IN THE COURT OF APPEALS OF IOWA

No. 2-552 / 11-1832
Filed October 3, 2012

CITY OF JOHNSTON,
Plaintiff-Appellee,

vs.

ANDREW C. CHRISTENSON,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Robert T. Wilson (motion for summary judgment), Don C. Nickerson (rule 1.904(2) motion), Artis I. Reis (motion to determine viability of rulings on motions for summary judgment), Richard G. Blane II (motion to strike, motion for entry of order in compliance with appellate court decisions, motion to reconsider, motion for summary judgment), and Karen A. Romano (motion for entry of order in compliance with appellate court decisions), Judges.

Defendant appeals from the district court's entry of summary judgment in favor of plaintiff. **AFFIRMED.**

Mark McCormick of Belin McCormick, P.C., Des Moines, and Frank Murray Smith and Jessman Smith of Frank Smith Law Office, Des Moines, for appellant.

J. Russell Hixson of Hixson & Brown, P.C., West Des Moines, for appellee.

Heard by Vaitheswaran, P.J., Bower, J., and Mahan, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

BOWER, J.

Defendant Andrew Christenson appeals from the district court's entry of summary judgment in favor of plaintiff City of Johnston in this protracted dispute over Christenson's proposal to build an accessory structure on his land to house his horses. Christenson contends the district court erred in denying his motion for summary judgment based on claim preclusion. Upon our review, we conclude Christenson did not sustain his burden to establish the elements of claim preclusion with respect to the issue of whether his nonconforming use of the land was eliminated under City of Johnston Zoning Ordinance section 17.04.160(F). Finding no error, we affirm the summary judgment entered by the district court.

I. Background Facts and Proceedings.

As we observed in 2009 in the city's second appeal, this case has a "lengthy and complex procedural history." *City of Johnston v. Christenson*, No. 07-1857, 2009 WL 1211868, at *1 (Iowa Ct. App. May 6, 2009) (*Christenson II*); *see City of Johnston v. Christenson*, 718 N.W.2d 290 (Iowa 2006) (*Christenson I*). It is therefore not surprising that in its third appeal, this case's procedural history has become even more lengthy and complex.

The parties' dispute revolves around a 9.7-acre tract of land owned by Andrew Christenson in the City of Johnston. The land has been described as "an island of bygone days, encased within a progressive, vibrant, rapidly sprawling metropolitan suburb . . . that retains many characteristics of its rural past today." *Christenson I*, 718 N.W.2d at 293. At issue between the parties is whether

Christenson's construction of a "large accessory building" on the land to be used "as storage for equipment and an exercise area for horses" would be in violation of several City ordinances. *Id.* at 294.

For more than ten years, litigation has ensued in the two actions that have been raised by the City against Christenson: a writ of certiorari action (CV3943) and a declaratory judgment action (CV4011). The case before us is Christenson's appeal of the district court's summary judgment ruling in CV4011; however, CV3943 and CV4011 are so intertwined as to make it impossible to understand and consider the issues before us without reciting and considering both actions.[1]

The following facts are undisputed. Prior to the City's incorporation in 1969, the land at issue was used for agricultural purposes. Christenson purchased the property in 1990; at that time a single-family residence, a detached garage, and five outbuildings were located on it. The outbuildings included a small barn, a tack shed, a farrier shed, a grain shed, and an insulated shed. Much of the land was enclosed by a fence to retain farm animals. Although the land is now located in a mixed-use center district of the City that includes a mixture of residential, office, and commercial uses, Christenson continued to legally use it for agricultural purposes as a preexisting, nonconforming use. He kept several horses on his property and maintained a large portion of it as pasture for the horses.

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[1] The parties previously stipulated the court could take judicial notice of CV3943. In addition, the district court later concluded the court could take judicial notice of CV3943 in its December 2010 ruling on the City's motion to reconsider.

In 1998, the detached garage and all of the outbuildings on Christenson's land were destroyed or damaged beyond repair by a severe storm. Christenson had used those buildings to store horse tack and related equipment, feed, and other supplies for his horses. He also occasionally put some of the horses in the buildings during inclement weather or for veterinarian visits.

