COURT OF APPEALS
DECISION
DATED AND FILED

February 5, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1500 **Cir. Ct. No. 2006CV350**

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

BRUCE G. PHELPS,

PLAINTIFF-APPELLANT,

V.

HARVEY PHELPS, JR. AND KAREN PHELPS,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Chippewa County: FREDERICK A. HENDERSON, Judge. *Reversed and cause remanded for further proceedings.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Bruce Phelps appeals a summary judgment dismissing his adverse possession and trespass action against his brother, Harvey Phelps. Bruce contends the circuit court erred by concluding his claims were

barred under the doctrine of claim preclusion because of a prior action by Harvey against Bruce.

¶2 We conclude that Bruce's claims are not barred. Therefore, we reverse the summary judgment and remand to the circuit court for further proceedings on Bruce's claims.

BACKGROUND

¶3 Bruce and Harvey each own two forty-acre parcels of adjacent real estate, with Harvey's parcels lying directly north of Bruce's. Harvey purchased his parcels from his and Bruce's father by land contract in 1997. Their father died shortly thereafter, and their father's vendor interest in the land contract passed to Bruce, along with other siblings who are not parties to this appeal.

¶4 When Harvey completed his payments under the land contract, he demanded delivery of a deed in satisfaction of the land contract, which Bruce refused to provide. Harvey then sued Bruce for specific performance under the land contract. After Bruce proffered no reason for failing to deliver the deed, the circuit court granted summary judgment to Harvey.

¶5 A couple months later, Harvey had his parcels surveyed and discovered that an apparent boundary fence did not sit on the surveyed boundary, but instead was about sixty feet on his side of the surveyed boundary line. Harvey tore down the fence and built another near the surveyed boundary line.

¶6 Then, in the present action, Bruce sued Harvey for adverse possession of the property up to the old fence's location and for trespass because Harvey removed and relocated the fence. Harvey moved for summary judgment, arguing that Bruce's claims were barred by the doctrine of claim preclusion.

Relying on our supreme court's decision in ***Menard v. Liteway Lighting Products***, 2005 WI 98, 282 Wis. 2d 582, 698 N.W.2d 738, the circuit court agreed with Harvey and granted him summary judgment.

DISCUSSION

¶7 Pursuant to WIS. STAT. § 802.07(1),[1] the permissive counterclaim statute, the general rule is that a defendant who can bring a counterclaim, but fails to do so, is not precluded from maintaining a subsequent action on that claim. ***Menard***, 282 Wis. 2d 582, ¶27. As a "narrow" exception to this rule, Wisconsin courts have adopted the common-law compulsory counterclaim rule, as set forth in the RESTATEMENT (SECOND) OF JUDGMENTS § 22(2)(b) (1982). ***Id.***, ¶¶47-48.

¶8 For the common-law compulsory counterclaim rule to apply, the elements of claim preclusion must first be present. ***Menard***, 282 Wis. 2d 582, ¶27. Those elements are: "(1) an identity between the parties or their privies in the prior and present suits; (2) an identity between the [claims] in the two suits; and, (3) a final judgment on the merits in a court of competent jurisdiction." ***Id.***, ¶26 (citation omitted). If the elements of claim preclusion are present, the common-law compulsory counterclaim rule applies if "a verdict favorable to the plaintiff in the second suit would undermine the judgment in the first suit or impair the established legal rights of the plaintiff in the initial action." ***Id.***, ¶28.

¶9 Here, the parties disagree about whether the second element of claim preclusion exists—whether there was an identity between Harvey's and Bruce's

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

claims. To determine whether an identity exists, Wisconsin courts have adopted the transactional approach from the RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1982). ***Menard***, 282 Wis. 2d 582, ¶30. Under this approach, "all claims arising out of one transaction or factual situation are treated as being part of a single [claim,] and they are required to be litigated together." ***Id.*** (citation omitted). "[A] transaction connotes a natural grouping or common nucleus of operative facts." ***Id.*** (citation omitted). When determining whether claims "arise from a single transaction, [courts] may consider whether the facts are related in time, space, origin, or motivation." ***Id.*** (citation omitted).

¶10 Harvey and Bruce both rely upon our supreme court's decision in ***Menard***.[2] In that case, Menard purchased lighting fixtures from Liteway and failed to pay for them. ***Id.***, ¶6. Liteway sued Menard, and Menard failed to timely answer Liteway's complaint, resulting in a default judgment. ***Id.***, ¶7. Menard then commenced its own action against Liteway, alleging the lighting fixtures were defective and some had been returned. ***Id.***, ¶¶2, 11. Menard conceded that it discovered the alleged defects and returned the lighting fixtures before Liteway commenced its action. ***Id.***, ¶6.

