STATE OF MICHIGAN

COURT OF APPEALS

DUCK LAKE RIPARIAN OWNERS ASSOCIATION, DAVID PEQUET, and JANE KENNEDY,

Plaintiffs-Appellants,

v

FRUITLAND TOWNSHIP, FRUITLAND TOWNSHIP PARKS AND RECREATION BOARD, DOUGLAS A ZWEMER, JENNIFER L ZWEMER, RONALD B PEEL, KELLY J PEEL, JOEL BOYDEN JR, FRANKLIN L AND KAREN S GORDON TRUST, JOSEPH SHELTON, GERALD HENNING, GWENDOLYN HENNING, JUDITH M TRAYNOR TRUST, RICHARD DURELL, LINDA DURELL, CYNTHIA D ZIEMBA TRUST, JEROME K RUMPS TRUST, ROBERT HUBERS, RUTH HUBERS, JAMES D SCHWEIGERT, LISA M SCHWEIGERT, RONALD RANDS JR, and BRENDA RANDS,

Defendants-Appellees,

and

HUGO J FERRARI JR,

Defendant.

UNPUBLISHED
March 6, 2014

No. 312295
Muskegon Circuit Court
LC No. 11-047935-CZ

Before: HOEKSTRA, P.J., and MARKEY and RONAYNE KRAUSE, JJ.

PER CURIAM.

Plaintiffs appeal by right several orders granting summary disposition in favor of defendants on a variety of grounds. This matter arises out of plaintiffs' desire to preclude the individual defendants, who are landowners near Duck Lake whose property parcels do not touch the shore, from using a shoreline park, Marcus Park, for riparian purposes. This matter—

although not this actual case—has been before this Court previously, at which time this Court held that plaintiffs lacked standing. *Duck Lake Riparian Owners Assn v Fruitland Township* ("*Duck Lake I*"), unpublished opinion per curiam of the Court of Appeals, decided Oct 30, 2008 (Docket No. 276265). Among other bases for granting summary disposition, the trial court concluded that this Court's standing analysis collaterally estopped plaintiffs from having standing in the instant matter. We affirm.

In 1953, all of the property presently belonging to all of the defendants, including the Marcus Park land, was owned by G. Edward and Mignon P. Dake. The Dakes conveyed part of their property to John Achterhoff with language granting an easement to access Duck Lake; and another part of their property, including what would become Marcus Park, that also contained an easement to Duck Lake, to Robert Van Kempen, who conveyed it to Benjamin and Ruth Marcus. In 1977, the Marcuses conveyed Marcus Park to Fruitland Township, subject to several conditions, including mandating that it be used as a park and reserving an easement. By resolution, Fruitland accepted the donation under enumerated conditions similar to the restrictions above in the Marcuses' deed. The remainder of the relevant property conveyed by the Dakes was eventually conveyed to the individual defendants.

In 2005, essentially the same plaintiffs filed suit against essentially the same defendants. The trial court granted summary disposition in favor of the defendants, concluding that they had an easement right to build and maintain docks and shore stations on Duck Lake. However,

> The trial court ruled that the individual plaintiffs had standing because, as riparian landowners, they have a legally protected interest in Duck Lake that may be affected by defendants' activities. In addition, the trial court opined that plaintiff Duck Lake Riparian Owners Association (DLROA) had standing because "[t]he fourth and fifth purposes listed therein [in the DLROA's articles of incorporation] give the DLRO [sic] standing and confer the status of a real party in interest to bring this action which relates to the rights of riparian owners as they may be affected by the land/water development involved herein." The trial court also concluded that both the individual plaintiffs and DLROA are affected differently than the public at large by defendants' conduct. [(*Duck Lake I*, slip op at pp 2-3).]

This Court did not reach the question of what easement rights, if any, the defendants had; rather, this Court reversed the trial court's finding that plaintiffs had standing and remanded for entry of summary disposition in defendants' favor on that alternate basis.

Plaintiffs commenced the instant action on June 20, 2011. Plaintiffs generally seek declarations or injunctions to the effect that the landowner defendants were not permitted to use Duck Lake or not permitted to use Duck Lake to the extent they were doing so, or that Fruitland was required to so preclude the landowner defendants. The trial court granted summary disposition in favor of the defendants for various reasons, including that plaintiff was collaterally estopped by *Duck Lake I* from bringing the claims raised in this matter.

