COURT OF APPEALS
DECISION
DATED AND FILED

January 21, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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* § 808.10 and RULE 809.62, STATS.

No. 98-1042

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

MANAGEMENT COMPUTER SERVICES, INC.,

PLAINTIFF-APPELLANT,

V.

HAWKINS, ASH, BAPTIE & CO., A WISCONSIN PARTNERSHIP, DAVID D. BAPTIE, R. ROY CAMPBELL, WALTER L. LEIFELD, LARRY E. VANGEN, JACK E. WHITE, ESTATE OF JAMES O. ASH, RICHARD G. HAWKINS, ROBERT J. DALEY, ALLAN D. BROTT, JOHN S. DANFORTH, JUDITH A. FUCHSTEINER, STEVEN G. HANDRICK, MARK A. HANSON, RANDALL L. MILLER, RALPH P. RUBEN, CHARLES R. SCHINDHELM, DAVID A. SCHLUETER, ROGER J. SORENSON, GALEN H. WAUTIER, AND DARWIN F. ISAACSON,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for La Crosse County: EDWARD E. LEINEWEBER, Judge. *Affirmed.*

Before Dykman, P.J., Eich and Deininger, JJ.

PER CURIAM. Management Computer Services, Inc. (MCS) appeals from a summary judgment in which the trial court dismissed its action for contract damages arising from the uncompensated use of software programs. MCS claims the trial court erred when it concluded the present action was barred under the doctrine of claim preclusion[1] by prior litigation which MCS had brought against the same parties for previous use of the software, because additional uncompensated installations of the software occurred after that action had been tried. We agree with the trial court that claim preclusion nonetheless applies because MCS litigated the issue of future use of the software in the prior action. Accordingly, we affirm.

BACKGROUND

MCS is a computer services firm that agreed to provide certain computer hardware, software and services to the regional accounting firm of Hawkins, Ash, Baptie & Company (HABCO) in a contract signed June 1, 1979. MCS alleges that the contract allowed HABCO unlimited use of certain accounting software installed on the computer system, which MCS had provided to it, but required the accounting firm to pay twenty-five percent of the program value in order to install the software on any other computers which it would then purchase from MCS. Sometime in 1981 or 1982, a HABCO employee copied several payroll and accounts receivable programs from backup tapes which MCS had stored at HABCO. HABCO used the software in its own operations without informing or compensating MCS. In addition, HABCO loaded various accounting software applications onto the computer systems of its clients.

[1] The claim preclusion doctrine was formerly known as res judicata. *See* ***Northern States Power Co. v. Bugher***, 189 Wis.2d 541, 549, 525 N.W.2d 723,727 (1995).

In 1989, MCS sued HABCO for breach of contract, conversion, unjust enrichment and punitive damages. With respect to the contract claim,[2] HABCO maintained that its agreement to pay for future software installations applied only to installations on computer systems that it bought from MCS, and that nothing in the contract required it to buy any additional hardware from MCS. A jury disagreed, finding that the contract did require HABCO to buy its computer systems from MCS and to pay for future installations regardless of what computers they were installed upon, but the trial court set aside that part of the verdict. *See* ***Management Computer Services, Inc. v. Hawkins, Ash, Baptie & Co.***, 206 Wis.2d 158, 173, 182, 557 N.W.2d 67, 73, 77 (1996) (discussing jury award for breach of contract). Ultimately, the Supreme Court reinstated the jury's award of $740,000 in damages for HABCO's failure to purchase computer hardware from MCS and $530,000 for its failure to pay twenty-five percent of the program value to MCS for use of the contract software.[3] ***Id***.

MCS commenced the present action on January 3, 1997, claiming that it was entitled to additional damages for HABCO's continued licensing of the contract software to third parties. The trial court dismissed the action on summary judgment and MCS appeals.

[2] The conversion, unjust enrichment and punitive damage claims are not relevant to this appeal.

[3] MCS abandoned its attempt to reinstate additional damages of $250,750 for HABCO's failure to compensate it for the use of its proprietary software.

STANDARD OF REVIEW

It is well established that this court applies the same summary judgment methodology as that employed by the circuit court. Section 802.08, STATS.; ***State v. Dunn***, 213 Wis.2d 363, 368, 570 N.W.2d 614, 616 (Ct. App. 1997). We first examine the complaint to determine whether it states a claim, and then review the answer to determine whether it joins issue. ***Id***. If we conclude that the pleadings are sufficient to join an issue of law or fact, we examine the moving party's affidavits to determine whether they establish a prima facie case for summary judgment. ***Id***. at 368, 570 N.W.2d at 617. If they do, we look to the opposing party's affidavits to determine whether there are any material facts in dispute which require a trial. ***Id***.

Whether claim preclusion applies to an undisputed set of facts is a question of law. ***Amber J.F. v. Richard B.***, 205 Wis.2d 510, 515, 557 N.W.2d 84, 86 (Ct. App. 1996). It is therefore appropriate to resolve the issue on summary judgment.

ANALYSIS

The doctrine of claim preclusion provides that a final judgment is conclusive in all subsequent actions between the same parties as to all matters that were litigated or that could have been litigated in the former proceedings. ***Amber J.F.***, 205 Wis.2d at 516, 557 N.W.2d at 86. This means that the party seeking to preclude a claim must establish: (1) that a court of competent jurisdiction issued a final judgment terminating the prior proceeding on its merits; (2) that there is an identity of parties between the actions; and (3) that there is an identity of claims between the two actions. ***Northern States Power Co. v. Bugher***, 189 Wis.2d 541, 551, 525 N.W.2d 723, 728 (1995). The purpose of the doctrine is to encourage

finality of judgments and to prevent repetitive litigation. ***DePratt v. West Bend Mut. Ins. Co.***, 113 Wis.2d 306, 311, 334 N.W.2d 883, 885 (1983).

The parties do not dispute that the first two elements for claim preclusion have been met. The issue before us is whether there is an identity of causes between the two actions. This state adopted a transactional approach to determining whether two suits involve the same cause of action. ***Northern States Power Co.***, 189 Wis.2d at 553, 525 N.W.2d at 728 (citations omitted).

> (1) When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar …, the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.
>
> (2) What factual grouping constitutes a "transaction", and what groupings constitute a "series", are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.
>
> ….
>
> … [The transactional identity of causes applies] regardless of the number of substantive theories, or variant forms of relief flowing from those theories, that may be available to the plaintiff; regardless of the number of primary rights that may have been invaded; and regardless of the variations in the evidence needed to support the theories or rights.

Id. at 553-54, 525 N.W.2d at 728-29 (citations omitted).

We are satisfied that the current action arose out of the same series of transactions as did the prior lawsuit. Both cases deal with breaches of the same contract in the same manner. Furthermore, MCS was clearly aware of the possibility that HABCO might continue its use of the software when it tried the

first case, because it attempted to introduce evidence to prove its future damages based upon that theory. The fact that the evidence offered happened to be excluded as inadmissible does not alter the fact that the issue of future use of the contract software (i.e., future breaches) was actually litigated. This is precisely the sort of repetitive litigation which the doctrine of claim preclusion was designed to prohibit.

By the Court.—Judgment affirmed.

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