COURT OF APPEALS
DECISION
DATED AND FILED

June 22, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP844 **Cir. Ct. No. 2015CV2101**

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

COMMUNICATIONS PRODUCTS CORPORATION,

PLAINTIFF-APPELLANT,

V.

AMERICAN TRUST AND SAVINGS BANK, JEFFREY VORWALD, THOMAS UTZIG, MICHAEL POLSKY AND BECK, CHAET, BAMBERGER & POLSKY, S.C.,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Dane County: JOHN W. MARKSON, Judge. *Affirmed*.

Before Lundsten, Sherman and Blanchard, JJ.

¶1 PER CURIAM. Communications Products Corporation appeals a judgment of the circuit court granting summary judgment in favor of American

Trust & Savings Bank, Jeffrey Vorwald, Thomas Utzig,[1] Michael Polsky,[2] and Beck, Chaet, Bamberger & Polsky, S.C., the law firm in which Polsky is a shareholder (collectively, "the Respondents"). Communications Products brought suit against the Respondents, alleging numerous claims against the Respondents, both individually and collectively. The circuit court granted summary judgment in favor of the Respondents on the basis that Communications Products' claims are barred by both claim preclusion and issue preclusion, and because the statute of limitations has run on the claims. For the reasons discussed below, we conclude Communications Products claims are barred by claim preclusion and, therefore, affirm summary judgment.

BACKGROUND

¶2 The facts underlying this case have given rise to a long and complicated history of litigation, which is set forth below only to the extent necessary to provide a basic understanding of the matter now before us. For greater factual background, see ***Polsky v. Virnich***, 2010 WI App 20, 323 Wis. 2d 811, 779 N.W.2d 712; *affirmed by* ***Polsky v. Virnich***, 2011 WI 13, 332 Wis. 2d 1, 800 N.W.2d 742 (2011); ***American Trust & Savings Bank v. Communications Products***, No. 2011AP1234, unpublished slip op. (WI App Jan. 31, 2013); ***Virnich v. Vorwald***, No. 2015AP1600, unpublished slip op. (WI App July 28, 2016); and ***Virnich v. Vorwald***, No. 2015AP908, unpublished op. and order (WI App July 28, 2016).

[1] Vorwald and Utzig are employees of American Trust and Savings Bank.

[2] Polsky is the former receiver for Communications Products Corporation.

¶3 Over several years, American Trust loaned sums of money to Communications Products, which was owned indirectly by Daniel Virnich and Jack Moores. In June 2003, Communications Products defaulted on a loan from American Trust, and American Trust brought an ex parte motion to appoint a receiver for Communications Products, alleging that Communications Products was insolvent or in imminent danger of insolvency. The motion was granted and Polsky was appointed as receiver. Virnich and Moores and Communications Products contested the appointment of the receiver, but later withdrew their objection as part of an agreement reached by the parties to facilitate the sale of Communications Products' assets. That agreement was approved by the receivership court and Communications Products' physical assets were sold.

¶4 Thereafter, Virnich and Moores and Communications Products took steps in an attempt for a suit to be filed against American Trust either directly by Communications Products at the direction of Polsky, or by means of a derivative action filed by Virnich and Moores, and later the topic of a suit against Polsky was broached. *See* ***American Trust & Savings Bank v. Communications Products***, No. 2011AP1234, unpublished slip op. (WI App Jan. 31, 2013). The receivership court determined that Virnich and Moores and Communications Products had forfeited their rights to seek damages against American Trust and Polsky, and the court prohibited Communications Products from filing a direct action, and Virnich and Moores from filing a derivative action, against American Trust and/or Polsky. ***Id.***, ¶¶1, 11. Virnich and Moores and Communications Products appealed the receivership court's decision to this court. By the time that appeal came before us, the receivership had terminated and Virnich and Moores no longer needed the receivership court's permission to bring a derivative claim, so a challenge to the court's decision to deny Virnich and Moores' leave to file a derivative action was

moot. ***Id.***, ¶2. This left before this court only the question of whether the receivership court properly prohibited Communications Products from suing American Trust and Polsky. ***Id.***, ¶3. We concluded that Communications Products had not forfeited its right to sue American Trust or Polsky for damages, but we did not decide the underlying merits of any possible suits for damages against American Trust or Polsky. ***Id.***, ¶¶83-84.

