COURT OF APPEALS
DECISION
DATED AND FILED

February 28, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-1952 **Cir. Ct. No. 00-SC-818**

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

JOHN P. GASIENICA,

PLAINTIFF-APPELLANT,

V.

NEIL RICHMAN,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Grant County: MICHAEL KIRCHMAN, Judge. *Affirmed.*

¶1 ROGGENSACK, J.[1] John Gasienica filed a small claims action alleging that a neighboring property owner, Neil Richman, failed to adequately

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (1999-2000). In addition, all further references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

maintain a ditch that carries surface water run-off in an area near the boundary of the two properties. Water run-off allegedly caused flooding on Gasienica's property because the ditch has filled with debris. The circuit court granted Richman's motion to dismiss on the bases of issue and claim preclusion. We affirm the circuit court's order of dismissal.

BACKGROUND

¶2 John Gasienica and Neil Richman own adjacent properties located in Grant County, Wisconsin. Prior to Gasienica's purchase of his property, the Town of Paris constructed a drainage ditch on Richman's property for the purpose of channeling surface waters. The ditch runs near the boundary between the parties' respective properties.

¶3 In 1997, Gasienica filed a lawsuit against Richman, alleging that Richman had failed to maintain the drainage ditch and thereby caused flooding on his property between July 1994 and August 1996. After a trial to the court, the circuit court issued a written decision in favor of Richman. The circuit court's decision included the following findings of fact and conclusions of law:

> (1) [T]he flooding was a natural event enhanced by the township's diversion of water off its roadway into the watershed.
>
> (2) [T]he creation of the ditch by the township did not cause any harm or substantially interfere with the natural watershed of the surface waters.
>
> (3) [T]he existence of the ditch did not increase the natural flooding problem, but decreased it.
>
> (4) Over the years, this ditch had become filled with dirt and debris.

> (5) [N]o damage was caused to Mr. Gasienica's property that would not have been caused by the natural flow of water in the area.
>
> (6) Mr. Richman had no duty to maintain this ditch.
>
> (7) No liability to either party attaches, since the damages if any were caused by the natural flooding enhanced by this increased flow caused by the township's diversion of water into the ditch it had built.

¶4 On October 27, 2000, Gasienica filed the first complaint in this action, alleging that between November 1996 and October 26, 2000, Richman "knowingly and intentionally" caused damage to Gasienica's real and personal property by allowing surface water run-off to repeatedly breach the ditch and flood Gasienica's property. He sought damages for cleaning debris out of the ditch and for water damage to vegetation on his property. Gasienica characterized his claim as one of private nuisance, and he also alleged that Richman failed to exercise reasonable and ordinary care in maintaining the drainage ditch, such that it was in "disrepair and silted in."[2]

¶5 Gasienica amended his complaint three times, all without leave of the court. Richman's amended answer raised issue preclusion as one affirmative defense, and then he filed a motion to dismiss based, in part, on that defense. Richman argued that issues decided in the 1997 lawsuit initiated by Gasienica served to bar consideration of Gasienica's current claims for relief.

¶6 During the hearing on Richman's motion to dismiss, the court asked Gasienica whether he was claiming that "something [had] been done with regard

[2] Gasienica also named the Town of Paris as a defendant in his original complaint. The court dismissed the Town of Paris from the case, and the claims against it are not before the court on this appeal.

to this ditch since the decision [in the 1997 action]." Gasienica responded that the ditch "has continued to deteriorate," become "completely blocked in" and "no longer flows." Based on this characterization of Gasienica's claim, the circuit court took the motion to dismiss under advisement:

> Mr. Gasienica also is stating that this lawsuit is based upon … a fact situation not part of the original lawsuit in that, saying the water course has now been completely … blocked in which wasn't the situation in the original lawsuit. That might be a new fact which would permit a new lawsuit.
>
> So, I'm going to deny the Defendant's Motion to Dismiss. But, I think before any trial is set we should determine whether it's possible for Mr. Gasienica to succeed. In other words is there case law … on [a] fact situation similar to this, where the possessor of land is liable for water damages, even if it's created by somebody else.

