COURT OF APPEALS
DECISION
DATED AND RELEASED

March 20, 1997

NOTICE

No. 96-0791

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

CATHERINE G. HENRY, M.D.,

Plaintiff-Appellant,

v.

RIVERWOOD CLINIC, S.C., a domestic corporation, DAVID E. DENNSTEDT; REGIS R. CHAMBERLIN, M.D.; CHRISTINE L. UBER, M.D.; JANET A. WILSON, M.D.; ROBERT L. VAN DYKEN, M.D.; AND CHARLES CONGER, M.D.,

Defendants-Respondents.

APPEAL from an order of the circuit court for Wood County: LEWIS MURACH, Judge. *Reversed and cause remanded*.

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

DEININGER, J. Catherine Henry, M.D., appeals an order for summary judgment dismissing her conspiracy and intentional interference with contract claims against Riverwood Clinic and several individual physicians employed by Riverwood. The issues are: (1) whether Henry is barred by claim

preclusion from litigating these claims and (2) if not, whether either issue preclusion or estoppel by record bars her claims. We conclude that these doctrines do not bar Henry's claims and thus reverse the summary judgment.

BACKGROUND

Catherine Henry joined the Riverwood Clinic (Riverwood) staff in 1984 as a part-time pediatrician. In 1989, Henry's husband, William Henry, M.D., also a member of the Riverwood staff, resigned from Riverwood because of a conflict with the other Riverwood physicians. In November 1989, Riverwood notified Henry that it was terminating her employment on the basis that she had begun working full-time without authorization, had contacted the state medical society concerning the earlier conflict between Riverwood and William Henry, and had referred potential clinic patients to him.

In April 1992, Henry filed an action against Riverwood alleging breach of her employment contract ("first action"). Henry moved to amend the pleadings in August 1993, adding allegations against six individual clinic physicians for statutory conspiracy under § 134.01-03, STATS., and for violations of the Wisconsin Fair Dealership Law, § 135.02-04, STATS., for their actions leading up to her termination. On October 12, 1993, the trial court denied the motion, stating that the claims in the proposed amendment would complicate and extend the litigation and might confuse the jury. The trial court then granted summary judgment for Riverwood on the contract claim, on the basis that Riverwood had not terminated Henry without good cause as set out in the contract.[1]

On October 28, 1993, Henry filed a separate suit ("second action") repeating the statutory conspiracy claim and adding claims against the individual physicians for common law conspiracy, intentional interference with contractual relations, post-termination conspiracy and post-termination interference with prospective contractual relations (collectively, the "conspiracy and intentional interference claims"). Henry amended her complaint in the

[1] We affirmed the summary judgment on appeal in ***Henry v. Riverwood Clinic***, No. 94-1250, unpublished slip op. (Ct. App. June 15, 1995).

second action to add claims against Riverwood for post-termination interference with prospective contract and conspiracy on the grounds that it, as an entity acting through its agents, engaged in anti-competitive conduct after Henry's termination from Riverwood.

Riverwood moved for summary judgment in the second action on the basis of claim preclusion, issue preclusion and estoppel by record. The trial court granted summary judgment, ruling that because the claims in the second action arose out of the same factual situation as the first action, the second action was barred by claim preclusion.[2] Henry appeals.

ANALYSIS

We review summary judgment de novo, applying the same standards as the trial court. ***Voss v. City of Middleton***, 162 Wis.2d 737, 748, 470 N.W.2d 625, 629 (1991). Summary judgment is proper when the pleadings, answers, admissions and affidavits show no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. ***Maynard v. Port Publications, Inc.***, 98 Wis.2d 555, 558, 297 N.W.2d 500, 502-03 (1980). The application of claim preclusion is a question of law, which this court also reviews de novo. ***Lindas v. Cady***, 183 Wis.2d 547, 552, 515 N.W.2d 458, 460 (1994).

[2] The trial court granted defendants' motion for "dismissal or, in the alternative, summary judgment" without specifying which it was granting. However, because matters outside the pleadings were presented to and not excluded by the trial court, we must construe the order as one for summary judgment. *See* § 802.06(2)(b), STATS.

