

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

February 13, 1997

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.

NOTICE

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

No. 96-2561-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**DANIEL J. WACKETT and
KATHLEEN E. WACKETT,**

Plaintiffs-Respondents,

v.

ANATOLY NEPSCHA,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Adams County:
DUANE A. POLIVKA, Judge. *Reversed and cause remanded with directions.*

Before Eich, C.J., Vergeront and Deininger, JJ.

PER CURIAM. Anatoly Nepscha appeals from a summary judgment granting Daniel and Kathleen Wackett quiet title to a disputed strip of

property, and dismissing his adverse possession claim.¹ The trial court held that the Wacketts were entitled to judgment under the doctrine of claim preclusion. We conclude, however, that it is the Wacketts who are precluded from challenging Nepscha's claim to the property. We therefore reverse and remand with instructions to enter judgment for Nepscha on his complaint.

Nepscha owns property to the east and south of the Wacketts' property. Prior to this lawsuit, Nepscha commenced an action to resolve a dispute with the Wacketts over the location of the Wacketts' east boundary. The Wacketts counterclaimed, alleging that Nepscha had encroached on their property and destroyed a fence and trees along the Wacketts south property line. In a deposition, Daniel Wackett testified that the south boundary of his land was an old fence line, running east-west. At trial, Nepscha agreed. Questions from Wackett's counsel plainly indicated that no dispute existed on that issue at that time.

After Nepscha and two other witnesses testified, the parties settled and placed the following stipulation on the record:

So what we are proposing is that the [north-south] fence line be accepted as the [east-west] boundary line between the parcels, and by fence line, we mean all of the posts and wire except for the most southerly post that's pulled in to the east. We've agreed that... on the south, we would ignore that last southern most tree that is pulled into the east and have the surveyor then place a stake on the forty line that's in line with all of the other posts, and that would then represent the boundary line for the southeast corner.... That would then give us our boundary line between the Wackett property to the west and the Nepscha property to the east.... As to the south line that we have heard testimony about, *there never has been any dispute as to the location of that line. So nothing needs to be determined as to that.*

¹ This is an expedited appeal under RULE 809.17, STATS.

(Emphasis added.) Judgment was then entered on the stipulation, which also included the Wacketts' agreement to dismiss their counterclaim.

The present dispute occurred after the surveyor went to place the southeast post as stipulated. Instead of placing that post in line with the old east-west fence line, as the parties had plainly contemplated, he placed it fifteen feet further south, in line with what he determined to be the true southern property line by survey. After discovering that the survey gave them an extra fifteen feet to the south, the Wacketts began using it. They commenced this action for quiet title after Nepscha interfered with their use of the property.

Nepscha counterclaimed for possession of that land by adverse possession. He then moved for summary judgment, arguing that the stipulated resolution of the first action established the east-west fence line as the south property line between the parties' property.

The Wacketts disputed that interpretation of the stipulation, and argued that the south property line was never a contested issue because they had conceded that the fence line was the boundary until the surveyor subsequently discovered the true property line. The trial court disagreed with both parties and held that the south boundary was a contested issue in the previous proceeding, that the stipulated judgment and placement of the stake resolved it in the Wacketts' favor, and that claim preclusion therefore prevented Nepscha from defending against the Wacketts' subsequent complaint.

Under the doctrine of claim preclusion, a final judgment is conclusive in all subsequent actions between the same parties as to all matters that were or 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). The doctrine of estoppel by record has the same effect where, as here, it is the record of the earlier proceedings, rather than the judgment itself, that bars the second proceeding. *Acharya v. AFSCME, Counsel 24*, 146 Wis.2d 693, 696, 432 N.W.2d 140, 142 (Ct. App. 1988).² In either case, there must be an identity of

² We rely on estoppel by record rather than claim preclusion in this case, because the final judgment in the earlier proceeding is not in the record. The analysis is the same, however.

causes of action or claims between the earlier and later proceedings, as determined by a transactional, or fact-based analysis. *Northern States Power Co.*, 189 Wis.2d at 553-54, 525 N.W.2d at 728. Under that analysis, a claim is precluded if both suits arise from the same transaction, incident or factual situation. *Id.* at 554, 525 N.W.2d at 728-29. We decide issues of claim preclusion as a question of law, without deference to the trial court. *Id.* at 551, 525 N.W.2d at 728.

In the first action, location of the south property line might have been litigated but for the Wacketts' mistaken belief that the fence line was the boundary. In determining whether a prior and subsequent action involve the same transaction, or factual grouping, we consider, pragmatically, 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. *Northern States Power Co.*, 189 Wis.2d at 554, 525 N.W.2d at 729 (*citing* RESTATEMENT (SECOND) OF JUDGMENTS § 24(2) (1982)). Here, in both the first and second action, the Wacketts' claim concerned Nepscha's alleged encroachment on their property from the south. Therefore, in both cases, the transaction was the same. All claims regarding that transaction, including the correct placement of the line, could have been litigated in the first action. As a result, when the Wacketts belatedly discovered that they had mistakenly conceded fifteen feet of their property, their remedy, if any existed, was a motion to reopen the first judgment.

By the Court.—Judgment reversed and cause remanded with directions.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.