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

**February 9, 2011**

**A. John Voelker**
**Acting Clerk of Court of Appeals**



**Appeal No. 2009AP2920** **Cir. Ct. No. 2008CV514**

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

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**DAVID J. MERTEN AND ROSE M. MERTEN,**

**PLAINTIFFS-APPELLANTS,**

**V.**

**ESTATE OF SYLVESTER E. STRAUSS, BY KRISTINE A. GLEICHNER, PERSONAL REPRESENTATIVE, DALE A. GLEICHNER, KRISTINE A. GLEICHNER AND PATRICK GLEICHNER,**

**DEFENDANTS-RESPONDENTS.**

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APPEAL from an order of the circuit court for Manitowoc County: DARRYL W. DEETS, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Anderson, J.

¶1 ANDERSON, J. David and Rose Merten appeal from a final order granting summary judgment to the Estate of Sylvester E. Strauss, by Kristine A.

Gleichner, personal representative, Dale A. Gleichner, Kristine A. Gleichner and Patrick Gleichner, and denying the Merten's motion for summary judgment. Because we conclude that all of the elements of claim preclusion have been met and that it was properly applied, we affirm the circuit court.

¶2 The Mertens purchased their current homestead and surrounding acreage from Sylvester and Shirley Strauss in 1997. At the time of the purchase, the Mertens also purchased the right of first refusal (ROFR) to purchase additional parcels of the Strausses' land.

¶3 After the Mertens purchased their homestead, the Strausses subdivided their remaining tracts of land into lots 1-6. The Strausses' home on lot 2 was exempt under the terms of the Merten's ROFR. All other lots remained subject to the Merten's ROFR.

¶4 Shirley preceded her husband Sylvester in death. Following Shirley's death, their daughter Kristine Gleichner was appointed as the personal representative of the Strauss Estate under Sylvester's will dated August 18, 2005. Sylvester's will also stated that "my daughter Kristine Gleichner shall have a first option to purchase my home or any other land contiguous to it for the then existing market value." The property referenced therein was the same property referred to in the ROFR as tracts 3.1, 3.4 and 3.5 of the certified survey map, less formally known as lots 1, 3, 4 and 6.

¶5 Sylvester passed away on September 2, 2005. However, before his death, he sold lot 6 to Kristine, her husband Dale and her son Patrick, as joint tenants, by way of a land contract executed on May 13, 2005, and recorded in the Manitowoc County Register of Deeds office on May 16, 2005.

¶6 The agreement stated that if Sylvester "dies during the term of this Land Contract, said Land Contract shall be considered paid in full as of his date of death." Thus, following Sylvester's death, Kristine and her family were absolved of any further payment obligation on lot 6. Also Kristine was afforded, according to Sylvester's last will and testament, the "first option to purchase my home or any other land contiguous to it [lots 1, 2, 3 and 4] for the then existing market value."

¶7 On November 1, 2005, the Estate—by its personal representative, Kristine—accepted Kristine's and her family's offer to purchase her father's home, lot 2, and the adjoining lots 1, 3 and 4. Subsequently, Kristine and her family learned that Sylvester had, ten years earlier, granted a ROFR to the Mertens on lots 1, 3, 4 and 6. On December 2, 2005, Kristine contacted the Mertens by phone and indicated that she just learned that they had a ROFR on her father's property. Negotiations followed, but an agreement could not be reached.

¶8 In what we will call Merten I (Manitowoc county case No. 2006CV230), the Mertens sued the Estate for breach of the ROFR by accepting the Gleichners' offer to purchase lots 1, 3 and 4 without giving the Mertens the opportunity to exercise their ROFR.

¶9 The Merten I complaint, filed May 3, 2006, did not expressly mention the land contract that transferred ownership of lot 6 to the Gleichners. However, shortly after filing that complaint, in the summer of 2006, David Merten stated that he was doing research at the courthouse and found the land contract for the transfer of lot 6. This is when he discovered that lot 6 had been sold without him having been given notice and a chance to buy it under his ROFR agreement.

¶10 Thus, the Mertens became aware of their claim to lot 6 during the pendency of Merten I and well within the time limits[1] to amend the Merten I complaint to include lot 6. Moreover, David admits that he and his attorney agreed lot 6 should be included in the Merten I suit. Nevertheless, the Mertens

[1] WISCONSIN STAT. § 802.09 (2007-08) provides in part:

> **Amended and supplemental pleadings. (1)** AMENDMENTS. A party may amend the party's pleading once as a matter of course at any time within 6 months after the summons and complaint are filed or within the time set in a scheduling order under s. 802.10. Otherwise a party may amend the pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given at any stage of the action when justice so requires. A party shall plead in response to an amended pleading within 20 days after service of the amended pleading unless: a) the court otherwise orders; or b) no responsive pleading is required or permitted under s. 802.01(1). If a defendant in the action is an insurance company, if any cause of action raised in the original pleading, cross-claim, or counterclaim is founded in tort, or if the party pleading in response is the state or an officer, agent, employee, or agency of the state, the 20-day time period under this subsection is increased to 45 days.
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> ….
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> **(3)** RELATION BACK OF AMENDMENTS. If the claim asserted in the amended pleading arose out of the transaction, occurrence, or event set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the filing of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against such party, the party to be brought in by amendment has received such notice of the institution of the action that he or she will not be prejudiced in maintaining a defense on the merits, and knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against such party.

