COURT OF APPEALS
DECISION
DATED AND RELEASED

July 17, 1996

No. 95-1498

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

JAMES P. ZIENTEK and CAROL A. ZIENTEK,

Plaintiffs-Appellants-Cross Respondents,

v.

ROBERT C. SMITH and COLLEEN M. SMITH,

Defendants-Third Party Plaintiffs-Respondents-Cross Appellants,

v.

HINZE & ASSOCIATES, INC., and DAVID C. HINZE,

Third Party Defendants-Cross Respondents.

APPEAL and CROSS-APPEAL from a judgment and an order of the circuit court for Sheboygan County: JOHN B. MURPHY, Judge. *Affirmed*.

Before Anderson, P.J., Brown and Snyder, JJ.

PER CURIAM. James P. and Carol A. Zientek appeal from an order dismissing several of their claims against Robert C. and Colleen M. Smith on the grounds that a prior judgment regarding a disputed thirty-one feet of property along the boundary between the parties' properties was res judicata and that an affidavit of correction filed by the surveyor had no impact on the prior judgment.[1] The Smiths cross-appeal from a judgment dismissing their third-party complaint against David C. Hinze and Hinze & Associates, Inc. on the grounds that while Hinze was negligent in failing to accurately survey the Smiths' property (resulting in a thirty-one foot discrepancy), the limitations period barred recovery and the Smiths had not established by satisfactory evidence that Hinze violated § 706.13, STATS. (slander of title) by filing an affidavit correcting the survey in June 1992 after the trial court ruled in the Zientek-Smith action that the Zienteks had not established their entitlement under the then-existing survey to the disputed thirty-one feet. The Smiths also challenge the trial court's refusal to award them statutory costs after the last of the Zienteks' claims were dismissed.

Because we agree with the circuit court that the prior judgment is res judicata on the question of the owner of the disputed thirty-one feet, we affirm the order dismissing the Zienteks' claims. Because we conclude that the trial court's factual findings regarding the Smiths' slander of title action against Hinze are not clearly erroneous, that the trial court correctly determined that the Smiths' negligence claims against Hinze and Hinze & Associates were barred on limitations grounds and properly declined to award statutory costs to the Smiths after the Zienteks dismissed their remaining claims in order to commence an appeal, we affirm on the cross-appeal.

The Zienteks and the Smiths have been litigating their interests in a thirty-one foot strip of property since discovering in 1990 a surveying error regarding the boundary between their properties. The Zienteks sued the Smiths in 1991 seeking a declaration of their rights to the disputed property after the Smiths moved a fence thirty-one feet onto what the Zienteks believed was their property. The Smiths moved their fence after learning in 1990 that a survey was

[1] The appeal is taken from the final order entered on April 21, 1995. The order which is the subject of the appeal is a nonfinal order entered by the circuit court on November 30, 1993. This order was not final because it did not dispose of all of the claims between the parties. *See* § 808.03(1), STATS. The April 21, 1995, order resolved the parties' remaining claims.

erroneous and that their property should extend another thirty-one feet into the Zienteks' backyard. In findings of fact, conclusions of law and judgment entered on May 27, 1992, the trial court held that the Zienteks had failed to establish by the requisite burden of proof that they were entitled to prescriptive rights in the disputed property and dismissed the Zienteks' complaint. We affirmed. ***Zientek v. Smith,*** No. 92-1606, unpublished slip op. (Wis. Ct. App. Jan. 13, 1993).

After entry of the May 1992 judgment, David Hinze, the surveyor who was involved in the erroneous survey, filed an affidavit of correction pursuant to § 236.295, STATS., reestablishing the lot line consistent with where it should have been when the survey was first done. After the affidavit of correction was filed, the Zienteks sued the Smiths in May 1993 to have their rights to the thirty-one feet declared by virtue of the affidavit of correction. The Zienteks contended that the affidavit located the boundary at the point relied upon by the parties prior to the relocation of the Smiths' fence.