"Collateral estoppel, or issue preclusion, precludes relitigation of an issue in a subsequent, different cause of action between the same parties or their privies when the prior proceeding culminated in a valid final judgment and the issue was actually and necessarily

determined in the prior proceeding." *Ditmore v Michalik*, 244 Mich App 569, 576; 625 NW2d 462 (2001). "That doctrine requires that (1) a question of fact essential to the judgment was actually litigated and determined by a valid and final judgment, (2) the same parties had a full and fair opportunity to litigate the issue, and (3) there was mutuality of estoppel." *Estes v Titus*, 481 Mich 573, 585; 751 NW2d 493 (2008). However, "where collateral estoppel is being asserted defensively against a party who has already had a full and fair opportunity to litigate the issue, mutuality is not required." *Monat v State Farm Ins Co*, 469 Mich 679, 695; 677 NW2d 843 (2004).

There is no serious dispute that all of the parties to the instant suit are the substantially same parties to *Duck Lake I* or are in privity with parties to *Duck Lake I*. Furthermore, defendants are indeed asserting collateral estoppel defensively against plaintiffs, who defendants contend had a full and fair opportunity to litigate the issue in *Duck Lake I*. It appears axiomatic that in fact plaintiffs did have such a full and fair opportunity, and moreover were amply motivated to assert that they had standing to contest defendants' use of Duck Lake. While the specific causes of action in the instant suit are somewhat different, plaintiff is for the most part challenging the same thing: the landowner defendants' use of Duck Lake via Marcus Park and Fruitland's acquiescence in that use. Plaintiff does not seriously dispute that this is "the same case with the same parties with the same ultimate issues" as *Duck Lake I*. Finally, the issue of standing was actually litigated and decided. This Court observed that the trial court had made a specific determination of the issue. *Duck Lake I*, slip op at pp 2-3. This Court also made a specific determination of the issue, holding that because plaintiffs had failed to articulate more than "generalized concerns," they had not established standing; this Court unambiguously decided the issue because it held that plaintiffs' lack of standing disposed of the case. *Id*. at p 3. Plaintiffs nevertheless contend that collateral estoppel does not apply.

Plaintiffs note that the standard for determining standing has changed since *Duck Lake I*. We agree that it has. See *Lansing Schools Ed Ass'n v Lansing Bd of Ed* (*LSEA*), 487 Mich 349; 792 NW2d 686 (2010). Res judicata will not bar an *action* if there has been a subsequent change in the legal principles applicable to the resolution of the case. *Pike v City of Wyoming*, 431 Mich 589, 595-597; 433 NW2d 768 (1988). There may be an exception to the application of collateral estoppel where there is a fundamental change in the nature, purposes, or procedures of the two proceedings. *People v Johnson*, 191 Mich App 222, 225-226; 477 NW2d 426 (1991). The case law regarding collateral estoppel is less clear, but our Supreme Court has indicated that "whether a party has had a 'full and fair' opportunity to litigate an *issue*" may depend on, inter alia, whether "[t]he issue is one of law and . . . a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws." *Monat v State Farm Ins Co*, 469 Mich 679, 683 n 2; 677 NW2d 843 (2004) (emphasis added) (quotation omitted).

We are persuaded that the intervening change in the applicable standard for evaluating standing might, in an appropriate case, be a basis for avoiding the application of collateral estoppel. However, this Court actually cited and seemingly applied the historical standard of suffering harm "in a manner different than a member of the general public," which is the present standard. *Duck Lake I*, slip op at pp 2-3; *LSEA*, 487 Mich at 359, 372. Furthermore, even if *Duck Lake I* relied on a now-obsolete standard, a change in the applicable binding precedent because a case is overruled does not alter effectuated judgments. *Kidder v Ptacin*, 284 Mich App

166, 170-171; 771 NW2d 806 (2009). Consequently, although *LSEA* may afford plaintiffs with a theoretical basis for avoiding the application of collateral estoppel, as a practical matter no *functional* change in the *applied* legal principles has taken place. Therefore, *LSEA* is of no real significance to the application of collateral estoppel.

Plaintiffs argue that a lack of standing determination is not a determination to which collateral estoppel can apply at all. Plaintiffs rely on the fact that a determination that a party lacks standing is not an adjudication of whether the claim is itself justiciable or whether the claim or any other issues therein have substantive merit. *LSEA*, 487 Mich at 355, 357. Plaintiffs appear to confuse collateral estoppel with res judicata. Res judicata bars a subsequent action when "(1) the prior action was decided on the merits, (2) the prior decision resulted in a final judgment, (3) both actions involved the same parties or those in privity with the parties, and (4) the issues presented in the subsequent case were or could have been decided in the prior case." *Duncan v Michigan*, 300 Mich App 176, 194; 832 NW2d 761 (2013). Obviously, if a determination that a party lacks standing is not a determination of the merits of an action, *res judicata* cannot apply. However, *standing is itself an issue*, so whether the case was decided on the merits is irrelevant to collateral estoppel if *the merits of the issue* were decided.

