COURT OF APPEALS
DECISION
DATED AND FILED

August 25, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP791 **Cir. Ct. No. 2001CV1978**

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

KATHRYN ROBISON,

PLAINTIFF-APPELLANT,

V.

WISCONSIN LAWYERS MUTUAL INSURANCE COMPANY,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: JOHN C. ALBERT, Judge. *Affirmed.*

Before Dykman, Deininger and Higginbotham, JJ.

¶1 HIGGINBOTHAM, J. Kathryn Robison[1] appeals a partial summary judgment order entered in favor of Wisconsin Lawyers Mutual Insurance Company (WILMIC), dismissing her WIS. STAT. § 632.24 (2003-04)[2] direct action malpractice claim against WILMIC as Attorney James Kitelinger's malpractice insurer. The Robisons assert they retained Kitelinger to file a lawsuit against J. Wm. Foley Company (Foley) and Wisconsin Electric Power Company (WEPCO) for electrical surge incidents and stray voltage problems that occurred on their farm. The Robisons alleged that Kitelinger negligently failed to include their stray voltage claim in the 1994 lawsuit and instead asserted only the electrical surge claims.

¶2 The Robisons argue partial summary judgment should not have been granted for three reasons. First, claim preclusion barred them from prosecuting the stray voltage claim in any subsequent action following the dismissal of the 1994 action. Second, the Robisons claim Kitelinger's mishandling of their lawsuit was so far-reaching that the case would have been without value once it was dismissed. Third, because Kitelinger's negligence caused their stray voltage claim to be barred by claim preclusion, their negligence or the negligence of a different attorney was immaterial.[3]

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[1] While Kathryn Robison is the sole plaintiff, she is bringing both her own claim and a claim of Gary as an assignee. Thus plaintiffs in this matter will simply be referred to as the Robisons.

[2] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

[3] The Robisons also argue the fact that they consulted with a lawyer after the dismissal of the initial lawsuit but prior to the filing of this malpractice action did not constitute superseding negligence absolving Kitelinger of liability. We summarily reject this argument because superseding negligence is no longer a doctrine recognized in Wisconsin law. *See* ***Fandrey v. American Family Mut. Ins. Co.***, 2004 WI 62, ¶12, 272 Wis. 2d 46, 680 N.W.2d 345. We (continued)

¶3 We conclude claim preclusion did not bar the stray voltage claim because the facts surrounding that claim differ markedly from the electrical surge claims dismissed in 1998. We further conclude Kitelinger's alleged negligence did not cause the loss of the Robison's stray voltage claim. Rather, when the Robisons consulted with a different attorney to pursue a malpractice claim against Kitelinger, the statute of limitations had not yet expired on their stray voltage claim. Thus, because that attorney may have been negligent in failing to properly advise the Robisons their stray voltage claim remained viable, at least with respect to the statute of limitations, Kitelinger's alleged negligence did not cause the Robisons to lose their stray voltage cause of action. We therefore affirm the partial summary judgment order entered in WILMIC's favor.

FACTS[4]

¶4 The Robisons were Kitelinger's long-time clients. In September and October 1993, the Robisons experienced three electrical surges on their farm that caused substantial damage. The Robisons contacted Kitelinger about a possible lawsuit, not only for the damages from the surges, but also for damages related to stray voltage. On May 5, 1994, the Robisons arranged a meeting with Kitelinger and Attorney Scott Lawrence. Lawrence had extensive experience with stray voltage litigation and the meeting was to discuss the Robisons' potential electric

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consider remoteness a public policy factor. ***Id***. The Robisons do not discuss public policy factors.

