COURT OF APPEALS
DECISION
DATED AND RELEASED

MAY 28, 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. 96-0917

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ALICE C. KETTER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Fond du Lac County: HENRY B. BUSLEE, Judge. *Affirmed.*

Before Snyder, P.J., Nettesheim and Anderson, JJ.

ANDERSON, J. Alice C. Ketter appeals from a summary judgment awarding costs under § 144.449(5), STATS.,[1] to the State of Wisconsin in the amount of $385,399.93—the cost to the Wisconsin Department of Natural

[1] Section 144.449, STATS., was redesignated as § 289.55, STATS., by 1995 Wis. Act 227, § 630. All references are to the 1993-94 statutes.

Resources (DNR) for removing more than 500,000 tires from property Alice jointly owned with her deceased husband. The central issue on appeal is whether Alice received constructive or actual notice of the opportunity to get rid of the waste tires from her property. We conclude that Alice received constructive, if not actual, notice to remove the waste tires from her property or be liable for the costs incurred by the State for their removal. Because we also reject Alice's arguments regarding the motion to dismiss and claim preclusion, we affirm the judgment.

In October 1987, the State brought an action against Loren and Alice Ketter, individually, alleging that: "From on or before October 1, 1986 to the present, the [Ketters] have unlawfully maintained a solid waste storage facility on the property for the storage of … discarded rubber vehicle tires, and have done so without an operating license …." The State sought an injunction to require the Ketters to either obtain the appropriate license to operate a solid waste storage facility or to immediately remove the tires to a licensed solid waste facility. A temporary injunction was granted in December 1987.

On December 2, 1988, the DNR sent, by certified mail, a notice of noncompliance and a notice of nuisance addressed to Loren. The notice requested the removal of all of the waste tires located on the Ketter property. On April 3, 1989, the DNR issued a special order requiring Loren to submit a workplan for processing and/or removing the nuisance waste tire stockpile located on the Ketter property. Because Loren failed to submit a workplan, the DNR sent, on June 5, 1989, a notice to Loren that the DNR would begin abatement activities on the property. The DNR began the tire removal on or about October 1, 1989.

Around this same time, both Loren and Alice stipulated and agreed to being jointly and severally responsible for complying with the injunction to "not

accept, store or dispose of any solid wastes, including used or discarded rubber vehicle tires, on their property …." The parties agreed that "judgment shall be issued in accordance with this stipulation, without cost to either party." Judgment was entered on October 11, 1989.

On August 14, 1990, the DNR sent, via certified mail, an invoice for payment of the cleanup costs in the amount of $385,399.93. Although the invoice was only addressed to Loren, the Ketters, in an August 20, 1990 letter from their attorney, Arik Guenther, declined the State's request for payment.

The State subsequently filed suit against Alice for repayment of the costs to abate the waste tire dump nuisance on the Ketter property.[2] Alice moved to dismiss the complaint based on res judicata and for failure to state a claim. The trial court denied the motion.

The State then filed a motion for summary judgment. At the hearing, Alice's counsel agreed with the court that the main thrust of his argument was whether there was notice to Alice. The court found that there was "not only actual notice, but there was constructive notice of all of these proceedings to [Alice]." The court concluded that:

> [I]t appears almost overwhelmingly that Alice Ketter was well aware of what was transpiring here, and not only was she an owner of the property, but she was a responsible person as the statute indicates in the operation of this nuisance. And that nuisance has not been abated. They were given an opportunity to clean up the nuisance, they did not clean up the nuisance. …
>
> [S]he in fact is responsible therefore for the cost of cleaning up this nuisance, which was assumed by the State because

[2] Loren died in early 1991. Accordingly, the State brought this action against Alice.

> of the lack on her part and her now deceased husband's part, to take any proper action to do the same.

Judgment was entered against Alice in the amount of $385,399.93 in costs under § 144.449(5), STATS., and $98 in costs under § 814.04(2), STATS. Alice appeals.

Alice makes three arguments on appeal: (1) the trial court erred in not granting her motion to dismiss for failure to state a claim; (2) the State's summary judgment motion should have been denied because Alice "never received any notices, was never given an opportunity to mitigate the damages, [and] was never heard on her claim that the [DNR] contributed to the waste tire dump"; and (3) the 1987 injunction action precludes this second action under claim preclusion.[3] The arguments regarding the motion to dismiss and claim preclusion stem from the trial court's nonfinal memorandum decision dated November 29, 1994. Because they are somewhat peripheral to the main issue on appeal, we will address them first.

MOTION TO DISMISS

Alice claims that the trial court erred by not granting her motion to dismiss for failure to state a claim. She argues that all of the notices for abatement identified Loren, her deceased husband, as the "person responsible" for the tire dump; therefore, the DNR incorrectly sought recovery of its removal expenses under § 144.449(5), STATS., from her.

