

STATE OF MICHIGAN
COURT OF APPEALS

TOWNSHIP OF RICHMOND,

Plaintiff-Appellee,

UNPUBLISHED
February 21, 2013

v

RONDIGO, LLC,

Defendant-Appellant.

No. 307520
Macomb Circuit Court
LC No. 2011-002437-CZ

Before: CAVANAGH, P.J., and SAWYER and SAAD, JJ.

PER CURIAM.

Defendant, Rondigo, LLC, appeals the trial court's grant of summary disposition to plaintiff, Richmond Township. For the reasons set forth below, we affirm.

I. FACTS AND PROCEEDINGS

This appeal arises out of Richmond's attempt to enjoin and abate Rondigo's construction, expansion, and use of two access roads on its property at 26775 32 Mile Road in Richmond Township. Among other claims, this issue was addressed in a prior opinion issued by this Court in *Twp of Richmond v Rondigo, LLC*, unpublished opinion per curiam of the Court of Appeals, issued April 20, 2010 (Docket Nos. 288625, 290054). This Court explained the facts as follows:

Rondigo owns farm property, and it intended to implement a nutrient management plan, which included extensive on-site composting, as part of an effort to naturally fertilize the farmland. Rondigo engaged in the improvement, extension, and construction of two access roads on the property to facilitate the hauling of leaves, grass, and yard waste for composting purposes. The township disapproved of and challenged Rondigo's roadwork activities, arguing that Rondigo never obtained proper township approval. In two separate complaints, the township alleged, in pertinent part, that the roadwork construction projects violated various provisions of the township zoning ordinance and violated the township's engineering standards ordinance, thus constituting nuisances per se that required abatement. The township also contended that Rondigo's composting operation violated township ordinances and constituted a nuisance. [*Id.*, slip op p 2.]

The trial court consolidated Richmond's complaints, and ruled that Rondigo's ability to conduct a composting operation on the property is protected by the Right to Farm Act (RTFA), MCL 286.471 *et seq.*, and the Michigan Department of Agriculture's generally accepted agricultural management practices, and that these preempt any conflicting local ordinance with regard to Rondigo's composting activities.

In May 2008, the trial court held a bench trial on Richmond's claims that the access road on the east side of the property and the access road on the west side of the property constitute nuisances because they violate the zoning and engineering ordinances. This Court set forth the trial court's ruling as follows:

[T]he trial court determined that § 4.12(A) of the township ordinance, which governs approval of non-residential driveways, is unconstitutionally vague, lacking standards and guidance as to the determination of whether an application should be approved or disapproved. The trial court also found that § IV-1(I)(2) of the township's engineering standards ordinance violates the title-object clause of Const 1963, art 4, § 24, in its application to non-residential driveways, i.e., the two access roads at issue. The trial court also found that § 3.02 of the township ordinance, which speaks to the issue of site plans, did not require the submission of a site plan relative to the two access roads. [*Id.*, slip op p 3.]

The trial court denied Rondigo's motion for costs and attorney fees.

On appeal, this Court reversed the trial court's ruling that Richmond's zoning and engineering ordinances are unconstitutional. *Id.*, slip op p 9. The Court held that Rondigo was required to comply with the ordinances and that "Rondigo violated the ordinances when it engaged in construction on the access roads without first seeking township approval." *Id.* The Court remanded the case for the limited purpose of allowing the trial court to consider, within its discretion, whether Rondigo was entitled to an award of costs and fees under the RTFA, MCL 286.473b, because it prevailed on Richmond's claims that Rondigo's composting activities constituted a nuisance under the Richmond ordinances. *Id.*, slip op at 10. This Court further opined that, on remand, the trial court could consider whether Rondigo could procedurally raise a claim with regard to Richmond's denial of its site plan application for the west access road and, if it was properly before the court, whether the denial was arbitrary and capricious.¹ *Id.*, slip op at 10-11. On remand, Rondigo failed to raise a challenge to the denial of its site plan application for the west access, and merely sought and received fees and costs for its defense of Richmond's

