COURT OF APPEALS
DECISION
DATED AND FILED

September 24, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-3637

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

SCOT CADEAU,

PLAINTIFF-APPELLANT,

V.

DAIRYLAND INSURANCE COMPANY, AND XYZ INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Sauk County: JAMES EVENSON, Judge. *Affirmed.*

Before Eich, Vergeront and Roggensack, JJ.

ROGGENSACK, J. Scot Cadeau appeals from a judgment of the circuit court dismissing his lawsuit against Dairyland Insurance Company (Dairyland) due to claim preclusion. The circuit court concluded that the three conditions for claim preclusion were present because a final judgment had been

entered in a former proceeding, Dairyland and Scot were adverse in that proceeding, and Scot's claim against Dairyland could have been litigated in the former proceeding. We conclude, as the circuit court did, that Scot's claim against Dairyland in the present action is barred by claim preclusion. Therefore, we affirm the judgment of the circuit court.

BACKGROUND

On October 29, 1993, Sheilah Elverd's automobile, driven by Robert Harriman, collided with the vehicle driven by Scot. Sheilah and Scot were both injured, and Harriman, who was cited for operating while intoxicated in violation of § 346.63, STATS., was killed.

On June 14, 1994, Sheilah filed a lawsuit in Sauk County against Scot, St. Paul Fire & Marine Insurance Company (St. Paul), and Dairyland (the Elverd suit), alleging that the defendants were negligent and that this negligence caused or contributed to Sheilah's injuries. On August 16, 1994, Dairyland, as Harriman's insurer, cross-claimed against Scot claiming that his negligence entitled Dairyland to indemnification from him if Sheilah prevailed. In August of 1995, Scot, Dairyland, St. Paul and Sheilah entered into a stipulation and order for dismissal, and on August 17, 1995, the circuit court judge dismissed the Elverd suit on the merits.

On October 15, 1996, Scot filed a lawsuit in Milwaukee County against Dairyland (the Cadeau suit), claiming that Dairyland was responsible for the injuries Scot allegedly sustained due to Herriman's negligence in the October 29, 1993 accident. Dairyland moved to change venue and to dismiss the Cadeau suit. The circuit court granted Dairyland's motion to change venue to Sauk County. On October 22, 1997, the Sauk County Circuit Court granted

Dairyland's motion to dismiss, concluding that Scot's lawsuit against Dairyland was barred by the doctrine of *res judicata* (hereinafter claim preclusion).[1] This appeal followed.

DISCUSSION

Standard of Review.

Whether claim preclusion applies to an undisputed set of facts is a question of law which we review *de novo*. ***Amber J.F. v. Richard B.***, 205 Wis.2d 510, 515, 557 N.W.2d 84, 86 (Ct. App. 1996).

Claim Preclusion.

"The doctrine of [claim preclusion] states that a final judgment is conclusive in all subsequent actions between the same parties as to all matters which were litigated or which might have been litigated in the former proceedings." ***DePratt v. West Bend Mut. Ins. Co.***, 113 Wis.2d 306, 310, 334 N.W.2d 883, 885 (1983). The purpose of claim preclusion is to encourage finality of judgments and to prevent repetitive litigation. ***Id.*** at 311, 334 N.W.2d at 885.

The party seeking to preclude a claim must establish three elements: (1) the court issued a final judgment terminating a prior proceeding, ***id.*** at 310, 334 N.W.2d at 885, (2) the parties, or their privies, in the current litigation were adversaries in the prior proceeding, ***U.S. Fidelity & Guaranty Co. v. Goldblatt Bros.***, 142 Wis.2d 187, 191, 417 N.W.2d 417, 419 (Ct. App. 1987), and (3) the

[1] The Wisconsin Supreme Court has clarified the doctrine of *res judicata*, which it renamed "claim preclusion." ***Northern States Power Co. v. Bugher***, 189 Wis.2d 541, 550, 525 N.W.2d 723, 727 (1995).

current claim is a matter which was litigated or which should have been litigated in the prior proceeding. ***DePratt***, 113 Wis.2d at 310, 334 N.W.2d at 885. The relevant dispute, to which we apply this analysis, is the dispute between Scot and Dairyland regarding driver negligence. This issue was a potential cross-claim in the Elverd suit and is also the basis for the complaint in the Cadeau suit.

1. Final Judgment.

A final judgment may be entered without a trial on the merits. ***DePratt***, 113 Wis.2d at 310-11, 334 N.W.2d at 885. A stipulation between the parties and approved by the court can form the basis for a final judgment. ***Great Lakes Trucking Co., Inc. v. Black***, 165 Wis.2d 162, 168-69, 447 N.W.2d 65, 67 (Ct. App. 1991).

