COURT OF APPEALS
DECISION
DATED AND FILED

March 16, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP1033 **Cir. Ct. No. 2004CV1021**

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

HARMONY ANTIQUE CARS, INC.,

PLAINTIFF-APPELLANT,

V.

MIDWEST TOWER PARTNERS LLC,

DEFENDANT-RESPONDENT.

APPEAL from a judgment and an order of the circuit court for Rock County: JOHN W. ROETHE, Judge. *Reversed and cause remanded with directions*.

Before Dykman, Vergeront and Higginbotham, JJ.

¶1 DYKMAN, J. This is an appeal from a judgment dismissing Harmony Antique Cars, Inc.'s complaint and from an order declaring the scope of an easement. The issue is whether an easement held by Midwest Tower Partners

over land owned by Harmony authorized Midwest to construct a three and one-half feet by three and one-half feet by three feet reinforced concrete anchor block and a thirty by thirty-four foot gravel berm on Harmony's land. We conclude that it does not and therefore reverse.

¶2 This case has a significant history. The record is long and complex. In 1991, Albert and Marcia Phillips deeded the west half of their commercial lot to Isabel and Donald Donahue. A radio communications tower was located on the lot, which required three guy wires and anchors for its support. One of the anchors was located on the west half of the lot, so the deed from the Phillips to the Donahues contained the following language: "Grantor reserves a right of way for a guy wire and associated hardware in its present location until such time as grantor, their heirs or assigns, remove the radio communications tower located on grantor's adjoining property."

¶3 In 1998, the tower was owned by Tower Light Communications, Inc. Tower Light installed a new tower capable of supporting twelve antennas and removed the original tower. It also installed a new dead man, the buried concrete anchor to which an anchor rod is attached, a new anchor head and new guy wires. Harmony sued in trespass, alleging that the new tower breached the provision in the deed granting an easement only until the then-existing tower was removed. The trial court, Judge Michael J. Byron presiding, concluded that the deed's provisions allowed a replacement tower to be built. But it also concluded that moving the dead man, anchor rod and anchor head violated the "present location" provision of the deed. The trial court concluded that, by doing so, Tower Light trespassed on Harmony's land. The court awarded damages. Harmony appealed arguing that, because the previous tower had been removed, the easement or right of way in the deed provision no longer applied. Tower Light did not cross-appeal

the trial court's conclusion that Tower Light had trespassed on Harmony's land. We affirmed. ***Harmony Antique Cars, Inc. v. LSH, Inc.***, No. 1999AP2082, unpublished slip op. (WI App July 27, 2000).

¶4 In 2002, Midwest Tower Partners LLC was now the owner of the tower. Midwest hired PiRod, Inc. to conduct a study to determine whether additional antennas could be placed on the tower. PiRod produced exhibit seven, which shows a requested antenna loading of twenty-seven antennas and six amplifiers. To resist the weight and wind load of the additional equipment, PiRod recommended placing one foot six inches of compacted fill around the dead man for a distance of fifteen feet six inches in the front and five feet five inches beyond the back and sides and a concrete block around each anchor rod. Midwest installed the concrete anchor block and a gravel berm. In April 2004, PiRod conducted an additional study to determine whether additional antennas could be added to the tower.

¶5 In July 2004, Harmony again sued, this time naming Midwest, as the assignee of Tower Light, as a defendant.[1] Harmony asserted that Midwest had exceeded the scope of its easement and had trespassed on its land. Harmony sought actual and punitive damages and equitable relief. The trial court, Judge John W. Roethe presiding, dismissed Harmony's complaint based on its reading of our 2000 decision affirming Judge Byron's decision. It also issued an order defining the dimensions of the easement contained in the 1991 deed. The court concluded that ***Gallagher v. Grant-Lafayette Elec. Co-op*****,** 2001 WI App 276, ¶17,

[1] The plaintiff originally was Isabel Donahue, but through proceedings not relevant here, Harmony was substituted as a plaintiff.

249 Wis. 2d 115, 637 N.W.2d 80, provided the analysis it was to use here. It quoted the following passage from ***Gallagher***:

> We agree with the Cooperative that the only reasonable interpretation of the membership agreement is that it grants the Cooperative a right-of-way easement and that at least one purpose of the easement is for the placement and maintenance of power lines. Since the membership agreement does not provide any detail on the scope of the easement, we apply the principle that every easement carries with it by implication the right to do what is reasonably necessary for the full enjoyment of the easement in light of the purpose for which it was granted. ***Atkinson***, 211 Wis. 2d at 640. Applying that principle, we conclude that the Cooperative's easement includes the right to take those steps that are reasonably necessary to maintain its power line on the Gallaghers' property.

Id., ¶17 (footnote omitted).