All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

neglected to amend the Merten I complaint. Instead, they referred to the lot 6 issue sometime later during discovery.

¶11 At the summary judgment hearing, the circuit court rejected the Merten's attempt to include the lot 6 issue, stating that the Mertens had not properly pleaded it:

> There was a reference in the last pleading filed by the plaintiffs to Lot 6, but I did not see that referenced in the complaint and I am not issuing any ruling on Lot 6 today. I frankly don't know anything about that and I don't believe that the issue was raised by the pleadings in this case.

¶12 A trial proceeded on the value of lots 1, 3 and 4 which resulted in an order for judgment and judgment in the Merten's favor on May 14, 2008. The court ruled that the three lots have a fair market value of $15,000 each. The court indicated that the Mertens shall exercise their right of first refusal, including all other provisions regarding warranty deed, etc., within twenty-one days from May 6, 2008—the date of its oral ruling to the parties—by advising the Estate "of their intent to purchase the real estate" at the prices determined by the court. The court specifically referenced "Lot 1, Lot 3, and Lot 4" as "the subject of this action." It further advised that "this Judgment hereby disposes of the entire matter between the parties" and confirmed that it was final for purposes of appeal.

¶13 Having succeeded in their claim over lots 1, 3 and 4 in Merten I, the Mertens filed a new complaint attempting to revive their right to purchase lot 6 under the same ROFR agreement. The Mertens asked the court to declare the land contract from Strauss to the Gleichners null and void and divest the defendants of any interest in lot 6 except to effectuate the transfer of the same to the Mertens.

¶14 All parties moved for summary judgment in what we will call Merten II, the present case. A hearing on the motions was held on October 5, 2009. In denying the Merten's summary judgment motion and granting summary judgment to the Estate and the Gleichners, the circuit court concluded that under the doctrine of claim preclusion, the Mertens waived their ROFR claim to lot 6.[2] The Mertens appeal.

¶15 Generally, we review a grant or denial of summary judgment de novo. ***Singer by Cohen v. Jones***, 173 Wis. 2d 191, 194, 496 N.W.2d 156 (Ct. App. 1992). However, as to equitable claims or defenses, if the circuit court has determined that there are no material issues of fact for trial, the court must further determine whether, in its discretion, any equitable relief should have been granted. ***Id.*** at 194-95. In such a case, we apply a two-tiered standard of review. ***Id.*** As to the legal issues, the de novo standard applies; as to the decision whether to grant equitable relief, the erroneous exercise of discretion standard applies. ***Id.*** When we review a circuit court's exercise of discretion, we examine the record to determine whether the circuit court logically interpreted the facts, applied the proper legal standard, and used a demonstrated rational process to reach a conclusion that a reasonable judge could reach. *See* ***Nettesheim v. S.G. New Age Prods., Inc.***, 2005 WI App 169, ¶9, 285 Wis. 2d 663, 702 N.W.2d 449.

[2] Because we affirm solely on claim preclusion, we do not address the other arguments proffered by the parties nor do we discuss the other reasons the court gave for granting summary judgment to the Estate and the Gleichners. Because our conclusion that claim preclusion applies disposes of the appeal, we need not consider alternative rationale for the circuit court's decision. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (as one sufficient ground for support of the judgment has been declared, there is no need to discuss others).

¶16 In Wisconsin, the doctrine of claim preclusion[3] has three elements:

> (1) identity between the parties or their privies in the prior and 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.

***Kruckenberg v. Harvey***, 2005 WI 43, ¶21, 279 Wis. 2d 520, 694 N.W.2d 879. "In effect, the doctrine of claim preclusion determines whether matters undecided in a prior lawsuit fall within the bounds of that prior judgment." ***Id.***, ¶22.

