COURT OF APPEALS
DECISION
DATED AND FILED

January 28, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP2049-FT **Cir. Ct. No. 2008CV1013**

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

TERRANCE F. LARSON,

PLAINTIFF-APPELLANT,

V.

TIMOTHY P. ROSS AND STATE OF WISCONSIN, DEPARTMENT OF CHILDREN & FAMILIES,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Jefferson County: JACQUELINE R. ERWIN, Judge. *Affirmed*.

Before Dykman, P.J., Vergeront and Higginbotham, JJ.

¶1 PER CURIAM. Terrance Larson appeals an order dismissing his complaint against Timothy Ross. The circuit court held that this action was barred by the doctrine of claim preclusion. We agree, and therefore affirm.

¶2 Before commencing this action, Larson filed a replevin action against Ross in small claims court for the return of a motorcycle. He alleged that Ross had purchased the motorcycle from him, but had failed to make full payment or perform other obligations under the sales contract. A court commissioner dismissed the action, concluding that Larson could not sue for replevin because he had failed to create an enforceable security interest in the motorcycle. Larson did not appeal that decision to the circuit court, making it the final disposition of the action. *See* WIS. STAT. § 799.207(2) (2007-08).[1]

¶3 In this large claims action Larson filed a complaint alleging that Ross breached the contract for sale of the motorcycle. As his remedy, he asked the court to impose a constructive trust on the motorcycle, and, pursuant to the constructive trust, to return it to him to prevent an unjust enrichment. The court granted Ross's summary judgment motion, concluding that the doctrine of claim preclusion barred further litigation over the motorcycle contract. On appeal Larson contends that the doctrine does not apply because the small claims court was not competent to hear the matter, the factual bases of the lawsuits are different, and this case falls under exceptions to the general rule of claim preclusion.

¶4 Whether the doctrine of claim preclusion applies is a question of law. *See* ***Menard, Inc. v. Liteway Lighting Prods.***, 2005 WI 98, ¶23, 282 Wis. 2d 582, 698 N.W.2d 738. The doctrine requires: (1) identity between the parties or their privies in the prior and present suits; (2) a final judgment on the merits by a

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

court with jurisdiction in the prior litigation; and (3) an identity of claims in the two suits. ***Kruckenberg v. Harvey***, 2005 WI 43, ¶21, 279 Wis. 2d 520, 694 N.W.2d 879. We use the "transactional approach" to determine whether there is an identity of claims between two suits. ***Id.***, ¶25.

> The goal in the transactional approach is to see a claim in factual terms and to make a claim coterminous with the transaction, regardless of the claimant's substantive theories or forms of relief, regardless of the primary rights invaded, and regardless of the evidence needed to support the theories or rights. Under the transactional approach, the legal theories, remedies sought, and evidence used may be different between the first and second actions.

Id., ¶26 (footnotes omitted). We therefore look not only to claims actually brought, but to claims that could have been brought in the first action. *See* ***id.***, ¶27.

¶5 Larson concedes satisfaction with the first factor, namely, the identity of the parties is the same between the two lawsuits. His dispute lies with the second and third factors.

¶6 With respect to the second factor, Larson contends that the small claims court did not render a valid judgment because the value of the motorcycle exceeded $5000, and small claims courts do not have competency to hear replevin actions if the value of the property exceeds $5000. *See* WIS. STAT. § 799.01(1)(c). However, by petitioning the small claims court, Larson implicitly represented that the value of the motorcycle was equal to or less than $5000. Additionally, the record contains no evidence that the motorcycle's worth exceeded $5000 when

Larson filed the small claims action.[2] Consequently, Larson has no basis to argue that the small claims court lacked competency to enter judgment.

¶7 Regarding the third factor, Larson argues that the facts in each of the cases are different, such that the claims are also different. He contends that his "theory of recovery in the [small claims action] was that he had a valid lien on the motorcycle in question, and was therefore entitled to replevin." In this action, his claim "is rooted on the fact that … the defendant's failure to file the lien paperwork … served to defeat plaintiff's lien claim." These are, however, differences in legal theory based on what Larson knew at the time rather than differences in fact. The underlying factual grouping in each case remained identical, regardless of what Larson knew or believed, and under the transactional approach we focus on that factual grouping to determine identity of claims. *See* ***Kruckenberg***, 279 Wis. 2d 520, ¶¶25-26. Therefore, the two suits are identical for purposes of our claim preclusion analysis.

¶8 Finally, Larson contends that he falls under two of the exceptions to claim preclusion contained in the Restatement (Second) of Judgments § 26(1), including (1) when the court lacks competency or jurisdiction to hear a claim or grant a remedy in the first action that the plaintiff wishes to pursue in the second action, and (2) when the prior litigation fails to yield a "coherent disposition of the controversy." Restatement (Second) of Judgments §§ 26(1)(c) and (f). He contends that the exceptions apply because he was unable to pursue his

[2] Ross bought the motorcycle from Larson for $9000 in May 2006. However, there is no evidence in the record concerning the value of the motorcycle when Larson filed his small claims complaint two years later.

constructive trust claim until he learned that Ross had never filed the lien paperwork, as was allegedly his obligation.

¶9 We acknowledge that Wisconsin recognizes certain narrowly drawn exceptions to the claim preclusion doctrine, such as those contained in the Restatement. *See* ***Kruckenberg***, 279 Wis. 2d 520, ¶¶36-40 (applying Restatement (Second) of Judgments, § 26(1)(f), where an "extraordinary reason" existed). We refuse to apply those exceptions here where a party files a replevin action in small claims court, does not succeed on the merits on that theory, and then brings an action in large claims court asserting a different theory when both theories could have been brought in large claims court. In short, Larson selected his forum and now must abide by the result there. In addition, we see no reason why bringing the replevin action in small claims court prevented the court from coherently disposing of the first action, even if disposition was incomplete in Larson's view.[3]

By the Court.—Order affirmed.

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

[3] Our decision makes it unnecessary to decide whether Larson's complaint in this action stated a viable cause of action for a constructive trust, given that the "method provided in [WIS. STAT. ch. 342] of perfecting and giving notice of security interests [in motor vehicles] is exclusive." WIS. STAT. § 342.24.