Following the storm, Christenson approached the city's zoning administrator about building a large accessory structure on the portion of his property that he used as pasture to replace the buildings that were destroyed. Christenson proposed constructing a 16,000 square foot structure to be used for storage of feed and supplies, personal property, vehicles, and horses. He also envisioned using part of the building for exercising and training his horses. Christenson filed an application with the board of adjustment for a special exception to exceed the maximum area limitation of 3600 square feet for accessory structures. He also requested a variance from the fifteen-foot height restriction.

In December 2001, a hearing on Christenson's application was held before the board of adjustment. The city's zoning administrator informed the board in a written report prepared prior to the hearing that although "Christenson's horses are lawful, nonconforming uses," Christenson's proposed structure could conflict with the purpose of the city's nonconforming-use

ordinances. Despite the concern expressed by the zoning administrator, the board ultimately passed a resolution approving Christenson's application as to both the special exception for area and a variance for height. In doing so, the Board determined:

1. The building size was "appropriate for the intended use as storage for equipment and an exercise area for horses."
2. Notice should be recorded to limit the present and future use of the building to permitted uses under the ordinance because the building could be used for nonpermitted uses.
3. The siting of the building was appropriate.
4. Special architecture restrictions were needed so the building would blend into the surrounding area.
5. The variance for height was needed based on hardship of constructing a large building without a corresponding increase in the height of the roof.

A condition of the board's resolution also required Christenson to submit a site plan for approval by the planning and zoning commission and the city council.

The city attorney subsequently provided the city council with a written opinion that the intended use of the structure for horses was prohibited under several city ordinances as an illegal expansion of a nonconforming use. In expressing that opinion, the city attorney "assumed that Mr. Christenson has been pasturing his horses on the entire 9.72 acres for a number of years and that the use of his land for such purpose is a legal nonconforming use." The city attorney nonetheless concluded that Christenson "would not be allowed to erect an entirely new building or structure ('building use') simply because it would be used in conjunction with his nonconforming 'land use.'" Following its receipt of the city attorney's opinion, the city council requested the board of adjustment to

reconsider the board's resolution. In January 2002, the board of adjustment reconsidered the matter at a hearing. Upon discussion of the concerns raised by the city attorney, however, the board voted in favor of confirming its prior resolution.

In February 2002, the City filed a petition for writ of certiorari with the district court (CV3943), challenging the decision of the board of adjustment. Christenson then submitted a site plan to the planning and zoning commission and the city council for its approval. The City declined to take action on the site plan. Instead, in March 2002, the City initiated the instant case by filing a petition for declaratory judgment (CV4011), requesting the district court to declare that it was not obligated to approve the plan because the intended "use of the proposed structure" would violate various city ordinances. Specifically, the City claimed the use of the structure "to stall, stable, exercise or ride horses" would (1) violate Johnston Zoning Ordinance section 17.10.182.40, which set forth the permitted uses for accessory buildings; (2) not qualify as a nonconforming use of *land* under section 17.04.150[2] or a nonconforming use of *structure* under section 17.04.160;[3] and (3) be an "illegal expansion" of a nonconforming use.

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[2] Section 17.04.150 provides:

> The lawful use of land upon which no building or structure is erected or constructed which becomes non-conforming . . . may be continued so long as it remains otherwise lawful, subject to the following provisions:
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> A. No such non-conforming use of land shall be enlarged or increased nor extended to occupy a greater area of land than was occupied at the effective date of adoption or amendment of this ordinance;
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> B. No such non-conforming use of land shall be moved in whole or in part to any other portion of the lot or parcel which was not occupied by

The district court stayed the writ of certiorari action while the parties litigated the declaratory judgment action. The parties filed opposing motions for summary judgment. In June 2003, the district court denied Christenson's motion and granted the majority of the City's motion, concluding Christenson's proposed structure would violate section 17.10.182.40 and was prohibited by section 17.04.160. The court found section 17.04.150 inapplicable to Christenson's proposition.

Both parties filed motions pursuant to Iowa Rule of Civil Procedure 1.904(2). The district court's January 2004 ruling granted a portion of Christenson's motion, noting that the court had taken judicial notice of CV3943, but denied Christenson's motion on the remaining grounds. The court also granted part of the City's motion by expanding its ruling to find that "all of the six structures at issue on Christenson's land were either destroyed or damaged

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> such use at the effective date of adoption or amendment of this ordinance;
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> C. If any such non-conforming use of land ceases for any reason for a period of more than six (6) months, any subsequent use of such land shall conform to the district regulations for the district in which such land is located.

