COURT OF APPEALS
DECISION
DATED AND FILED

December 14, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2017AP226 **Cir. Ct. No. 2016CV128**

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

TERESA JAMES,

PLAINTIFF-APPELLANT,

V.

JAMES SMALL,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Jefferson County: JENNIFER L. WESTON, Judge. *Affirmed*.

Before Lundsten, P.J., Sherman and Fitzpatrick, JJ.

¶1 PER CURIAM. Teresa James appeals a circuit court order that dismissed her mandamus action against James Small on the ground of claim preclusion. The dispute on appeal concerns whether the prior stipulated dismissal of a case "with prejudice" qualifies as a final judgment "on the merits" such that James' current lawsuit is barred by the doctrine of claim preclusion. We conclude that it does and affirm.

BACKGROUND

¶2 There is no dispute as to the following facts. Teresa James worked as an emergency medical technician for what is now known as the Village of Palmyra Fire and Rescue Department. On June 11, 2015, Village of Palmyra Public Safety Director James Small sent James a letter terminating her at-will employment citing, among other reasons, several alleged violations of work policies.

¶3 In January 2016, James filed a complaint against Small in the Jefferson County Circuit Court asserting a first claim for an alleged violation of James' civil rights under 42 U.S.C. § 1983. The second claim was for breach of contract because Small allegedly failed to follow procedures set forth in James' employee handbook before discharging her in that James was entitled to a hearing before the Police and Fire Commission (PFC) to challenge her termination.

¶4 In February 2016, Small removed the action from state to federal court. He subsequently moved to dismiss the action, arguing that James had failed to exhaust administrative remedies. James asked Small to stipulate to a dismissal without prejudice, but he refused. Instead, in March 2016, the parties filed a "STIPULATION FOR DISMISSAL" in federal court, stating:

> Pursuant to Rule 41(1)(a), the parties, by their attorneys, hereby agree that this action can be dismissed, with prejudice as to the 42 U.S.C. § 1983 claim and the breach of contract claim, and without costs to either party.

The federal court closed the case based upon the stipulation without taking additional action or issuing any additional order.[1]

¶5 Less than a month later, James filed the instant lawsuit seeking a writ of mandamus to compel Small to file a report of suspension and charges with the PFC so that the PFC could conduct a hearing to determine whether Small had cause to suspend and terminate her. The parties filed cross-motions for summary judgment, and the circuit court dismissed the action on the ground of claim preclusion.

DISCUSSION

¶6 Whether claim preclusion applies to a certain set of facts presents a question of law that this court reviews independently. ***Wisconsin Pub. Serv. Corp. v. Arby Const., Inc.***, 2012 WI 87, ¶30, 342 Wis. 2d 544, 818 N.W.2d 863. In determining the claim-preclusive effect of the judgment of a federal district court located in Wisconsin, Wisconsin courts apply Wisconsin law of claim preclusion. ***Id.***[2]

¶7 The doctrine of claim preclusion bars a party from bringing any claim that was the subject of a prior action when there is: (1) an identity between

[1] The record does not disclose the reason James agreed to the dismissal *with prejudice*. It is not germane to our analysis, so we do not weigh in on the topic.

[2] James contends, and Small does not dispute, that Wisconsin law rather than federal law applies to this question regarding claim preclusion.

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. ***Wickenhauser v. Lehtinen***, 2007 WI 82, ¶22, 302 Wis. 2d 41, 734 N.W.2d 855.

¶8 James acknowledges that she "basically conceded" the first and second elements of claim preclusion in the circuit court. However, James then appears to challenge the second element by arguing that she intended only to dismiss her § 1983 and contract claims then pending in federal court, but not her mandamus claim brought in this case. Aside from whether this argument has been waived, it is entirely without merit. Evaluation of whether claims in serial lawsuits are identical for purposes of claim preclusion is based upon whether those claims arose from the same transaction or common nucleus of operative facts, not whether the claims involve the same legal theories, remedies sought, or evidence. ***Id.***, ¶30. James' current mandamus action plainly arises from the same nucleus of facts as did her § 1983 and contract claims which were pending in federal court. Each cause of action, in the federal court lawsuit and in this case, demands that Small follow the procedures which will allow James to have a hearing before the PFC to challenge her termination. We conclude, therefore, that there were identical causes of action for purposes of claim preclusion. The only remaining issue, then, is whether the stipulated dismissal of James' prior lawsuit constituted a "final judgment on the merits."