The trial court ruled that when it denied the Zienteks' claim to the disputed property in May 1992, it necessarily and implicitly determined that the property belonged to the Smiths.[2] Therefore, the Zienteks' subsequent attempt to litigate rights to the property was barred on res judicata grounds. The court further held that the fact that Hinze had filed an affidavit of correction subsequent to the May 1992 judgment did not have any impact on the court's previous judgment. In December 1993, the Smiths filed a thirty-party complaint against Hinze and Hinze & Associates alleging intentional or, in the alternative, negligent conduct in the creation of the survey and slander of title for filing an affidavit of correction after the court determined in May 1992 that the thirty-one feet belonged to the Smiths.[3]

On appeal, the Zienteks argue that the court erroneously dismissed their claim on res judicata grounds. In ***Northern States Power Co. v.***

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[2] The court reached this determination based upon the fact that all of the property was originally owned by the Smiths. The Smiths sold a portion of it to the Zienteks. Therefore, there were only two possible owners of the disputed strip.

[3] The disposition of the Smiths' third-party complaint will be discussed when we address the cross-appeal.

Bugher, 189 Wis.2d 541, 525 N.W.2d 723 (1995), our supreme court adopted the term "claim preclusion" to replace the term "res judicata." ***Id.*** at 550, 525 N.W.2d at 727. 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." ***Id.*** (quoted source omitted). "[C]laim preclusion is designed to draw a line between the meritorious claim on the one hand and the vexatious, repetitious and needless claim on the other hand." ***Id.*** (quoted source omitted).

> In order for the earlier proceedings to act as a claim-preclusive bar in relation to the present 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.

Id. at 551, 525 N.W.2d at 728. Whether claim preclusion applies under a given set of facts is a question of law which we review independently. ***Id.***

The parties in the 1991-92 Zientek-Smith action and the parties in the present (1993) action are identical. The May 1992 judgment was entered on the merits in a court of competent jurisdiction. Therefore, our analysis focuses on whether there is an identity between the causes of action asserted in the two suits brought by the Zienteks.

Wisconsin uses a transactional approach to determine whether two suits involve the same cause of action. ***Id.*** at 553, 525 N.W.2d at 728. "[I]f both suits arise from the same transaction, incident or factual situation, claim preclusion generally will bar the second suit." ***Id.*** at 554, 525 N.W.2d at 729 (quoted source omitted). In the first action, the Zienteks sought a declaration of rights with regard to the disputed thirty-one feet of property. They were unsuccessful in that suit. After the surveyor filed an affidavit of correction allegedly realigning the property boundary consistent with the parties' understanding prior to 1990, the Zienteks sought to enforce their rights based upon the altered public record.

"[T]he transactional view of claim preclusion requires the presentation in the action of all material relevant to the transaction without artificial confinement to any substantive theory or kind of relief ...." ***Id.*** at 555, 525 N.W.2d at 729 (quoted source omitted). If there are a number of theories or approaches which may support a party's claim to relief arising from the same factual underpinnings, they must be brought in the same action or be barred from future consideration. ***Id.***

The error in the survey was known or capable of being known at the time the Zienteks commenced their 1991 action seeking a declaration of rights in the disputed strip of property. When the Smiths discovered the survey error and moved their fence onto what the Zienteks perceived to be their property, the Zienteks were on notice that the Smiths asserted a claim to the property. Because the basis for the Smiths' claim to the property was discoverable in the first action and could have been the subject of further investigation, we conclude that the issue could have been fully litigated in that case. We discern nothing which would have prevented the Zienteks from fully litigating in the first action the location of the true boundary between their property and the Smiths' property.

We conclude that claim preclusion is satisfied here, and the circuit court did not err in dismissing the Zienteks' second attempt to assert their rights to the disputed thirty-one feet of property, regardless of subsequent developments involving the filing of an affidavit of correction.