¶6 ***Gallagher*** involved whether, under an easement which read "a reasonable right of way easement," an electric power company could destroy trees and other vegetation with herbicides. We interpreted the easement in the manner the trial court quoted. We concluded that whether the cooperative trespassed on the Gallagher's property under the terms of the easement depended on whether it was reasonably necessary for the power company to clear *all* the trees and other vegetation from the easement. We did not say that, regardless of the terms of an easement, a trial court's only inquiry would be whether the use of the easement was reasonable. The law is otherwise. In ***Hunter v. Keys***, 229 Wis. 2d 710, 714, 600 N.W.2d 269 (Ct. App. 1999), we explained:

> The meaning of an easement created by deed involves construction of the deed's language. The scope of the easement is reflected in the instrument creating the easement and we look to that instrument in construing the rights of the relative landowners. The use of the easement must be in accordance with and confined to the terms and purposes of the grant. (Citation omitted.)

¶7 We review the language of an unambiguous deed de novo. ***Rikkers v. Ryan***, 76 Wis. 2d 185, 188, 251 N.W.2d 25 (1977). We conclude that the words "[g]rantor reserves a right-of-way for a guy wire and associated hardware in its present location" are unambiguous as to the location of the dead man, anchor rod and anchor head. The "present location" of the dead man, anchor rod and anchor head was known to both parties to the deed. Exhibit seventeen shows the anchor rod and anchor head of the original anchor with the new anchor head and berm in the background. The two are certainly not in the same location. The new installation with its berm covers dramatically more space than the original installation. We reach the same conclusion as did Judge Byron, that the change in the dead man, anchor rod and anchor head location by ten to thirteen feet constituted a trespass because it exceeded the privilege granted by the deed.

¶8 Midwest argues, however, that it interprets Judge Byron's decision as permitting its later expansion of its anchor and that this decision must be followed under principles of claim preclusion and issue preclusion. While we disagree that Judge Byron held that Midwest could do whatever was reasonably necessary to enhance the tower's antenna carrying capacity, we will consider whether principles of preclusion apply.

¶9 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. ***Menard, Inc. v. Liteway Lighting Prods.,*** 2005 WI 98, ¶26, 282 Wis. 2d 582, 698 N.W.2d 738. We review the applicability of claim preclusion de novo. ***Kruckenberg v. Harvey***, 2005 WI 43, ¶17, 279 Wis. 2d 520, 694 N.W.2d 879. The elements of claim preclusion are: (1) identity between the parties or their privies in the prior or present suits; (2) prior litigation resulted in a final judgment

on the merits by a court with jurisdiction; and (3) identity of the causes of action in the two suits. ***Id.***, ¶21. There is no "fundamental fairness" element in claim preclusion analysis. ***Id.***, ¶62. Wisconsin has adopted the "transactional approach" to determine the third element of claim preclusion:

> 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 legal rights. Under the transactional approach, the legal theories, remedies sought, and evidence used may be different between the first and second actions. The concept of a transaction connotes a common nucleus of operative facts.
>
> The transactional approach to claim preclusion reflects the expectation that the parties who are given the capacity to present their entire controversies shall in fact do so. One text states that the pragmatic approach that seems most consistent with modern procedural philosophy looks to see if the claim asserted in the second action should have been presented for decision in the earlier action, taking into account practical considerations relating mainly to trial convenience and fairness.

Id., ¶¶26-27 (citations and footnotes omitted).

¶10 Applying the transactional approach, we cannot conclude that Harmony should have brought the claim asserted here in its previous suit. It was not possible for Harmony to make the claim that Midwest, or its privy, Tower Light, placed a reinforced concrete block and a berm on its property in its first suit. When it sued the first time, those things had not occurred. Claim preclusion does not bar this suit.

¶11 Midwest cites ***In re Commitment of Sorenson*****,** 2001 WI App 251, ¶¶13-14, 248 Wis. 2d 237, 635 N.W.2d 787, for its conclusion that issue preclusion bars Harmony's second suit against it. ***Sorenson*** was modified by the

supreme court, ***In re Commitment of Sorenson***, 2002 WI 78, 254 Wis. 2d 54, 646 N.W.2d 354, though the modification changed only the interpretation of the elements of issue preclusion, not the elements themselves. ***Sorenson***, however, does not undertake a complete issue preclusion analysis, concluding only that if certain evidence was otherwise admissible, excluding the evidence would be fundamentally unfair. ***Sorenson***, 248 Wis. 2d 237, ¶¶32, 35. Other cases are more helpful.