¶5 In 2014, Virnich brought separate lawsuits against Polsky and American Trust and Vorwald, alleging that Polsky, American Trust, and Vorwald had conspired to maliciously injure Virnich's business and reputation in violation of WIS. STAT. § 134.01 (2013-14). *See* ***Virnich v. Vorwald***, No. 2015AP1600, unpublished slip op. (WI App July 28, 2016); and ***Virnich v. Vorwald***, No. 2015AP908, unpublished op. and order (WI App July 28, 2016). The circuit court granted summary judgment against Polsky and American Trust and Vorwald. We affirmed on appeal. We concluded that the evidentiary materials were insufficient to establish a genuine issue of fact as to whether American Trust and Vorwald acted with malice, one of the four elements of a conspiracy claim under § 134.01, and that because malice must be established as to all conspirators, Virnich could not prevail on his § 134.01 claim against Polsky. *See* ***id.***

¶6 In August 2015, Communications Products filed the present action against the Respondents. Communications Products alleged ten claims against some or all of the Respondents: breach of duty of good faith and fair dealing; improper appointment of Polsky as the receiver; conspiracy to maliciously injure under WIS. STAT. § 134.01 (2015-16); abuse of process; aiding and abetting; tortious interference with contract or prospective contract; breach of fiduciary duty; negligence; negligent training and supervision; and equitable subordination. All of the Respondents moved the circuit court for summary judgment. The court

granted the Respondents' motions, concluding that Communications Products' claims are barred under the doctrines of claim and issue preclusion, and that the statute of limitations had run on Communications Products' claims. Communications Products appeals.

DISCUSSION

¶7 Virnich contends that the circuit court erred in granting summary judgment in favor of the Respondents. This court reviews a grant or denial of summary judgment de novo. ***Mach v. Allison***, 2003 WI App 11, ¶14, 259 Wis. 2d 686, 656 N.W.2d 766. A moving party is entitled to summary judgment when there are no disputed issues of material fact and that party is entitled to judgment as a matter of law. WIS. STAT. § 802.08 (2015-16).

¶8 The Respondents contend that summary judgment was appropriate because, following our decision in ***Virnich v. Vorwald***, No. 2015AP1600, unpublished slip op. (WI App July 28, 2016), and ***Virnich v. Vorwald***, No. 2015AP908, unpublished op. and order (WI App July 28, 2016), claim preclusion bars Communications Products from bringing the present action. The application of claim preclusion to a set of facts presents a question of law that we review de novo. *See* ***Lindas v. Cady***, 183 Wis. 2d 547, 552, 515 N.W.2d 458 (1994).

¶9 Under the doctrine of claim preclusion, "'a final judgment is conclusive in all subsequent actions between the same parties [or their privies] as to all matters which were litigated or which might have been litigated in the former proceedings.'" ***Northern States Power Co. v. Bugher***, 189 Wis. 2d 541, 550, 525 N.W.2d 723 (1995) (quoted source and internal quotation marks omitted). In order for claim preclusion to apply, there must be: (1) an identity between the parties or their privies in the prior and present suit; (2) an identity of

the causes of action in the two suits; and (3) the prior litigation must have resulted in a final judgment on the merits by a court with jurisdiction. ***Barber v. Weber***, 2006 WI App 88, ¶9, 292 Wis. 2d 426, 715 N.W.2d 683.

¶10 Turning to the first element, parties are in privity if "a [litigant] is so identified in interest with a party to former litigation that [the litigant] represents precisely the same legal right in respect to the subject matter involved," ***Pasko v. City of Milwaukee***, 2002 WI 33, ¶16, 252 Wis. 2d 1, 643 N.W.2d 72 (quoted source omitted), and the litigant's interest in the prior case can be deemed to have been litigated. ***Paige K.B. ex rel. Peterson v. Steven G.B.***, 226 Wis. 2d 210, 226, 594 N.W.2d 370 (1999).

¶11 The circuit court found that there is privity between Virnich and Communications Products. Communications Products does not argue that privity does not exist, and has therefore abandoned any challenge to that determination. *See also* ***Virnich v. Vorwald***, 664 F.3d 206, 216 (7th Cir. 2012) (concluding that Virnich stands in privity with Communications Products).