A motion to dismiss for failure to state a claim tests the legal sufficiency of the complaint. *See* ***Anderson v. Regents of the Univ. of Cal.***, 203

[3] In ***Northern States Power Co. v. Bugher***, 189 Wis.2d 541, 550, 525 N.W.2d 723, 727 (1995), the supreme court adopted the term "claim preclusion" as a replacement for "res judicata" and "issue preclusion" as a replacement for "collateral estoppel." Alice's argument centers on the former.

Wis.2d 469, 479, 554 N.W.2d 509, 514 (Ct. App. 1996). The motion raises a question of law which we review de novo. *See* ***id.*** at 480, 554 N.W.2d at 514. We liberally construe the pleading in favor of its stating a claim, if reasonably possible. *See* ***id.*** We also accept as true all facts the plaintiff properly pleaded and reasonable inferences from those facts, and we will dismiss the complaint only if the plaintiff cannot recover under any circumstances. *See* ***id.***

The State sought abatement costs under § 144.449(5), STATS. Section 144.449(5) provides in relevant part: "The [DNR] may ask the attorney general to initiate a civil action to recover from the person responsible for the nuisance the reasonable and necessary costs incurred by the [DNR] for its nuisance abatement activities and its administrative and legal expenses related to the abatement." We conclude that in order to recover abatement costs under § 144.449(5), the State must *allege* that: (1) the defendant is the person responsible; (2) the facility constitutes a nuisance; and (3) the costs incurred by the DNR for removal are reasonable and necessary.

The complaint alleged that from October 1986 to April 1990, "[Alice] and her spouse, [Loren] operated or maintained an unlicensed waste tire storage facility on the property." Because the waste tires constituted a waste tire dump nuisance under § 144.449(1)(a) and (b), STATS., the DNR incurred $385,399.93 in costs to abate the nuisance. The DNR sought judgment against Alice in the amount of $385,399.93 for the reasonable and necessary costs to abate the Ketters' nuisance activities under § 144.449(5).

Again, on review of a motion to dismiss, we accept as true all facts the plaintiff properly pleaded and reasonable inferences from those facts. *See* ***Anderson***, 203 Wis.2d at 480, 554 N.W.2d at 514. It is not necessary at the

pleading stage for the State to *prove* the allegations; rather, the complaint must allege facts necessary to support the alleged violation(s). *See* ***State v. Baldwin***, 101 Wis.2d 441, 447, 304 N.W.2d 742, 746 (1981). We conclude that the State's complaint set forth facts to support a cause of action for recovery of abatement expenses from Alice.

CLAIM PRECLUSION

Alice next argues that the State's prior injunction action bars this second action for recovery of abatement costs. Alice insists that the parties are the same in both actions and that "[t]he prior action did not deal with the issue of the repayment of abatement costs but certainly could have and should have." We disagree.

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.'" ***Northern States Power Co. v. Bugher,*** 189 Wis.2d 541, 550, 525 N.W.2d 723, 727 (quoted source omitted). 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. *See* ***id.*** at 551, 525 N.W.2d at 728.

Although there is an identity between the parties in the two suits, there is not an identity between the causes of action. As noted by the trial court:

> The 1987 case concerns storage of waste tires without an operating license and failure to meet applicable sanitary and nuisance requirements, and as for relief, the 1987 complaint asks for forfeiture for past violations and an

> injunction requiring that the waste tire operations either comply with the law or be stopped.
>
> This case concerns the DNR's removal of waste tires between October, 1989, and April, 1990, at a cost to the DNR of $385,399.93, and the defendant's failure to pay DNR for the removal.

We agree that this second action is not an attempt to relitigate the 1987 case. Notably, the stipulation resolving the 1987 case was signed on October 5, 1989, the same time the tire removal was initiated. At that point, the Ketters had not yet refused to reimburse the DNR for its abatement action. It is implausible that in October 1989, the DNR could have sought the "reasonable and necessary costs *incurred by* the [DNR] for its nuisance abatement activities." Section 144.449(5), STATS. (emphasis added). This was not possible until the remediation was completed—April 1990—and until the Ketters actually refused to make payment. We conclude that claim preclusion does not bar the present recovery action.

SUMMARY JUDGMENT

Alice's final argument is that the trial court should have denied the State's motion for summary judgment. On appeal, Alice contends that genuine issues of fact exist as to whether she received any notices from the DNR, whether she was given an opportunity to mitigate the damages, whether the DNR contributed to the waste tire dump and whether she was appropriately deemed the "responsible person" under § 144.449, STATS.

We review a motion for summary judgment using the same methodology as the trial court and we consider the issues de novo. *See* ***M & I First Nat'l Bank v. Episcopal Homes Management, Inc.***, 195 Wis.2d 485, 496, 536 N.W.2d 175, 182 (Ct. App. 1995). That methodology is well known, and we will not repeat it here except to observe 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* ***id.*** at 496-97, 536 N.W.2d at 182.