¶12 Issue preclusion is a two-step analysis. The first step is to determine whether a litigant against whom issue preclusion is asserted is in privity with a nonparty or has sufficient identity of interests to comport with due process. ***Paige K.B. v. Steven G.B.***, 226 Wis. 2d 210, 224, 594 N.W.2d 370 (1999). This is a question of law that we review de novo. ***Id.*** The first step is satisfied here. Harmony was a plaintiff in the previous lawsuit and is a plaintiff here. Midwest is in privity with Tower Light, having purchased its interest in the tower.

¶13 The next step in issue preclusion analysis is whether applying issue preclusion comports with principles of fundamental fairness. This is generally a discretionary decision, although some of the factors the circuit court is to consider in determining fairness present a question of law. ***Paige K.B.***, 226 Wis. 2d at 225. Whether the circuit court properly applied or refused to apply issue preclusion in an individual case is a discretionary decision. ***Mrozek v. Intra Financial Corp.***, 2005 WI 73, ¶15, 281 Wis. 2d 448, 699 N.W.2d 54. We review discretionary decisions deferentially, for erroneous exercise of discretion. ***State v. Love***, 2005 WI 116, ¶26, 284 Wis. 2d 111, 700 N.W.2d 62. But before proceeding further, we consider whether we should proceed at all.

¶14 The concurring opinion in ***Mrozek*** noted that the circuit court in that case had not considered the question of issue preclusion. ***Mrozek***, 281 Wis. 2d 448, ¶44. It concluded that because so much of an issue preclusion analysis was discretionary, appellate courts should not undertake an issue preclusion analysis unless the trial court had done so. ***Id***. Thus, the concurring justice would have reversed the court of appeals because the trial court did not consider issue preclusion. ***Id***. That is the case here, and were we to adopt the concurring opinion in ***Mrozek***, we would end now. But we have no way of knowing whether a majority of the supreme court would adopt the ***Mrozek*** concurrence. Here, neither party asserts standard of review as a reason for us to decline to address issue preclusion. Indeed both parties discuss the merits of this issue. And, because much of the evidence was undisputed, the only questions are ones of law. We will consider where Midwest's issue preclusion analysis leads.

¶15 The factors that courts may consider when undertaking the second step of issue preclusion are:

> (1) could the party against whom preclusion is sought, as a matter of law, have obtained review of the judgment; (2) is the question one of law that involves two distinct claims or intervening contextual shifts in the law; (3) do significant differences in the quality or extensiveness of proceedings between the two courts warrant relitigation of the issue; (4) have the burdens of persuasion shifted such that the party seeking preclusion had a lower burden of persuasion in the first trial than in the second; or (5) are matters of public policy and individual circumstances involved that would render the application of collateral estoppel to be fundamentally unfair, including inadequate opportunity or incentive to obtain a full and fair adjudication in the initial action?

Michelle T. v. Crozier, 173 Wis. 2d 681, 689, 495 N.W.2d 327 (1993) (footnote omitted). While we proceed cautiously in light of the concurring opinion in

Mrozek, we have been asked to apply issue preclusion by Midwest and not to apply it by Harmony. Midwest asked the trial court to apply issue preclusion in the trial court and briefed the issue. And here, under the unusual facts of this case, most of the five factors are undisputed.[2]

¶16 The first factor is met. Harmony, the party against whom issue preclusion is asserted, not only could have obtained review of Judge Byron's judgment, it did so. The second factor depends on what "claim" Harmony made in its first action. Several cases have considered matters asserted as claims. The following were determined to be claims: "Whether plaintiff attempted an improper lane change," ***Masco v. City of Madison***, 2003 WI App 124, ¶8, 265 Wis. 2d 442, 665 N.W.2d 391; "apparent authority," ***Precision Erecting, Inc. v. AFW Foundry, Inc.*** (***Precision Erecting II***), 229 Wis. 2d 189, 195, 598 N.W.2d 614 (Ct. App. 1999); "status as agent or general contractor," ***Precision Erecting v. M & I Marshall & Ilsley Bank*** (***Precision Erecting I***), 224 Wis. 2d 288, 307, 592 N.W.2d 5 (Ct. App. 1998); "paternity," ***Amber J.F. v. Richard B.***, 205 Wis. 2d 510, 521, 557 N.W.2d 84 (Ct. App. 1996); "defendant's negligence," ***Jensen v. Milwaukee Mut. Ins. Co.***, 204 Wis. 2d 231, 238, 554 N.W.2d 232 (Ct. App. 1996); definition of "employee," ***Moore v. LIRC***, 175 Wis. 2d 561, 568, 499 N.W.2d 288 (Ct. App. 1993). We conclude that the meaning of the words "in its present location" in the deed from Albert and Marcia Phillips to Isabel and Donald Donahue is a similar factor. That factor was determined by Judge Byron to mean the location where the anchor, anchor head and rod and guy wire existed when the

[2] Three of the five factors, one, two and four, are questions of law. ***Mrozek v. Intra Financial Corp.***, 2005 WI 73, ¶17, 281 Wis. 2d 448, 699 N.W.2d 54.

deed was executed in 1991. Were that not the meaning of that phrase, Judge Byron would not have concluded:

> But the court believes that they exceeded the privilege granted by the original right of way, knowing that there was going to be removal from its present location, and, thus would be guilty of a trespass to the land owned by the plaintiff in this case. In regard to damages for trespass ….

