COURT OF APPEALS
DECISION
DATED AND FILED

October 9, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

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

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

Appeal No. 2007AP2104 **Cir. Ct. No. 2005FO570**

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

COUNTY OF PORTAGE,

PLAINTIFF-APPELLANT,

V.

LADISLAUS F. HINTZ,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Portage County: JAMES M. MASON, Judge. *Affirmed.*

¶1 LUNDSTEN, J.[1] The County of Portage appeals the circuit court's order dismissing its action against Ladislaus Hintz for operating an automobile

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(b) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

wrecking yard and a solid waste disposal site in violation of the County's zoning ordinance. We uphold the circuit court's conclusion that claim preclusion bars the County's action, and affirm the order.

Background

¶2 In 2003, the County filed a small claims action against Hintz. The County alleged that Hintz was operating an automobile wrecking yard in violation of the County's zoning ordinance due to his failure to obtain special exception approval. The ordinance defines "automobile wrecking yard" as:

> The use of land on which there is located two or more inoperable and/or unlicensed self-propelled vehicles and associated parts thereof, which are stored in the open. A vehicle is stored in the open if it is not located within a building.[2]

The County sought a forfeiture of $50 per day for 100 days, for a total of $5000 in damages, the small claims limit.

¶3 Hintz moved for summary judgment and sought dismissal. He admitted that he had, for at least twenty years, used his property as an automobile wrecking yard as that term is defined in the ordinance. He argued, however, that this use was a lawful, nonconforming use because it pre-existed the definition of an automobile wrecking yard in the ordinance. The circuit court ruled for Hintz, and dismissed the County's small claims action.

¶4 Between one and two months later, the County filed the large claims action that is the subject of this appeal. The County again alleged that Hintz was

[2] The County supplies a copy of its zoning ordinance in its appendix, and we quote from it. There is no dispute as to the ordinance's contents.

operating an automobile wrecking yard in violation of the County's zoning ordinance. This time, however, the County alleged additional reasons why the wrecking yard violated the ordinance. The County also alleged that Hintz was operating a solid waste disposal site in violation of the ordinance. "Solid waste disposal site" is defined in the ordinance as:

> The use of more than 500 square feet of any lot for outside storage of any used, secondhand or refuse material, (except agricultural wastes and slash stored in conformance with conservation standards and clean road construction material) including but not limited to garbage, rubbish, ashes, street refuse including street sweepings, dead animals, machinery not in operating condition, industrial waste, demolition waste, construction waste material, excavation waste or contaminated soils not in connection with a permitted use.

In its request for relief, the County sought forfeitures of between $50 and $500 per day for an unspecified number of days. In addition, the County sought to have Hintz permanently enjoined from operating an automobile wrecking yard or a solid waste disposal site on his property.

¶5 Hintz moved for summary judgment, arguing that claim preclusion and issue preclusion barred the County's claims. Relying on both claim and issue preclusion principles, the circuit court granted Hintz's motion and dismissed the County's action. The court concluded that the County could have and should have originally combined all of its claims against Hintz in a single large claims action. We reference additional facts as needed below.

Discussion

¶6 We review summary judgment *de novo*, applying the same standards as the circuit court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 314-15, 401 N.W.2d 816 (1987). We need not repeat all of those standards here; it is

sufficient to say that summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See* ***Germanotta v. National Indem. Co.***, 119 Wis. 2d 293, 296, 349 N.W.2d 733 (Ct. App. 1984).

¶7 According to the County, its complaint alleges six separate claims based on six different violations of the zoning ordinance. Three claims pertain to Hintz's operation of an automobile wrecking yard and three claims pertain to Hintz's operation of a solid waste disposal site. Specifically, the County characterizes its six claims as follows:

> (1) Hintz is operating an automobile wrecking yard in a Conservancy District, which is prohibited by the zoning ordinance under any circumstances.
>
> (2) Hintz is operating an automobile wrecking yard in an A-2 Agricultural Transition District without a zoning permit.
>
> (3) Hintz is operating an automobile wrecking yard in an A-2 Agricultural Transition District without special exception approval.
>
> (4) Hintz is operating a solid waste disposal site in an A-2 Agricultural Transition District without a zoning permit.
>
> (5) Hintz is operating a solid waste disposal site in a Conservancy District, which is prohibited by the zoning ordinance under any circumstances.
>
> (6) Hintz is operating a solid waste disposal site in an A-2 Agricultural Transition District without special exception approval.

For purposes here, we will accept the County's characterization of its claims.

¶8 The County divides its arguments into two main parts, one pertaining to the three automobile wrecking yard claims and the other pertaining to

the three solid waste disposal site claims. Following the County's lead, we divide our opinion into two corresponding parts.

Automobile Wrecking Yard Claims

¶9 The parties dispute the applicability of both claim preclusion and issue preclusion to the County's automobile wrecking yard claims. Because we conclude that claim preclusion bars those claims, we need not address whether issue preclusion bars the claims.

