COURT OF APPEALS
DECISION
DATED AND FILED

November 18, 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. 2025AP2375 **Cir. Ct. No. 2023CV1721**

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

JEFF MUELLER AND MARSHA MUELLER,

PLAINTIFFS-APPELLANTS,

V.

TD WISC. I, LLC, THOMAS DEMUTH AND JOHN THEISEN,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Waukesha County: MICHAEL P. MAXWELL, Judge. *Affirmed*.

Before Lazar, P.J., Gundrum, and Grogan, JJ.

Per curiam opinions 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).

¶1 PER CURIAM. Jeff and Marsha Mueller appeal an order granting summary judgment in favor of TD Wisc. I, LLC ("TDW"), Thomas DeMuth, and John Theisen. The circuit court dismissed the Muellers' complaint, concluding the causes of action were barred by the doctrine of claim preclusion, formerly known as res judicata.[1] We affirm.

BACKGROUND

¶2 In May 2019, the Muellers and TDW entered into a purchase agreement, wherein the Muellers agreed to purchase property from TDW for $220,000. As part of the agreement, TDW agreed to make certain changes to the property, such as removing buildings and concrete, sealing wells and septic systems, and other tasks. The Muellers closed on the property in June 2019. Fifty thousand dollars from the sales proceeds was placed in an escrow account for TDW to use to complete the agreed-upon tasks. TDW had approximately four months after closing to complete the tasks. TDW, however, failed to complete them.

¶3 In April 2020, the Muellers brought suit against TDW and its members, DeMuth and Theisen, for breach of contract, civil theft, and intentional misrepresentation. DeMuth and Theisen moved to dismiss all causes of action against them, and TDW moved to dismiss the causes of action for civil theft and intentional misrepresentation.

[1] "The term claim preclusion replaces res judicata." ***Northern States Power Co. v. Bugher***, 189 Wis. 2d 541, 550, 525 N.W.2d 723 (1995).

¶4 The Muellers responded to the dismissal motion by filing an amended complaint. The amended complaint only listed TDW as a defendant (omitting DeMuth and Theisen) and alleged causes of action for breach of contract and recission (omitting the claims for civil theft and intentional misrepresentation).

¶5 On June 18, 2020, the circuit court entered an order that provided, in part:

> 1. John Theisen and Thomas DeMuth are hereby dismissed from this action *with prejudice*.
>
> 2. That Defendants' [Dismissal] Motion of May 5, 2020 is moot due to the Amended Complaint and, as such, the hearing previously scheduled by this Court is removed from the calendar and no further briefing on this matter should be submitted.
>
> 3. Should Plaintiffs attempt to reassert the claims brought in the original complaint the motion at the option of defendant(s) may be renewed.

(Emphasis added.)

¶6 In July 2020, the Muellers moved the circuit court to reconsider its dismissal of Theisen and DeMuth with prejudice. TDW opposed the motion. TDW advised the court that when it filed its motion to dismiss, it also served a WIS. STAT. § 802.05 (2023-24)[2] safe harbor letter and draft sanctions motion regarding the Muellers' claims against Theisen and DeMuth. TDW argued that Theisen and DeMuth's dismissal with prejudice was appropriate because the Muellers withdrew their claims against Theisen and DeMuth in the face of TDW's assertion that the claims were baseless in law and fact.

[2] All references to the Wisconsin Statutes are to the 2023-24 version.

¶7 In September 2020, the circuit court denied the Muellers' reconsideration motion. The Muellers did not appeal the court's dismissal of Theisen and DeMuth with prejudice or the denial of their reconsideration motion.

¶8 The case proceeded on the Muellers' claims against TDW. On June 30, 2023, the circuit court entered a stipulated judgment against TDW. The judgment provided the Muellers with title to the property, all money remaining in the escrow account, and an additional $170,000 plus taxable costs.

¶9 On October 26, 2023, the Muellers brought the underlying lawsuit against TDW, Theisen, and DeMuth. The complaint alleged three causes of action: "veil piercing"; fraudulent transfer under WIS. STAT. § 242.04; and intentional misrepresentation. (Capitalization and emphasis omitted.) Broadly, the complaint sought to hold Theisen and DeMuth personally liable for the judgment entered against TDW, contained allegations that TDW had improperly transferred the sales proceeds to others, and alleged that Theisen and DeMuth had intentionally misrepresented that they would perform the agreed-upon tasks regarding the 2019 purchase agreement.

¶10 TDW, Theisen, and DeMuth (collectively now, TDW) moved to dismiss the complaint based on claim preclusion and failure to state a claim upon which relief could be granted. The Muellers opposed the motion. Following briefing and argument, and "for the reasons stated on the record,"[3] the circuit court denied TDW's dismissal motion for piercing the corporate veil and fraudulent transfer and granted the motion to dismiss for intentional misrepresentation.