[4] WILMIC has failed to provide consistent citations to the record to corroborate the facts set out in their briefs. Such failure is a violation of WIS. STAT. RULE 809.19(1)(d) and (3) of the rules of appellate procedure which requires parties to set out facts "relevant to the issues presented for review, *with appropriate references to the record*." (Emphasis added.) An appellate court is improperly burdened where briefs fail to properly cite to the record. *See* ***Meyer v. Fronimades***, 2 Wis. 2d 89, 93-94, 86 N.W.2d 25 (1957).

surge and stray voltage claims. After this meeting, Lawrence wrote to the Robisons declining to represent them in a stray voltage case and emphasizing the difficulty and challenges of stray voltage cases.

¶5 In September 1994, the Robisons, represented by Kitelinger, sued WEPCO and Foley in Sheboygan county. The complaint alleged as follows:

> 4. On information and belief, at all times relevant to the allegations contained in this Complaint, including, but not limited to, the months of September through December, 1993, Foley was employed by WEPCO to repair and/or replace electric power distribution lines in the vicinity of plaintiffs' residence at Glenbeulah, Wisconsin.
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> 5. On information and belief, on or about October 15, 1993 and October 28, 1993, Foley, by its negligence, caused a surge of high voltage electricity to pass through the electrical transmissions lines and onto plaintiffs' property. As a result of Foley's negligence, plaintiffs suffered damage to the electrical wiring serving their premises and farming facility; their electrical equipment; the health, welfare and economic productivity of their herd of dairy cows and physical and mental injury to plaintiffs, all in an amount to be proved at the trial of this matter.
>
> 6. At all times relevant hereto, WEPCO had a duty to ensure that its agent, Foley, performed its work in a manner which would not cause loss or injury to plaintiffs.

Kitelinger averred in an affidavit submitted in support of WILMIC's motion for summary judgment that, prior to filing the lawsuit, he informed the Robisons he would not pursue a stray voltage case but would pursue a lawsuit based only on the electric surge accidents. Kitelinger provided the Robisons with a copy of the summons and complaint. The case did not progress. Eventually, in November 1998, the circuit court dismissed the electric surge lawsuit with prejudice for lack of prosecution. The circuit court made particular note of the lack of discovery

completed. At the time of the dismissal, the stray voltage claim was not yet time-barred.[5]

¶6 After the case was dismissed, the Robisons sought legal counsel to file a legal malpractice action against Kitelinger. The Robisons consulted with Attorney Timothy Knurr for legal advice about Kitelinger's alleged mishandling of the potential surge and stray voltage cases. In October 1998, the Robisons retained Knurr to pursue a malpractice claim against Kitelinger.

¶7 On July 24, 2001, the Robisons, represented by a third law firm, sued WILMIC as Kitelinger's legal malpractice insurer.[6] Later, the Robisons' claim was assigned to Kathryn and the complaint was amended to name Kathryn as the sole plaintiff. The allegations of the original malpractice complaint remained unchanged.

¶8 The amended complaint alleged that (1) the Robisons retained Kitelinger to sue WEPCO and Foley; (2) Kitelinger filed a lawsuit against WEPCO and Foley; (3) the underlying lawsuit was dismissed due to Kitelinger's negligence; and (4) but for Kitelinger's negligence, the Robisons would have recovered a judgment against WEPCO and Foley in the underlying lawsuit. WILMIC answered.

¶9 WILMIC moved for partial summary judgment to dismiss that portion of the Robisons' malpractice claim relating to the stray voltage issue. The

[5] It is undisputed the stray voltage claim was not time-barred until April 2000.

[6] The record is unclear when the relationship between the Robisons and Knurr terminated and when the Robisons retained their current attorneys.

circuit court granted this motion and entered the order for partial summary judgment. This order dismissed the portion of the malpractice claim seeking to recover stray voltage damages but preserved the portion seeking to recover damages arising from the two accidents which were the subject of the underlying electrical surge accident lawsuit.

¶10 The Robisons' motion for reconsideration was denied. Rather than proceeding to trial on the surge accident damage claim, the Robisons moved to voluntarily dismiss that claim. The circuit court granted this request and dismissed the surge accident portion of the claim for failure of proof. As a result, a judgment dismissing all claims was entered. The Robisons appeal.