Claim Preclusion[3]

Under claim preclusion, "`"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."'" ***Northern States Power Co. v. Bugher***, 189 Wis.2d 541, 550, 525 N.W.2d 723, 727 (1995) (quoted sources omitted).[4] In order for an earlier proceeding to bar subsequent claims under claim preclusion, the following factors must be present: (1) an identity between the parties (or their privies) in the prior and present suit; (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 551, 525 N.W.2d at 728.

In dismissing Henry's proposed amendment to the pleadings in the first action, the trial court made the following ruling:

> The Court is denying ... the conspiracy [claim].... As far as the motion to amend the conspiracy claim, the Court is using and absolutely intends to exercise its discretion in excluding and not permitting a conspiracy claim to be tried with the breach of contract claim.
>
> ....
>
> There's also, I give very little weight, but some weight to the fact that the motion to amend the pleadings was not timely filed, and it was of some importance because it was mentioned and it was discussed at the time for setting those motions. And

[3] Henry argues that the defendants should be judicially estopped from raising claim preclusion because they argued in the first action that the conspiracy claims did not arise out of the same transaction as the breach of contract claim. Because we conclude claim preclusion does not apply, we do not address this argument.

[4] The supreme court has adopted the terms "claim preclusion" to replace "res judicata" and "issue preclusion" to replace "collateral estoppel." ***Northern States Power Co. v. Bugher***, 189 Wis.2d 541, 550, 525 N.W.2d 723, 727 (1995). We do likewise.

it was filed a day late; however, if I thought that the -- the amendments were crucial to the decision of the outcome of this controversy between the parties, I would perhaps feel differently, but I don't think that it is.

The 134 claim seeks to add six individuals ... it is pled that they were acting as individuals and not in their corporate capacity. As such, each of them are going to have antagonistic positions and positions that are antagonistic with each other and as such are going to require six separate counsel.

Of course, you're adding an extremely complex piece of litigation to what should be a fairly straightforward dispute over the contract between these parties.... And I think that you're talking -- it looks like you're talking a fairly complicated and fairly lengthy trial, but not only that, the conspiracy scenario is a whole separate claim.

....

... And I fear that the inclusion of the conspiracy theory is very likely to lead to confusion of the issues, a fairly clear-cut good cause issue to a confusion of the issue and to overtones that may affect the jury's finding on the essential claim of your client, and that is the breach of contract claim.

....

For those reasons the Court is going to -- and if you want to file a separate claim on conspiracy, have at it. I think if it were permitted here, even a motion to sever the claims might be appropriate because of the mixing of the intentional with the breach of the contract claim because of the overtones of the maliciousness and the intention, the overtones of the conspiracy....

> It's going to delay the trial significantly. It's going to significantly expand the amount of time that's been set aside for the trial. This is the second time this case has been set for trial. *And for all of those reasons I'm exercising the discretion to permit you to file someplace else if you wish, but we're not going to try it in this lawsuit.*

(Emphasis supplied).

Henry argues, citing ***Schneider v. Mistele***, 39 Wis.2d 137, 158 N.W.2d 383 (1968), that because the trial court in the first action "invited" her to file her claims elsewhere, claim preclusion should not apply when she did so. We agree. In ***Schneider***, the plaintiff stated claims for alienation of affections and criminal conversation, and requested that both claims be submitted to the jury. The trial court denied the request as to the criminal conversation claim, stating that the denial "by no way denies plaintiff[] ... from pursuing a cause of action for criminal conversation ...." ***Id.*** at 141, 158 N.W.2d at 385. The plaintiff then brought the criminal conversation claim in a separate suit. The trial court in the second action ruled that the second claim was barred by claim preclusion. On appeal, the Wisconsin Supreme Court reversed, stating:

It is particularly true that a prior judgment is not res adjudicata or
> an estoppel bar as to any matter which the court in the earlier case expressly refused to submit to the jury and expressly directed should be litigated in another forum or in another action.

Id.