¶10 "The doctrine of [claim preclusion] provides 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.'" ***A.B.C.G. Enters., Inc. v. First Bank Southeast, N.A.***, 184 Wis. 2d 465, 472-73, 515 N.W.2d 904 (1994) (citation omitted). Claim preclusion requires there to be "(1) an identity between the parties or their privies in the prior 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." ***Northern States Power Co. v. Bugher***, 189 Wis. 2d 541, 551, 525 N.W.2d 723 (1995).

¶11 The County tells us that the second and third requirements cannot be established, but we conclude that, at bottom, the County is making one main argument. The County argues that claim preclusion does not apply to its wrecking yard claims because the relief available to the County in small claims court was strictly limited by small claims jurisdiction. The County asserts that, in small claims court, it could not request all of the necessary injunctive relief and was limited to $5000 in damages, an amount insufficient to cover the applicable forfeitures for all of its claims.

¶12 The County relies primarily on the RESTATEMENT (SECOND) OF JUDGMENTS.[3] In particular, the County refers us to § 26(1)(c), which provides that claim preclusion may not apply when

> [t]he 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 to rely on that theory or to seek that remedy or form of relief.

RESTATEMENT (SECOND) OF JUDGMENTS § 26(1)(c) (1982).

¶13 The problem with the County's reliance on this portion of the Restatement is that it represents an incomplete statement of the rule as relevant here. The County fails to address a comment in the Restatement § 24 which suggests that the pertinent question is not whether a party initially proceeded in a forum with limited jurisdiction but, rather, whether a forum of more general jurisdiction was *available* to that party. The Restatement explains:

> *g. When the jurisdiction of the court is limited.* [Claim preclusion] … is applicable although the first action is brought in a court which has no jurisdiction to give a judgment for more than a designated amount. When the plaintiff brings an action in such a court and recovers judgment for the maximum amount which the court can award, he is precluded from thereafter maintaining an action for the balance of his claim…. It is assumed here that a court was available to the plaintiff in the same system of courts—say a court of general jurisdiction in the same state—where he could have sued for the entire amount….

[3] Wisconsin courts have in the past adopted or relied on portions of the Restatement in matters of claim preclusion (formerly termed res judicata). *See, e.g.*, ***Northern States Power Co. v. Bugher***, 189 Wis. 2d 541, 549, 553-55, 525 N.W.2d 723 (1995); ***A.B.C.G. Enters., Inc. v. First Bank Southeast, N.A.***, 184 Wis. 2d 465, 480-81, 515 N.W.2d 904 (1994); ***Landess v. Schmidt***, 115 Wis. 2d 186, 192-93, 340 N.W.2d 213 (Ct. App. 1983).

> The same considerations apply when the first action is brought in a court which has jurisdiction to redress an invasion of a certain interest of the plaintiff, but not another, and the action goes to judgment on the merits…. *The plaintiff, having voluntarily brought his action in a court which can grant him only limited relief, cannot insist upon maintaining another action on the claim.*

RESTATEMENT (SECOND) OF JUDGMENTS § 24 cmt. g (emphasis added); *see also* ***Landess v. Schmidt***, 115 Wis. 2d 186, 192, 340 N.W.2d 213 (Ct. App. 1983) ("A plaintiff's claim is barred although he or she is prepared in the second action … to seek remedies or forms of relief not demanded in the first action.").

¶14 Consistent with the Restatement, the circuit court expressly concluded that the County's present claims should be barred because the County *elected* to proceed initially in small claims court even though the County could have proceeded with a large claims action. The circuit court stated:

> The plaintiff could have combined all of its claims against this defendant in the case that it brought before; could have and should have. And could have filed it as a large claim, could have filed it as it did this one …. It didn't.
>
> It has those options, it has those elections; it can do those things and once it does them, once it relies upon the elections that it's made, it's compelled to rely upon them ….

The County does not address this part of the circuit court's decision, nor does it suggest some reason why it could not have originally brought a large claims action, as the circuit court suggested. Accordingly, we reject the County's reliance on the limited nature of small claims court jurisdiction as a means to avoid claim preclusion.

¶15 The County may also be arguing that its wrecking yard claims cannot be precluded because those claims are not all precisely the same as the

previous wrecking yard claim in its small claims action. Any such argument goes to the "identity of claims" requirement.

¶16 Wisconsin courts follow a "transactional" approach to determine whether two suits involve an identity of claims. ***Northern States Power***, 189 Wis. 2d at 553. "The concept of a transaction, 'connotes a natural grouping or common nucleus of operative facts.'" ***A.B.C.G. Enters.***, 184 Wis. 2d at 481 (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 24 cmt. b (1982)). Thus, "identity of claims" is a term of art which refers not to whether individual claims are actually identical, but instead to whether the claims should have been brought together because they result "from the same factual underpinnings." *See* ***Northern States Power***, 189 Wis. 2d at 555.

