COURT OF APPEALS
DECISION
DATED AND FILED

November 4, 2026

Samuel A. Christensen
Clerk of Court of Appeals

NOTICE

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

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

Appeal No. 2026AP891 **Cir. Ct. No. 2025SC1229**

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

ELIES FAMILY LP,

PLAINTIFF-APPELLANT,

V.

JAMES D. ELIES,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Walworth County: KRISTINE E. DRETTWAN, Judge. *Affirmed.*

¶1 LAZAR, P.J.[1] Elies Family LP ("Partnership") appeals from a circuit court order granting James D. Elies's motion to dismiss. For the following reasons, this court affirms.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2023-24). All references to the Wisconsin Statutes are to the 2023-24 version.

BACKGROUND

¶2 The Partnership is an Illinois limited partnership established in 1999. The Partnership's assets include a farm property in Elkhorn, WI, at issue in this appeal. The Partnership is managed by its sole general partner, Howard Elies,[2] whose ownership interest consists of a 40.7039% interest held individually as a general and limited partner. Howard is also trustee of the Dorothy Elies Trust, which has an 18.8057% interest in the Partnership as a limited partner. The James D. Elies Trust, of which James is the trustee, has a 40.4904% interest in the Partnership as a limited partner.

¶3 Before filing this case, the Partnership commenced litigation in Illinois to wind down and dissolve the Partnership. The amended complaint in that lawsuit, filed in March 2025, asserts that James lives at the Elkhorn farm, refuses to vacate, and wishes to buy the farm. It further alleges that the Partnership cannot liquidate the property without Illinois court intervention.[3] Months later, in November 2025, the Partnership filed this eviction lawsuit in Wisconsin.

¶4 James moved to dismiss this action pursuant to WIS. STAT. § 802.06(2)(a)6. and 10., arguing that the dispute concerns the Partnership rather than a landlord-tenant relationship and therefore is not properly resolved in an eviction proceeding, and that the dispute is already pending in Illinois. The

[2] For ease of reference, because the Elies Family LP's general partner and appellant share the same surname, this court respectfully refers to them by their first names.

[3] The facts concerning the Illinois action are drawn from the circuit court's review of the Illinois filing, to which the Illinois court had granted it access.

Partnership responded that James was a tenant at will on the property under an implied contract, and that no other action was pending between the same parties for the same cause.

¶5 In its oral ruling on the motion to dismiss, the circuit court noted that "[o]ther than the partnership agreement, the [c]ourt is aware of no oral or written contract of the parties regarding [James] residing at the farm[.]" The court stated that the Partnership conceded this point, and that the Partnership "asks the [c]ourt to find an implied contract formulating a tenancy at will." Having noted that neither party requested an evidentiary hearing, the court stated that it "does not have enough facts to draw on in this record to determine if there is or was an implied contract. That's a very fact specific question to be answered." Ultimately, the court granted James's motion to dismiss on the basis of WIS. STAT. § 802.06(2)(a)10., stating that the amended complaint in the Illinois litigation "specifically complains about [James] living at the farm … in Wisconsin and refusing to vacate … . The bottom line is that Howard has a pending lawsuit involving [James]. It involves the farm and residency on the farm. All pending in Illinois long before [Howard] filed this action in Wisconsin." The court continued that it "find[s] it's fundamentally unfair to then bring an eviction action here in Wisconsin. … [I]t's a waste of resources for both Wisconsin and Illinois courts" to proceed on the same matter.

¶6 The Partnership appeals.

DISCUSSION

¶7 Dismissal under WIS. STAT. § 802.06(2)(a)10. is a discretionary decision. ***Barricade Flasher Serv., Inc. v. Wind Lake Auto Parts, Inc.***, 2011 WI App 162, ¶5, 338 Wis. 2d 144, 807 N.W.2d 697. This court will not reverse a

circuit court's discretionary decision unless the circuit court erroneously exercised its discretion by making an error of law or failing to base its decision on the facts in the Record. ***Id.***

¶8 To prevail on a motion to dismiss under WIS. STAT. § 802.06(2)(a)10., the movant must prove the existence of: (1) another pending action; (2) between the same parties; (3) for the same cause.[4] ***Id.*** The Partnership argues that the circuit court erroneously exercised its discretion by dismissing its eviction action under this statute: first, it contends that the parties in the pending actions are not the same, and, second, that the causes of action are not the same.