Plaintiff relies extensively on an unpublished case from this Court.[1] Unpublished cases are not binding. MCR 7.215(C)(1). Furthermore, this Court disfavors reliance on unpublished opinions even as persuasive precedent and strongly discourages the bench and bar from relying on them in any way. However, for the sake of completeness, we observe briefly that the case does not in any way stand for the proposition that collateral estoppel is per se inapplicable to standing determinations. Rather, it held, unremarkably, that res judicata does not apply where a prior case was dismissed for a lack of standing. The plaintiff therein was not collaterally estopped on the basis of standing because the plaintiff in that case was a different entity from the plaintiff in the prior case and did in fact have standing.

Therefore, we conclude that the trial court correctly determined that plaintiffs are collaterally estopped from prosecuting most of their claims in this matter. However, *Duck Lake I* did not address all of the specific issues present in the instant matter; e.g., whether Fruitland could convey fee title to any portion of Marcus Park in light of the restrictions. Nonetheless, we also conclude that even if *Duck Lake I* had no preclusive effect, plaintiffs would nevertheless independently lack standing.

As discussed, the historical standard for evaluating standing in the absence of a cause of action explicitly provided by law depended on a litigant having "a special injury or right or substantial interest that would be detrimentally affected in a manner different from the citizenry at large." *LSEA*, 487 Mich at 359. *LSEA* effectuated a return to that standard. *Id*. at 372. Additionally, a litigant may seek declaratory judgment by meeting the requirements of MCR 2.605. *Id*. Plaintiffs assert that they have a "special injury" distinct from the citizenry at large pursuant to *Baldwin Manor Inc v City of Birmingham*, 341 Mich 324; 67 NW2d 812 (1954).

[1] *Elite Publishing LLC v Wendover*, unpublished opinion per curiam of the Court of Appeals, issued Jan 31, 2003 (Docket No. 235001).

Plaintiffs misread *Baldwin*, however, by contending that *Baldwin* simply confers *per se* standing upon abutting, or even nearby, property owners to assert an interest in a public park.

In *Baldwin*, a parcel of property was conveyed to the then-village of Birmingham to "be used . . . for the purposes of a park and for that only, and if not so used it is to revert to [the grantor's] heirs." *Baldwin*, 341 Mich at 425-426. Birmingham proposed to construct a highway through part of the park, and the plaintiffs, who were landowners abutting the park, objected. *Id*. at 425-427. Significantly, one of the plaintiffs explicitly established that it had "made extensive improvements in reliance on the continued use of 'Baldwin Park' for park purposes, and that they will sustain injury if the defendant is permitted to divert the land to other uses." *Id*. at 427. That plaintiff was determined to have standing to seek injunctive relief to prevent the highway project; the other two defendants who had not proven any similar special injury were only entitled to seek injunctive relief to prevent their own property from being taken "other than by purchase or by a condemnation proceeding." *Id*. at 427, 439.

Even more significantly, our Supreme Court's holding was despite its explicit approval of a statement from a prior case that property owners may in fact be able to seek equitable relief if a park abutting their property "has been subverted to a use foreign to that of a public park." *Baldwin*, 341 Mich at 435, quoting *Dodge v North End Improvement Ass'n*, 189 Mich 16, 22; 155 NW 438 (1915). Our Supreme Court cited several other cases in which adjoining or nearby property owners had been permitted to prosecute claims to prevent parks from being put to other uses. *Baldwin*, 341 Mich at 435-439. However, in all of the cases so cited, the plaintiffs were found to have some actual interest in the park's continued use as a park beyond that of a mere ordinary resident or taxpayer in the locality. Given the actual ruling in *Baldwin*, that the abutting property owners who had failed to prove special damage did not have standing merely as abutting property owners, *Baldwin* clearly does not conflict with the general rule laid out in *LSEA* that a plaintiff must, under any circumstance, provide actual proof of some harm distinct from that of any other member of the public, and merely owning adjoining or nearby property does not *per se* confer such standing.

