COURT OF APPEALS
DECISION
DATED AND RELEASED

June 10, 1997

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-2116

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

WILLIAM J. EVERS,

PLAINTIFF-APPELLANT,

ANITA E. EVERS,

PLAINTIFF,

V.

ROBERT J. LERNER,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Outagamie County: DEE R. DYER, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. William Evers appeals a summary judgment of dismissal granted on the basis of res judicata. Evers argues that the trial court

erroneously concluded that res judicata bars the action. He also argues that the trial court judge had a conflict of interest, ought to have recused himself, and was biased against Evers. We reject his arguments and affirm the judgment.

This is the latest in a series of appeals stemming from various actions filed by Evers against Robert Lerner, his former attorney. In 1993, we affirmed the dismissal of Evers' lawsuit against Lerner seeking $250,000 in punitive damages and $250,000 compensatory damages because, although Evers had obtained a default judgment on liability, Evers failed to prove damages. ***Evers v. Lerner,*** No. 92-2998, unpublished slip op. (Wis. Ct. App. May 11, 1993).

On October 5, 1995, we summarily affirmed a summary judgment of dismissal of Evers' action against Lerner and others claiming a conspiracy to deprive him of property rights and constitutional rights. ***Evers v. Outagamie County,*** No. 95-0597, unpublished slip op. (Wis. Ct. App. Oct. 5, 1995). On November 28, 1995, we affirmed a summary judgment of dismissal of Evers' suit against Lerner claiming legal malpractice and negligence in defending a defamation suit, breach of contract, theft and fraud, and conversion of proceeds of the sale of a car. ***Evers v. Lerner,*** No. 95-1354, unpublished slip op. (Wis. Ct. App. Nov. 28, 1995).

Now Evers appeals the dismissal of his most recent lawsuit against Lerner. His complaint alleges that he hired Lerner to represent him between November 1986 and October 1988 in civil and criminal proceedings. It alleges that Lerner engaged in acts of racketeering between November 1986 and February 1992, causing injury to Evers. The complaint alleges twenty-eight separate racketeering acts. The first eleven acts allege that between November 8, 1986, and July 10, 1987, Lerner received checks for legal services, but did not apply the

funds to legal services. The next four acts allege fraud between July and September 1987. The next four acts allege fraud with respect to the delivery of legal services. The next four acts allege additional schemes to defraud Evers of property. The balance of the racketeering acts allege additional acts of fraud and conversion with respect to billings for legal services and an automobile. The complaint alleges several acts of racketeering resulting in damages to Evers in excess of $900,000 and requested $1,000,000 punitive damages.

Lerner moved for summary judgment on the basis of the doctrines of res judicata and estoppel. He accompanied his motion with an affidavit that the allegations of the instant action are essentially the same allegations made in earlier actions filed by the Evers against Lerner. Lerner included copies of pleadings filed in the earlier lawsuits.

The trial court granted Lerner's motion for summary judgment. In its written decision, the trial court examined the instant complaint and compared it to the pleadings filed in previous actions. The trial court determined that there was an identity of parties and actions. It concluded:

> The transactional view of claim preclusion requires the presentation of all material relevant to the transaction without artificial confinement to any substantive theory or kind of relief. The number of substantive theories that may be available to the plaintiff is immaterial. If they arise from the same factual underpinnings, they must all be brought in the same action or be barred from future consideration.

The trial court concluded that because the previous actions were dismissed with prejudice, the requirements for claim preclusion and res judicata have been met.

The standard methodology for review of summary judgment requires that we apply § 802.08, STATS., in the same manner as the circuit court. ***Green Spring Farms v. Kersten,*** 136 Wis.2d 304, 314-15, 401 N.W.2d 816, 820 (1987). We review summary judgment without deference to the circuit court. ***Brownelli v. McCaughtry***, 182 Wis.2d 367, 372, 514 N.W.2d 48, 49 (Ct. App. 1994). If the moving party has stated a prima facie case for summary judgment, we examine the affidavits and other proofs submitted by the opposing party to determine whether a material issue of fact is presented or whether the moving party is entitled to judgment as a matter of law. ***Kersten***, 136 Wis.2d at 315, 401 N.W.2d at 820. Here the issue presented requires the application of legal standards to an undisputed set of facts. Whether claim preclusion applies under a given factual scenario is a question of law. ***NSP v. Bugher,*** 189 Wis.2d 541, 551, 525 N.W.2d 723, 728 (1995).

We conclude that the trial court correctly applied the doctrine of claim preclusion. "The term claim preclusion replaces res judicata; the term issue preclusion replaces collateral estoppel." ***Id***. at 550, 525 N.W.2d at 727. As ***NSP*** explains, "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." ***Id.*** (quoting ***Lindas v. Cady***, 183 Wis.2d 547, 558, 515 N.W.2d 458, 463 (1994)). In order for the earlier proceedings to act as a claim-preclusive bar in relation to the present suit, the following factors must be present: (1) an identity of parties between the prior and present suits; (2) an identity of causes of action in the two suits; and (3) a final judgment on the merits in a court of competent jurisdiction. ***Id.*** at 551, 525 N.W.2d at 728.

Here, Evers does not challenge the trial court's conclusion that the first requirement, an identity of parties, has been met. Evers argues that the criminal acts alleged in this civil racketeering complaint were not brought in previous actions of breach of contract, negligence, fraud and theft. We disagree.

> The present trend is to see a claim in factual terms and to make it coterminous with the transaction regardless of the number of substantive theories, or variant forms of relief flowing from those theories, that may be available to the plaintiff; regardless of the number of primary rights that may have been invaded; and regardless of the variations in the evidence needed to support the theories or rights.

Id. at 554, 525 N.W.2d at 729 (quoting ***DePratt v. West Bend Mut. Ins. Co***., 113 Wis.2d 306, 311, 334 N.W.2d 883, 886 (1983)). Having reviewed the pleadings and other materials filed with respect to the earlier cases, and the pleadings filed in this action, we are satisfied that the allegations in both the earlier suits and this one arise from essentially the same series of incidents, facts and transactions. Evers merely seeks relief under an alternative legal theory for alleged wrongs addressed in earlier actions.

Next, Evers argues that the judgment in one of the earlier appeals is not legally valid because it was not entered in writing or signed. This argument is without support in the record and we reject it. The record reflects that final judgments were entered. As proof of this point, Evers has appealed the previous judgments to the court of appeals, which issued opinions affirming them.

Next, without citation to the record, Evers argues that the prior proceedings were inadequate and incomplete and that he did not have a fair opportunity to litigate the issues. Our review of the record reveals no support for this argument. The record indicates that Evers had a fair opportunity to litigate his

claims. We conclude that the doctrine of claim preclusion should be applied here to "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication." ***NSP,*** 189 Wis.2d at 559, 525 N.W.2d at 731 (quoting ***Allen v. McCurry***, 449 U.S. 90, 94 (1980).

Finally, Evers argues that the trial court was biased against him and its decision was arbitrary, capricious and irrational. Evers argues that the trial court denied him his right to pretrial discovery. We disagree. The record fails to support Evers' contentions. It demonstrates that the trial court merely scheduled pretrial motions ahead of discovery. The trial court controls its own calendar. Our de novo review of its decision on summary judgment discloses no bias, no conflict of interest, or any basis for recusal. The court's decision based upon a correct interpretation of the law.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.