COURT OF APPEALS
DECISION
DATED AND RELEASED

August 7, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-2024

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

SOMMERS ESTATES COMPANY, a joint venture, JOHN CARR, individually and as general partner of KATERI INVESTMENTS, a limited partnership, and ELMER SOMMERS, individually and as joint venturer,

Plaintiffs-Appellants,

v.

CITY OF NEW BERLIN,

Defendant-Respondent.

APPEAL from an order of the circuit court for Waukesha County: PATRICK L. SNYDER, Judge. *Affirmed*.

Before Brown, Nettesheim and Snyder, JJ.

PER CURIAM. Sommers Estates Company, John Carr, Kateri Investments and Elmer Sommers (hereinafter, Sommers) appeal from an order

dismissing their action against the City of New Berlin. The sole issue is whether their action is barred by a prior action against the City. We conclude that the doctrine of claim preclusion bars this action and we affirm the order of the circuit court.

Sommers entered into Subdivider's Agreements[1] with the City for the development of a subdivision of single-family residences named Sommerset Gardens. In April 1992, Sommers filed a suit against the City for the excess cost of constructing storm sewers. That action was dismissed and the dismissal affirmed on appeal. ***Sommers Estate Co., et al. v. City of New Berlin***, No. 94-1119, unpublished slip op. (Wis. Ct. App. Apr. 12, 1995).

This action was commenced in September 1994 and alleged the taking of certain land without just compensation, the City's breach of the developer's agreements, and fraudulent conduct by the City regarding sanitary sewer charges, water main connection charges and water fees. The circuit court concluded that these claims arose out of the same transaction as the first suit and that the claims could have been litigated in the first suit. It dismissed the action.

Claim preclusion, or res judicata, limits relitigation of issues that were or might have been litigated in former proceedings. ***A.B.C.G. Enters. v. First Bank Southeast***, 184 Wis.2d 465, 473, 515 N.W.2d 904, 907 (1994). Whether the doctrine applies under a given set of facts is a question of law which we review de novo. ***Id.*** at 472, 515 N.W.2d at 906. For the first action to bar a second action under claim preclusion, there must be an identity of parties, an identity of causes of action or claims in the two cases, and a final judgment on the merits in the one suit. ***Northern States Power Co. v. Bugher***, 189 Wis.2d 541, 551, 525 N.W.2d 723, 728 (1995).

Here, there is no question that the two suits involve the identical parties. A final judgment in the first action is in place. Thus, the only issue is identity of causes of action.

[1] There were five separate Subdivider's Agreements.

Wisconsin has adopted the transactional approach to determining whether two suits involve the same cause of action. ***Id.*** at 553, 525 N.W.2d at 728. If both suits arise from the same transaction, incident or factual situation, claim preclusion generally bars the second suit. ***Id.*** at 554, 525 N.W.2d at 729. What constitutes the same transaction is 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." ***Id.*** (citing RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1982)).

Sommers argues that although both actions involve the same subdivision, this action is related to different utilities—that is, sanitary sewer and water rather than storm sewers. It also contends that the causes of action are different because the first suit questioned the City's exercise of discretion and this suit seeks damages for breach of contract, fraud and unconstitutional appropriation of land.

Sommers ignores the transactional concept. The prior action was a claim for storm sewer overcosts despite a provision in the developer's agreement that Sommers would pay for the approved drainage system. The claims here arise out of the same negotiations with the City and the same agreements implicated in the first action. Again, Sommers seeks reimbursement of certain costs when the developer's agreement provides otherwise. The claims are related in time, space, origin and motivation. We are not persuaded that each breach of the contract is a separate cause of action under these circumstances. Additionally, the claims made in this suit were known to Sommers at the time the first suit was litigated.[2] The doctrine of claim preclusion extends to issues that could have been litigated. ***A.B.C.G.***, 184 Wis.2d at 473, 515 N.W.2d at 906.

[2] Sommers conceded that it was aware of the existence of the present causes of action when the first suit was filed against the City. The affidavit of John Carr, the general partner of joint venturer Kateri Investments, indicates that when the first suit was filed on the storm sewer charges, for various reasons a decision was made to not include other claims. It explains that only upon learning of the financial loss to be suffered by the investors was Sommers able to appreciate the increased costs resulting from the City's actions and the necessity of this action to recoup allegedly improper overcharges.

Sommers argues that because Wisconsin has a permissive joinder of claims statute, this action is not barred simply because the claims could have been litigated in the first suit against the City. We recognize that Wisconsin does not require mandatory joinder of claims or compulsory counterclaims. ***Stuart v. Stuart***, 140 Wis.2d 455, 466, 410 N.W.2d 632, 637 (Ct. App. 1987), *aff'd,* 143 Wis.2d 347, 421 N.W.2d 505 (1988); § 803.02(1), STATS. However, the statute does not operate to shield the application of claim preclusion. *See* ***A.B.C.G.***, 184 Wis.2d at 476, 515 N.W.2d at 908 (Wisconsin's noncompulsory counterclaim statute overridden by common law compulsory counterclaims). While § 803.02(1) may not require the joinder of all claims, the party who chooses not to join claims does so at the risk that claim preclusion may bar the later assertion because the claims arise out of the same transaction as that already litigated.

We conclude that Sommers' present action shares an identity of cause of action with the first suit. This action is barred by claim preclusion.

By the Court.—Order affirmed.

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