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**DISTRICT IV**

October 28, 2021

To:

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

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2020AP1677

John Nelson v. Edgerton Hospital and Health Services, Inc.  
(L.C. # 2018CV262)

Before Blanchard, P.J., Kloppenburg, and Graham, JJ.

**Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).**

John Nelson appeals a circuit court order that dismissed Nelson's amended complaint against Edgerton Hospital and Health Services, Inc., in this action, which is case number 2018CV262. 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 (2019-20).<sup>1</sup> We summarily affirm.

In March 2018, Nelson commenced this action against Edgerton Hospital by filing a complaint alleging injuries sustained by Nelson's father in March 2015. The complaint sought damages based on theories of ordinary and per se negligence. In February 2019, the circuit court dismissed this action because Nelson did not then have an appointment as representative of his father's estate. But, the court granted Nelson leave to file an amended complaint. Nelson was subsequently appointed as representative of his father's estate.

On May 21, 2019, Nelson commenced a new action by filing a complaint against Edgerton Hospital claiming medical malpractice under WIS. STAT. ch. 655. This new action was docketed as circuit court case number 2019CV506. Edgerton Hospital moved to dismiss case number 2019CV506, arguing that it was barred by the statute of limitations that applies to medical malpractice claims.

On December 6, 2019, Nelson filed an amended complaint in this action, asserting the same medical malpractice claim that was the subject of the motion to dismiss in case number 2019CV506.

The next event of note occurred in case number 2019CV506. In an oral ruling on December 12, 2019, the circuit court determined that the medical malpractice claim in case

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

number 2019CV506 was barred by the statute of limitations. The circuit court entered an order dismissing case number 2019CV506 “on the merits” and “with prejudice.”

Turning back to this action, on August 19, 2020, after a hearing, the circuit court dismissed Nelson’s amended complaint. The court made the following determinations: the amended complaint was not timely; the amended complaint did not relate back to the original complaint to toll the statute of limitations; and the amended complaint was barred by claim preclusion following the dismissal of the action in case number 2019CV506.

Nelson argues that the circuit court erred by dismissing his amended complaint in this action because, he asserts: (1) the original complaint in this action was dismissed on the mere technical defect that Nelson had failed to renew his appointment as personal representative of his father’s estate at the time of the filing of the original complaint, and Nelson promptly attempted to cure by filing his new complaint in case number 2019CV506; (2) the amended complaint in this action related back to the original complaint, tolling the statute of limitations; and (3) claim preclusion does not apply because the decision to dismiss case number 2019CV506 was not “on the merits” and also because barring the amended complaint in this action would not serve the purpose of claim preclusion to prevent repetitious claims. We conclude that the circuit court properly dismissed the amended complaint in this action based on claim preclusion.<sup>2</sup>

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. *See Northern*

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<sup>2</sup> Because our conclusion that the circuit court properly dismissed this action based on claim preclusion is dispositive, we do not reach the other arguments asserted by the parties or rationales expressed by the circuit court.

*States Power Co. v. Bugher*, 189 Wis. 2d 541, 550-51, 525 N.W.2d 723 (1995). Nelson does not dispute that the amended complaint in this case asserted the same cause of action between the same parties following a final judgment by a court of competent jurisdiction. His only argument based on the elements of claim preclusion is that the final judgment in case number 2019CV506, dismissing the action as untimely under the statute of limitations,<sup>3</sup> was not “on the merits” because it did not reach the substance of Nelson’s claim against Edgerton Hospital. He also asserts that we should apply public policy considerations to reverse the circuit court’s application of claim preclusion here. We are not persuaded.

Nelson argues that the final judgment in case number 2019CV506 was not “on the merits” because it was limited to a determination that the complaint in that action was untimely based on the statute of limitations. He contends that the judgment was not “on the merits” because it did not reach the substance of Nelson’s claim against Edgerton Hospital. However, “a final judgment on the merits need not be the result of a full litigation of the claims in order for claim preclusion to apply.” *State v. Miller*, 2004 WI App 117, ¶28, 274 Wis. 2d 471, 683 N.W.2d 485. Rather, “the common element” that defines “final judgment on the merits” “is that the judgment ends the litigation on the merits of the claim or claims.” *Id.* (observing that both a stipulation and a default judgment may meet the requirement). Here, the judgment in case number 2019CV506 dismissed Nelson’s medical malpractice claim against Edgerton Hospital on

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<sup>3</sup> The transcript of the hearing from case number 2019CV506 in which the circuit court set forth its reasoning for dismissing the action is not in the record for this appeal. However, Nelson asserts that the circuit court dismissed that action because it was filed after the expiration of the statute of limitations. For purposes of this opinion, we assume without deciding that, as Nelson asserts, case number 2019CV506 was dismissed based on the circuit court’s determination that the action was filed beyond the statute of limitations.

the ground that it was filed untimely, thus ending the litigation on the merits of Nelson's claim. Accordingly, it was a final judgment on the merits for purposes of claim preclusion.

Nelson also contends that claim preclusion is not “an ironclad rule which must be implacably applied whenever its literal requirements are met.” See *Sopha v. Owens-Corning Fiberglass Corp.*, 230 Wis. 2d 212, 235-37, 601 N.W.2d 627 (1999) (quoted source omitted) (stating that, “[a]lthough the purposes underlying claim preclusion are important, this court does not blindly apply the doctrine of claim preclusion,” and concluding in that case that an exception to claim preclusion applied due to special circumstances). He asserts that this is not the type of case that claim preclusion is designed to protect against because it does not involve a “vexatious, repetitious and needless claim.” See *Aldrich v. LIRC*, 2008 WI App 63, ¶6, 310 Wis. 2d 796, 751 N.W.2d 866 (quoting authority that traces back to a broad observation by a federal court that claim 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.” (quoted source omitted)). He points out that the amended complaint in this case was filed prior to the circuit court issuing its decision dismissing case number 2019CV506, and that the original complaint in this action predated his commencement of the action in case number 2019CV506. Attempting to borrow concepts from the context of the common-law compulsory counterclaim rule, Nelson argues that a verdict favorable to Nelson in this case would not “undermine the judgment in the first suit or impair the established legal rights” of the parties. See *Kowske v. Ameriquest Mortg. Co.*, 2009 WI App 45, ¶20, 317 Wis. 2d 500, 767 N.W.2d 309. His point in drawing on this doctrine is premised on the fact that the circuit court's dismissal of the action in case number 2019CV506 was based solely on the issue of when the complaint in that action was filed, and did not reach the substance of Nelson's medical malpractice claim. However, we

discern no reason that Nelson could not have raised with the circuit court, in case number 2019CV506, the exact same relation back and tolling arguments related to the amended complaint in this action, based on the timing of the filing of the original complaint in this action, that he now seeks to raise. Thus, it appears that Nelson had a full opportunity to litigate any issues he had related to the statute of limitations in case number 2019CV506, including by pursuing an appeal of any adverse final judgment or order, had he so chosen. Based on the particular circumstances of this case, we are not persuaded that public policy concerns call for reversal of the circuit court's application of claim preclusion. *See Sopha*, 230 Wis. 2d at 236 (explaining that exceptions are to be based on "significant policies" and "must be limited to special circumstances," otherwise "the exceptions will weaken the values of repose and reliance").

Therefore,

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

IT IS FURTHER ORDERED that this summary disposition order will not be published.

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*Sheila T. Reiff*  
*Clerk of Court of Appeals*