IN THE COURT OF APPEALS OF IOWA

No. 6-642 / 06-0248
Filed October 11, 2006

KENNETH H. SWIPIES,
Plaintiff-Appellant,

vs.

PETER GOLDSMITH,
Defendant-Appellee.

Appeal from the Iowa District Court for Ida County, Duane E. Hoffmeyer, Judge.

The plaintiff appeals from an order granting summary dismissal of his lawsuit against the defendant. **AFFIRMED.**

Kenneth Swipies, La Pine, Oregon, pro se.

Brent B. Green and Bradley C. Obermeier of Duncan, Green, Brown & Langeness, A P.C., Des Monies, for appellee.

Considered by Vogel, P.J., and Miller and Eisenhauer, JJ.

MILLER, J.

The district court dismissed Kenneth Swipies's petition at law which sought money damages from the defendant Kenneth Goldsmith. Swipies appeals. Upon our review for correction of errors of law, *see* Iowa R. App. P. 6.4, we affirm.

Goldsmith had represented Swipies in a case in which Swipies's parental rights to a daughter were terminated. Goldsmith agreed to appeal, but failed to file a timely and proper notice of appeal. Swipies sued Goldsmith, claiming Goldsmith's failure constituted malpractice and seeking money damages. In ruling on a motion for summary judgment filed by Goldsmith, the district court found that Swipies had no evidence to offer on a necessary element of his claim, that an appeal would have succeeded but for Goldsmith's admitted negligence. The court concluded there was therefore no genuine issue of material fact on this essential element of Swipies's claim, and granted Goldsmith's motion for summary judgment. Swipies did not appeal from that grant of summary judgment.

Swipies later brought the present lawsuit, based on the same underlying facts, Goldsmith's failure to file a timely and proper notice of appeal from the termination of Swipies's parental rights. He again sought money damages, "for Breach of Contract, and Promissory Estoppel." Ruling on a motion by Goldsmith, the district court dismissed Swipies's petition. It held that Swipies's lawsuit was barred by the claim preclusion branch of the doctrine of res judicata.

Swipies appeals. In his brief he states as issues the following:

> ISSUE I
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> DID THE COURT CORRECTLY APPLY IOWA CASE LAW?
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> ISSUE II
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> IS RES JUDICATA APPLICABLE WHEN THE COURT IGNORES ALTERNATIVE THEORIES OF RECOVERY?
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> ISSUE III
>
> IS THE PLAINTIFF SEEKING TO HAVE A SECOND DAY IN COURT ON THE SAME ISSUES?
>
> ISSUE IV
>
> DOES IOWA CODE [272C.1(7)] APPLY TO ATTORNEYS?

As correctly noted by Goldsmith, "The first three (3) 'Issues' can be summed up into one: *Was the Plaintiff-Appellant's Second Lawsuit Precluded by the Doctrine of Res Judicata?*". We proceed to address that issue.[1]

"Res judicata" is a term that includes concepts of both claim preclusion and issue preclusion. *Bennett v. MC # 619, Inc.*, 586 N.W.2d 512, 516 (Iowa 1998). "When used in the sense of claim preclusion, res judicata means that further litigation on the claim is barred." *Id.*

> Claim preclusion is generally implicated where there has been a full and fair opportunity to litigate the claim—the claim was litigated, or it could have been, but was not. A second claim is likely to be considered precluded if the acts complained of, and the recovery demanded, are the same, or when the same evidence will support both actions.

[1] In addressing the issue we do note that Swipies does not challenge the propriety of the issue having been raised and decided by way of motion to dismiss rather than by way of motion for summary judgment. We further note there is in fact no dispute concerning any material fact.

Whalen v. Connelly, 621 N.W.2d 681, 685 (Iowa 2000) (citations and quotations omitted).

> The policy of the law underlying claim preclusion is that a claim cannot be split or tried piecemeal. Thus, a party must try all issues growing out of the claim at one time and not in separate actions. An adjudication in a prior action between the parties on the same claim is *final* as to all issues that could have been presented to the court for determination. Simply put, a party is not entitled to a "second bite" simply by alleging a new theory of recovery for the same wrong.

Bennett, 586 N.W.2d at 516-17 (citations omitted, emphasis in original).

Except in limited situations not relevant here, a summary judgment constitutes a final judgment on the merits. Iowa R. Civ. P. 1.946; *Peppmeier v. Murphy*, 708 N.W.2d 57, 66 (Iowa 2005).

Goldsmith's acts or omissions of which Swipies complains in this lawsuit are the same as those complained of in the prior lawsuit. The recovery sought, money damages, is the same as in the prior lawsuit. The same evidence would support both actions. Swipies had a full and fair opportunity to litigate his claim against Goldsmith in the prior lawsuit. The summary judgment in the prior lawsuit constitutes an adjudication on the merits against Swipies. Swipies simply alleges new theories of recovery for the same wrong. We conclude the district court correctly held that Swipies's present lawsuit is barred by the claim preclusion branch of the doctrine of res judicata.

No issue regarding whether Iowa Code section 272C.1(7) applies to attorneys was presented to or passed upon by the district court, and therefore no such issue is properly before us in this appeal. *See Metz v. Amoco Oil Co.*, 581 N.W.2d 597, 600 (Iowa 1998) (stating our error preservation rule requires that issues must be presented to and passed upon by the district court before they

can be raised and decided on appeal); *Benavides v. J.C. Penney Life Ins. Co.*, 539 N.W.2d 352, 356 (Iowa 1995) (same).

AFFIRMED.