¶12 With regard to the second element, an identity of claims, Wisconsin follows the transactional view. ***Post v. Schwall***, 157 Wis. 2d 652, 658, 460 N.W.2d 794 (Ct. App. 1990). Under this view, claim preclusion bars subsequent litigation arising out of the same transaction or series of transactions, regardless of the theories or forms of relief originally pursued. ***Id.*** "[T]he legal theories, remedies sought, and evidence used may be different between the first and second actions." ***Kruckenberg v. Harvey***, 2005 WI 43, ¶26, 279 Wis. 2d 520, 694 N.W.2d 879. Thus, claim preclusion bars not only those matters that were litigated, but also those that might have been litigated in the former proceeding so long as there is a "common nucleus of operative facts" between the first and

second actions. *See* ***id.*** and ***Northern States Power Co.***, 189 Wis. 2d at 550. In our view, all of the current claims either were litigated or could have been litigated.

¶13 In the prior actions, Virnich brought suit against American Trust, Vorwald, and Polsky based upon their actions leading up to and following Polsky's appointment as receiver for Communications Products. The present action against the Respondents arises from the same actions or inactions by the Respondents leading up to and following Polsky's appointment as receiver.

¶14 As best we can tell, as to this second element, Communications Products argues that although the present action arises from the same actions or inactions by the Respondents, the second element is not met because Virnich "did not have the capacity" to present Communications Products' claims in Virnich's actions "because Virnich had limited time to bring his state court action, and at the time [Communications Products] had to bring its motion to proceed in the receivership case." However, while the time frame may have been narrow, Communications Products has not argued that it could not have brought suit. Furthermore, by the time Virnich filed his actions, the receivership had ceased and Communications Products does not explain why it would still have been necessary for Communications Products to move the circuit court in the receivership proceeding for permission to act. Accordingly, we conclude that Communications Products has failed to show that any of its current claims could not have been brought during the prior suit and that despite the variation in "forms of relief," there is an identity of claims.

¶15 The final element requires that the prior litigation resulted in a final judgment on the merits by a court with jurisdiction. There can be no dispute that

final judgments on the merits resulted in ***Virnich v. Vorwald***, No. 2015AP1600, unpublished slip op. (WI App July 28, 2016), and ***Virnich v. Vorwald***, No. 2015AP908, unpublished op. and order (WI App July 28, 2016), both of which were resolved on summary judgment against Virnich, are final judgments on the merits.

¶16 In sum, we conclude that all the requirements of claim preclusion are met.

¶17 Communications Products argues that even if the elements of claim preclusion are met, its lawsuit should nevertheless proceed because the suit falls under one or more exceptions to the doctrine of claim preclusion. We explained in ***Kruckenberg*** that exceptions to the doctrine of claim preclusion are rare but in some cases, there are "'policy reasons for allowing an exception [to] override the policy reasons for applying'" claim preclusion. ***Kruckenberg***, 279 Wis. 2d 520, ¶37 (quoting ***Sopha v. Owens-Corning Fiberglas Corp***., 230 Wis. 2d 212, 222, 235-36, 601 N.W.2d 627 (1999)). Exceptions to claim preclusion are described in the RESTATEMENT (SECOND) OF JUDGMENTS § 26 (1)(a)-(f). *See* ***id.***, ¶38. Relevant here are the exceptions set forth in paragraphs (a)-(c), which provide as follows:

> (1) When any of the following circumstances exists, the general rule of § 24 does not apply to extinguish the claim, and part or all of the claim subsists as a possible basis for a second action by the plaintiff against the defendant:
>
> (a) The parties have agreed in terms or in effect that the plaintiff may split his [or her] claim, or the defendant has acquiesced therein; or
>
> (b) The court in the first action has expressly reserved the plaintiff's right to maintain the second action; or

> (c) The plaintiff was unable to rely on a certain theory of the case or to seek a certain remedy or form of relief in the first action because of the limitations on the subject matter jurisdiction of the courts or restrictions on their authority to entertain multiple theories or demands for multiple remedies or forms of relief in a single action, and the plaintiff desires in the second action on that theory or to seek that remedy or form of relief….

