**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**June 10, 2003**

**Cornelia G. Clark**
**Clerk of Court of Appeals**



**Appeal No. 02-3253** **Cir. Ct. No. 01-CV-2**

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

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**DAVID GLOSS,**

**PLAINTIFF-APPELLANT,**

**V.**

**LEGEND LAKE PROPERTY OWNERS ASSOCIATION, INC.,**

**DEFENDANT-RESPONDENT.**

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APPEAL from a judgment of the circuit court for Menominee County: THOMAS G. GROVER, Judge. *Reversed and cause remanded with directions*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 HOOVER, P.J. David Gloss appeals a summary judgment granted to Legend Lake Property Owners Association, Inc. The trial court concluded that Gloss's claim against Legend Lake was barred by claim and issue preclusion. We conclude that the trial court erred because the case upon which it relied is not

sufficiently similar to Gloss's to permit application of those preclusive doctrines. We reverse the judgment and remand for further proceedings.

## Background

¶2 Legend Lake is a residential development consisting of forty-seven subdivisions constructed in the 1960s and 1970s. Each subdivision was subject to one of two sets of restrictions. One version required membership in a property owners' association, while the other provided for optional membership. By their terms, both sets were to expire on July 1, 1999.

¶3 Legend Lake recognized the impending expiration and in 1998 revised the restrictions to make them more detailed and perpetual. Both sets also made association membership mandatory. Legend Lake claims it submitted the proposed changes to the property owners for approval and contends that it received majority approval.

¶4 Gloss had purchased a lot prior to 1999 that was apparently subject to the optional membership restrictions. He planned to subdivide the lot into two parcels and construct two separate residences. Before July 1, 1999, the restrictions prevented his building plans. If the restrictions expired, he would be able to build without limitations on size or placement of his buildings. If the restrictions were properly renewed, however, Gloss could not carry out his plans. Consequently, he did not approve the proposed changes and contends they do not apply to him. Gloss brought this action seeking to invalidate the revised bylaws and to declare his rights.

## Related Litigation

¶5 Prior to Gloss's suit, Legend Lake had brought small claims suits against Gordon and Patricia Brockman and David LeMay for failure to pay association dues. Legend Lake also sought an injunction to prevent Robert Hermes from constructing a garage on his lot. The small claims cases were consolidated,[1] and Hermes' case was joined for briefing and argument purposes.

¶6 The Brockmans and LeMay claimed that the 1998 revision of the association bylaws was invalid, either because it was impermissible or because it was procedurally flawed. Thus, they argued that the bylaws expired in 1999 and were unenforceable, preventing the association from imposing dues and liens.

¶7 Hermes' case appeared to involve that issue, but more significantly focused on the relationship between a section of the revised bylaws that allowed local ordinances to preempt the bylaws in the event of a conflict. Hermes was trying to construct a garage, which Legend Lake believed violated the bylaws. However, a county ordinance gave Hermes the right to construct the garage, and he defended against the injunction on that ground. Each of the four parties sought summary judgment.

¶8 The court determined that Legend Lake had the right to extend its bylaws when it knew they were scheduled to expire and indicated it would grant judgment to that effect. However, with respect to Hermes' case, the court determined that the 1998 bylaws clearly stated that a local ordinance prevails

[1] The cases were converted to regular civil cases when LeMay and the Brockmans counterclaimed for slander of title.

when there is a conflict; because the Menominee County ordinance allowed Hermes to build his garage even though Legend Lake disapproved, Hermes prevailed.

¶9 The Brockmans and LeMay then indicated that another issue remained—whether Legend Lake followed the appropriate procedure for adopting the bylaw changes. The court agreed that summary judgment would be partial so that the remaining issue could be litigated. At that point, Hermes informed the court that he had not raised this precise issue and, therefore, he would not continue in the litigation.

¶10 The trial court issued two orders. In Hermes' case, the order stated that the Legend Lake bylaws were valid and enforceable, but because the ordinance superceded the bylaws Hermes could build his garage. In the Brockman and LeMay cases, the court granted judgment "as to the present-day enforceability of the 1998 By-Laws amendments" but left open the adoption issue. The Hermes decision became final, but the Brockman and LeMay cases were still in litigation when Gloss filed his case.