In ***Great Lakes***, a trucking company and its former insurer entered into a court approved stipulation settling their dispute without a trial. Several years later, the trucking company filed another lawsuit against its former insurer based on related issues. We concluded that claim preclusion applied because the second lawsuit was barred by the judgment in the first lawsuit. Here, as in the first lawsuit in ***Great Lakes***, the Elverd suit was settled between all parties by a court approved stipulation and order of dismissal. The stipulation dismissed the cross-claim by Dairyland against Scot. Therefore, we conclude the first element of claim preclusion is present.

2. Adversarial Relationship.

Claim preclusion applies only to parties, or their privies, who were adversaries during the prior litigation. ***Northern States Power Co. v. Bugher***, 189 Wis.2d 541, 551, 525 N.W.2d 723, 728 (1995). For an adversarial relationship to

exist, the parties need not be on opposite sides of the lawsuit, only on opposite sides of an issue. ***Gies v. Nissen Corp.***, 57 Wis.2d 371, 383, 204 N.W.2d 519, 525 (1973). Therefore, co-defendants may be adverse, when one defendant files a cross-claim against another. ***Id.*** at 383-84, 204 N.W.2d at 526.

Both ***Fidelity*** and ***Gies*** addressed three conditions in determining whether the parties were adverse: (1) whether an issue was joined between the parties, (2) whether the parties were arrayed on opposite sides of the issue, and (3) whether the issue was proffered by one party and controverted by the other. ***Fidelity***, 142 Wis.2d at 192, 417 N.W.2d at 419; ***Gies***, 57 Wis.2d at 383, 204 N.W.2d at 525.

Gies addresses the cross-claim situation as it relates to claim preclusion in more detail. In ***Gies***, a defendant, Mount Mary College (College), cross-claimed against another defendant, Burghart, alleging indemnification and contribution for negligence which caused a trampoline accident. The trial court granted Burghart's motion for summary judgment against the plaintiff, and Burghart then moved for summary judgment against the College. The court prohibited the College from opposing Burghart's motion for summary judgment on the cross-claim, reasoning that Burghart and Mount Mary College were adversaries due to the cross-claim and that the College had an opportunity to be heard during the motion for summary judgment filed by Burghart against the plaintiff. Thus, the court concluded that claim preclusion barred the College from litigating the issues involved in the first motion for summary judgment.

Scot and Dairyland meet all three conditions necessary to an adversarial relationship. First, the issue of Scot's negligence, as compared with Harriman's negligence, was joined by Dairyland's cross-claim against Scot.

Second, although Dairyland and Scot were not on opposite sides of the Elverd lawsuit, they were on opposite sides of the cross-claim and the issue of Scot's negligence. Dairyland's cross-claim alleged that Scot was negligent and Scot answered that he was not. Therefore, we conclude that Scot and Dairyland were adverse.

3. Transactional Analysis.

Claim preclusion applies to all matters which were litigated or which should have been litigated in the former proceedings. *See* ***DePratt***, 113 Wis.2d at 310, 334 N.W.2d at 885. We use a transactional analysis to determine whether a matter should have been litigated in the former proceeding. ***Parks v. City of Madison***, 171 Wis.2d 730, 735, 492 N.W.2d 365, 368 (Ct. App. 1992). Under this analysis, all claims arising out of the same transaction or factual situation are treated as a single cause of action and must be litigated together. ***Id.*** A claim arising out of the same transaction is barred even though the party in the second action is prepared with different evidence or theories of the case or intends to seek another form of relief. ***Id.***

The transaction in both the Elverd suit and the Cadeau suit arose out of the October 29, 1993 automobile accident. Therefore, Scot's claim against Dairyland should have been litigated in the Elverd suit because that lawsuit and the Cadeau suit involve the same transaction. We conclude that because Scot could have challenged the dismissal of the Elverd suit and litigated the issue of driver negligence, his cross-claim against Dairyland was a compulsory cross-claim. Therefore, the third element of claim preclusion has been met, which prevents him from maintaining a second lawsuit.

CONCLUSION

The three elements of claim preclusion are present in this case. First, the court approved stipulation and order of dismissal entered into by all the parties in the Elverd suit resulted in a final judgment of the cross-claim between Dairyland and Scot. Second, the cross-claim in the Elverd suit created adversity between Dairyland and Scot in regard to driver negligence. Finally, Scot should have brought his claim against Dairyland in the Elverd suit because his claim arose out of the same transaction as Dairyland's cross-claim. Therefore, because Scot's claim against Dairyland was a compulsory cross-claim, claim preclusion bars the Cadeau suit against Dairyland and it was properly dismissed.

By the Court.—Judgment affirmed.

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