¶17 The doctrine of claim preclusion provides that a final judgment on the merits in one action bars parties from relitigating any claim that arises out of the same relevant facts, transactions or occurrences. ***Id.***, ¶19. Furthermore, when the doctrine of claim preclusion is applied, a final judgment on the merits will ordinarily bar all matters which were litigated or which might have been litigated in the former proceedings. ***Id.***

¶18 Claim preclusion thus provides an effective and useful means to establish and fix the rights of individuals, to relieve parties of the cost and aggravation of multiple lawsuits, to conserve judicial resources, to prevent inconsistent decisions, and to encourage reliance on adjudication. ***Id.***, ¶20. The doctrine of claim preclusion recognizes that "endless litigation leads to chaos; that certainty in legal relations must be maintained; that after a party has had his [or

[3] "In Wisconsin, the term 'claim preclusion' has replaced 'res judicata.'" ***Barber v. Weber***, 2006 WI App 88, ¶11 n.3, 292 Wis. 2d 426, 715 N.W.2d 683. Thus, this opinion will refer to claim preclusion, even though the record and case law at times uses the term res judicata.

her] day in court, justice, expediency, and the preservation of the public tranquility requires that the matter be at an end." ***Id.*** (citation omitted).

¶19 On appeal, the Mertens argue that their claims are two distinct claims, and thus, not barred by claim preclusion: The Mertens offer the following characterizations as distinctions: (1) Claim one is their claim over lot 1, 3 and 4, while claim two is their claim over lot 6; (2) The owner of lots 1, 3 and 4 is the Estate, while the owner of lot 6 is the Gleichners; (3) The defendant in the first case, Merten I, is the Estate, while the defendant in this case is the Gleichners and the Estate; (4) The cause of action in Merten I is for specific performance of the Merten's ROFR, while the cause of action in this case is for declaratory judgment that the sale of lot 6 violates the Merten's ROFR; (5) In Merten I, ownership of lots 1, 3 and 4 was never transferred, while in this case, ownership of lot 6 was transferred to the Gleichners before Sylvester Strauss died; (6) In Merten I, the alleged breach of the Merten's ROFR is that the Estate accepted the offer to purchase lot 1, 3 and 4 from the Gleichners; here, the alleged breach of the Merten's ROFR is that Sylvester Strauss sold lot 6 to the Gleichners.

¶20 The Gleichners and the Estate counter the Mertens attempt at distinguishing the claims and argue that all elements of claim preclusion have been satisfied, and thus, this claim is precluded. They emphasize that what is relevant is not the title given to the causes of action, but the origin of those causes of action. The Merten's claims are not separate and distinct because they are based on breach of the same contract, i.e., the right of first refusal agreement.

¶21 We agree. We are not swayed by the Merten's attempt at distinguishing their claim to lots 1, 3 and 4 as separate and distinct from their claim to lot 6. All elements of claim preclusion are satisfied.

¶22 The first element of claim preclusion requires there to be an identity between the parties or their privies in the prior and present suits. *See* ***id.***, ¶21. We acknowledge that the parties in the two actions are not exactly the same. However, they need not be because there is an identity of parties when the parties are, "for the most part, identical." ***Wickenhauser v. Lehtinen***, 2007 WI 82, ¶¶28-29, 302 Wis. 2d 41, 734 N.W.2d 855. 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.

¶23 In Merten I, the Mertens sued the Estate of Sylvester Strauss. The Mertens argued the right to buy lots 1, 3 and 4 was triggered by an offer to purchase the lots from the Estate by Kristine and Dale Gleichner. Thus, although Kristine and Dale were not parties to the action as individuals, they were involved in triggering the ROFR by their offer to purchase lots 1, 3 and 4 and their interests were at stake. Kristine was also the personal representative of the Estate of Sylvester Strauss.

¶24 Here, in Merten II, the Mertens are again plaintiffs; the Estate is again a defendant, and Kristine remains its personal representative. Additionally, Kristine, Dale and their son Patrick are defendants. Similar to the Gleichner's offer to purchase lots 1, 3 and 4 triggering the Merten's ROFR in Merten I, the Gleichner's purchase of lot 6 by land contract triggered the Merten's ROFR in Merten II.

¶25 We are satisfied that the parties in the two cases are, "for the most part, identical," ***Wickenhauser***, 302 Wis. 2d 41, ¶¶28-29, and the Estate and the Gleichners in this case are so identified in interest with the Estate in the Merten I

litigation that they now represent the same legal right with respect to the subject matter involved. *See* ***Pasko***, 252 Wis. 2d 1, ¶16. The first element of claim preclusion is satisfied. *See* ***Kruckenberg***, 279 Wis. 2d 520, ¶21.

¶26 As to the second element of claim preclusion, the circuit court's May 14, 2008 order for judgment and judgment stating that "this Judgment hereby disposes of the entire matter between the parties" and confirming that it "is final for purposes of WIS. STAT. § 808.03(1)" is a final judgment on the merits by a court with jurisdiction, satisfying the second element of claim preclusion. *See* ***Kruckenberg***, 279 Wis. 2d 520, ¶21.

