



OFFICE OF THE CLERK  
**WISCONSIN COURT OF APPEALS**

110 EAST MAIN STREET, SUITE 215  
P.O. BOX 1688  
MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880  
TTY: (800) 947-3529  
Facsimile (608) 267-0640  
Web Site: [www.wicourts.gov](http://www.wicourts.gov)

**DISTRICT IV**

January 29, 2016

To:

Hon. Richard G. Niess  
Circuit Court Judge  
215 South Hamilton, Br 9, Rm 5103  
Madison, WI 53703

S. Michael Murphy  
Assistant Attorney General  
P.O. Box 7857  
Madison, WI 53707-7857

Carlo Esqueda  
Clerk of Circuit Court  
Room 1000  
215 South Hamilton  
Madison, WI 53703

Thomas L. Burse  
9296 N. Burbank Avenue  
Milwaukee, WI 53224

Buveck Consultants LLC  
9296 N. Burbank Avenue  
Milwaukee, WI 53224

You are hereby notified that the Court has entered the following opinion and order:

---

2015AP1141

State of Wisconsin v. Thomas L. Burse and Buveck Consultants  
LLC (L.C. # 2013CV3664)

Before Kloppenburg, P.J., Lundsten and Sherman, JJ.

Thomas Burse, pro se, appeals a money judgment in this action by the State against Burse for fraud. Burse contends that the circuit court was precluded from entering a money judgment following the federal bankruptcy court's earlier judgment declaring that Burse's debt to the State was nondischargeable. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2013-14).<sup>1</sup> We summarily affirm.

---

<sup>1</sup> All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

In March 2013, the State commenced an adversary proceeding in Burse's bankruptcy case. The State sought a declaration that Burse's debt to the State was nondischargeable because the debt was obtained by fraud. In September 2013, the bankruptcy court issued a judgment declaring that Burse's debt to the State was nondischargeable.

In November 2013, the State commenced this action against Burse, seeking a money judgment for fraud. Burse moved to dismiss based on claim preclusion, arguing that the State's action was barred by the final judgment issued by the bankruptcy court. *See Northern States Power Co. v. Bugher*, 189 Wis. 2d 541, 550-51, 525 N.W.2d 723 (1995) (claim preclusion bars relitigation of the same cause of action between the same parties following a final judgment on the merits by a court of competent jurisdiction). The court issued an oral ruling denying Burse's motion at a hearing on April 22, 2014. Burse moved for reconsideration, and the court issued an order denying Burse's motion to dismiss on grounds that Burse had not established that any prior matter had preclusive effect warranting dismissal of this action.

Burse then moved to dismiss for failure to state a claim, again arguing claim preclusion, and the court denied the motion to dismiss as untimely. Burse filed another motion for reconsideration of the court's April 22, 2014 oral ruling denying Burse's motion to dismiss based on claim preclusion, and the circuit court issued an order denying reconsideration. The court explained that the bankruptcy action determined only that Burse's debt to the State was nondischargeable, and that Burse's liability under state law had not been adjudicated. The court held a trial on May 14, 2015, and entered a money judgment in favor of the State.

Burse contends that the State's fraud action was barred by claim preclusion following the final judgment of the bankruptcy court declaring Burse's debt to the State nondischargeable.

Burse does not contend that the bankruptcy court actually adjudicated Burse's liability to the State for fraud or the amount of that liability. Rather, Burse contends that the State was precluded from pursuing this fraud action because, according to Burse, the State could have pursued its demand for money damages in the bankruptcy court. *See DePratt v. West Bend Mut. Ins. Co.*, 113 Wis. 2d 306, 310, 334 N.W.2d 883 (1983) (under claim preclusion, "a final judgment is conclusive in all subsequent actions between the same parties as to all matters which were litigated or which might have been litigated in the former proceedings"). Burse also contends that the State failed to file a response brief as required by the court's briefing schedule on Burse's motion for reconsideration, and thus conceded that claim preclusion bars its action. We disagree.

"The burden of proving claim preclusion is upon the party asserting its applicability." *State ex rel. Barksdale v. Litscher*, 2004 WI App 130, ¶13, 275 Wis. 2d 493, 685 N.W.2d 801. Thus, Burse had the burden of proving to the circuit court that claim preclusion applies in this case. The circuit court denied Burse's motion to dismiss by oral ruling on April 22, 2014. However, Burse has not provided us with a transcript of the circuit court's oral ruling, and thus we are unable to review any factual findings by the circuit court in support of its decision. In the absence of a transcript of the court's oral ruling, we must assume that the transcript would support the circuit court's decision to deny Burse's motion to dismiss. *See State Bank of Hartland v. Arndt*, 129 Wis. 2d 411, 423, 385 N.W.2d 219 (Ct. App. 1986) (when an appellate record is incomplete in connection with an issue raised by the appellant, we must assume that the missing material supports the circuit court's ruling).

Moreover, we are not persuaded that claim preclusion bars a state action to recover a debt ruled nondischargeable in federal bankruptcy court. Indeed, the effect of a ruling by the

bankruptcy court that a debt is nondischargeable is to lift the automatic stay of judicial actions to recover the debt. *See* 11 U.S.C. §§ 362(a)(1) and (c)(2)(C) (filing of bankruptcy action stays actions to recover claims against debtor until discharge is denied); 11 U.S.C. § 523(a)(2)(A) (debt obtained by fraud is nondischargeable in bankruptcy). Burse has not cited any case law holding that a state fraud claim for money damages is the “same cause of action” as an adversary bankruptcy proceeding, or that such state fraud claim could have been litigated in an earlier bankruptcy action. Rather, the cases Burse cites in support of his claim preclusion argument are distinguishable and do not persuade us that claim preclusion applies here. *See Matrix IV, Inc. v. American Nat’l Bank & Trust Co. of Chicago*, 649 F. 3d 539, 541-42, 551-52 (7th Cir. 2011) (addressing “questions about the preclusive effect of judgments rendered by a bankruptcy court on later litigation between creditors and a company affiliated with the debtor,” and resolving the case on issue preclusion grounds because the asserted claim had actually been litigated in bankruptcy court); *Crop-Maker Soil Servs., Inc. v. Fairmont State Bank*, 881 F. 2d 436, 436-37, 440 (7th Cir. 1989) (claim preclusion barred action by one creditor against another claiming that defendant creditor’s priority status had been fraudulently obtained, in same court that had adjudicated prior bankruptcy proceedings determining priority of interests of the creditors, because creditor could have challenged other creditor’s actions within the bankruptcy case).

Finally, we are not persuaded that the outcome of this case is determined by the extent to which the State disputed the principles of claim preclusion in the circuit court. Whether claim preclusion applies based on the facts of a given case is a question of law, *see DePratt*, 113 Wis. 2d at 310, and we are not bound by a party’s concession of law, *see Bergmann v. McCaughtry*, 211 Wis. 2d 1, 7, 564 N.W.2d 712 (1997). To the extent Burse is arguing that the circuit court should have granted Burse’s motion for reconsideration as a sanction for the State’s

failure to follow the briefing schedule, we are not persuaded. Burse has not developed any argument that the court was required to impose such a sanction, and we do not consider that argument further.

Therefore,

IT IS ORDERED that the judgment is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

---

*Diane M. Fremgen*  
*Clerk of Court of Appeals*