¹ During the litigation in 2008, Rondigo filed a site plan application for its construction activities on the west access road and the Richmond planning commission denied the application. Rondigo did not appeal that decision to the circuit court, thus raising the question of whether the circuit court could review the matter in Richmond's consolidated suits against Rondigo.

ordinance violation claims regarding the composting operation. On May 17, 2011, the trial court issued a final order in that case.²

Notwithstanding this Court's rulings on the constitutionality, applicability, and Rondigo's violation of Richmond's zoning and engineering ordinances, Rondigo resumed its use of both the east and west access roads without seeking review or approval by the Richmond planning commission. Richmond sent a letter to Rondigo urging it to voluntarily terminate its use of the roads, but Rondigo declined to comply with Richmond's request. Richmond filed this action on June 16, 2011, and alleged that Rondigo's use of the access roads violated the zoning and engineering ordinances and that this constitutes a nuisance per se that must be abated by the trial court pursuant to MCL 125.3407.

Richmond filed a motion for summary disposition and argued that the law of the case established that Rondigo's use of the access roads violates the township ordinances and asked the trial court to abate Rondigo's conduct as a nuisance per se. In response, Rondigo argued that Richmond failed to pursue any action with regard to the west access road in the prior remand and that Rondigo's use of the east access road constitutes a legal nonconforming use that predated Richmond's ordinances. On August 29, 2011, the trial court ruled that Richmond was entitled to abatement of the west access road because Rondigo never appealed the denial of its site plan application and, on remand in the prior case, it made no attempt to show the issue was properly before the court or that the planning commission's decision was arbitrary and capricious, as directed by this Court. The trial court further ruled that, because this Court held that Rondigo was required to comply with Richmond's ordinances and Rondigo admittedly failed to do so, the continuing activity on the west access road constitutes a nuisance per se under MCL 125.3407. With regard to the east access road, the court ruled that it could not resolve issues related to the east access road because, in its 2008 bench trial ruling, the trial court observed that the east access road, at least in some form, existed before the enactment of the engineering ordinance, and might constitute a legal, nonconforming use. The court sought further briefing on the issue.

Thereafter, Richmond filed another motion for summary disposition pursuant to MCR 2.116(C)(7) and (9) and asserted, among other arguments, that Rondigo's claim that the east driveway constitutes a legal, nonconforming use is barred by res judicata or Rondigo waived the issue by failing to raise it in the prior litigation. In response, Rondigo asserted that, in the prior litigation, it raised the defense that the east driveway existed before the effective date of the engineering ordinance and that Rondigo is entitled to summary disposition because res judicata bars any claim by Richmond regarding Rondigo's use of the east access road. The trial court granted summary disposition to Richmond and enjoined Rondigo from using both the east and west access roads.

II. ANALYSIS

² Rondigo filed an appeal and Richmond filed a cross-appeal of the trial court's order in that case, which remains pending in this Court. The parties stipulated to hold the issuance of an opinion in abeyance for 45 days, and this Court entered an order reflecting that stipulation on January 9, 2013.

Rondigo contends that Richmond's case is barred by res judicata and that the trial court incorrectly that the east access road is nuisance per se. The trial court granted summary disposition to Richmond pursuant to MCR 2.116(C)(7). As this Court explained in *Begin v Michigan Bell Telephone Co*, 284 Mich App 581, 598; 773 NW2d 271 (2009):

We review de novo whether the doctrine of res judicata bars a subsequent action. *Adair v Michigan*, 470 Mich 105, 119; 680 NW2d 386 (2004). We also review de novo a trial court's ruling on a motion for summary disposition. *Id.* A motion for summary disposition under MCR 2.116(C)(7) asserts that a claim is legally barred. The motion may, but need not, be supported or opposed by affidavits, depositions, admissions, or other documentary evidence. *Maiden [v Rozwood]*, 461 Mich 109, 119; 597 NW2d 817 (1999).] The allegations of the complaint are accepted as true unless contradicted by documentary evidence. *Id.*