¶27 The third element of claim preclusion—whether there is identity of the causes of action in the two suits—poses the most debate between the parties. Nonetheless, it is clear that under Wisconsin's approach, there is identity of the causes of action and the third element of claim preclusion is satisfied. *See* ***id.***

¶28 In ***Kruckenberg***, our supreme court clarified that Wisconsin adheres to the "transactional approach" when determining whether there is identity of claims between the two suits. ***Id.***, ¶25. Under the doctrine of claim preclusion, a valid and final judgment in an action extinguishes all rights to remedies against a defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose. ***Id.*** "The transactional approach is not capable of a 'mathematically precise definition,' and determining what factual grouping constitutes a 'transaction' is not always easy." ***Id.*** (citation omitted). Our supreme court approvingly referred to the explanation given by the RESTATEMENT (SECOND) OF JUDGMENTS § 24(2) (1982) that the transactional approach makes the determination pragmatically, considering such factors as whether the facts are related in time, space, origin, or motivation. *See also*

***Kruckenberg***, 279 Wis. 2d 520, ¶25. RESTATEMENT (SECOND) OF JUDGMENTS § 24(2) provides as follows:

> **(2) What factual grouping constitutes a "transaction", and what groupings constitute a "series", are to be determined pragmatically, giving weight to such considerations as 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 or business understanding or usage.**

*See also* ***Kruckenberg***, 279 Wis. 2d 520, ¶25.

¶29 After approving the Restatement's explanation of the transactional approach, the supreme court went on to explain that the objective in the transactional approach is to see a claim in factual terms and to make a claim co-terminous 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 rights. ***Kruckenberg***, 279 Wis. 2d 520, ¶26. Under the transactional approach, the legal theories, remedies sought, and evidence used may be different between the first and second suits. ***Id.*** The concept of a transaction connotes a common nucleus of operative facts. ***Id.***

¶30 Furthermore, the transactional approach to claim preclusion reflects the expectation that parties who are given the capacity to present their entire controversies shall, in fact, do so. *See* ***id.*** 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 resolution in the earlier action, taking into account practical considerations relating mainly to trial practicality and fairness. *See* ***id.*** The transaction is the basis of the litigative unit

which may not be split. ***Great Lakes Trucking Co., Inc. v. Black***, 165 Wis. 2d 162, 169, 477 N.W.2d 65 (Ct. App. 1991).

¶31 Applying Wisconsin's transactional approach, taking into account practical considerations relating mainly to trial convenience and fairness, it is manifest that the claim asserted in this action should have been presented for resolution in the earlier action. *See* ***Kruckenberg***, 279 Wis. 2d 520, ¶26. It is readily apparent to this court, as it was to the circuit court, that both causes of action arise out of *one* ROFR agreement and its breach. The Merten's Merten I summary judgment motion—in which they urge that lots 1, 3, 4 and 6 "be treated the same"—belies their current attempt to distinguish their claim to lots 1, 3 and 4 from their claim to lot 6. In that motion, the Mertens stated, "It is clear that the [Mertens] have a ROFR on Lot 6 just as plain as the one they have on Lots 1, 3 and 4. Lot 6 must be treated the same as lots 1, 3, and 4."

¶32 We could not agree more.

¶33 While the Mertens had a ROFR claim to lot 6, they did not act upon it in a way in which the court could provide them with relief. The problem—as the circuit court pointed out in Merten I when refusing to rule on lot 6—is that the Mertens presented their "claim" to lot 6 by way of a summary judgment motion; the court did not accept this as a properly pled claim because it was not included in the original complaint, nor was it added in an amended complaint. It was the Mertens then, not the circuit court, who neglected to treat their ROFR on lot 6 "the same as lots 1, 3 and 4."

¶34 Additionally, the record plainly demonstrates that the Mertens were given the capacity to present their entire controversy and chose not to do so. *See* ***Kruckenberg***, 279 Wis. 2d 520, ¶26. By David Merten's own admission, the

Mertens were aware that their claim to lot 6 had been triggered by the land contract shortly after filing their original Merten I complaint and well before the six month time allotted to amend as a matter of course. Moreover, David admits that he and his attorney discussed his lot 6 claim at the time and that they agreed that lot 6 should be included in the Merten I suit.

¶35 It was not.

¶36 We conclude that the transactional approach does not allow the Mertens to reopen this litigation and thwart not only the orderly working of the judiciary but its authority. *See* ***id.***, ¶20 n.14. Claim preclusion "is essential to *judicial operation*, to the orderly working of the judicial branch. If disputants could just reopen their adjudicated disputes, there would be no end to litigation, nor any beginning of authority." ***Id.*** (citation omitted). By neglecting to amend their complaint to include lot 6, the Mertens are precluded from resuscitating this claim.

*By the Court.*—Order affirmed.

Not recommended for publication in the official reports.