DISCUSSION

¶11 We review summary judgment de novo, applying the same methodology as the circuit court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). We first determine whether the complaint states a claim. ***Id***. If the complaint states a claim, we then determine whether there is a material factual dispute and whether the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2); ***Green Spring Farms***, 136 Wis. 2d at 315. We turn to address the question of whether claim preclusion barred the Robisons from pursuing their stray voltage claim.

Claim Preclusion

¶12 The Robisons contend the dismissal of their first lawsuit due to Kitelinger's negligence precluded any further prosecution of the stray voltage claim in any subsequent action because the claims for the electric surges and the stray voltage were not severable and thus a subsequent stray voltage claim would

have been barred by claim preclusion.[7] We disagree; claim preclusion would not have barred prosecution of the Robisons' stray voltage case.

¶13 Under the doctrine of 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 (1995) (citation omitted). The purpose of claim preclusion is "to draw the line between the meritorious claim on the one hand and the vexatious, repetitious and needless claim on the other hand." ***Id***. (citation omitted). Generally the question of whether claim preclusion applies is an issue of law we review de novo. *See* ***Schaeffer v. State Pers. Comm'n***, 150 Wis. 2d 132, 138, 441 N.W.2d 292 (Ct. App. 1989).

¶14 The following three factors must be present for claim preclusion to apply: "(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." ***State ex rel. Barksdale v. Litscher***, 2004 WI App 130, ¶13, 275 Wis. 2d 493, 685 N.W.2d 801, *quoting* ***Northern States Power Co.***, 189 Wis. 2d at 551.

¶15 The first question we must address is whether there is identity between the parties or their privies. ***Barksdale***, 275 Wis. 2d 493, ¶14. WILMIC concedes the first element of claim preclusion is met here because the Robisons

[7] The Robisons open their argument asserting that when the circuit court dismissed their 1994 lawsuit, they "reasonably believed their stray voltage case had been dismissed along with their surge case." This argument is not developed, thus we consider it no further.

and WEPCO were both parties to the underlying electrical surge lawsuit and would also have been parties to a stray voltage lawsuit.

¶16 The third element of claim preclusion, a final judgment on the merits in the prior suit, is also met here, as WILMIC also concedes. Dismissal of the underlying surge lawsuit with prejudice constituted a judgment on the merits by a court of competent jurisdiction.

¶17 Thus, our dispositive inquiry is whether the second requirement for claim preclusion, identity between causes of action in the two lawsuits, has been met. *See* ***id.***, ¶15. To determine whether two suits involve the same cause of action, Wisconsin applies a transactional approach. ***Id.*** If both suits arise from the same transaction, incident or factual situation, claim preclusion generally will bar the second suit. ***Id.*** The number of substantive theories that may be available to the plaintiff is immaterial if they all arise from the same factual underpinnings; all are barred from future consideration unless brought in the same action. ***Id.*** In essence, claim preclusion prevents a party from unsuccessfully taking one set of facts and presenting one legal theory, then taking those same facts using a different legal theory in a subsequent action.

¶18 We conclude, after applying the transactional standard to the facts of this case, that there is an absence of identity between the two suits. Accordingly, we conclude claim preclusion would not have barred a suit by the Robisons against WEPCO alleging a stray voltage claim.

¶19 Claim preclusion would not serve to bar the Robisons from pursuing a stray voltage claim against WEPCO because the Robisons' two potential causes of action against WEPCO and Foley are transactionally different in five ways:

(1) in origin; (2) in nature; (3) as to time and space; (4) in damages; and (5) as to location. We will address each difference in turn.

¶20 First, the origins of the two claims are different. The surge accidents or occurrences were solely due to Foley's alleged negligence. The Robisons alleged the surges of electricity stemmed from Foley's improper repair work. WEPCO's liability for the surge incidents, if any, is purely vicarious as WEPCO is Foley's principal. Foley is not, however, implicated in the potential stray voltage claim. It is WEPCO's alleged negligent use and maintenance of a distribution system that allowed excessive stray voltage and caused the damage to the Robisons' herd.[8]

¶21 Second, the two claims are different in nature. The surge accidents involved two distinct surges of electricity on two separate dates. Stray voltage, however, is not based upon a single isolated incident but is a continuous condition arising from the distribution system.