We now turn to the cross-appeal arising from the dismissal of the Smiths' third-party complaint and the trial court's refusal to award the Smiths statutory costs after the Zienteks dismissed their remaining claims to commence an appeal.

After a bench trial, the court found that the error in the certified survey map was discovered in 1990 and related to the erroneous placement of the boundary markers, resulting in an approximate thirty-one foot discrepancy. When the Smiths learned of the error, they moved their fence an additional thirty-one feet into the Zienteks' backyard. The court found that the surveyor, an employee of Hinze & Associates, negligently made the survey and that such negligence could be imputed to Hinze & Associates. Nevertheless, the court

concluded that the limitations period for pursuing the surveyor had expired, and therefore the corporation could not be held vicariously liable.

On the question of slander of title under § 706.13, STATS., resulting from Hinze's filing of an affidavit of correction, the court noted that in order for there to be liability, Hinze had to know that the affidavit was false, sham or frivolous. The court found that there was no clear, satisfactory and convincing evidence of this.[4]

Slander of title is addressed in § 706.13(1), STATS., which provides in pertinent part:

> [A]ny person who submits for filing, docketing or recording ... any other instrument relating to the title in real or personal property, knowing the contents or any part of the contents to be false, sham or frivolous, is liable in tort to any person interested in the property whose title is thereby impaired ....

Where the trial court acts as the finder of fact, it determines the weight of the evidence and the credibility of the witnesses, and we will not overturn those findings unless they are clearly erroneous. *See* ***Micro-Managers, Inc. v. Gregory,*** 147 Wis.2d 500, 512, 434 N.W.2d 97, 102 (Ct. App. 1988). The court found that Hinze believed that his affidavit was necessary to correct the erroneous survey. The court found that while Hinze was probably wrong in filing the affidavit and relying on legal advice to do so, he did not have the requisite level of knowledge that the affidavit was false, sham or frivolous. This finding is not clearly erroneous and is therefore sustained on appeal.[5]

The Smiths next argue that their negligence claim against Hinze was not barred by the statute of limitations. The trial court ruled that § 893.37,

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[4] Nevertheless, the court required Hinze to rescind the affidavit of correction.

[5] The Smiths do not direct us to any portion of Hinze's testimony indicating that he had the requisite knowledge that the affidavit was false, sham or frivolous.

STATS., applied. That statute states: "No action may be brought against an engineer or any land surveyor to recover damages for negligence, errors or omission in the making of any survey nor for contribution or indemnity related to such negligence, errors or omissions more than 6 years after the completion of a survey."

The trial court found that the survey was completed by January 2, 1980, and Hinze was negligent in failing to accurately survey the Smiths' property. However, the court concluded that § 893.37, STATS., barred any recovery against Hinze personally. The court further concluded that where the limitations period bars recovery against the employee, the employer (Hinze & Associates) cannot be liable under respondeat superior.[6]

We agree with the trial court's analysis. The Smiths pled negligence. Therefore, the limitations period of § 893.37, STATS., applied.

The Smiths argue that the "discovery rule" of ***Hansen v. A. H. Robins Co.,*** 113 Wis.2d 550, 560, 335 N.W.2d 578, 583 (1983), applies such that their 1990 discovery of the survey error was the date on which their negligence claim accrued—not the date the survey was completed.

The ***Hansen*** discovery rule does not apply to all tort actions. "[W]hen a statute establishes a definite point of accrual [of a cause of action], the ***Hansen*** discovery rule does not apply." ***Skrupky v. Elbert,*** 189 Wis.2d 31, 55, 526 N.W.2d 264, 273 (Ct. App. 1994). When the plain language of the limitations statute measures the time from the act or transaction, such has been deemed a "legislatively created 'non-discovery rule' outside the reach of ***Hansen.***" ***Id.*** (quoted source omitted).