¶9 The Partnership maintains that the parties to the pending Illinois action differ from those in the Wisconsin action. It explains that its Wisconsin action is brought against James, as an individual, while its Illinois action is against

[4] WISCONSIN STAT. § 802.06(2)(a)10. provides:

> **(2)** HOW PRESENTED. (a) Every defense, in law or fact, except the defense of improper venue, to a claim for relief in any pleading, whether a claim, counterclaim, cross claim, or 3rd-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:
>
> ....
>
> 10. Another action pending between the same parties for the same cause.

the James D. Elies Trust, of which James is the trustee.[5] This difference is not dispositive.

¶10 In ***Barricade Flasher***, the circuit court dismissed an action under WIS. STAT. § 802.06(2)(a)10., in which the named defendant had not been named as a defendant in an earlier filed action. ***Barricade Flasher***, 338 Wis. 2d 144, ¶¶2-3. The ***Barricade Flasher*** court was persuaded by ***Aon Risk Services, Inc. v. Liebenstein***, 2006 WI App 4, 289 Wis. 2d 127, 710 N.W.2d 175 (2005), *abrogated on other grounds by* ***Burbank Grease Services, LLC v. Sokolowski***, 2006 WI 103, ¶33, 294 Wis. 2d 274, 717 N.W.2d 781, in which the parties differed in two pending actions, but the allegations in the two suits mirrored each other. ***Barricade Flasher***, 338 Wis. 2d 144, ¶6-8.

¶11 These cases are instructive.[6] As the circuit court explained, the Illinois complaint alleged that James's occupancy and refusal to vacate impeded the Partnership's efforts to liquidate its assets. The court did not err in

[5] The Partnership relies on ***Pagoudis v. Keidl***, 2023 WI 27, 406 Wis. 2d 542, 988 N.W.2d 606. While ***Pagoudis*** addresses the difference between a business entity and its members and delineates their separate interests, ***id.***, ¶¶18-22, the case does not interpret WIS. STAT. § 802.06(2)(a)10. and does not support the Partnership's claim that the legal distinction between the James D. Elies Trust and James as an individual, precludes dismissal under that statute.

[6] This court recognizes that ***Aon Risk Services, Inc. v. Liebenstein***, 2006 WI App 4, 289 Wis. 2d 127, 710 N.W.2d 175 (2005), was partially overruled by ***Burbank Grease Services, LLC v. Sokolowski***, 2006 WI 103, ¶33, 294 Wis. 2d 274, 717 N.W.2d 781. This court is also aware "that a court of appeals decision expressly overruled by [the supreme court] no longer retains any precedential value, unless [the supreme court] expressly states that it is leaving portions of the court of appeals decision intact." ***Blum v. 1st Auto & Cas. Ins. Co.***, 2010 WI 78, ¶56, 326 Wis. 2d 729, 786 N.W.2d 78. Although ***Burbank*** did not abrogate the portion of ***Aon*** addressing WIS. STAT. § 802.06(2)(a)10., it also did not expressly state that it was leaving that portion intact. ***Barricade Flasher Serv., Inc. v. Wind Lake Auto Parts, Inc.***, 2011 WI App 162, ¶9, 338 Wis. 2d 144, 807 N.W.2d 697. Accordingly, ***Aon*** is no longer controlling precedent but remains persuasive authority. ***Barricade Flasher***, 338 Wis. 2d 144, ¶9.

determining that the difference in the named defendants did not preclude dismissal under WIS. STAT. § 802.06(2)(a)10. *See* ***Barricade Flasher***, 338 Wis. 2d 144, ¶8 ("Bringing a new action against a different party is not enough to get around … § 802.06(2)(a)10.").

