 198 P. at 753. "The contract must be made expressly for the benefit of the third party, and the word 'expressly' means 'in direct terms.'" *McKeever*, 60 Mont. at 274, 198 P. at 753 (citing Webster's International Dictionary). As Diamond V noted on appeal, this agreement was intended to benefit "third parties such as users of the Road and landowners along the road." Anyone can use a public road. A contract for the benefit of users of a

public road and all the landowners along a public road effectively encompasses the general public. Diamond V's inclusion in this group does not make the contract expressly for Diamond V's benefit.

¶17 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. In the opinion of the Court, the case presents a question controlled by settled law or by the clear application of applicable standards of review. Having reviewed the briefs and the record on appeal, we conclude that Diamond V has not established the existence of genuine issues of material fact. The District Court did not err by granting summary judgment to the County and Buckhorn.

/S/ JAMES JEREMIAH SHEA

We Concur:

/S/ MIKE McGRATH
/S/ LAURIE McKINNON
/S/ DIRK M. SANDEFUR
/S/ JIM RICE