[3] Section 17.04.160 provides:

> The lawful use of a building or structure and adjacent land which is part of the plot upon which the building or structure is located, which becomes nonconforming . . . may be continued so long as it remains otherwise lawful, subject to the following provisions:
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> . . .
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> G. Any structure devoted to a use made non-conforming by this ordinance that is destroyed or has substantial damage by any means to an extent of fifty (50) percent or more of its replacement cost at the time of destruction . . . shall not be reconstructed and used as before such event.

beyond repair, which eliminated the nonconforming use status of the land" pursuant to section 17.04.160(F).[4]

In February 2004, Christenson appealed, claiming the issues of permitted and nonconforming uses were the same issues raised and decided adversely to the City in the board of adjustment action, and the doctrine of issue preclusion thus precluded the City from raising the issues again in the exercise of its authority to approve the site plan. In March 2006, the supreme court entered its ruling, agreeing in part, and concluding:

> [T]he issue of whether Christenson's proposed use of the structure was permitted under the zoning ordinance was actually decided by the board of adjustment when it voted to reaffirm its decision to grant a special exception and variance. . . . Accordingly, the doctrine of issue preclusion applies to preclude the City from relitigating in the declaratory-judgment action whether Christenson's use of the property for horses was permitted under the zoning ordinance as a nonconforming use . . . . Unless and until the court in the certiorari action corrects the board's action, the board's decision that the use of the structure for horses is permitted under the zoning ordinance is binding on the City under issue preclusion.

Christenson I, 718 N.W.2d at 302. The supreme court accordingly reversed the judgment of the district court and remanded for further proceedings. However, in so doing, the court observed "a primary issue" in the writ of certiorari proceeding was whether the City filed its petition in a timely manner; the court stated Christenson's argument with regard to timeliness was "self-defeating under estoppel principles." *Id.* at 303 n.5. As the court noted:

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[4] Section 17.04.160(F) states in relevant part that "[w]here non-conforming use status applies to a structure and land in combination, removal or destruction of the structure shall eliminate the non-conforming status of the land."

> Clearly, Christenson succeeds in this declaratory-judgment action only because the board of adjustment decided the legality of the proposed use of the structure following the request by the City for the board to reconsider the issue in its request for reconsideration. If the City's reconsideration request was a nullity because reconsideration was not authorized, then it would follow that the board's decision upon reconsideration also has no effect. The doctrine of judicial estoppel prevents Christenson from using the reconsideration decision in this case as a valid judgment to establish issue preclusion and then claim it is a nullity for the purposes of triggering the commencement of the time to file a petition for writ of certiorari. Christenson cannot have it both ways.

Id. The supreme court also observed:

> [T]he summary judgment entered by the district court in this case granted additional relief in the form of a declaration that the prior nonconforming status of the land was eliminated, an issue not raised by Christenson on appeal or discussed by the parties in the appeal. We only decide appeals within the framework of the issues raised, and we leave it to the district court on remand to determine the viability of any portion of its judgment not challenged in this appeal.

Id.

In July 2007, on remand to the district court following the supreme court's ruling, Christenson filed a motion to determine viability of rulings on motions for summary judgment, contending the doctrine of issue preclusion applied to bar the City from litigating the nonconforming status of Christenson's land because the board approved that use when it granted the special exception and variance for Christenson's proposed accessory building. Specifically, Christenson's motion requested: (1) the City's petition for declaratory judgment be dismissed with prejudice, (2) all district court rulings granting relief sought by the City be declared void, and (3) the issues raised by the City concerning Christenson's use

of his property be allowed to proceed and be determined in the certiorari proceedings.

The City filed a response to Christenson's motion, stating:

> In a nutshell, Christenson requests the Court to dismiss, in its entirety, the City's petition [for declaratory judgment] based allegedly on the Iowa Supreme Court's decision on appeal. Although Christenson's motion should be granted in some respects, it also must be denied in others.

Accordingly, the City requested (1) the district court's June 2003 ruling be vacated with a statement that the issue of the legality of Christenson's proposed structure will be decided by the certiorari court, and (2) the district court's January 2004 ruling remain in place as a declaration of the rights between the parties as to Christenson's loss of the nonconforming use of his land for horses.