[3] The record does not contain a transcript of this motion hearing.

(Capitalization and emphasis omitted.) The court gave the Muellers leave to file an amended complaint as to their claim for intentional misrepresentation, which they did.

¶11 The case progressed, and TDW moved for summary judgment. The motion alleged that the Muellers could not establish, as a matter of law, that TDW's corporate veil should be pierced or that TDW's conveyances were fraudulent. The motion also alleged that the Muellers' claim for intentional misrepresentation continued to be barred by claim preclusion.

¶12 The Muellers opposed the motion, and the circuit court held a motion hearing. At the end of the hearing, the court questioned the Muellers on whether their allegations should have been raised in their original action and whether discovery in the previous litigation could have revealed certain information. The court then took the matter under advisement and indicated it would issue a written decision.

¶13 Approximately two weeks after the summary judgment hearing, the Muellers wrote a letter to the circuit court regarding claim preclusion. The letter reminded the court that it had previously denied TDW's motion to dismiss on the basis of claim preclusion and that TDW's present motion only discussed claim preclusion as to the Muellers' claim for intentional misrepresentation. As to the court's questions regarding discovery in the previous litigation, the Muellers advised the court that during the prior litigation the parties had entered into a tolling agreement "that served to table the dispute regarding discovery of the LLC's financial documents until after the conclusion of the underlying litigation." The Muellers provided the court with a copy of the tolling agreement.

¶14 The circuit court subsequently issued a written decision granting summary judgment in favor of TDW on the basis of claim preclusion. The court acknowledged that it had initially denied TDW's motion to dismiss based on claim preclusion. However, it explained that after considering the parties' filings, arguments, and the record, it had determined that the Muellers' first two causes of action (piercing the corporate veil and fraudulent transfer) were barred by claim preclusion. The court also determined the Muellers' amended intentional misrepresentation claim was similarly barred by claim preclusion. The court dismissed the Muellers' complaint. The Muellers appeal.

DISCUSSION

¶15 The doctrine of "claim preclusion prevents relitigation of 'all matters which were litigated or which might have been litigated in the former proceedings.'" ***Clarke v. WEC***, 2023 WI 79, ¶46, 410 Wis. 2d 1, 998 N.W.2d 370 (citation omitted). It 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.'" ***Northern States Power Co. v. Bugher***, 189 Wis. 2d 541, 550, 525 N.W.2d 723 (1995) (citation omitted). Claim preclusion has three requirements: "(1) an identity between the parties or their privies in the prior and present suits; (2) an identity between the causes of action in the two suits; and, (3) a final judgment on the merits in a court of competent jurisdiction." ***Id.*** at 551. We review de novo whether claim preclusion applies to a factual scenario. ***Id.*** In this case, we agree with the circuit court that the elements of claim preclusion have been satisfied.

¶16 First, the Muellers do not appear to dispute on appeal that the first element of claim preclusion is satisfied (identity between the parties in the first two actions). Instead, the Muellers' appellate argument focuses on whether the

second and third elements of claim preclusion have been satisfied. They argue that there is no identity between the causes of action in the two suits and there was not a final judgment on the merits in the prior lawsuit. We disagree.

¶17 Wisconsin uses a transactional approach to determine whether two suits involve the same cause of action. ***Teske v. Wilson Mut. Ins. Co.***, 2019 WI 62, ¶31, 387 Wis. 2d 213, 928 N.W.2d 555. "The transactional approach 'reflects the expectation that parties who are given the capacity to present their entire controversies shall in fact do so.'" ***Id.*** (citation omitted). "Pursuant to this analysis, 'all claims arising out of one transaction or factual situation are treated as being part of a single cause of action and they are required to be litigated together.'" ***Id.*** (citation omitted).

¶18 Here, it is apparent that the Muellers' causes of action in both lawsuits arise from the same factual circumstances surrounding the 2019 purchase agreement and TDW's subsequent failure to complete its agreed-upon tasks. It is from this factual situation that all of the Muellers' claims arise. Although the Muellers argue that different claims were alleged in the first case compared to the present one, under the transactional approach, "it is irrelevant that 'the legal theories, remedies sought, and evidence used may be different between the first and second actions.'" *See* ***id.***, ¶36 (citation omitted). We agree with the circuit court that there is an identity between the causes of action in the two suits. *See* ***Northern States***, 189 Wis. 2d at 551. The second element of claim preclusion is satisfied. *See* ***id.***

¶19 The Muellers also argue that the third element of claim preclusion—a final judgment on the merits, was not satisfied in this case. They assert the circuit court's dismissal of DeMuth and Theisen *with prejudice* in the previous

case did not constitute a dismissal on the merits because the Muellers amended their complaint to remove these defendants. The Muellers also argue that the judgment entered against TDW was not a judgment on the merits because it was a stipulated judgment.