¶7 Gasienica's post-hearing brief responded to the circuit court's request for further authority on the issue of Richman's potential liability for a nuisance that Richman did not create, but that is located on his land. However, Gasienica's brief also included additional "Factual Background" to the case that does not appear in the pleadings:

> Plaintiff has alleged, generally in his Amended Complaint, and will prove, by specific evidence at trial, the following: … (4) the discharge and overflow has been and is caused by one or more artificial conditions (e.g., a ditch and an embankment) that have existed at all times relevant to this suit and continue to exist upon the Defendant's land; (5) the Plaintiff's property is at a higher elevation than the Defendant's property and, absent the aforesaid artificial conditions, water in the area would runoff and flow onto the Defendant's land beyond the bed of the ditch and, in fact, at least one of the artificial structures was created for the specific purpose of preventing water from flowing onto the Defendant's property beyond the bed of the ditch; and (6) the Defendant has, on at least three occasions, prevented the Plaintiff from abating the aforesaid discharge and overflow, including abatement in such a manner that

> water would not overflow upon the property of either the Defendant or the Plaintiff.

¶8 After the post-hearing briefing, the court issued a memorandum decision and order dismissing the case. The court determined that it was precluded from revisiting the issue of Richman's duty to take action regarding an alleged nuisance created by another because "the opportunity to make that argument either did exist in the previous case or could have and should have been argued in the previous case between Mr. Gasienica and Mr. [Richman]. The plaintiff's case here is brought upon slightly different facts and theories than in the original action, but is substantially the same as the case previously decided." Gasienica appeals.

DISCUSSION

Standard of Review.

¶9 The circuit court resolved this case by granting Richman's motion to dismiss based on the preclusive effect of the prior lawsuit. Whether issue preclusion or claim preclusion may be applied to a particular set of facts or legal claims are questions of law which we review *de novo*. ***Juneau County v. Sauk County***, 217 Wis. 2d 705, 709, 580 N.W.2d 694, 695 (Ct. App. 1998); ***May v. Tri-County Trails Comm'n***, 220 Wis. 2d 729, 733, 583 N.W.2d 878, 880 (Ct. App. 1998).[3]

[3] If issue preclusion may be applied in a given case, it is generally within the circuit court's discretion to determine whether actually applying the doctrine comports with principles of fundamental fairness. ***Paige K.B. v. Steven G.B.***, 226 Wis. 2d 210, 225, 594 N.W.2d 370, 377 (1999). Here, Gasienica's appeal is based solely on issues that are subject to *de novo* review.

Preliminary Matters.

1. Multiple pleadings.

¶10 Gasienica filed four complaints, all with similar factual allegations. Richman moved to strike the second and third amended complaints due to Gasienica's failure to obtain leave of court before amending his pleadings. *See* WIS. STAT. § 802.09(1). The circuit court never ruled on Richman's motion. However, we conclude that our decision on the merits would be the same regardless which complaint is the operative pleading.

2. Facts outside the pleadings.

¶11 A second preliminary issue is whether the facts alleged in Gasienica's post-hearing brief are before this court. Gasienica's brief assumes that they are, but we conclude that they are not. On appeal of a motion to dismiss, we confine our review to the pleadings, ***Jenkins v. Sabourin***, 104 Wis. 2d 309, 313-14, 311 N.W.2d 600, 603 (1981), and Gasienica's post-hearing brief is not part of the pleadings nor is it an evidentiary submission in proper form.[4]

[4] The circuit court must treat a motion to dismiss as a motion for summary judgment if the parties present evidentiary submissions outside of the pleadings and the court does not exclude those submissions. WIS. STAT. § 802.06(2)(b). Here, the circuit court took judicial notice of the decision in the 1997 action that Gasienica initiated against Richman. This decision was referred to in the pleadings.

