COURT OF APPEALS
DECISION
DATED AND FILED

March 23, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

No. 99-1363

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

CLEANSOILS WISCONSIN, INC.,

DEFENDANT-APPELLANT,

JAMES K. POUCHER AND JOHN K. POUCHER,

DEFENDANTS.

APPEAL from an order of the circuit court for Dane County: ROBERT DE CHAMBEAU, Judge. *Affirmed.*

Before Eich, Vergeront and Roggensack, JJ

¶1 PER CURIAM. In this interlocutory appeal, CleanSoils Wisconsin, Inc., appeals from a partial summary judgment finding it liable for violation of certain state environmental statutes and rules. We conclude that some of the

appellant's arguments are barred by issue preclusion, and that the appellant failed to make a sufficient showing of selective prosecution. We affirm.

¶2 This action was commenced by the State in 1998. It alleged that CleanSoils facilities in Milwaukee, Bayfield and Lafayette counties were violating their plans of operation, WIS. STAT. ch. 289, and WIS. ADMIN. CODE chs. NR 500-520. The State sought injunctive relief and forfeitures. The trial court granted injunctive relief, but held the forfeiture issue in abeyance. We granted CleanSoils' petition for leave to appeal from this nonfinal order.

¶3 The State has brought similar enforcement actions in Waupaca and Oconto counties against other CleanSoils facilities, which have resulted in judgments adverse to CleanSoils.[1] The first issue is whether those judgments have a preclusive effect in this case. The State argues that they do.

¶4 The doctrine of issue preclusion limits relitigation of issues that have been contested in a previous action between the same or different parties. *See* ***Michelle T. v. Crozier***, 173 Wis. 2d 681, 687, 495 N.W.2d 327 (1993). Wisconsin permits a plaintiff to use "offensive" issue preclusion against a defendant. *See* ***id.*** at 695. In recent times, courts follow an equities-based interpretation of the doctrine, and in doing so they may consider several factors. *See* ***id.*** at 688-89. CleanSoils relies on two of those factors here: (1) whether there are significant differences in the quality or extensiveness of proceedings between the two courts that warrant relitigation of the issue, and (2) whether the circumstances render application of the doctrine fundamentally unfair, including inadequate opportunity

[1] The Waupaca County case no. is 97-CV-326. The Oconto County case is no. 98-CV-28. The Oconto decision was affirmed by this court. *See* ***State v. CleanSoils Wis., Inc.***, No. 99-0963, unpublished slip op. (WI App. Jan. 11, 2000).

or incentive to obtain a full and fair adjudication in the initial action. *See* ***id.*** at 689. We review the application of these factors for an erroneous exercise of discretion. *See* ***Paige K.B. v. Steven G.B.***, 226 Wis. 2d 210, 225, 594 N.W.2d 370 (1999).

¶5 We conclude that the trial court correctly determined that the earlier judgments preclude CleanSoils from litigating the legal issue of whether its operations are subject to the statutes and rules alleged by the State. CleanSoils argues that this issue was not adequately litigated in the earlier cases because those courts did not have certain information that was developed by CleanSoils in discovery during the present case. Specifically, the information relates to the Department of Natural Resources (DNR) staff's lack of familiarity with these rules. CleanSoils apparently wants to use that information to argue that although courts ordinarily defer to an agency's interpretation of statutes or rules it administers, such deference would not be appropriate when agency staff do not understand its own rules.

¶6 Even if we assume that this type of factual information could properly be used to alter the standard of review, issue preclusion is still appropriate. In making its argument, CleanSoils does not provide any reason to believe it had an inadequate opportunity in the earlier cases to develop the same information in discovery that it now relies on. The fact that CleanSoils did not obtain this information in the earlier case is not a "significant" difference in the quality or extensiveness of proceedings between the courts.

¶7 CleanSoils also argues that this prosecution should be dismissed because the State is selectively prosecuting CleanSoils. The parties first dispute whether the defense of selective enforcement is available in this type of action.

We assume, without deciding, that it is available. In a recent decision, the Wisconsin Supreme Court described the legal test for a claim of selective and discriminatory prosecution. The claim should be judged under ordinary equal protection standards, which require the defendant to show that the prosecution had a discriminatory effect and was motivated by a discriminatory purpose. *See* ***County of Kenosha v. C & S Mgmt***., 223 Wis. 2d 373, 400-01, 588 N.W.2d 236 (1999). Before receiving a full evidentiary hearing, the defendant must first present a *prima facie* showing that it has been singled out for prosecution while others similarly situated have not, and that the discriminatory selection was based on an impermissible consideration such as race, religion or the exercise of constitutional rights. *See* ***id.*** at 401.

¶8 The State concedes that there "may be some disputed facts about some of what [CleanSoils] argues" on selective enforcement. If there is a dispute of material fact, of course, summary judgment is not appropriate. *See* WIS. STAT. § 802.08(2) (1997-98).[2] However, we conclude that viewing the evidence in the light most favorable to CleanSoils, as required on summary judgment, there is an insufficient showing on one component of the selective enforcement argument.

¶9 CleanSoils argues that the prosecution in this case was in retaliation for the company's exercise of its First Amendment right to criticize DNR rules and practices. We conclude that CleanSoils has failed to make a *prima facie* case on this point. Its evidence of the retaliatory motive appears to consist of the following: (1) the State knowingly allowed the company to conduct its operations at other locations for a considerable period of time without complaint, before

[2] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

CleanSoils began to question whether it was obligated to obtain licenses or approvals; and (2) none of the State personnel who were involved in the investigation of CleanSoils locations fully understood the applicable regulations, which, according to CleanSoils, "raises the suspicion of an ulterior motive."[3]

¶10 We conclude that this is insufficient evidence. No reasonable fact finder could find, based solely on this evidence, that this prosecution was motivated by a desire to retaliate for CleanSoils' First Amendment expression. Therefore, we conclude that summary judgment was properly granted to the State.

By the Court.—Order affirmed.

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

[3] CleanSoils also relies on an affidavit by a person working for CleanSoils, who averred that he was told by an official from the Department of Commerce that an unidentified person in the Department of Natural Resources told her that the DNR was "doing everything it could to run [CleanSoils] out of business." The State argues that we should disregard this averment as inadmissible hearsay. *See* WIS. STAT. § 802.08(3). CleanSoils does not rebut this argument, and we take that failure as a concession of inadmissibility. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).