STATE OF MICHIGAN

COURT OF APPEALS

THOMAS GAWRYCH and CAROL A. GAWRYCH,

Plaintiffs/Counter-Defendants-Appellees,

v

MARK RUBIN,

Defendant/Counter-Plaintiff-Appellant.

UNPUBLISHED
July 20, 2006

No. 267447
Alcona Circuit Court
LC No. 99-010306-CE

Before: Neff, P.J., and Bandstra and Zahra, JJ.

PER CURIAM.

Defendant claims an appeal from the trial court's decision on remand granting summary disposition in favor of plaintiff and ordering him to abate a nuisance. We affirm.

Plaintiffs own three lots in a subdivision in Alcona Township. Plaintiffs' lot 2 lies on the shore of Lake Huron, while their lots 10 and 11, on which their residence sits, are located across the street from lot 2. Defendant owns lots 3, 4, and 5 in the subdivision. Defendant's lot 3 is adjacent to plaintiffs' lot 2, and is located across the road from plaintiffs' lot 10.

Defendant erected a second pole barn on lot 3, and in the course of doing so, trespassed onto plaintiffs' lot 2. Plaintiffs filed suit, alleging that the construction violated the local zoning ordinance and thus constituted a nuisance per se, that defendant trespassed on their land while constructing the pole barn and on their riparian rights by constructing a boat dock in front of lot 2, that defendant's placement of the pole barn violated subdivision restrictions, and that the pole barn constituted a private nuisance because floodlights attached thereto disturbed them at night. Plaintiffs claimed that they suffered special damages in the use and enjoyment of their property because their view of Lake Huron from their home was blocked by the second pole barn, that the obstructed view diminished the value of their property, that the pole barn disrupted the residential character of the neighborhood, and that defendant's construction activities created unnatural runoff and erosion problems. Defendant filed a countercomplaint alleging that the location of plaintiffs' home violated subdivision restrictions, and therefore constituted a nuisance.

Plaintiffs filed an appeal with the Alcona Township Zoning Board of Appeals (ZBA), arguing that defendant's construction of a second pole barn violated the zoning ordinance. The ZBA ruled in favor of plaintiffs. The circuit court reversed that decision, concluding that plaintiffs' appeal to the ZBA was untimely.

The trial court denied plaintiffs' motion for summary disposition of their public nuisance claim, but granted summary disposition for defendant based on laches, holding that plaintiffs' delay in appealing to the ZBA resulted in prejudice to defendant. The trial court also granted partial summary disposition for plaintiffs on their trespass to land claims, and awarded plaintiffs $733.50 in damages. The trial court granted summary disposition for plaintiffs on their private nuisance claim based on the location of the floodlights, and ordered defendant to abate the nuisance. The trial court granted summary disposition for defendant on plaintiffs' claim of trespass on their riparian rights and on their claim for treble damages for trespass.

Subsequently, the trial court granted plaintiffs' unopposed motion for summary disposition of defendant's counterclaim, and granted plaintiffs' motion for voluntary dismissal of their remaining claims. The trial court granted defendant's motion for fees and costs.

Plaintiffs appealed,[1] and in *Gawrych v Rubin*, unpublished opinion per curiam of the Court of Appeals, issued October 26, 2004 (Docket No. 247744), this Court reversed in part and remanded for further proceedings. This Court affirmed the trial court's denial of summary disposition for plaintiffs on their public nuisance claim, but reversed the grant of summary disposition for defendant, and remanded for consideration of the issue of plaintiffs' standing to bring such a claim. This Court found that defendant's pole barn violated the zoning ordinance, and thus constituted a nuisance per se under MCL 125.294, but directed the trial court to consider "whether the obstruction of plaintiffs' scenic view of Lake Huron is a special damage that would permit plaintiffs to proceed on their public nuisance claim." *Id*., slip op at 2. This Court rejected plaintiffs' argument that the trial court erred in holding that they were required to exhaust their administrative remedies before the ZBA prior to proceeding in circuit court. *Id*. This Court agreed with plaintiffs that the trial court erred by applying the doctrine of laches to their public nuisance claim, *id*. at 2-3, found that the trial court erred by failing to award plaintiffs treble damages under MCL 600.2919(1) on their trespass to land claim and reversed for entry of judgment for plaintiffs in the amount of $2,200.50 rather than $733.50, *id*. at 3, and vacated the trial court's award of costs and fees to defendant and remanded for further consideration of that issue. *Id*. at 3-4.