Plaintiffs apparently rest on the fact that they are property owners near to Marcus Park who have frontage on the same lake as Marcus Park and who are unhappy about defendants' use of the Duck Lake by accessing it through Marcus Park. Plaintiffs arguably have *some* interests "different from the citizenry at large" simply by virtue of being riparian landowners sharing a lake with the park in dispute and at least *possibly* specially affected by anything that affects the water; e.g., pollution or draining. See *Anglers of the AuSable Inc v Dep't of Environmental Quality*, 488 Mich 69, 82 n 22; 793 NW2d 596 (2010), vacated on other grounds of mootness 489 Mich 884 (2011). Plaintiffs have not, however, proven this. Members of the public can use Duck Lake through other public parks and therefore have an interest in boat traffic. Any landowner nearby would be similarly affected by noise and vehicular traffic. Furthermore, "the mere increase in traffic in the area" and "general economic and aesthetic losses" are not *per se* the kind of special damages sufficient to acquire standing. *Unger v Forest Home Twp*, 65 Mich App 614, 617; 237 NW2d 582 (1975).

Plaintiffs asserted in their complaint that MCL 324.30110 confers a cause of action. We disagree. MCL 324.30110(2) allows private individuals aggrieved by an action or inaction of the Department of Environmental Quality to request a formal hearing, not to initiate a lawsuit. MCL

324.30110(4) "does not limit the right of a riparian owner to institute proceedings in any circuit court of the state against any person when necessary to protect his or her rights," but that language declines to limit whatever other remedies a party might have; it does not actually confer any. Plaintiffs also rely on MCL 324.80149, which requires persons operating vessels or water-skiing to comport themselves in specified safe manners and provides penalties for failing to do so. However, it in no way suggests that private individuals have any right to enforce those requirements or recover for another person failing to so comply. Although plaintiffs contend that they are "entitled to declaratory relief pursuant to MCL 2.605," plaintiffs do not support this conclusory assertion with facts. We conclude that plaintiffs have simply not proven that they have the kind of particularized injury necessary to give them standing.

Plaintiffs also argue that Fruitland's conveyance of the Narrow Strip is void. We disagree. Initially, plaintiffs' contention that Fruitland received no consideration is incorrect. "Consideration" is simply "a bargained-for exchange" under which a party receives a benefit, suffers a detriment, or performs a service. *General Motors Corp v Dep't of Treasury*, 466 Mich 231, 238-239; 644 NW2d 734 (2002). Even if none of the landowner defendants had any actual rights with respect to Marcus Park, it is clear that they believed they did. An agreement to forebear any attempt to exercise or enforce a right constitutes "consideration." *Timko v Oakwood Custom Coating Inc*, 244 Mich App 234, 244; 625 NW2d 101 (2001). Indeed, agreeing to forbear a right that one in good faith believes one has constitutes consideration. *Layer v Layer*, 184 Mich 663, 671-672; 151 NW 759 (1915).[2] Consequently, the Marcus Dunes defendants' agreement to terminate whatever rights they believed had, even if those rights did not in actuality exist, was "consideration" in exchange for the transfer of the Narrow Strip.

Plaintiffs' contention that the conveyance violates the terms of the deed from the Marcuses to Fruitland is plausible, particularly because the deed is not a model of clarity.[3] Nonetheless, even if the deed does in fact contain a restrictive covenant forever barring Fruitland from conveying Marcus Park to any entity other than another governmental unit, plaintiffs' standing would *still* depend on having some kind of harm distinct from that of the general public, meaning "the enjoyment and beneficial use of their own property." *City of Huntington Woods v*

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[2] In *Goodrich v Waller*, 314 Mich 456, 469-470; 22 NW2d 862 (1946), our Supreme Court found such a forbearance not to constitute consideration because there was no actual controversy and the purported agreement was "not executed in pursuance of any agreement of forbearance" in any event. In contrast, there appears to be no dispute here that the defendants genuinely believed they had rights to engage in their complained-of acts over Marcus Park.

[3] Plaintiffs' reliance on the terms of Fruitland's acceptance of the deed is misplaced. The grantor's intent as expressed in the deed, and consequently the language of the deed itself, is the only relevant concern. *Dep't of Natural Resources v Carmody-Lahti Real Estate Inc*, 472 Mich 359, 370; 699 NW2d 272 (2005).

City of Detroit, 279 Mich App 603, 617-618; 761 NW2d 127 (2008). If plaintiffs are, in fact, suffering harm to their own enjoyment of their own property, violation of a covenant in the deed might have some bearing on an equitable claim to remedy that harm, but it does not provide them with a *per se* cause of action. See *Clark v City of Grand Rapids*, 334 Mich 646, 654; 55 NW2d 137 (1952). Again, plaintiffs have not proven that they are suffering the requisite harm.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Jane E. Markey
/s/ Amy Ronayne Krause