¶22 Third, the surge occurrences and the stray voltage are different as to time and space. The surge causes of action arose from accidents that occurred on two specific dates: October 15 and 28, 1993. The stray voltage problems were ongoing and both predated and postdated the electric surges. The Robisons allege WEPCO's malfunctioning distribution system that caused the stray voltage existed on the farm from the 1980s through 2000 and caused damage throughout the time the Robisons farmed this property from March 1990 until at least 2000.

[8] In stray voltage cases, although injury to a herd may continue for an extended period of time, the alleged act of negligence is the utility's use of a distribution system that allowed excessively high levels of stray voltage to reach the farmer's cows. *See* ***Kolpin v. Pioneer Power & Light Co., Inc.***, 162 Wis. 2d 1, 24-25, 469 N.W.2d 595 (1991).

¶23 Fourth, the damages the Robisons claimed they suffered caused by the electrical surges were different than the damages allegedly caused by stray voltage. Although the Robisons vigorously argue their economic expert, Dr. Michael Behr, concluded it is impossible to differentiate damages caused by the electrical surges from stray voltage damage, Behr also surmised the Robisons' stray voltage damages began when they started selling milk in March 1992. In other words, Behr, the Robisons' own expert, was of the opinion that damages caused by stray voltage began at least twenty months before the first electrical surge accident in October 1993. Thus, even if we were to accept Behr's opinion that one cannot separate the surge damages from the stray voltage damages after October 1993, it is clear that damages caused by stray voltage from March 1992 until October 1993 could be separately proven, assuming they are susceptible to proof in all other respects.

¶24 Damages caused by the stray voltage differ from the surge accident in other respects such that claim preclusion is inapplicable here.[9] For example, the electrical surges resulted in burned wiring and damaged equipment on the Robisons' farm. The Robisons make no allegation that stray voltage caused similar damage. The Robisons also alleged Gary suffered bodily injury as a result of the Foley surge accidents; they make no similar claim with respect to the stray voltage.

[9] The only item of damages shared in common between the electrical surge incidents and the stray voltage problem was damage to the cows. This fact does not save the Robisons because the purpose of claim preclusion is to prevent relitigation of claims arising out of the same factual circumstance or transaction that were or could have been litigated in a previous action. *See* ***State ex rel. Barksdale v. Litscher***, 2004 WI App 130, ¶15, 275 Wis. 2d 493, 685 N.W.2d 801.

¶25 Finally, the surge accidents and the stray voltage situation arose at different locations. The surge incidents resulted from occurrences at Foley construction work sites in the fall and winter of 1993 while the stray voltage claim originated from WEPCO's distribution system which existed on the farm as early as the early 1980s. The Robisons argue both claims arose at the same place, their farm. We agree that the electricity causing damage eventually reached the Robisons' farm in both instances. However, the alleged causes of the electrical problems resulting in the purported damages originated from different locations.

¶26 In summary, we conclude the transactions underlying the electrical surge causes of action and the stray voltage cause of action are not identical, thus the second criteria for claim preclusion has not been met. *See* ***Barksdale***, 275 Wis. 2d 493, ¶15. The Robisons' stray voltage claim would not have been barred by claim preclusion.