In October 2007, the district court entered its order on remand, concluding:

> [The board of adjustment] both actually and presumptively approved the agricultural use of the land when it approved the same use of the structure for which Christenson sought a variance and special exception. The City of Johnston is barred by issue preclusion from relitigating the use of the underlying land in the Declaratory Judgment case.
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> In accordance with the ruling of the Iowa Supreme Court, the [district court's January 2004 ruling] is vacated, and this case is dismissed. City may argue the illegality of the Board's action in the Certiorari case.

In November 2007, the City appealed.

Meanwhile, the stay in the writ of certiorari action (CV3943) was lifted. The City and Christenson filed motions for summary judgment.[5] In January

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[5] The City's motion raised three issues, but at the hearing, the City withdrew its motion with respect to two of those issues. Thus, the only issue on the City's motion remaining

2008, following a hearing, the district court entered its ruling on the parties' motions. The court concluded the board of adjustment's action was a grant of a special exception that was authorized under section 17.04.290, and rejected the City's contention that the supreme court's finding in *Christenson I* precluded Christenson from raising that issue. The district court further held the City lacked the statutory authority to ask the board to reconsider the board's decision granting a special exception. As the court observed, "Iowa Code section 414.7 only authorizes cities to remand a decision to grant a variance to the board of adjustment for further study." In effect, the district court determined that with respect to the special exception, the board's reconsideration decision was a nullity. The court concluded the City was "precluded from challenging the board's decision granting the special exception because such challenge [was] not timely filed within thirty (30) days of the filing of the decision with the office of the board on December 31, 2001."[6]

The court further concluded it did not have to decide the issues of whether the outbuildings on Christenson's land were totally destroyed, and thus whether the proposed structure was illegal because Christenson had lost the right to keep horses due to the alleged total destruction pursuant to sections 17.04.160(F) and 17.04.160(G) because the City had withdrawn those claims, and because the court had found the City's certiorari petition was untimely so it did not have

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to be considered by the court was whether the board of adjustment had authority to grant the special exception for Christenson's proposed structure. Christenson's motion raised only the issue of whether the special exception granted by the board of adjustment was actually a special exception.

[6] The City had filed its certiorari action with the court on February 4, 2002.

jurisdiction to rule on those issues. Accordingly, the district court concluded: (1) the special exception was a special exception, (2) the board had authority to grant the special exception for Christenson's proposed structure, (3) Johnston ordinances allowed Christenson to enlarge or alter his nonconforming use structures as allowed by the board, (4) the City did not timely challenge the board's decision, and (5) the court lacked subject matter jurisdiction to entertain the City's challenge to the special exception under Count I of the City's certiorari petition and Count I was dismissed. The court therefore denied the City's motion for summary judgment and granted Christenson's motion for summary judgment.

Meanwhile, in CV4011, the City's appeal of the district court's decision on remand was pending before this court. The City contended the district court erred in applying the doctrine of issue preclusion with respect to the issue of whether the nonconforming status of Christenson's land was eliminated under section 17.04.160(F), alleging that issue was not actually litigated in the board of adjustment action. In May 2009, this court entered its ruling. In doing so, this court was without the benefit of the district court's January 2008 ruling in CV3943 which upheld the board of adjustment's grant of Christenson's special exception.

In its ruling, this court agreed with the City and reversed the district court's ruling. *Christenson II*, 2009 WL 1211868 at *5-6. As this court determined:

> [W]e agree with the City that its admission regarding the nonconforming use status of Christenson's land in the board of adjustment proceedings did not constitute actual litigation of that issue for the purpose of applying issue preclusion. . . . We conclude the doctrine of issue preclusion did not prevent the City from litigating in this declaratory judgment action the issue of

> whether Christenson lost the nonconforming use of his land for horses.[7]

Id. at *5. The City also argued the district court on remand lacked the jurisdiction or authority to vacate its January 2004 ruling in regard to the court's decision that Christenson had lost the nonconforming use of his land for his horses. This court agreed and found that when Christenson "did not challenge the portion of the district court's ruling holding he had lost the nonconforming use of his land for horses, . . . it became final and not subject to subsequent collateral attack." *Id.* at *6. This court therefore concluded the district court erred in vacating that portion of its January 2004 ruling.