¶11 Our supreme court concluded that Menard's claims were barred by the doctrine of claim preclusion and the common-law compulsory counterclaim

[2] Bruce also relies on our supreme court's decision in ***Kruckenberg v. Harvey***, 2005 WI 43, 279 Wis. 2d 520, 694 N.W.2d 879, particularly the court's commentary about how the facts in that case might relate to the second element of claim preclusion. ***Kruckenberg*** is not useful here for several reasons. The ***Kruckenberg*** court expressly declined to decide the claim preclusion issue, instead creating an exception to that doctrine. Also, ***Kruckenberg*** did not involve the permissive counterclaim statute or the common-law compulsory counterclaim rule. Finally, unlike here, both cases in ***Kruckenberg*** revolved around boundary disputes, which was the basis for the discussion relied upon by Bruce. ***Id.***, ¶¶30-34, 40.

rule. ***Id.***, ¶¶55-56. A central issue was whether the parties' claims arose from the same transaction, as required by the second element of claim preclusion. ***Id.***, ¶29. In concluding the parties' claims arose from the same transaction, the court noted that Menard failed to pay the amount sought in Liteway's action *because* of the allegedly defective and returned goods that formed the basis of Menard's action. ***Id.***, ¶38.

¶12 The court also emphasized that the facts underlying Menard's claims existed and were known when Liteway commenced its initial suit. ***Id.*** The court expressly declined to adopt a bright-line rule that a sale and return of goods constitute a single transaction because, in some situations, defects in goods might not be discovered, or be legally required to be discovered, until after an action for payment is completed. ***Id.***

¶13 Ultimately, the ***Menard*** court's holding was limited and fact-specific. The court described the issue and its holding as follows:

> The issue presented is whether a buyer's claims based on credit for returned goods are barred under the doctrine of claim preclusion and the common-law compulsory counterclaim rule *when* the seller had previously sued the buyer for breach of contract based on unpaid invoices, a default judgment was entered due to the buyer's failure to timely file an answer, the parties had terminated their business relationship prior to the instigation of the first suit, the defective goods were returned prior to the time the first lawsuit was filed, and the issue of credit for the defective goods was the basis of the entire dispute between the parties that led to the filing of the initial lawsuit. We hold that *under these facts*, the doctrine of claim preclusion and the common-law compulsory counterclaim rule bar any subsequent suit by the buyer for credit for the returned goods.

Id., ¶20 (emphasis added).

¶14 In light of ***Menard***, we conclude that the doctrine of claim preclusion and the common-law compulsory counterclaim rule do not bar Bruce's claims. Bruce's and Harvey's claims simply do not arise from a common nucleus of operative facts.

¶15 The only connection between their claims is a single fact—Harvey's ownership interest in the property neighboring Bruce's.[3] Unlike the sale and return of goods in ***Menard***, there is no sequence of facts here that is common to both Harvey's and Bruce's claims, or that otherwise resembles a single transaction.

¶16 Also, the ***Menard*** court relied upon the fact that Menard did not pay for the goods for which Liteway sought payment in the initial action *because* Menard allegedly returned those goods. ***Id.***, ¶38. Here, by contrast, it is unclear why Bruce did not deliver the deed to Harvey. According to the findings of fact in the initial action, Bruce provided no reason. More importantly, neither party argues that the claim in the first lawsuit involved any boundary dispute.

¶17 Finally, in ***Menard***, the court emphasized that the facts underlying Menard's claims existed and were known before Liteway commenced its action. ***Menard***, 282 Wis. 2d 582, ¶¶38, 40. The same is not true here. At the time of Harvey's action, he had not yet had the property surveyed, discovered the disparity between the fence location and the surveyed boundary line, or removed and relocated the fence. Therefore, these facts could not have supported Bruce's claims at that time. Harvey's arguments imply that Bruce was required to discover

[3] Of course, another common fact is the identity of the parties involved, but that fact relates to a separate element of the claim preclusion analysis not at issue here.

the facts necessary to support his claims at the time of Harvey's action. Yet, Harvey does not sufficiently develop an argument on this point, so we need not address it. *See* ***State v. Gulrud***, 140 Wis. 2d 721, 730, 412 N.W.2d 139 (Ct. App. 1987).

By the Court.—Judgment reversed and cause remanded for further proceedings.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.