Kitelinger's Presumed Negligence Did Not Cause The Robisons' Loss

¶27 Having determined that claim preclusion would not have barred the Robisons from prosecuting their stray voltage claim, we turn to the question of whether Kitelinger's presumed negligence[10] in failing to prosecute that claim caused the Robisons to lose their right to sue WEPCO for stray voltage. In a case factually similar to the instant case, we framed the issue this way:

[10] We note that a factual dispute exists as to whether Kitelinger was retained to prosecute the Robisons' stray voltage claim. The circuit court determined that a genuine issue of material fact existed on this issue and denied WILMIC's motion for partial summary judgment on this issue. However, because we conclude that Kitelinger's alleged negligence was not the cause of the Robisons' asserted damages, any factual dispute on this issue is not material. Thus, we will, for the purpose of this opinion only, assume without deciding that Kitelinger was negligent.

> When a client is represented sequentially by two lawyers, both of whom were arguably negligent with respect to the same matter, can the first lawyer's alleged negligence be a cause of the client's damages if the client would not have sustained any damage if the second lawyer could have prevented the harm but did not?

Seltrecht v. Bremer, 214 Wis. 2d 110, 112, 571 N.W.2d 686 (Ct. App. 1997). We conclude, based on the undisputed facts of the summary judgment record and our holding in ***Seltrecht***, that Kitelinger's negligence was not, as a matter of law, a cause of the Robisons' loss of their stray voltage claim against WEPCO.

¶28 The Robisons advance two arguments in support of their contention that the circuit court erred in granting partial summary judgment to WILMIC. First, Kitelinger's negligence was so profound thus leaving the case in such a "shambles" that no attorney could have salvaged it. Consequently, the Robisons argue, no other attorney's negligence could have caused the loss the Robisons complain of here. Second, because Kitelinger's negligence caused their stray voltage claim to be barred by claim preclusion, neither their negligence nor Knurr's later alleged negligence caused them to lose their stray voltage claim[11] within the statute of limitations. These arguments lack merit.

[11] The Robisons make a third argument, which is Knurr was retained solely to investigate and prosecute a legal malpractice claim against Kitelinger. The Robisons insist Knurr was not retained to prosecute the stray voltage claim. The Robisons miss the point. First, we reject this argument because it is not developed in their opening brief. The Robisons do not truly develop it until their reply brief and even then it is barely developed. Secondly, as WILMIC points out, Knurr was required to determine whether the Robisons' right to bring the stray voltage claim remained viable and had a duty to advise them of the status of their claim as part of his advice on whether the Robisons had a viable cause of action in malpractice against Kitelinger. Thus, whether Knurr was retained to represent the Robisons in a stray voltage case or to sue Kitelinger for malpractice is immaterial, the duty is the same: Knurr was required to determine whether the statute of limitations had expired on the Robisons' stray voltage claim.

¶29 The Robisons' "shambles" argument fails because it is conclusory. They fail to cite from the record how they were prejudiced by Kitelinger's negligence. They also point to no evidence tending to show that Kitelinger's negligence was so extreme it caused them to not tender the stray voltage claim to an attorney within the statute of limitations for prosecution.

¶30 With respect to the Robisons' claim preclusion argument, we have already concluded the Robisons' stray voltage claim would not have been barred by claim preclusion. Thus, Kitelinger's negligence in failing to bring the stray voltage claim in 1994 did not prevent the Robisons from pursuing the stray voltage claim within the statute of limitations. The Robisons also completely ignore the analysis in ***Seltrecht*** that we have determined controlling on the facts of this case. We turn to examine ***Seltrecht*** and apply it to the facts here.

¶31 The facts in ***Seltrecht*** present a similar factual situation to the case at bar and guides our decision here. In June 1987, the Seltrechts retained Attorney Bremer to represent them for their medical malpractice claims against a doctor and a pharmaceutical company. In January 1988, the Seltrechts met with Bremer. Bremer informed them that the applicable statute of limitations had expired on the claim against the doctor. ***Id***. at 113. Bremer also encouraged them to seek a second legal opinion. ***Id***. However, Bremer's representation did not immediately end because of the potential for a lawsuit against the pharmaceutical company. ***Id***. In December 1988, however, Bremer declined to pursue the claim against the pharmaceutical company and reminded the Seltrechts that their claim against the doctor had expired. ***Id***. at 113-14.