First, the State's complaint stated a claim for relief. As indicated in the above discussion, the complaint alleged that from October 1986 to April 1990, "[Alice] and her spouse, [Loren] operated or maintained an unlicensed waste tire storage facility on the property." The DNR incurred $385,399.93 in costs to abate the nuisance and sought judgment against Alice for the reasonable and necessary costs to abate the Ketters' nuisance activities under § 144.449(5), STATS. Alice's denials joined the issues.

Next we look to the parties' affidavits. Although Dennis Pippin, a waste tire specialist for the DNR, avers that the DNR notified the Ketters of the State's position regarding their waste tire stockpile, all of the correspondence was addressed only to Loren. Even the special order indicates that "[t]he [DNR] notified Mr. Loren Ketter as the person responsible for the nuisance …." Even so, the State insists that Alice could have and did avail herself of the information Loren received from the DNR.

Alice's affidavit states that she never received notice to cease and desist the stockpiling of tires, nor was she advised to obtain a license to operate this type of business. She further avers that "[a]ny stocking [sic] piling of tires that may have occurred upon my property was not done by me nor did I directly or indirectly receive any benefit or financial gain from this activity." Alice further

states that she was never offered an opportunity to effectuate the cleanup of the discarded tires which she could have accomplished for less.[4]

Whether Alice received constructive or actual notice of the opportunity to get rid of the waste tires is the crux of the matter before us. Constructive notice is a fiction; it is neither notice nor knowledge. Rather, for reasons of policy, we attribute constructive notice of a fact to a person and treat his or her legal rights and interests as if there was actual notice, even though in fact there may be none. *See* ***State ex rel. Brookside Poultry Farms v. Jefferson County Bd. of Adjustment***, 125 Wis.2d 387, 393, 373 N.W.2d 450, 453 (Ct. App. 1985). It is a general rule of law that:

> [W]hatever fairly puts a person on inquiry with respect to an existing fact is sufficient notice of that fact if the means of knowledge are at hand. If under such circumstances one omits to inquire, [s]he is then chargeable with all the facts which, by proper inquiry, [s]he might have ascertained.…
> ….
> "A person has 'reason to know' a fact when he has such information as would lead a person exercising reasonable care to acquire knowledge of the fact in question or to infer its existence."

Id. at 393-94, 373 N.W.2d at 453 (quoting ***Zdunek v. Thomas***, 215 Wis. 11, 15, 254 N.W. 382, 383 (1934)). Ordinarily, constructive notice cannot be found when

[4] Alice's first two statements are directly contrary to the October 11, 1989 stipulation. In order to settle the 1987 complaint, Alice stipulated and agreed that "[she] and all persons under [her] supervision, direction or control are enjoined to not accept, store or dispose of any solid wastes, including used or discarded rubber vehicle tires, on [her] property …. The defendants [Loren and Alice Ketter] shall be jointly and severally responsible for complying with the injunction." It is completely disingenuous for Alice to now claim she was unaware of and not responsible for the unlicensed tire dump. We conclude that Alice is judicially estopped from maintaining this position. *See* ***Godfrey Co. v. Lopardo***, 164 Wis.2d 352, 363, 474 N.W.2d 786, 790 (Ct. App. 1991) (a party may be estopped from asserting positions in a judicial action or proceeding that are contrary to and inconsistent with those previously asserted). Because these inconsistent statements do not constitute factual issues, we will not address them.

there is no evidence as to the length of time the condition existed. *See* ***May v. Skelley Oil Co.***, 83 Wis.2d 30, 35-38, 264 N.W.2d 574, 576-78 (1978).

Clearly, Alice was aware of the waste tire stockpile from at least October 1989—by agreeing not to accept, store or dispose of any waste tires, Alice stipulated to her role in operating and maintaining the unlicensed waste storage facility. On October 1, 1989, the DNR had also initiated the removal of the tires from the Ketter property. At this point, Alice had constructive notice of the opportunity to get rid of the waste tires or, by proper inquiry, she might have ascertained as much.

Moreover, the Ketters' August 20, 1990 letter establishes that Alice had actual notice of the abatement activities. The letter states:

> Please be advised that this office represents Loren and Alice Ketter with reference to the [Loren and Alice Ketter Tire Removal] matter. This letter is in response to your letter to the Ketters dated August 14, 1990.
>
> ….
>
> [T]herefore the Ketters respectfully decline the State's request for payment as set forth in your letter of August 14, 1990.

As noted by the trial court, "[I]t is highly improbable that [Alice] lacked actual notice since [the letter] states the firm represents her with respect to the tire removal matters and acknowledges that although the DNR's August 14, '90, letter was addressed only to Loren Ketter, it was intended for both [Alice] and her [spouse]." We agree; accordingly, we affirm the judgment.

By the Court.—Judgment affirmed.

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