Here the first trial court denied Henry's proposed amendment and ruled that Henry could "file someplace else if [she] wish[ed], but [the trial court was] not going to try it in this lawsuit."[5] We conclude that the trial court's

[5] Defendants contend that the trial court denied the proposed amendment on the basis of timeliness, rather than because the conspiracy and intentional interference claims constituted separate causes of action. We disagree. The trial court emphasized that it gave "very little weight" to the late filing of the proposed amendment and later stated that

direction to Henry that she could file her proposed claim in another action prevents the application of claim preclusion by defendants to bar her second action.

Defendants argue that claim preclusion bars Henry's claims regardless, because under the "transactional view," Henry could have brought her claims for conspiracy and intentional interference with her contract claim in the first action. Under the transactional view, a later claim might have been brought in prior proceedings if it arises out of one transaction or factual situation, regardless of the number of bases for relief which are possible. *See* ***Juneau Square Corp. v. First Wisconsin Nat'l Bank***, 122 Wis.2d 673, 683-84, 364 N.W.2d 164, 170 (Ct. App. 1985) (applying transactional view).

The supreme court in ***DePratt v. West Bend Mutual Insurance Co.***, 113 Wis.2d 306, 311-12, 334 N.W.2d 883, 885-86 (1983), adopted the transactional view, relying on RESTATEMENT (SECOND) OF JUDGMENTS § 24 cmt. a.[6] But § 24 cmt. a also states that the transactional view is justified "only when the parties have ample procedural means for fully developing the entire transaction in the one action." The purpose of using the transactional view analysis is to ascertain whether a party had an opportunity to previously litigate an issue. Because the trial court dismissed Henry's claims for conspiracy with the proviso that she

(..continued)
"the conspiracy scenario is a whole separate claim."

[6] The transactional view is described in RESTATEMENT (SECOND) OF JUDGMENTS § 24 cmt. a:

> 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. The transaction is the basis of the litigative unit or entity which may not be split.

could file them elsewhere, Henry could not have litigated the conspiracy and intentional interference claims in the first action.[7]

Finally, defendants contend that the "equities" in this case support dismissal because (1) Henry has taken inconsistent positions between the first action and second action on the issue of identity between claims; (2) Henry's failure to appeal the trial court's dismissal in the first action bars the claims in the second action; and (3) the litigation should be brought to an end.

Defendants argued to the trial court in the first action that "claims under these Statutes do not arise out of the original occurrence stated in the original Complaint" and that allowing the proposed amendment would lead to complications of the litigation. The latter argument was ultimately adopted by the trial court. We conclude defendants have little room to complain that Henry has taken inconsistent positions in the two actions.

Further, we cannot conclude that Henry's failure to appeal the trial court's dismissal of the conspiracy claims in the first action warrants dismissing the second action. Henry has not argued that the trial court's dismissal of the claims in the first action was erroneous. Given our conclusion that the trial court permitted Henry to file the second action, her failure to appeal the first action does not affect the outcome of this action.

Claim preclusion is based on the principle that sound judicial administration and fairness to the parties require that litigation must, at some

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[7] Defendants point out that Henry did not include the common law conspiracy claim and the intentional interference claims in the proposed amendments in the first action. Defendants argue that claim preclusion bars the additional claims in the second action because Henry could have brought them in the first action but did not. However, each of the additional claims implicate the same difficulties cited by the trial court in dismissing the statutory conspiracy claims: the complications of adding six individual defendants, potential confusion of the issues for the jury, and questions of the individual defendants' intent. We conclude that had Henry attempted to raise the intentional interference claims in the first action, they would have suffered the same fate as the conspiracy claims. The additional claims, like the statutory conspiracy claim, are thus not barred by issue preclusion.

point, come to an end. ***A.B.C.G. Enters., Inc. v. First Bank Southeast***, 184 Wis.2d 465, 473, 515 N.W.2d 904, 906 (1994). We are aware that there has been extensive litigation surrounding the termination of Henry's employment at Riverwood. However, we conclude that this does not mean that an end of the litigation by claim preclusion is appropriate. While there must be an end to litigation, it should not occur before a party has been given a reasonable opportunity to have "her day in court."