Tr. Ct. Op. Transcript, p. 14. Nor could Judge Byron have concluded that Harmony was entitled to damages for trespass unless Tower Light had trespassed. The second factor is met.

¶17 We also conclude that the third factor is met. The two proceedings were of the same quality and extensiveness. In both cases Harmony asserted that Tower Light and Midwest, entities in privity with each other, had violated the terms of the 1991 easement. Both cases were trials to the court without a jury, though either party could have obtained a jury trial. Both parties had extensive discovery, and neither trial court limited the parties' presentations. One of Harmony's two officers and its sole shareholder testified and was cross-examined. There was an adequate opportunity for each side to litigate. Burden of proof was the same in both cases. Both parties were represented by counsel, and in both cases the defendant was represented by the same counsel. Trespass law has not changed.

¶18 The burden of persuasion was the same in both trials. Both were civil proceedings. The fourth factor is met.

¶19 The fifth factor, matters of public policy, individual circumstances, and adequate opportunity or incentive to obtain a full and fair adjudication, is the same in both trials. In each case Harmony wanted a finding regarding the deed

that the tower owner did not want. It would not be fundamentally unfair to prevent relitigation of whether Tower Light and its privy, Midwest, trespassed on Harmony's property by adding a concrete block and a berm at a place prohibited by the 1991 deed.

¶20 We conclude that Midwest is correct that issue preclusion would be a bar here. But the result of that bar is not, as Midwest argues, that Midwest's concrete anchor block and berm are within the scope of the easement; instead it is that they constitute a trespass, as Judge Byron concluded the previous changes in location of the dead man, anchor rod and anchor head to be. However, not only has Harmony not raised this issue, in its reply brief it titles its second heading: "Preclusion Doctrines Do Not Bar this Action." Harmony cannot raise, let alone prevail on, an issue that it did not assert in the trial court. ***State v. Polashek,*** 2002 WI 74, ¶ 25, 253 Wis. 2d 527, 646 N.W.2d 330.

¶21 After its decision dismissing Harmony's complaint, the trial court issued an order declaring the dimensions of the perimeter of Midwest's easement to be 64.16 feet, 60 feet, 100.32 feet and 123.06 feet. We need not address Harmony's argument that the trial court erred in doing so. Because we have reversed the judgment upon which the order depended, the order becomes a nullity.

¶22 Midwest makes several other arguments in response to Harmony's assertion that Midwest exceeded the dimensions of its easement, thereby committing a trespass. Some of these respond to other arguments Harmony has made, which we have not addressed because we have concluded that Harmony prevails under the unambiguous term "in its present location" in the 1991 deed. Other arguments use excerpts from Judge Byron's and our decisions to conclude

that Judge Byron or this court concluded that it was permitted to do whatever was reasonably necessary outside of the area described as "in its present location." We did not say that. What we did say was: "Harmony has already prevailed on the question of whether Tower Light violated the easement provision allowing the wire and anchor 'in its present location.'" ***Harmony***, unpublished slip op ¶5 (No. 1999AP2082). Midwest's other arguments are foreclosed either by our previous conclusion or by the fact that they indirectly take issue with our conclusion here that Midwest has trespassed on Harmony's property by installing a concrete anchor block and berm.

¶23 In addition to its request that we reverse the trial court's judgment and order, Harmony asks that we award damages for Midwest's trespass and enjoin Midwest from further trespasses, which, it says, would include removal of the present trespass. To award damages we would be required to hold hearings to make findings as to the number of antennas Midwest has been able to add as a result of its trespass and their value to Midwest, and the value of the damages to its property that Harmony claims. While the elements necessary to maintain an action for trespass and the forms of relief to which a plaintiff is entitled are questions of law, ***State v. Gaulke***, 177 Wis. 2d 789, 793, 503 N.W.2d 330 (Ct. App. 1993), we are prohibited by article VII, section 5(3) of the Wisconsin Constitution from finding facts. ***Wurtz v. Fleischman***, 97 Wis. 2d 100, 107 n.3, 293 N.W.2d 155 (1980). We therefore remand to permit the trial court to determine the damages and equitable relief to which Harmony is entitled.

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

Not recommended for publication in the official reports.