¶12 The Partnership contends that its parallel actions are not for the same cause. It states that "[t]he Illinois litigation and the Wisconsin eviction action involve fundamentally different transactions, different legal standards, different remedies[,] and different operative facts[.]"[7] The Partnership relies on the transactional approach used to determine whether two actions involve the same cause of action for purposes of claim preclusion. *See supra* note 7. The question here, however, arises under WIS. STAT. § 802.06(2)(a)10. In ***Barricade Flasher***, 338 Wis. 2d 144, and ***Payday Loan Store of Wisconsin Inc. v. Krueger***, 2013 WI App 25, 346 Wis. 2d 237, 828 N.W.2d 587, this court addressed whether separate actions involved the same cause for purposes of that statute. This court looks to those cases to determine whether the circuit court properly dismissed this action.

¶13 In ***Barricade Flasher***, the plaintiff filed a second action against a party it had unsuccessfully attempted to add to an earlier action. ***Barricade Flasher***, 338 Wis. 2d 144, ¶¶2-3. This court affirmed the dismissal under WIS. STAT. § 802.06(2)(a)10., reasoning that the later action arose from the

[7] The Partnership bases its argument on Wisconsin's transactional approach adopted from the RESTATEMENT (SECOND) OF JUDGMENTS § 24(2) (A.L.I. 1982) to determine whether two suits involve the same cause of action *for purposes of claim preclusion*. *See* ***Kruckenberg v. Harvey***, 2005 WI 43, ¶25, 279 Wis. 2d 520, 694 N.W.2d 879; ***Menard, Inc. v. Liteway Lighting Prods.***, 2005 WI 98, ¶30, 282 Wis. 2d 582, 698 N.W.2d 738. However, claim preclusion is distinct from WIS. STAT. § 802.06(2)(a)10.: the former concerns the preclusive effect of a final judgment, whereas the latter concerns the pendency of another action between the same parties for the same cause.

same underlying facts and circumstances as the earlier action. ***Barricade Flasher***, 338 Wis. 2d 144, ¶¶8, 10. This court explained that bringing a new action against a different party was not enough to avoid dismissal when the actions arose from the same underlying claim. ***Id.***, ¶8.

¶14 In ***Payday Loan Store***, this court affirmed dismissal under WIS. STAT. § 802.06(2)(a)10. of petitions to compel arbitration that raised an issue already raised in an underlying lawsuit. ***Payday Loan Store***, 346 Wis. 2d 237, ¶7. In the underlying action, the petitioner had asserted arbitration as an affirmative defense and sought a stay pending arbitration. ***Id.***

¶15 Like ***Barricade Flasher*** and ***Payday Loan Store***, this case involves a later-filed action concerning a matter also raised in an earlier action. The Illinois complaint alleges that James resides at the Elkhorn farm, refuses to vacate, wishes to purchase the property, and thereby impedes the Partnership's efforts to liquidate its assets. This Wisconsin eviction action seeks to remove James from that same property. Both actions concern James's occupancy of the farm and the effect of that occupancy on the Partnership's efforts to liquidate its assets.

¶16 The actions seek different forms of relief under different bodies of law: the Illinois action seeks dissolution and winding up of the Partnership, whereas this action seeks possession of real property under Wisconsin landlord-tenant law. Nevertheless, the Illinois complaint specifically identifies James's occupancy and refusal to vacate as obstacles to the Partnership's efforts to liquidate the farm. *See* ***Barricade Flasher***, 338 Wis. 2d 144, ¶8 (explaining that a different party designation does not necessarily avoid dismissal when the actions arise from the same underlying claim); ***Payday Loan Store***, 346 Wis. 2d 237, ¶7 (affirming dismissal where the later-filed petitions raised an issue already raised in

the underlying action). Based on the overlap between the two actions, the circuit court concluded that proceeding with both actions would waste judicial resources and risk inconsistent results. On this Record, this court concludes that the circuit court did not erroneously exercise its discretion in dismissing this action under WIS. STAT. § 802.06(2)(a)10.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.