The trial court ruled that, in the prior Court of Appeals opinion, this Court held that Rondigo was required to comply with Richmond's zoning and engineering ordinances and that Rondigo violated the ordinances when it constructed the roads without township approval. Because the issue was resolved in the prior action, the trial court held that Richmond was entitled to have Rondigo's use of the roads abated on remand from this Court. While the trial court observed that Richmond should have sought the abatement on remand in the prior litigation, for purposes of "judicial economy," it declined to dismiss Richmond's action and reopen the prior case when Richmond was clearly entitled to its requested relief. The court further emphasized that, while Rondigo is enjoined from using the access roads, the "decision is without prejudice to [Rondigo] seeking plaintiff's future approval of either or both access roads."

We hold that the trial court correctly granted summary disposition to Richmond. "The law of the case doctrine holds that a ruling by an appellate court on a particular issue binds the appellate court and all lower tribunals with respect to that issue." *KBD & Associates, Inc v Great Lakes Foam Technologies, Inc*, 295 Mich App 666, 679; 816 NW2d 464 (2012). As this Court further opined in *Augustine v Allstate Ins Co*, 292 Mich App 408, 425; 807 NW2d 77 (2011):

Under the law-of-the-case doctrine, this Court's determination of an issue in a case binds both the trial court on remand and this Court in subsequent appeals. *Grievance Administrator v Lopatin*, 462 Mich 235, 260; 612 NW2d 120 (2000). On remand, the trial court may not take action that is inconsistent with the judgment of this Court. *Id.* "[T]he trial court is bound to strictly comply with the law of the case, as established by [this Court], according to its true intent and meaning." *Kasben [v Hoffman]*, 278 Mich App 466, 470; 751 NW2d 520 (2008)] (quotation marks and citation omitted). "Thus, 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." *Driver v Hanley (After Remand)*, 226 Mich App 558, 565; 575 NW2d 31 (1997).

Here, in its prior opinion, this Court observed that construction on the east access road "began after the trial court enjoined work on the west-side roadway." *Twp of Richmond*, slip op at 2, n 1. Further, this Court unequivocally ruled that Richmond's ordinances apply to Rondigo's

construction, expansion and use of both access roads and that Rondigo violated the ordinances by failing to comply with them. *Id.*, slip op at 9. These legal rulings are binding on the trial court and on this Court. *Augustine*, 292 Mich App at 425. Moreover, this law of the case precluded Rondigo from claiming that Richmond had to move on remand to stop Rondigo's use of the west access road or that the ordinances do not apply to the east access road because a driveway existed on the east side of the property when Rondigo purchased the land. The doctrine also precludes us from deciding the merits of those claims because this Court already ruled that Rondigo violated Richmond's ordinances by constructing, expanding, and using both access roads. *Id.* Again, this Court gave Rondigo the opportunity to raise its claims regarding the west access road and Rondigo declined. Further, to the extent Rondigo's "existing driveway" theory for the east access road was addressed in the prior litigation, that record was before this Court and, again, this Court ruled that the ordinances apply to both access roads, that Rondigo was required to comply with the ordinances, and that Rondigo violated the ordinances by failing to do so.

While Richmond could have sought abatement on remand, this Court's ruling made clear that it was incumbent upon Rondigo to comply with the ordinances by seeking township review and approval before it used, improved, or expanded the access roads. Rondigo disregarded this, and resumed activities on the roads without any effort to comply with the ordinances. After warning Rondigo to cease its use of the roads because of Rondigo's noncompliance with the applicable ordinances, Richmond filed this action to enjoin Rondigo's further activities. This was both necessary and logical in light of this Court's prior decision and Rondigo's continuing conduct. Further, because, as a matter of law, Rondigo used the access roads in violation of Richmond's ordinances, the trial court correctly ruled the uses to be nuisances per se under MCL 125.3407, and the court was obligated under the statute to abate the nuisances.

Affirmed.

/s/ Mark J. Cavanagh
/s/ David H. Sawyer
/s/ Henry William Saad