¶9 James first argues that the stipulated dismissal of her prior claims in federal court was not a final judgment on the merits because the stipulation did not

contain the words "on the merits" in referring to the dismissal. In support of this argument, James points to WIS. STAT. § 805.04(1)(2015-16)[3], which states:

> An action may be dismissed … by the filing of a stipulation of dismissal signed by all parties who have appeared in the action. *Unless otherwise stated in the ... stipulation, the dismissal is not on the merits* ….

(Emphasis added.)

¶10 The use of the phrase "with prejudice" is sufficient to "otherwise state" an intention of the parties for a dismissal on the merits. James argues that the plain meaning of WIS. STAT. § 805.04(1) requires the exact words "on the merits" to be in the stipulation for there to be a preclusive effect and the use of the phrase "with prejudice" in the stipulation is insufficient. However, we conclude that § 805.04(1) does not require any particular words if the intent is clear that dismissal is with prejudice. The default result under § 805.04(1) is that a dismissal is not on the merits, but that can be overcome if a different intent is "otherwise stated." That phrase is broad and cannot reasonably be interpreted to require the exact phrase "on the merits" with all other phrasing precluded as insufficient. ***Wisconsin Carry, Inc. v. City of Madison***, 2017 WI 19, ¶20, 373 Wis. 2d 543, 892 N.W.2d 233 (quoting ***State ex rel. Kalal v. Circuit Ct. for Dane Cty.***, 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110 ("statutory language is interpreted … reasonably, to avoid absurd or unreasonable results")). We have interpreted the phrase "with prejudice" to mean a judgment on the merits or a judgment that precludes future claims. ***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

[3] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

merits); *see also* ***Jason B. v. State***, 176 Wis. 2d 400, 406, 500 N.W.2d 384 (Ct. App. 1993) (by definition, a dismissal "without prejudice" allows the complainant to sue again on the same cause of action). Therefore, the parties' stipulation that dismissed the claims in federal court "with prejudice" effectively "otherwise stated" that the dismissal was on the merits.

¶11 James also argues that the stipulated dismissal did not constitute a "final judgment on the merits" for claim preclusion effect because the parties never actually adjudicated the substance of the claims, and the federal district court never issued a final order. But, a judgment on the merits does not need to be the result of actual litigation; a stipulation also has preclusive effect. ***Wisconsin Pub. Serv. Corp.***, 342 Wis. 2d 544, ¶64. So, we conclude that the parties' stipulation in federal court satisfies the third element of claim preclusion because it operated as a judgment on the merits.

¶12 Finally, James appears to argue (to the extent we can follow the argument) that she should be exempted from application of claim preclusion in the interest of justice or based upon fairness principles because she agreed to dismiss her § 1983 and contract claims in response to an argument from Small that she had failed to exhaust administrative remedies by first seeking a writ of mandamus, and the stipulation did not mention barring a future mandamus claim. Therefore, James argues, Small could have anticipated that she would file a mandamus action after dismissing her prior claims. We disagree.

¶13 As discussed above, the final dismissal of James' § 1983 and contract claims in federal court also had preclusive effect as to any other claims arising from the same underlying transaction. It is therefore irrelevant whether or not the stipulation also stated that any future mandamus action would be barred.

More importantly, our supreme court has stated that it has not adopted "fairness" as a factor in the doctrine of claim preclusion. ***Kruckenberg v. Harvey***, 2005 WI 43, ¶52, 279 Wis. 2d 520, 694 N.W.2d 879. Therefore, James' arguments regarding fairness are not relevant to the claim preclusion analysis.

¶14 For those reasons, we conclude that the doctrine of claim preclusion required dismissal of James' mandamus action against Small, and the circuit court order is affirmed.

By the Court.—Order affirmed.

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