Additionally, even if we were to review the circuit court's decision under the standards applicable to summary judgment, we would not be permitted to consider Gasienica's unsworn statements in his brief. *See* WIS. STAT. § 802.08(3). That is, the unsworn statements are not "evidentiary facts" and would not be sufficient to raise a genuine issue of material fact. *See* ***Hinrichs v. American Family Mut. Ins. Co.***, 2001 WI App 114, ¶13, 244 Wis. 2d 191, 629 N.W.2d 44; ***Helland v. Kurtis A. Froedtert Mem'l Lutheran Hosp.***, 229 Wis. 2d 751, 764, 601 N.W.2d 318, 325 (Ct. App. 1999).

Issue and Claim Preclusion.

¶12 Issue preclusion is a doctrine of judicial administration that has the dual purpose of protecting litigants from repetitive litigation and of promoting judicial economy. ***Amber J.F. v. Richard B.***, 205 Wis. 2d 510, 517, 557 N.W.2d 84, 87 (Ct. App. 1996). A court may apply issue preclusion to prevent relitigation, by the same parties or their privies, of an issue of fact or law that has been actually litigated in a prior action and that is necessary to the resulting judgment or order. ***Paige K.B. v. Steven G.B.***, 226 Wis. 2d 210, 219, 594 N.W.2d 370, 374 (1999); ***Northern States Power Co. v. Bugher***, 189 Wis. 2d 541, 550, 525 N.W.2d 723, 727 (1995). In addition, issue preclusion may apply even if the cause of action in the second suit is different from the first. ***Crowall v. Heritage Mut. Ins. Co.***, 118 Wis. 2d 120, 122 n.1, 346 N.W.2d 327, 329 n.1 (Ct. App. 1984). A court's determination of whether to actually apply issue preclusion in a given case involves a flexible analysis based on fundamental fairness. ***Michelle T. v. Crozier***, 173 Wis. 2d 681, 688-89, 495 N.W.2d 327, 330-31 (1993). The test requires "that a person must have had a fair opportunity procedurally, substantively and evidentially to pursue the claim before a second litigation will be precluded." ***Amber J.F.***, 205 Wis. 2d at 520, 557 N.W.2d at 88. The party asserting issue preclusion and seeking its benefits has the burden to establish that it should be applied. ***Paige K.B.***, 226 Wis. 2d at 219, 594 N.W.2d at 374.

¶13 Claim preclusion establishes that a final judgment between parties is conclusive for all subsequent actions between those same parties, as to all matters which were, or which could have been, litigated in the proceedings from which the judgment arose. ***Juneau County***, 217 Wis. 2d at 712, 580 N.W.2d at 696.

¶14 It is not clear to us whether the circuit court applied issue or claim preclusion to dismiss Gasienica's current lawsuit. In the 1997 action, however, the court found that Gasienica's property had "natural flooding problems," that the existence of the ditch decreased these natural flooding problems and that the condition of the ditch (which the court determined to be "filled with dirt and debris") caused no damage to Gasienica's property that would not have been caused by the natural flow of water in the area. Under these factual circumstances, the circuit court further concluded that Richman had no duty to maintain the ditch.

¶15 Richman contends on appeal that the issues of fact and of law decided in the 1997 case have preclusive effect in this case. As appellant, Gasienica's primary arguments are: (1) that Richman's failure to remedy an abatable nuisance between November 1996 and October 2000 gives rise to a new cause of action different from any cause of action he litigated or could have litigated in the 1997 case; (2) that he has asserted a new claim for relief in his allegation that Richman intentionally failed to abate a private nuisance, which is a theory of recovery that does not require a finding that Richman had an affirmative duty to maintain the ditch; and (3) that a change in the amount of the dirt and debris in the ditch allows him to relitigate findings of fact from the previous action. We conclude that none of Gasienica's theories are sufficient to overcome the preclusive effects of the prior lawsuit.