**Gloss's Case**

¶11 In Gloss's case, Legend Lake moved for summary judgment on grounds of claim and issue preclusion from the Hermes, Brockman, and LeMay cases. Although Gloss contended his case was different, the court granted judgment to Legend Lake. Our review of the transcript indicates that the sole basis for the judgment was the trial court's comparison of Gloss's suit to the

Hermes case. We conclude, for reasons below, that this was error and we reverse accordingly.[2]

## Standards of Review

¶12 A summary judgment motion presents a question of law that we review de novo. ***Schmitz v. Firstar Bank***, 2002 WI App 123, ¶10, 254 Wis. 2d 732, 647 N.W.2d 379. First, we consider whether there is a dispute as to a material fact. ***In re Estate of Wells***, 174 Wis. 2d 503, 509, 497 N.W.2d 779 (Ct. App. 1993). Second, we look to see if, under the law, the movant is entitled to a judgment. ***Id.*** Here, there is no factual dispute; thus, only a question of law is presented. *See* ***id.*** Questions of law may be decided by summary judgment, and we will reverse only if the trial court incorrectly decided the legal issue. ***Id.***

¶13 Whether claim preclusion applies under a given factual scenario is a question of law that we review de novo. ***NSP v. Bugher***, 189 Wis. 2d 541, 551, 525 N.W.2d 723 (1995). Whether issue preclusion applies is also a question of law we review without deference to the trial court. ***Jensen v. Milwaukee Mut. Ins. Co.***, 204 Wis. 2d 231, 236, 554 N.W.2d 232 (Ct. App. 1996).

## Discussion

¶14 We first reiterate that it is evident from reviewing the transcript that the trial court relied only on the Hermes case. Brockman and LeMay are

[2] The trial court also denied Gloss's motion for summary judgment. Based on the record, it appears this was because the finding of claim and issue preclusion necessarily required such a result. That is, the trial court did not address Gloss's claim on the merits. Our reversal of the summary judgment, therefore, should not be taken as an implication that Gloss, on remand, should be automatically entitled to judgment on his claim. Indeed, the merits of that motion may be the first thing the trial court will wish to consider on remand.

mentioned in passing, but not in the court's overall analysis. *See* ***Wright v. Wright***, 92 Wis. 2d 246, 255, 284 N.W.2d 894 (1979) (judgments are to be construed in the same manner as other written instruments); ***Cohn v. Town of Randall***, 2001 WI App 176, ¶5, 247 Wis. 2d 118, 633 N.W.2d 674 (interpretation of a written instrument is a question of law). As explained below, Hermes was the only case upon which the court could rely because it was the only final decision. However, the trial court erred by applying the Hermes case to conclude that Gloss's suit was precluded.

## I. Claim Preclusion

¶15 In order for earlier proceedings to act as a claim-preclusive bar in relation to a later suit,

> the following factors must be present: (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.

***NSP***, 189 Wis. 2d at 551.

¶16 Legend Lake concedes that the Brockman and LeMay cases contained only partial summary judgments at the time Gloss filed his suit. Legend Lake contends, however, that the judgments are final to the extent that they are the law of the case. We reject the notion that the Brockman and LeMay cases are final because the time for appeals has not expired or been exhausted and therefore the "law of the case" may yet be changed. For this reason—lack of finality—neither LeMay nor Brockman could preclude Gloss's case. Thus, the trial court

properly relied only on the Hermes case and only that case remains for us to analyze under the claim preclusion factors.[3]

### A. Identity Between the Parties or Privies

¶17 We must consider whether Gloss and Hermes are parties in privity. "Privity exists when a person is so identified in interest with a party to former litigation that he or she represents precisely the same legal right in respect to the subject matter involved." ***Pasko v. City of Milwaukee***, 2002 WI 33, ¶16, 252 Wis. 2d 1, 643 N.W.2d 72. "In other words, privity compares the interests of a party to a first action with a nonparty to determine whether the interests of the nonparty were represented in the first action." ***Id.***, ¶18. Whether privity exists is a question of law. *See* ***id.***, ¶16.

¶18 Legend Lake contends that because the underlying issue in both cases is whether the 1998 bylaws are enforceable, there is privity. We disagree. It is apparent to us from the transcript that the validity of the bylaws was irrelevant to Hermes' case. Hermes' legal rights to construction were conveyed strictly by county ordinance. The court's ruling on the bylaws in Hermes' case was a product of the consolidation, not the merits. Notwithstanding its inclusion in the judgment, the court's commentary on the bylaws was, with respect to Hermes, dicta.