Affirmance on Other Grounds

Defendants also urge us to affirm the summary judgment on grounds other than claim preclusion. *See* ***Koestler v. Pollard***, 162 Wis.2d 797, 809 n.8, 471 N.W.2d 7, 12 (1991) (appellate court may affirm lower court's decision on grounds different than those relied on below). We discuss each in turn.

Issue Preclusion

Issue preclusion is a narrower doctrine than claim preclusion. ***Northern States Power Co. v. Bugher***, 189 Wis.2d 541, 551, 525 N.W.2d 723, 727 (1995). Issue preclusion bars relitigation of an issue of ultimate fact previously determined by a final judgment. ***Landess v. Schmidt***, 115 Wis.2d 186, 198, 340 N.W.2d 213, 219 (Ct. App. 1983). An identity of the parties is not required. ***Michelle T. v. Crozier***, 173 Wis.2d 681, 690-91, 495 N.W.2d 327, 331 (1993). The issue in the prior action must have been actually litigated by the parties for issue preclusion to bar subsequent claims. ***Lindas v. Cady***, 183 Wis.2d 547, 559, 515 N.W.2d 458, 463 (1994). Summary judgment in the prior action is sufficient to meet the "actually litigated" requirement. ***Landess***, 115 Wis.2d at 198, 340 N.W.2d at 219. Issue preclusion applies where the matter raised in the second suit is identical in all respects to that decided in the first proceeding and where the controlling facts and applicable legal rules are the same. ***Id.***; *see* ***Manu-Tronics, Inc. v. Effective Management Sys., Inc.***, 163 Wis.2d 304, 316, 471 N.W.2d 263, 268 (Ct. App. 1991). The second proceeding must involve "`the same bundle of legal principles' that contributed to the disposition of the first legal proceeding." ***Landess***, 115 Wis.2d at 198, 340 N.W.2d at 219 (quoted source omitted).

In ruling on the motion for summary judgment in the first action, the trial court found nothing in the parties' submissions to indicate that the decision of the Riverwood Board to terminate Henry was "arbitrary or capricious," a result of "improper motive" or a "pretext" in order to fire her because of the conflict with her husband. Defendants contend that these findings preclude litigation of dispositive issues on the intentional interference and conspiracy claims. We disagree.

Whether the prerequisites for issue preclusion have been met (identity of issues and issues actually litigated) is a question of law which we review de novo. ***Lindas v. Cady***, 183 Wis.2d 547, 552, 515 N.W.2d 458, 460 (1994); *see also* ***Moore v. LIRC***, 175 Wis.2d 561, 567-71, 499 N.W.2d 288, 290-92 (Ct. App. 1993) (applying de novo review to whether identity of issues exists between two actions).[8]

In the first action, the issue presented to the trial court was whether the Riverwood Board had good cause to terminate Henry. The trial court construed the contract to define good cause as:

> what three-fourths of the Board of Directors say it is so long as the decision does not appear to be arbitrary, capricious, so long as it is not based upon an improper motive, [and] that it has a basis in fact ....

As is appropriate for summary judgment, the first trial court declined to make findings regarding whether Henry actually violated Riverwood's policies.[9] Rather, the court ruled that the Board had good cause as a matter of law

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[8] Even where there is an identity of issues which have been actually litigated, issue preclusion may still not be applied to a particular case unless the application of issue preclusion conforms with principles of fundamental fairness. ***Michelle T. v. Crozier***, 173 Wis.2d 681, 698, 495 N.W.2d 327, 335 (1993). Because we conclude that defendants have failed to show an identity of the issues, we do not address whether application of issue preclusion would conform with the principles of fundamental fairness in this case.

[9] A trial court does not decide issues of fact in a summary judgment proceeding, but may only determine whether a genuine factual issue exists. *See* ***State Bank of La Crosse v. Elsen***, 128 Wis.2d 508, 511-12, 383 N.W.2d 916, 917-18 (Ct. App. 1986).

because the Board could have found, at the very least, "that it would be contrary to the clinic's best interest to have the wife of someone with whom they are in litigation as a member of the clinic and who might be privy to some inside information that might not otherwise be available."[10]

By contrast, Henry's claims in this action are intentional interference with a contract and conspiracy. Specifically, Henry alleges that the individual defendants, or a group comprised of some or all of the individual defendants, either made false statements to the Board or used improper means including economic coercion to secure the three-fourths vote necessary for Henry's termination.