¶20 We reject both assertions. First, regarding the circuit court's dismissal of DeMuth and Theisen from the previous lawsuit with prejudice, we have interpreted the phrase "with prejudice" to mean a judgment on the merits or a judgment that precludes future claims. *See* ***State v. A.G.R., Jr.***, 140 Wis. 2d 843, 847, 412 N.W.2d 164 (Ct. App. 1987) (a dismissal with prejudice is tantamount to a judgment on the merits). It seems apparent that the Muellers recognized the significance of the dismissal-with-prejudice language in the court's order because they moved the court to reconsider the "with prejudice" language. The court denied the motion, and the Muellers did not appeal. We conclude the circuit court's dismissal order with prejudice constituted a judgment on the merits as to DeMuth and Theisen.[4] *See* ***id.***

¶21 As for the judgment entered against TDW, the Muellers appear to argue that the stipulated judgment did not constitute a final judgment on the merits for claim preclusion because the parties never actually adjudicated the substance of the claims. However, a judgment on the merits does not need to be the result of actual litigation; a stipulation also has preclusive effect. *See* ***Wisconsin Pub. Serv.***

[4] There are aspects of this case that are troubling. Particularly challenging is the fact that the amended complaint removed DeMuth and Theisen from the case, which made the order to dismiss them with prejudice unnecessary. Without that dismissal order, there would be no decision on the merits with respect to DeMuth and Theisen, and the Muellers' case could continue against them. However, the Muellers did not appeal the order dismissing these two members of TDW with prejudice. Therefore, that order satisfies the claim preclusion elements here.

Corp. v. Arby Const., Inc., 2012 WI 87, ¶64, 342 Wis. 2d 544, 566, 818 N.W.2d 863. We conclude the third element of claim preclusion—a final judgment on the merits in a court of competent jurisdiction—has been satisfied.

¶22 The Muellers nevertheless maintain that the circuit court erred by dismissing its claims based on claim preclusion. They assert the court failed to recognize that the parties entered into a tolling agreement that allowed the Muellers to raise claims at a later date. They also fault the court for failing to address the parties' tolling agreement.

¶23 However, the Muellers did not mention any tolling agreement in their summary judgment materials or during the summary judgment motion hearing. Rather, two weeks after the hearing, the Muellers wrote to the circuit court to assert the tolling agreement precluded application of claim preclusion.

¶24 We disagree with the Muellers that the circuit court was required, but failed, to consider its post-hearing letter regarding the tolling agreement. *See* WIS. STAT. § 802.08(2) (For summary judgment, "[u]nless earlier times are specified in the scheduling order[5] ... the adverse party shall serve opposing affidavits ... at least 5 days before the time fixed for the hearing."); ***David Christensen Trucking & Excavating, Inc. v. Mehdian***, 2006 WI App 254, ¶20, 297 Wis. 2d 765, 726 N.W.2d 689 ("We conclude that filing opposing affidavits at least five days prior to the date of the hearing was mandatory and that, in the absence of an effort to enlarge time, the circuit court had no alternative but to

[5] Here, the scheduling order required the Muellers to file "a responsive brief and supporting documents, or waiver in writing" on February 3, 2025, approximately one month before the March 4, 2025 summary judgment hearing.

consider only [the movant's] materials in determining whether to grant summary judgment."). Here, the court had no obligation to consider or address post-hearing submissions, and we do not consider the Muellers' arguments regarding the tolling agreement.

¶25 Finally, the Muellers argue that the circuit court's dismissal was improper because "the defendants only moved for summary judgment on the claims against the individual defendants." (Capitalization and emphasis omitted.) We disagree. TDW's motion for summary judgment provides:

> [T]he defendants, collectively, by their undersigned attorneys of record, hereby moves that the Court, the Honorable Michael P. Maxwell, presiding, for an order pursuant to the provisions of WIS. STAT. § 802.08, granting Summary Judgment *dismissing the Plaintiffs' claims on their merits* on the 4th day of March, 2025 at 1:30 p.m. or as soon thereafter as counsel may be heard.

(Emphasis added.)

¶26 Because all of the elements of claim preclusion have been satisfied, the circuit court properly applied the doctrine to bar the Muellers' current action against TDW, Theisen, and DeMuth. We affirm the circuit court's dismissal of the Muellers' action against TDW, Theisen, and DeMuth.

By the Court.—Order affirmed.

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