COURT OF APPEALS
DECISION
DATED AND FILED

April 7, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 96-2490

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

E. A. RICHARDS, P.E.,

PLAINTIFF-APPELLANT,

v.

GRUNAU COMPANY, INC.,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Milwaukee County: LAURENCE C. GRAM, JR., Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

PER CURIAM. E. A. Richards, P.E., appeals *pro se* from a trial court grant of summary judgment dismissing his claim against Grunau Company, Inc. Richards claims that: (1) the trial court erred in granting Grunau's motion for summary judgment; and (2) counsel for Grunau engaged in unprofessional

conduct, including ex parte communications with the trial court. We reject his claims and affirm.

The relevant facts are undisputed. In May 1990, Richards entered into a contract with Grunau to provide labor and materials for repairs on a metal compactor owned by Michael and Minnie Zizzo. At the conclusion of the project, Grunau received only partial payment for its work. As a result, in January 1991, Grunau sued Richards, in the circuit court for Milwaukee County, for breach of contract. Following a bench trial before Milwaukee County Circuit Judge Michael D. Goulee, judgment was entered in favor of Grunau. Richards did not appeal from that judgment.

At the same time its action against Richards was pending in Milwaukee County, Grunau also sued the Zizzos, in the circuit court for Kenosha County, for unjust enrichment. When the Zizzos failed to answer the complaint, default judgment was entered for Grunau in the Kenosha County case.

In the instant action, filed twenty-two months after judgment was entered against him in the Milwaukee County case, Richards sued Grunau claiming that Grunau's simultaneous pursuit of its two actions, and its alleged failure to disclose the existence of the Kenosha County lawsuit to the Milwaukee County Circuit Court, constituted fraud.

At the motion for summary judgment before Milwaukee County Circuit Judge Laurence C. Gram, Jr., the trial court dismissed Richards's action, concluding that the final judgment entered by Judge Goulee in the preceding Milwaukee County case was conclusive in a subsequent action between these same parties as to all matters that were litigated or that might have been litigated.

Judge Gram also heard testimony regarding Richards's allegation of ex parte communications and concluded that no ex parte communications had occurred.

Richards argues that Judge Gram erred in dismissing his suit based on the doctrine of claim preclusion. Whether preclusion doctrines apply to a given set of facts presents an issue of law which this court reviews without deference to the trial court. *See* ***DePratt v. West Bend Mut. Ins. Co.***, 113 Wis.2d 306, 310, 334 N.W.2d 883, 885 (1983). We conclude that Richards's cause of action was barred under the doctrine of issue preclusion.[1]

"Issue preclusion refers to the effect of a judgment in foreclosing relitigation in a subsequent action of an issue of law or fact that has been actually litigated and decided in a prior action." ***Northern States Power Co. v. Bugher***, 189 Wis.2d 541, 550, 525 N.W.2d 723, 727 (1995). Under the doctrine of issue preclusion, "such a judgment precludes relitigation of issues actually litigated and determined in the prior suit, regardless of whether it was based on the same cause of action as the second suit." ***Michelle T. v. Crozier***, 173 Wis.2d 681, 694 n.13, 495 N.W.2d 327, 333 n.13 (1993). It also requires actual litigation of an issue necessary to the outcome of the first action. *See* ***id.*** at 687, 495 N.W.2d at 330. The modern approach to issue preclusion requires courts to conduct a "fundamental fairness" analysis before applying it. *See* ***Lindas v. Cady***, 183 Wis.2d 547, 559, 515 N.W.2d 458, 463 (1994). Under this analysis, courts may consider whether: (1) the party against whom preclusion is sought, as a matter of law, could have obtained review of the judgment; (2) significant differences in the

[1] Claim preclusion does not apply in the instant case because there is no identity between the causes of action in the two lawsuits. *See* ***Northern States Power Co. v. Bugher,*** 189 Wis.2d 541, 553-54, 525 N.W.2d 723, 728-29 (1995).

quality or extensiveness of the proceedings warrant relitigation of the issue; and (3) matters of public policy and individual circumstances render the application of issue preclusion fundamentally unfair. *See* ***Michelle T.***, 173 Wis.2d at 689, 495 N.W.2d at 330.

Applying these principles to Richards's claim of fraud, we conclude that his suit is barred under the doctrine of issue preclusion. In the course of the previous trial, Richards argued, in essence, that Grunau was fraudulently pursuing two separate actions based upon the same claim. Judge Guolee knew about the Kenosha lawsuit and addressed it in his "Conclusions of Law," stating:

> The alleged lawsuit between Grunau and Zizzos in regards to the work done on the metal compactor is irrelevant to the responsibility of Richards to pay Grunau for the work contracted between Grunau and Richards. Zizzos may be found to be responsible for payment under a theory of unjust enrichment, which would not be based on the contract action here. Richards and Zizzos may be jointly and severally liable for the payment. Once Grunau is made whole[,] the issue of subrogation right may be litigated between Richards and Zizzos.

Because Judge Guolee had already rejected Richards's argument that Grunau was precluded from bringing the action against him because it had simultaneously brought an action against the Zizzos, he cannot relitigate the issue before Judge Gram. Richards could have appealed Judge Guolee's decision in the prior suit, but he chose not to do so. Accordingly, we conclude that the trial court correctly granted summary judgment to Grunau.

Richards also claims that counsel for Grunau engaged in unprofessional conduct, including ex parte communications with the trial court. [2] We disagree.

Supreme Court Rule 20:3.5(b) provides:

> **Impartiality and decorum of the tribunal.** A lawyer shall not:
>
> ….
>
> **(b)** communicate ex parte with [a judge, juror, prospective juror or other official] ... except as permitted by law or for scheduling purposes if permitted by the court. If communication between a lawyer and judge has occurred in order to schedule a matter, the lawyer involved shall promptly notify the lawyer for the other party or the other party, if unrepresented, of such communication[.]

The charge of ex parte communications developed out of a scheduling conference in which both sides were present, with Richards appearing *pro se*. Subsequently, Grunau's counsel contacted Richards's bankruptcy attorney, who had represented him in the bench trial on the breach of contract suit, and informed the bankruptcy counsel that Judge Gram had set a date to hear Grunau's motion for summary judgment. Grunau's counsel told the bankruptcy attorney that she had set forth her argument that Richards's cause of action was barred under the doctrine of claim preclusion and that she believed the trial court agreed with her. When Richards's bankruptcy counsel relayed the details of this conversation to him, Richards, failing to realize that he had been present at the scheduling conference, believed that Grunau's counsel had had this conversation with the trial court in his absence. Richards then wrote a letter to Judge Gram, questioning his and Grunau's counsel's

[2] Although Richards raises a number of allegations of unprofessional conduct, none is supported by the evidence he cites; consequently, we do not address them. *See* ***Barakat v. DHSS***, 191 Wis.2d 769, 786, 530 N.W.2d 392, 398-99 (Ct. App. 1995) (court of appeals need not address "amorphous and insufficiently developed" arguments).

ethics. Counsel for Grunau, on learning of the letter, wrote a letter of explanation to the court. At the hearing on the summary judgment motion, both letters were read into the record. The trial court then questioned Richards regarding his allegations, and concluded that the allegations were completely unfounded because no conversation had occurred between Grunau's counsel and the trial court in Richards's absence. The record supports the trial court's factual findings and legal conclusions.

By the Court.—Judgment affirmed.

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