On remand to the district court once again following this court's ruling on appeal, in August 2009, Christenson filed a motion for summary judgment, and the City filed a motion for entry of order in compliance with appellate court decisions and a motion to strike Christenson's motion for summary judgment. Christenson based his motion for summary judgment "upon recent activity and a final ruling in CV3943, which the City did not appeal, that affirmed the board of adjustment and his right to construct the proposed building." Specifically, Christenson argued: (1) the board's decision was final and could not be collaterally attacked through the declaratory judgment case, (2) after the City's appeal in *Christenson II*, the City litigated the land use issue in CV3943, thus

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[7] Christenson alleged the City should nevertheless be judicially estopped from litigating the nonconforming use status of his land because the City had asserted an inconsistent position in prior proceedings. *Id.* This court disagreed and found that application of judicial estoppel in this case would not "further the goal of protecting the integrity of the judicial process where the doctrine was not raised until the second appeal in a case that has been pending for several years." *Id.*

satisfying the "actually litigated" element of issue preclusion this court in *Christenson II* found missing, and (3) the City's actual litigation of the land use issue in CV3943 and subsequent dismissal with prejudice of that action was a final adjudication on the merits by the doctrine of res judicata.

In July 2010, following a hearing, the district court entered its ruling. The district court concluded the first and third issues presented in Christenson's motion, which were based on the final adjudication in CV3943, were not collateral attacks on the Court's decisions in the instant action, CV4011. The court found the second issue, however, was a collateral attack and could not be permitted. Thus, the district court granted the City's motion to strike Christenson's motion for summary judgment as to the second issue. Next, the court granted the City's motion for additional time to respond to Christenson's motion as to the first and third issues. Finally, the court denied the City's motion for entry of order in compliance with appellate court decisions because it was "not appropriate or necessary" as the court still needed to determine Christenson's motion for summary judgment regarding the first and third issues that had not yet been decided.

The City subsequently filed a motion to reconsider, contending the court erred in taking judicial notice of CV3943. The City also alleged the court erred in concluding Christenson could not build the proposed structure; rather, as the City set forth, Christenson *could* build the proposed structure, but *could not* use it for the proposed purpose of stabling and exercising his horses. The district court entered its ruling in December 2010, denying the City's motion in part, concluding

"[t]he factual and procedural history in CV3943 and CV4011 are so intertwined as to make it impossible to understand and consider the issues raised in one case without considering the other."[8] The court granted the City's motion in part, concluding "the Court improperly concluded that Christenson had lost the right to construct the building." Accordingly, the court struck the sentence to that effect from its June 2010 ruling.[9] The court found, however, that the issue still remained as to whether Christenson had the "ability to use the building for stabling and exercising his horses."

Thus, two issues remained on Christenson's motion for summary judgment: (1) whether the board's "decision is final and cannot be collaterally attacked through this declaratory judgment case," and (2) whether the "City's actual litigation of the land use issue in the certiorari action and subsequent dismissal with prejudice of that action is a final adjudication on the merits by the doctrine of res judicata." In March 2011, following a hearing, the district court entered its ruling denying Christenson's motion for summary judgment:

> [T]he Court concludes Christenson did not sustain his burden to establish the elements of either issue or claim preclusion with respect to the issue of whether his nonconforming use of the land was eliminated under Johnston City Ordinance 17.04.160(F). The Court did not make any determination on this issue in the certiorari action [CV3943], and neither the Court's dismissal of Count I on jurisdictional grounds, nor the City's voluntary dismissal without prejudice of Count II of the City's certiorari Petition are a final judgment on the merits of the issue. Accordingly, Christenson's Motion for Summary Judgment must be denied. All issues raised by Christenson in his Motion have been considered

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[8] The court further observed that two prior rulings "noted that the parties had agreed or stipulated that the Court could take judicial notice of the court file in CV3943."

[9] Specifically, the stricken sentence stated: "Thus, the city contends that in CV4011 the court determined that Christenson had lost his right to construct the building."

> by this Court, whether or not specifically addressed in this opinion, and have been found to be without merit.
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> The Court's denial of this Motion and determination that the certiorari action has no preclusive effect on the issue before the Court places the case as it stood on remand from the Court of Appeals. Specifically, that the City properly litigated the issue of whether Christenson lost the nonconforming use of his land for horses in its Motion for Summary Judgment in this Declaratory Judgment action [CV4011], and the Court's Ruling of January 4, 2004, that Christenson has in fact lost the nonconforming use of the land for horses pursuant to Johnston ordinance 17.04.160(F) due to the fact his outbuildings were destroyed or damaged beyond repair, is the final ruling on this issue. That ruling became effective as of the date it was entered on January 4, 2002.