¶18 Communications Products asserts that paragraphs (a)-(c) apply in this case to override the application of claim preclusion "given [the circuit court's] approval [in ***American Trust & Savings Bank v. Communications Prods.***, 2003CV285 following this court's remand in ***American Trust & Savings Bank v. Communications Products***, No. 2011AP1234, unpublished slip op. (WI App Jan. 31, 2013)] of [Communications Products] filing a separate action, [the] Respondents' acquiescence in that decision (including their failure to appeal), and Virnich's inability to present [Communications Products'] claims in his action." In support, Communications Products cites to the transcript of an April 2014 circuit court hearing held in ***American Trust & Savings Bank v. Communications Prods.***, 2003CV285 following our remand in ***American Trust & Savings Bank***, No. 2011AP1234, unpublished slip op. (WI App Jan. 31, 2013). As we explained in more detail above in ¶4, the issue before this court on appeal in ***American Trust & Savings Bank*** was whether the circuit court had erred in concluding that Communications Products had forfeited its right to sue American Trust or Polsky for damages, and we concluded that it had not. ***American Trust & Savings Bank***, No. 2011AP1234, unpublished slip op., ¶¶83-84. At the April 2014 hearing, the circuit court found that the receivership had ceased and that control of Communications Products therefore returned to its shareholders and board of directors. This being the case, the court concluded that there was nothing left to do in ***American Trust & Savings Bank v. Communications Prods.***, 2003CV285, and directed that an order dismissing the action be prepared. The court noted that

American Trust & Savings Bank v. Communications Prods., 2003CV285 was not the appropriate proceeding in which to determine what, if any, viable claims there may be against American Trust, Polsky, or any other party.

¶19 Nothing in the circuit court's oral ruling at the April 2014 hearing could reasonably be construed as an agreement between the parties that Polsky and Communications Products' claims be split, or a ruling by the circuit court that Communications Products retained the right to maintain an action against any of the Respondents separate from any action maintained by Polsky for claims arising out of the same transaction or series of transactions. In addition, Communications Products has not pointed to any place in the record that establishes that a theory of the case or certain remedy or form of relief could not have been pursued by Polsky in the first actions, and Communications Products does not develop an argument that it could not have done so. Accordingly, we conclude that the exceptions set forth in RESTATEMENT (SECOND) OF JUDGMENTS § 26 (1)(a)-(c) do not apply in this case.

¶20 Communications Products also argues that claim preclusion should not apply here because the suit falls within RESTATEMENT (SECOND) OF JUDGMENTS § 59(3)(b). Section 59(3)(b) provides:

> (3) If the corporation is closely held, in that one or a few persons hold substantially the entire ownership in it, the judgment in an action by or against the corporation or the holder of ownership in it is conclusive upon the other of them as to issues determined therein as follows:
>
> ….
>
> (b) The judgment in an action by or against the holder of ownership is conclusive upon the corporation *except when relitigation of the issue is justified in order to protect the interest of another owner or creditor of the corporation.* (Emphasis added).

¶21 Communications Products asserts that RESTATEMENT (SECOND) OF JUDGMENTS § 59.3(b) should prevent the application of the claim preclusion doctrine in this case because "Virnich is not the only ultimate owner of [Communications Products] … [and] the only hope [Communications Products'] unsecured creditors have of getting paid is if [Communications Products] can pursue its claims." However, Communications Products has not cited this court to Wisconsin authority adopting § 59.3(b) or to any legal authority applying § 59.3(b) as an exception to claim preclusion. Moreover, Communications Products has not developed any argument as to why the exception should be adopted and applied in this case. This is an undeveloped argument that we decline to attempt to address. *See* ***Associates Fin. Servs. Co. of Wis., Inc. v. Brown***, 2002 WI App 300, ¶4 n.3, 258 Wis. 2d 915, 656 N.W.2d 56.[3]

¶22 Because there is an identity of parties, an identity of claims, and the prior actions resulted in final judgments on their merits, and Communications Products has failed to demonstrate that there is any applicable exception, we conclude that claim preclusion bars Communications Products' claims in the present case. We therefore affirm summary judgment in favor of the Respondents.[4]

[3] Communications Products devotes substantial discussion to what it describes as the erroneous reasoning underlying the circuit court's grant of summary judgment in ***Virnich v. Vorwald***, No. 2015AP1600, unpublished slip op. (WI App July 28, 2016). However, we affirmed summary judgment in that case, and in ***Virnich v. Vorwald***, No. 2015AP908, unpublished op. and order (WI App July 28, 2016).

[4] Because our decision that claim preclusion bars Communications Products' claims in the present case is dispositive, we do not address other arguments raised by the parties, including arguments by the Respondents that Communications Products' claims are also barred by issue preclusion and are time barred. *See* ***Sweet v. Berge***, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983) (if a decision on one point disposes of the appeal, the court will not decide other issues raised).

CONCLUSION

¶23 For the reasons discussed above, we affirm.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2015-16). This opinion may not be cited except as provided under RULE 809.23(3).