On remand, plaintiffs moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that the obstruction of their view of Lake Huron by defendant's second pole barn, and the accumulation of vegetation growth on their beach resulting from runoff caused by defendant's construction activities, constituted special damages that supported their claim for public nuisance. The trial court granted summary disposition for plaintiffs on the basis that the obstruction of their view of Lake Huron by defendant's second pole barn constituted special

[1] Defendant filed a cross-appeal, but that appeal was dismissed pursuant to a stipulation.

damages that gave them standing to bring a public nuisance claim, but denied summary disposition for plaintiffs on the basis that the beach vegetation allegedly resulting from the runoff from defendant's activities constituted special damages, and granted summary disposition for defendant on that issue. Subsequently, the trial court entered an order concluding that plaintiffs had standing to bring a claim for public nuisance, and requiring defendant to abate the nuisance by removing the second pole barn.

We review a trial court's decision on a motion for summary disposition de novo. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001).

A structure erected in violation of a zoning ordinance is a nuisance per se. MCL 125.294. A nuisance arising from the violation of an ordinance is by its nature a public nuisance. *Towne v Harr*, 185 Mich App 230, 232; 460 NW2d 596 (1990). A public nuisance is an unreasonable interference with a common right enjoyed by the general public, and includes conduct which: (1) significantly interferes with the public's health, safety, peace, comfort, or convenience; (2) is proscribed by law; or (3) was known or should have been known by the actor to be of a continuing nature which produces a permanent or long-lasting significant effect on the public's rights. A private citizen may pursue an action for a public nuisance if he can show that he suffered a type of harm different from that of the general public. *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 190; 540 NW2d 297 (1995).

Defendant argues that the trial court on remand erred in not holding a hearing or trial on the issue of whether he violated the zoning ordinance by erecting a second pole barn. We disagree.

In *Gawrych*, *supra*, this Court held that defendant's construction of a second pole barn violated the zoning ordinance, and thus constituted a nuisance per se under MCL 125.294. The *Gawrych* Court's holding on this issue constitutes the law of the case. The law of the case doctrine provides that an appellate ruling on a particular issue binds the appellate court and all lower tribunals with regard to that issue. A question of law decided by an appellate court will not be decided differently on remand or in a subsequent appeal in the same case. *Reeves v Cincinnati, Inc (After Remand)*, 208 Mich App 556, 559; 528 NW2d 787 (1995). The doctrine applies to questions specifically decided in an earlier decision and to questions necessarily determined to arrive at that decision. *Webb v Smith (After Second Remand)*, 224 Mich App 203, 209; 568 NW2d 378 (1997). The trial court was bound by the *Gawrych* Court's holding that defendant's construction of a pole barn violated the zoning ordinance, and correctly declined to hold a hearing or trial on the issue.

Furthermore, defendant argues that the trial court erred by holding that plaintiffs demonstrated that they suffered special damages, i.e., the obstruction of their view of Lake Huron, that gave them standing to pursue their public nuisance claim. We disagree.

In *Towne*, *supra*, the plaintiffs sued to abate a public nuisance resulting from the defendants' erection of a pole building in violation of local zoning ordinances. The trial court found that the plaintiffs were the proper parties to institute such an action. This Court reversed, finding that the plaintiffs failed to prove special damages, and thus lacked standing to bring the abatement action. *Id.* at 231-233. The *Towne* Court did not hold that loss of view cannot constitute special damages, but simply noted without elaboration that the trial court's findings

demonstrated that the plaintiffs did not prove that they suffered special damages as a result of defendants' violation of the zoning ordinance. Furthermore, in *Webb*, *supra*, in which the plaintiffs sued to enforce negative reciprocal easements, this Court held that a diminution in property value resulting from a lake view obscured by construction in violation of deed restrictions constituted substantial harm. *Id*. at 212-213.

In support of their motion for summary disposition on remand, plaintiffs submitted an affidavit in which they stated that defendant's second pole barn, located on defendant's lot 3, directly obstructed their view of Lake Huron from their home. Plaintiffs also stated that their home had diminished in value due to defendant's placement of a pole barn on lot 3. This uncontradicted evidence supported the trial court's finding that defendant's construction of a pole barn on lot 3 resulted in harm to plaintiffs that was different from the harm suffered by the public in general. *Cloverleaf Car Co, supra*. The trial court did not err in holding that plaintiffs demonstrated that defendant's construction of a pole barn caused them special damages, and that they had standing to bring a claim of public nuisance.

Affirmed.

/s/ Janet T. Neff
/s/ Richard A. Bandstra
/s/ Brian K. Zahra