COURT OF APPEALS
DECISION
DATED AND RELEASED

July 29, 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. 97-0360

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

COUNTY OF MARATHON,

PLAINTIFF-APPELLANT,

v.

TROY KUYOTH,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Marathon County: RAYMOND THUMS, Judge. *Affirmed.*

LaROCQUE, J. Marathon County appeals a dismissal of a complaint against Troy Kuyoth. The trial court concluded that the County was barred from pursuing its allegations of zoning ordinance violations by claim preclusion, formerly res judicata. The County contends that claim preclusion should not apply because the complaint alleges new violations. This court affirms.

The County's 1996 complaint alleged that Kuyoth had constructed a boathouse on or about June 7, 1994, without required permits and with less than the required seventy-five-foot setback from the ordinary high water mark. The complaint also alleged that, during construction of the boathouse, the property had been graded and filled without the required permits; the complaint further alleged that each day following constituted a separate offense and continuing until the present.

Prior to commencement of this action, the County had filed a complaint in 1994 against Kuyoth for zoning ordinance violations growing out of the same boathouse construction. The complaint was dismissed August 9, 1995, for failure to prosecute pursuant to § 805.03, STATS.[1] The County did not move the court to reopen its judgment and did not appeal the dismissal. Thus, the dismissal operated as an adjudication on the merits.

When a new complaint was filed in 1996, Kuyoth moved to dismiss in this action, on grounds of claim preclusion. Because the new complaint alleged essentially the same facts as the earlier one, Kuyoth reasoned that the August 1995 dismissal was conclusive.

[1] Section 805.03, STATS., provides in part:

> For failure of any claimant to prosecute or for failure of any party to comply with the statutes governing procedure in civil actions or to obey any order of court, the court in which the action is pending may make such orders in regard to the failure as are just, including but not limited to orders authorized under s. 804.12(2)(a). Any dismissal under this section operates as an adjudication on the merits unless the court in its order for dismissal otherwise specifies for good cause shown recited in the order.

The evidentiary facts are undisputed. Whether claim preclusion applies under a given set of facts is a question of law this court reviews de novo. ***DePratt v. West Bend Mutual Ins. Co***., 113 Wis.2d 306, 310, 334 N.W.2d 883, 885 (1983). Under claim preclusion, "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." ***Id.***

In order for the earlier proceedings to act as a bar to the suit in question, courts now require that three factors are present: (1) an identity between the parties or their privies in the earlier and present suits; (2) an identity between the causes of action in the two suits; and (3) a final judgment on the merits in a court of competent jurisdiction. ***Id.*** at 310-11, 334 N.W.2d at 885. A dismissal with prejudice is tantamount to a judgment on the merits. ***In re M.T.H.,*** 140 Wis.2d 843, 846, 412 N.W.2d 164, 165 (Ct. App. 1987). The question before this court is whether the undisputed facts of this case fulfill these requirements.

The County tacitly concedes that there is an identity of parties in the two suits, as well as a final judgment on the merits in a court of competent jurisdiction. The issue before this court is whether an identity exists between the causes of action. The County contends that because § 17.93(2) of the Marathon County General Code of Ordinances provides that each day an ordinance is violated shall constitute a separate offense, those days in which the boathouse construction was in violation of the ordinances after the dismissal of the 1994 complaint are new violations. Therefore, the County argues, the new violations could not have been part of the 1994 complaint and should not be barred by claim preclusion. This court disagrees. Although the ordinance provides for a "new violation" for purposes of imposing a penalty, for purposes of finality of judgments, the continuing nature of the offense renders it a single transaction.

Wisconsin has adopted the transactional view of cause of action or claim:

> The Restatement (Second) of Judgments adopts a transactional view of claim or cause of action. Comment a to section 24 states:
>
> "The present trend is to see 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. The transaction is the basis of the litigative unit or entity which may not be split."
>
> We also adopt the transactional view of claim or cause of action. Wisconsin's modern procedural system provides the parties with an adequate method of fully developing the entire transaction in the one action going to the merits to which the plaintiff is ordinarily confined.

DePratt, 113 Wis.2d at 311-12, 334 N.W.2d at 886 (footnotes omitted).

Applying the transactional standard to the facts of the 1996 complaint, this court concludes that an identity between the causes of action exists. In both complaints, the County has alleged that Kuyoth was in violation of the same ordinance and sought the same relief, abatement of the violation, and a daily forfeiture, all arising out of a single transaction.

The County contends that because § 17.93(2) provides that each day of violation constitutes a separate offense, each offense after the 1995 dismissal constitutes a new offense that should not be precluded. The violations in both complaints arise from one undisputed set of facts, the construction of a boathouse and the accompanying grading and filling.

> What factual grouping constitutes a "transaction," and what grouping constitutes a "series," are to be determined

> pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

NSP Co. v. Bugher, 189 Wis.2d 541, 554, 525 N.W.2d 723, 729 (1995) (citing RESTATEMENT (SECOND) OF JUDGMENTS § 24(2) (1982)). Therefore, if both suits stem from the same transaction, incident, or set of facts, claim preclusion will generally bar the second suit. ***Id.***

Both complaints arise from Kuyoth's behavior in 1994. The County had full opportunity to proceed with the 1994 complaint, and may not pursue its claim now. This court concludes that the boathouse construction was one action, or transaction, giving rise to both suits, and bars the second suit. The fact that the County could seek additional monetary penalties based upon the passage of time from the initial transaction is not determinative.

By the Court.—Judgment affirmed.

This opinion will not be published. RULE 809.23(1)(b)4, STATS.