¶16 Our first task is to determine whether the court in the 1997 action concluded that the drainage ditch was not a private nuisance. A private nuisance is "an unreasonable interference with the interests of an individual in the use and enjoyment of land." ***Crest Chevrolet-Oldsmobile-Cadillac, Inc. v. Willemsen***, 129 Wis. 2d 129, 138 n.2, 384 N.W.2d 692, 695 n.2 (1986). Whether the interference is "unreasonable" is determined by balancing the gravity of the harm

with the utility of the actor's conduct. "Unreasonableness" also may be found when the harm caused by the conduct is serious, but the burden of compensating the person whose interests are interfered with is not significant enough to cause cessation of the conduct. ***Id.*** at 139, 384 N.W.2d at 695. A person is liable for conduct causing a private nuisance if the resulting invasion of another's property interests is either (1) intentional and unreasonable, or (2) unintentional and "otherwise actionable under the rules controlling liability for negligent or reckless conduct …." ***Id.*** at 138, 384 N.W.2d at 695 (citing RESTATEMENT (SECOND) OF TORTS § 822 (1979)).

¶17 In the 1997 action, the circuit court found that over the years the ditch had become filled with dirt and debris, that the ditch did not substantially interfere with the natural watershed for surface water run-off and that no damage was caused to Gasienica's property that would not have occurred through the natural flow of water. As a matter of law, the ditch could not be a private nuisance under these facts.

¶18 Here, Gasienica seeks total damages of $1,138.80 over a four-year period not covered by his 1997 action. The complaints collectively allege only that the ditch has "not been maintained," that Richman has "not acted upon the ditch," and that Richman has allowed the ditch "to remain in disrepair."

¶19 Undoubtedly, issue preclusion would defeat Gasienica's claims for private nuisance if the only differences between this case and the prior action were that new floods had created new damages. This is so because there would be no grounds for relitigating the previously determined fact that the condition of the ditch did not exacerbate the natural flooding problems on Gasienica's land, *i.e.*, that any claimed interference with Gasienica's property was not an unreasonable

interference, as required before an actionable nuisance can arise. Additionally, an action in negligence would not lie because in 1997 the circuit court held that Richman had no duty to maintain the ditch.

¶20 Gasienica, however, argues that he should have another chance to litigate the issues decided in the previous case because the condition of the ditch has changed. In particular, he argues that silt and debris have continued to build up in the ditch to the point that the ditch is now completely filled in and the water no longer flows in the ditch. We are unpersuaded that this lawsuit is based on new facts material to its disposition.

¶21 Gasienica's argument assumes that any increased blockage that causes less water to flow in the ditch and more water to flow onto the surrounding property creates an unlawful interference. However, the relevant starting point is not the amount of water that would flow onto his land if the ditch were free of all silt and debris. Instead, because the 1997 decision established that the existence of the man-made ditch is beneficial to Gasienica's property, the relevant comparison is to the amount of water that would flow onto Gasienica's property if there were no man-made ditch at all. Gasienica's allegation that the ditch progressed from being partially filled with silt to being completely filled, even if proved, is not sufficient to raise the necessary inference that the flooding has unreasonably interfered with his property rights. Therefore, Gasienica is not entitled to a complete retrial of the action merely because the water has carried more silt into the ditch. Accordingly, we conclude that the issues of fact and law previously decided in the 1997 case preclude the claims for relief raised by Gasienica's current pleadings and we affirm the circuit court's order of dismissal.

CONCLUSION

¶22 We affirm the circuit court's order of dismissal because we conclude that the issues of fact and law actually and necessarily decided in a previous action between the two parties preclude Gasienica's ability to recover on the claims for relief asserted in the pleadings.

By the Court.—Order affirmed.

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