¶19 Gloss, by contrast, has no rights conveyed by ordinance. A determination of his rights necessarily requires a determination on the validity of the bylaws.

[3] It is undisputed that the Hermes decision is final.

¶20 Because all three factors must be present for a defense of claim preclusion, we could stop our analysis here. However, we choose to also address the "identity of causes of action" factor.

### B. Identity Between Causes of Action

¶21 Wisconsin has adopted a transactional approach to determine whether two suits involve the same cause of action. ***NSP***, 189 Wis. 2d at 553. This approach is derived from RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1982), ***id.***, and can be summarized as "if both suits arise from the same transaction, incident or factual situation, [claim preclusion] will generally bar the second suit." ***Id.*** at 554 (citation omitted). What factual grouping constitutes the same "transaction" is to be determined pragmatically. ***Id.***

¶22 The claims are different here. In Hermes' case, Legend Lake sought injunctive relief against Hermes. Hermes was able to defend on the basis of the county ordinance, wholly independent of the actual validity of the bylaw changes. Here, Gloss seeks to repudiate the entire set of bylaw changes. The facts are different, and, because Hermes could be decided wholly independently of the bylaws, the underlying transactions differ as well.

## II. Issue Preclusion

¶23 Issue preclusion also requires a final judgment in the prior action, again making only the Hermes case relevant here. *See* ***In re Parrish***, 2002 WI App 263, ¶14, 258 Wis. 2d 521, 654 N.W.2d 273. Before a court may employ issue preclusion against a nonparty to the prior action, it must apply the "fundamental fairness" test. ***Jensen***, 204 Wis. 2d at 237. This involves consideration of some or all of the following factors:

> (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 [issue preclusion] to be fundamentally unfair, including inadequate opportunity or incentive to obtain a full and fair adjudication in the initial action?

***Id.*** at 237-38.

¶24 Gloss could not have obtained review of the judgment. He was not a party to Hermes' case and would have no standing to challenge the judgment. This factor weighs against preclusion.

¶25 The central issue in Hermes' case could be decided independently of the bylaws' legal merit. Here, the legality of the bylaws must be determined. The question of law is different. This also weighs against preclusion.

¶26 Even if the issue in the Hermes case were the bylaws, the issue has not been fully litigated. As Brockman and LeMay pointed out in their cases, an issue regarding the adoption of the bylaws may exist. Hermes never explored this because he did not need to—his case would have come out the same regardless of the underlying determination on the bylaws. Thus, with the issue not fully resolved in Hermes' case, "relitigation of the issue" would likely be necessary or desirable in Gloss's case. This factor weighs against preclusion.

¶27 It is inappropriate to apply issue preclusion if the burden of proof for the party seeking preclusion was lower in the first action than in the second.

***Jensen***, 204 Wis. 2d at 239. While both cases involve the "civil" burden of proof and persuasion, that burden was on Legend Lake as the plaintiff in the first action. Here, it falls on Gloss. This factor could arguably favor preclusion.

¶28 Finally, regarding "individual circumstances," Legend Lake contends that Gloss was aware of the litigation against the Brockmans, LeMay, and Hermes and could have intervened at any point. While Gloss's attorney reluctantly stated that he "guessed" Gloss could have done so, we think it unreasonable to conclude that Gloss should have intervened in Legend Lake's injunction action. Gloss had no reason to try to stop Hermes from building his garage, nor did Gloss seek to preempt the bylaws through use of the county ordinance. We also think it unreasonable to contend Gloss should have intervened in two small claims cases, each seeking payment of $29 in dues. This factor weighs against preclusion.

¶29 Based on the factors of the fundamental fairness test, we conclude that issue preclusion would be improper in this case. Hermes' case is factually and legally distinct from Gloss's.

¶30 The trial court could not have properly relied on the Brockman and LeMay cases in claim or issue preclusion analysis because neither contained a final judgment. In any event, it did not rely on these cases. The Hermes case, while final, is insufficiently similar to Gloss's to apply either claim or issue preclusion. Accordingly, we reverse the summary judgment and remand this case to the trial court for further proceedings.

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

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