¶17 Here, there can be no serious dispute that the County's automobile wrecking yard claims and its previous wrecking yard claim in the small claims action turn on the same "natural grouping or common nucleus of operative facts"—namely, Hintz's storage of inoperable vehicles in the open on his property. Rather, what the County has done in its present wrecking yard claims is allege, at most, alternative *theories* under its zoning ordinance for the illegality of Hintz's storing those vehicles on his property. This is insufficient. "[T]he number of substantive theories that may be available to the plaintiff is immaterial—if they all arise from the same factual underpinnings they must all be brought in the same action or be barred from future consideration." ***Id.***; *see also* ***Landess***, 115 Wis. 2d at 192 ("A plaintiff's claim is barred although he or she is prepared in the second action … to present evidence or grounds or theories of the case not presented in the first action ….").

Solid Waste Disposal Site Claims

¶18 We turn to the County's argument that its solid waste disposal site claims are not precluded. Once again, we conclude that claim preclusion bars these claims and, again, need not address issue preclusion.

¶19 The County states that both the second and third claim preclusion requirements have not been met, but we think it clear from the County's remaining arguments that the dispositive question is whether there is an identity of claims. In other words, the question is whether the County's solid waste disposal site claims, like its wrecking yard claims, arise from the same natural grouping or common nucleus of operative facts as the County's previous wrecking yard claim in its small claims action.

¶20 Initially, we observe that the County does not argue that the general conditions on Hintz's property have changed in any relevant respect since the time the County brought its small claims action. Rather, the County's argument seems to be that there can be no identity of claims because the County's zoning ordinance defines "automobile wrecking yard" and "solid waste disposal site" differently and because the types of activities underlying each of those uses are generally not the same. That may be true, but *in this case* the County conceded in the circuit court proceedings that Hintz's use of his property as an automobile wrecking yard at least arguably also constitutes a solid waste disposal site. The County similarly concedes in its briefing in this court that there may be "some overlap" between Hintz's use of his land for an automobile wrecking yard and for his alleged use of the land for a solid waste disposal site.

¶21 In addition, the County points to nothing in the record suggesting what types of items on Hintz's land, other than inoperable vehicles and associated

parts, form the basis for the County's solid waste disposal site claims. The County seems to be asserting, without providing evidentiary support, that the items might include 55-gallon drums and concrete blocks.[4] Regardless, the County assumes that, simply because *some* of the items on Hintz's property might constitute a solid waste disposal site but not an automobile wrecking yard, the County's disposal site claims do not share a common nucleus of operative facts with the County's previous claim that Hintz was operating an automobile wrecking yard.

¶22 We conclude that the County's argument depends on an overly narrow understanding of the identity of claims requirement and, therefore, we reject it. Courts are to look at the facts "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." RESTATEMENT (SECOND) OF JUDGMENTS § 24(2), *quoted in* ***Landess***, 115 Wis. 2d at 192.

¶23 Even assuming there are items on Hintz's land such as 55-gallon drums and concrete blocks, the County provides no convincing factual or legal reason why it would not have made sense to try the County's solid waste disposal site claims and the County's previous automobile wrecking yard claim as a unit. The parties' summary judgment affidavits show that the witnesses in each matter would have been identical, or at least substantially overlapping. Moreover, the County does not dispute evidence submitted by Hintz that the County was "aware

[4] We find nothing in the County's complaint or summary judgment materials specifying what the items might be. At a hearing on Hintz's summary judgment motion, the circuit court inquired whether the automobiles that formed the basis for the County's automobile wrecking yard claims were also the "solid waste" to which the County was referring in its complaint. The County replied "no," but did not elaborate.

of the conditions of [Hintz's property] as it relates to any alleged violations of the zoning ordinance" since the time of the County's small claims action.[5]

¶24 In sum, the County does not persuade us that the circuit court erred in granting summary judgment to Hintz based on claim preclusion. We therefore affirm the circuit court's order dismissing the County's action.[6]

By the Court.—Order affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)4.

[5] The County makes a general argument at the very end of its brief-in-chief that the parties' "conflicting affidavits" create a genuine issue of material fact. Because the County does not otherwise elaborate on what facts it believes to be disputed or why those alleged disputes are material, we consider this general argument no further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (court of appeals need not consider undeveloped arguments); *see also* ***Tam v. Luk***, 154 Wis. 2d 282, 291 n.5, 453 N.W.2d 158 (Ct. App. 1990) (court of appeals has neither duty nor resources to "sift and glean" the record for facts supporting a party's argument).

[6] We note that the County raises one other argument in respect to all of its present claims. The County points to a provision in its zoning ordinance that states that "[e]ach day of violation shall constitute a separate offense." The County then notes that "[a]ll dates [alleged in the current claims] are subsequent to those alleged in the small claims action," and argues from there that its current claims should not be precluded. Thus, the County's argument seems to be that, regardless of the particular circumstances, claim preclusion and issue preclusion could never apply to an action for an alleged ordinance violation so long as the violation is ongoing. Because the County provides no additional explanation in this regard and cites no authority other than its zoning ordinance, we consider this argument insufficiently developed and address it no further. *See* ***Pettit***, 171 Wis. 2d at 646-47. Similarly, since the County does not address whether the fact that this is a zoning case should affect the application of preclusion principles, any issue in that regard is not before us.