Section 893.37, STATS., requires commencement of an action against a land surveyor to recover damages for negligence, errors or omission in

[6] "Under the doctrine of respondeat superior, an employer is responsible to third parties for the negligent conduct of its servants." ***Kashishian v. Port,*** 167 Wis.2d 24, 33, 481 N.W.2d 277, 280 (1992).

the making of any survey within six years after completion of the survey. The legislature has defined the date on which the claim accrues, i.e., the date the survey was completed. Here, there is no question that the survey was completed on January 2, 1980. Therefore, the ***Hansen*** discovery rule is inapplicable, and the trial court did not err in holding that the Smiths' cause of action against Hinze was barred.

We reject the Smiths' argument that the survey was not completed until Hinze filed the affidavit of correction in June 1992. The Smiths' argument is necessarily premised on construction of the phrase "completion of a survey" in § 893.37, STATS. Construction of a statute is a question of law which we undertake independently. ***Voss v. City of Middleton,*** 162 Wis.2d 737, 749, 470 N.W.2d 625, 629 (1991). To ascertain the legislature's intent, we resort to the language of the statute itself. ***Id.*** If it is clear and unambiguous, we are prohibited from looking beyond the language of the statute to ascertain its meaning. ***Id.***

The phrase "completion of a survey" is not ambiguous and other than arguing that completion of a survey should also mean that the survey was completed accurately, the Smiths do not offer us any compelling reason to deem this part of the statute ambiguous.

The Smiths also argue that the trial court erred in ruling that because their action against Hinze was barred on limitations grounds, so was their action against the employer corporation, Hinze & Associates. The Smiths argue that § 893.37, STATS., does not apply to the corporate employer of the surveyor and therefore their claim against Hinze & Associates should not have been dismissed. Other than claiming that this result is inequitable, the Smiths do not offer us any authority for the proposition that Hinze & Associates remained liable to them under respondeat superior when the employee who erroneously surveyed the property cannot be held liable due to the expiration of the statute of limitations. We decline to craft this argument for the Smiths. Therefore, we will not address it further. *See* ***Vesely v. Security First Nat'l Bank,*** 128 Wis.2d 246, 255 n.5, 381 N.W.2d 593, 598 (Ct. App. 1985).

The final issue the Smiths raise in their cross-appeal is their claim for statutory costs against the Zienteks after the Zienteks' claims were

dismissed. Several of the Zienteks' claims were dismissed in November 1993. In an August 1994 hearing before the court, the Zienteks moved to dismiss their remaining claims to position the matter for an appeal of the trial court's prior claim preclusion ruling.[7] The Zienteks stated that if the court decided to impose costs on the dismissed claims, they would proceed to trial. The Smiths argued that if all of the Zienteks' causes of action were dismissed, they were entitled to statutory costs.

The court determined that the Zienteks had the right to dismiss their causes of action and that the award of statutory costs was discretionary with the court. The court declined to award costs in light of the public policy of encouraging less litigation.

On appeal, the Smiths argue that dismissal of the Zienteks' remaining claims required an award of costs. The remaining claims were dismissed with prejudice. In dismissals with prejudice, the defendant is protected from the risk of further litigation as to those claims. *See* ***Bishop v. Blue Cross & Blue Shield,*** 145 Wis.2d 315, 318, 426 N.W.2d 114, 116 (Ct. App. 1988). Under § 805.04(2), STATS., the court may grant dismissal of a plaintiff's claims "upon such terms and conditions as the court deems proper." Here, the court did not deem costs to be a proper condition of the dismissal. This is discretionary with the trial court. *See* ***Dunn v. Fred A. Mikkelson, Inc.,*** 88 Wis.2d 369, 380, 276 N.W.2d 748, 753 (1979). A discretionary decision will be affirmed if there is any reasonable basis for it. ***Id.*** The trial court gave its reasons for refusing to award costs to the Smiths, and those reasons support the trial court's exercise of discretion.

By the Court.—Judgment and order affirmed.

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

[7] The Smiths were unwilling to stipulate to dismissal of the remaining claims.