In October 2011, the district court sustained the City's motion for entry of order in compliance with appellate court decisions and entered judgment against Christenson, concluding:

> [I]n light of the Court's March 31, 2011, ruling on Defendant's motion for summary judgment, the Court has determined that Judge Nickerson's order of January 14, 2004, is the law of the case and in full force and effect. . . . Plaintiff is entitled to judgment against Defendant.

Christenson now appeals, contending the district court erred in denying his motion for summary judgment on the ground of claim preclusion.

II. Scope and Standard of Review.

We review a district court's ruling on summary judgment for correction of errors at law. Iowa R. App. P. 6.907. We may uphold the ruling on any ground raised before the district court, even if that ground was not a basis for the court's decision. *Sievers v. Iowa Mut. Ins. Co.*, 581 N.W.2d 633, 636 (Iowa 1998). Upon a motion for summary judgment, the court must: "(1) view the facts in the light most favorable to the nonmoving party, and (2) consider on behalf of the nonmoving party every legitimate inference reasonably deduced from the

record." *McCormick v. Nikkel & Assocs., Inc.*, 819 N.W.2d 368, 371 (Iowa 2012). Summary judgment is appropriate if "there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Koeppel v. Speirs*, 808 N.W.2d 177, 179 (Iowa 2011).

III. Error Preservation.

The City contends Christenson's appeal raises "numerous statements and assertions" that were not contained in Christenson's motion for summary judgment and were not decided by the district court. "It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal." *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002). Upon our review, we find the issues raised by Christenson on appeal were raised and decided before the district court.[10]

IV. Discussion.

As the district court observed in its ruling, the status of this case "is that Christenson can build Velvet a barn, but Velvet, being a horse, as a nonconforming use under the City's ordinances cannot live in it." There is no genuine issue of material fact concerning the City ordinance at issue and Christenson's former and proposed future use of his land. Accordingly, we must determine if the court erred in finding Christenson did not sustain his burden to establish the elements of claim preclusion with respect to the issue of whether

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[10] We observe the district court did not enunciate its reasoning as to every argument raised by Christenson. However, the court stated, "All issues raised by Christenson in his Motion have been considered by this Court, whether or not specifically addressed in this opinion, and have been found to be without merit."

his nonconforming use of the land was eliminated under Johnston Zoning Ordinance section 17.04.160(F).

Christenson contends the district court erred in denying his motion for summary judgment based on claim preclusion. Christenson alleges the City "impermissibly split its cause of action by making the same claim in two separate cases [CV3943 and CV4011] and then abandoning its claim in the only forum that had jurisdiction over it [CV3943]." Christenson argues that "[i]n failing to give res judicata effect to the board decision and final disposition of the certiorari case in this case, the district court allowed the City to usurp the 'special and exclusive role' of the board that makes certiorari the City's exclusive remedy in challenging board of adjustment decisions regarding land-use development." In other words, Christenson contends "the City attempted an end run around the holding of the supreme court by litigating the land use issue in this case and abandoning its attack on the variance in the certiorari case."

The doctrine of res judicata includes both claim preclusion and issue preclusion. *Pavone v. Kirke*, 807 N.W.2d 828, 835 (Iowa 2011). This appeal involves claim preclusion. *See, e.g.*, *Iowa Coal Mining Co. v. Monroe Cnty.*, 555 N.W.2d 418, 441 (Iowa 1996) ("Res judicata in the sense of claim preclusion means that further litigation on the claim is barred."). "The general rule of claim preclusion holds that a valid and final judgment on a claim bars a second action on the adjudicated claim or any part thereof." *Pavone*, 807 N.W.2d at 835. Accordingly, a party must litigate all matters growing out of the claim. *Id.* Claim preclusion will apply to matters actually determined in an earlier action as well as

relevant matter that could have been determined. *Id.* Claim preclusion may foreclose litigation on matters the parties never litigated in the first claim. *Arnevik v. Univ. of Minn. Bd. of Regents*, 642 N.W.2d 315, 319 (Iowa 2002).

> 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 same 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.