To show intentional interference with a contract or a prospective contract, a plaintiff must demonstrate that: (1) the plaintiff had a contract or a prospective contractual relationship with a third party; (2) the defendant interfered with the relationship; (3) the interference was intentional; (4) a causal connection exists between the interference and the damages; and (5) the defendant's conduct was improper, i.e., not justified or privileged. *See* ***Lorenz v. Dreske***, 62 Wis.2d 273, 286, 214 N.W.2d 753, 759-60 (1974); ***Hale v. Stoughton Hosp. Ass'n***, 126 Wis.2d 267, 281-82, 376 N.W.2d 89, 96 (Ct. App. 1985) (unprivileged or unjustified conduct equated with "improper" conduct); ***Cudd v. Crownhart***, 122 Wis.2d 656, 659-60, 364 N.W.2d 158, 160 (Ct. App. 1985).

A common law conspiracy is "a combination of two or more persons by some concerted action to accomplish some unlawful purpose or to accomplish by some unlawful means some purpose not in itself unlawful." ***Radue v. Dill***, 74 Wis.2d 239, 241, 246 N.W.2d 507, 509 (1976). Statutory conspiracy expressly requires the element of "malice," which is defined as "`an intent to do a wrongful harm and injury.'" ***Maleki v. Fine-Lando Clinic Chartered, S.C.***, 162 Wis.2d 73, 87, 469 N.W.2d 629, 634-35 (1991) (quoted source omitted).

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[10] We concluded likewise on appeal. *See* ***Henry v. Riverwood Clinic***, No. 94-1250, unpublished slip op. at 11 (Ct. App. June 15, 1995) (Henry's assertions regarding participation in advancing her husband's claims showed only that the Riverwood Board concluded that her continued employment was contrary to the clinic's best interests and potentially injurious to its business).

We conclude that the two actions are not based upon the same controlling facts. The first trial court did not determine whether individual defendants may have acted improperly, but merely ruled that the Board had good cause to terminate Henry's employment. While the first trial court concluded that the Board, under the definition of good cause outlined in the employment contract, could have found good cause to terminate, there was no finding that the Board was required to do so. Here, the allegations are that, but for the wrongful acts of the defendants, the Board would not have terminated Henry.

Further, the applicable legal principles are not the same. To meet the element of good cause, the trial court in the first action properly framed the question as a lack of arbitrariness, capriciousness, pretext or improper motive on the part of the Board. That differs from the elements for either the conspiracy claim (that the individual defendants acted together for some unlawful purpose with an intent to do a wrongful harm or injury) or the intentional interference claim (that some of the defendants acted intentionally and without privilege or justification).

Estoppel by Record

Finally, defendants contend that Henry is barred from bringing the second action by the doctrine of estoppel by record. Estoppel by record prevents a party from relitigating what was litigated or what might have been litigated in a prior proceeding. ***Acharya v. AFSCME***, 146 Wis.2d 693, 696, 432 N.W.2d 140, 142 (Ct. App. 1988). Estoppel by record is closely related to claim preclusion, except that under estoppel by record, it is the record of the earlier proceedings, rather than the judgment itself, that bars the second proceeding. ***Brooks v. Bank of Wisconsin Dells***, 161 Wis.2d 39, 46, 467 N.W.2d 187, 190 (Ct. App. 1991). Both rules require an identity of parties and an identity of causes of action or claims in the two proceedings. ***Id.*** at 46-47, 467 N.W.2d at 190.

As we discussed above, we have concluded that claim preclusion does not bar Henry's second action. Defendants have not explained how the record, as opposed to the judgment, would bar Henry's claims. We decline to review the issue further. ***Fritz v. McGrath***, 146 Wis.2d 681, 686, 431 N.W.2d 751, 753 (Ct. App. 1988).

Accordingly, we reverse the order for summary judgment and remand to the trial court for further proceedings.

By the Court.—Order reversed and cause remanded.

Not recommended for publication in the official reports.