¶32 Two years later, in October 1991, the Seltrechts hired a second attorney, who concluded the statute of limitations had not, in fact, expired when

the Seltrechts consulted Bremer and, in a letter to Bremer, "raised the specter of a legal-malpractice action against" her. ***Id.*** at 114. Bremer responded, indicating she had told the Seltrechts in 1988 that the statute of limitations against the doctor would not expire until October 1989 but that she had simply declined to take their case. ***Id***. at 115. The Seltrechts, with their second attorney, then filed a complaint against the doctor. ***Id***. at 116. Ultimately this action was dismissed for failure to prosecute because the defendants were not served. ***Id***. The Seltrechts filed a malpractice action against Bremer which the circuit court dismissed on summary judgment, concluding the lawsuit filed by the second attorney was timely filed and therefore any negligence by Bremer was not the cause of the Seltrechts' right to sue the doctor. ***Id***.

¶33 On appeal, we agreed, concluding that when a client is represented sequentially by two lawyers, both of whom were arguably negligent with respect to the same matter, the first lawyer's alleged negligence cannot be a cause of the client's damages if the client would not have sustained any damage if the second lawyer could have prevented the harm but didn't. ***Id***. at 112. A lawyer in a professional-malpractice case is not liable to the plaintiff unless the lawyer's alleged negligence was a cause of the plaintiff's damages. ***Id***. at 123. Where the claimed damage is the loss of a legal right, the person is not damaged until that right is, in fact, lost. ***Id***.

¶34 Thus, under the holding of ***Seltrecht***, the Robisons' right to sue WEPCO and Foley for stray voltage was not lost until the stray voltage claim was time-barred. *See* ***id***. The question we must answer, therefore, is, when did the statute of limitations expire on the Robisons' stray voltage claim? It is undisputed the stray voltage claim was not time-barred until April 2000. Thus, the next question we must answer under ***Seltrecht*** is, did a second lawyer retained by the

Robisons cause them to lose their stray voltage cause of action? We conclude there is no factual dispute that Knurr could have, but did not, act to preserve the Robisons' stray voltage claim.

¶35 We, again, look to the undisputed facts of the summary judgment record. The Robisons purchased their farm in March 1990. The Robisons first discovered stray voltage might be affecting their dairy herd in April 1994 when Thomas C. Beane, one of the Robisons' designated expert witnesses, took voltage readings and discussed his opinions about those readings with the Robisons.

¶36 The Robisons were apparently not aware their stray voltage claim had not expired when the surge suit was dismissed. In October 1998, the Robisons retained Knurr to sue Kitelinger for legal malpractice, apparently under the impression their right to pursue the stray voltage claim was foreclosed. WILMIC received Knurr's letter of retainer indicating he had been retained by the Robisons to pursue a legal malpractice claim against Kitelinger. Knurr, in a letter dated December 9, 1998, provided WILMIC with a copy of an expert witness report, dated November 25, 1997, identifying the damage to the Robison farm. On February 17, 1999, Knurr wrote WILMIC indicating he had retained a lawyer "who specializes in stray voltage and other types of voltage cases."

¶37 At that point, more than one year remained on the statute of limitations for the Robisons' stray voltage claim. Knurr's representation of the Robisons, based on his own letters and expert witness reports, asserted a potential stray voltage claim. It was therefore Knurr's responsibility to advise the Robisons of the applicable statute of limitation. Simply put, the Robisons did not lose their right to sue WEPCO and Foley for stray voltage while Kitelinger was their attorney. Instead, their stray voltage claim was lost more than eighteen months

after the Robisons had retained another lawyer. Thus, under ***Seltrecht***, Kitelinger's negligence cannot be the cause of the Robisons' damage because the Robisons' subsequent lawyer could have prevented the harm, but did not. *See* ***id.*** at 112. Accordingly, we conclude the circuit court did not err in granting WILMIC's motion for partial summary judgment on this issue.

By the Court.—Order affirmed.

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