Pavone, 807 N.W.2d at 835-36 (citations omitted).

"A second claim is likely to be barred by claim preclusion where the 'acts complained of, and the recovery demanded are the same or where the same evidence will support both actions.'" *Arnevik*, 642 N.W.2d at 319 (quoting *Whalen v. Connelly*, 621 N.W.2d 681, 685 (Iowa 2000)). To establish claim preclusion a party must show: (1) the parties in the first and second action were the same, (2) the claim in the second suit could have been fully and fairly adjudicated in the prior case, and (3) there was a final judgment on the merits in the first action. *Pavone*, 807 N.W.2d at 836; *Arnevik*, 642 N.W.2d at 319. "The absence of any one of these elements is fatal to a defense of claim preclusion." *Arnevik*, 642 N.W.2d at 319.

In this case, the district court concluded Christenson did not sustain his burden to establish the elements of claim preclusion with respect to the issue of whether his nonconforming use of the land was eliminated under Johnston Zoning Ordinance section 17.04.160(F). To establish claim preclusion in this case (CV4011), Christenson was required to show, in part, that there was a final

judgment on the merits in the writ of certiorari action (CV3943). *See Pavone*, 807 N.W.2d at 836; *Arnevik*, 642 N.W.2d at 319. The district court concluded Christenson failed to prove this element, finding that neither the court's dismissal for lack of jurisdiction of Count I of the City's certiorari petition nor the City's voluntary dismissal without prejudice of Count II of the petition constituted a final judgment on the merits of the issue of Christenson's loss of the nonconforming use of the land.

We agree in substance with the district court's conclusion. As the district court observed, the City's petition for writ of certiorari contained two counts. Contrary to the finding of the district court, we conclude the City's voluntary dismissal of Count II, standing alone, *is not* fatal to Christenson's defense of claim preclusion. *See Pavone*, 807 N.W.2d at 835 (reiterating that claim preclusion will apply to matters actually determined in an earlier action as well as relevant matter that could have been determined); *Arnevik*, 642 N.W.2d at 319 (observing that claim preclusion may foreclose litigation on matters the parties never litigated in the first claim). We agree with the district court, however, that the court's dismissal for lack of jurisdiction of Count I of the City's petition *is* fatal to Christenson's defense of claim preclusion.[11] "[D]ismissals for lack of jurisdiction are not adjudications on the merits." *Hammond v. Fla. Asset Fin. Corp.*, 695 N.W.2d 1, 8 (Iowa 2005). Accordingly, the district correctly concluded Christenson failed to prove there was a final judgment on the merits in CV3943,

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[11] Although the City voluntarily dismissed Count II, the court noted it would not decide that issue because the City's certiorari petition was untimely.

and Christenson cannot use the court's ruling in CV3943 to support his claim of res judicata in CV4011.[12]

Finding no error, we affirm the summary judgment entered by the district court.[13]

AFFIRMED.

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[12] This conclusion is consistent with our supreme court's ruling in *Christenson I*, where the supreme court noted that "Christenson cannot have it both ways" and found the doctrine of judicial estoppel prevented Christenson from using the board's reconsideration decision as a valid judgment to establish issue preclusion and then claiming it was a nullity "for the purposes of triggering the commencement of the time to file a petition for writ of certiorari." 718 N.W.2d at 303 n.5. In addition, we observe Christenson's argument that the certiorari action (CV3943) was the only proper forum for the City's claim seems to rely on the court's statement that "[u]nless and until the court in the certiorari action corrects the board's action, the board's decision . . . is binding on the City." *Id.* at 303. However, the supreme court also observed the district court had concluded Christenson lost the prior nonconforming use of his land for horses—"an issue not raised by Christenson on appeal or discussed by the parties in the appeal." *Id.* at 303 n.5. The supreme court directed the district court to determine on remand "the viability" of that portion of its judgment. *Id.* This court subsequently determined the City was not prevented "from litigating in this declaratory judgment action the issue of whether Christenson lost the nonconforming use of his land for horses," and when Christenson "did not challenge the portion of the district court's ruling holding he had lost the nonconforming use of his land for horses, . . . it became final and not subject to subsequent collateral attack." *Christenson II*, 2009 WL 1211868 at *5-6.

[13] Accordingly, the district court's October 2011 ruling entering judgment against Christenson per the court's January 2004 order sets forth the status of this case.