

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 16, 2009

David R. Schanker
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. 2008AP1738

Cir. Ct. No. 2006CV488

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

JERRY TORBECK AND CYNTHIA TORBECK,

PLAINTIFFS-APPELLANTS,

V.

JAMES LEHRER, D/B/A MIDWEST DISPOSAL SERVICES,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Outagamie County:
DEE R. DYER, Judge. *Reversed and cause remanded.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Jerry and Cynthia Torbeck appeal an order dismissing their nuisance action against James Lehrer. The Torbecks claim the circuit court erroneously concluded their action against Lehrer was barred by the doctrine of issue preclusion. We reverse the order and remand to the circuit court.

BACKGROUND

¶2 In 2001, the Torbecks purchased their property from Gladys Verhagen. The Torbecks' property sits next to a closed landfill formerly owned by a corporation controlled by Lehrer. The landfill property is currently owned by CE Land Development.

¶3 According to the Torbecks' complaint, in 1973, Lehrer caused biodegradable refuse to be used as fill in the Verhagens' back yard when their home was being built. The refuse subsequently decomposed, creating methane gas.

¶4 In 1978, the Verhagens reported smelling gas in their home, and the department of natural resources discovered that methane gas was leaking into the home through a garage drain vent. The DNR determined that the fill used in the back yard was creating a pathway for methane gas to travel underground toward the home.

¶5 That same year, the landfill closed. As a condition of closure, DNR orders required Lehrer to install an underground system on the Verhagen property that obstructed the flow of methane gas toward the Verhagen home and rerouted it back to the landfill. Lehrer installed the gas control mechanism, and the landfill closed.

¶6 In 2003, the Torbecks discovered that methane was leaking from the ground in their back yard. They initially filed suit against their real estate agent, the Verhagens, and the current owner of the landfill property, CE Land Development. The Torbecks did not sue Lehrer. As relevant here, the Torbecks asserted CE Land Development, as the successor owner of the landfill, was

statutorily obligated to maintain the methane control system. *See* WIS. STAT. §§ 289.41(1m)(c) and 289.46(1)-(2).¹ The circuit court disagreed and dismissed the Torbecks' claims against CE Land Development in a summary judgment.

¶7 The Torbecks appealed, and we affirmed. *Torbeck v. CE Land Development, LLC*, No.2005AP1999, unpublished slip op. ¶1 (WI App March 9, 2006). We concluded CE Land Development had no duty to mitigate any nuisance arising from the refuse on the Torbeck property because: (1) the refuse was placed on the property at the Verhagens' request; and (2) the DNR orders did not require the 1978 gas control mechanism to address methane gas originating from the Verhagen property, but instead addressed the migration of gases from the landfill property to the Verhagen home. *Id.*, ¶¶7-10.

¶8 The Torbecks then commenced this action against Lehrer, claiming he was responsible for the nuisance on their property. Lehrer moved to dismiss, asserting the Torbecks' claim was barred by the doctrine of issue preclusion. Lehrer's motion relied on our decision in *Torbeck*. The circuit court agreed with Lehrer, relying on the following language from our decision in *Torbeck*: "We see no tort arising from the refuse-laden fill on the Verhagen property, because that was done at the Verhagens' request." *See id.*, ¶7. The circuit court entered an order dismissing the Torbecks' action.

¹ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

DISCUSSION

¶9 The Torbecks claim the circuit court erred when concluding that issue preclusion barred their claim against Lehrer. Determining whether issue preclusion bars a plaintiff's claim involves a two-step analysis. *Rille v. Physician's Ins. Co.*, 2007 WI 36, ¶36, 300 Wis. 2d 1, 728 N.W.2d 693. The first step is to determine whether issue preclusion can, as a matter of law, be applied. *Id.*, ¶37. This inquiry examines whether the issue in the current proceeding was actually litigated and determined in the prior proceeding and whether the determination was essential to the judgment. *Id.* We review a circuit court's determination on this issue independently, though benefiting from its analysis. *Id.*

¶10 If the doctrine of issue preclusion can, as a matter of law, be applied, the second step is to determine whether applying the doctrine would be fundamentally fair. *Id.*, ¶¶37-38. Case law has set forth several factors to aid in the circuit court's analysis. *Id.*, ¶38. While the ultimate decision on fairness is discretionary, some of the factors involve questions of law that are reviewed independently. *Id.*

¶11 We first note that while the circuit court determined issue preclusion applied to bar the Torbecks' claims, the court did not conduct a fundamental fairness analysis. This was an erroneous exercise of discretion that requires reversal. *See id.*, ¶¶37-38. However, we do not remand for the court to perform a fundamental fairness analysis because we conclude that issue preclusion cannot, as a matter of law, bar the Torbecks' claims against Lehrer. Thus, because issue preclusion cannot be applied under the first step of the issue preclusion analysis, there is no reason to proceed to the second step. *See id.*

¶12 Under the first step, the Torbecks' claim against Lehrer cannot be barred because Lehrer's liability was not actually litigated, determined, or essential to the judgment dismissing CE Land Development from the prior action. *See Rille*, 300 Wis. 2d 1, ¶37. In the action against CE Land Development, the issue was whether CE Land Development, as subsequent owner of the landfill property adjoining the Torbeck property, was liable for the nuisance. Lehrer was not a party to that action, and his liability was not an issue. *See Torbeck*, No. 2005AP1999, unpublished slip op., ¶4. However, Lehrer's liability *is* the distinct issue in this action. The Torbecks claim Lehrer is liable because they allege he caused refuse to be used as fill on their property in 1973 and failed to maintain a subsequently installed methane gas control mechanism. CE Land Development's and Lehrer's liability are two distinct issues, and only one was litigated in the prior action.

¶13 Our language in *Torbeck* does not alter our conclusion here.² While our opinion broadly stated there was no tort arising from the placement of refuse on what is now the Torbecks' property, our statement cannot be viewed in isolation from the actual issue in that action—CE Land Development's liability as successor owner of the landfill. The Torbecks asserted CE Land Development was liable under statutes establishing the responsibilities of entities that take ownership of previously established landfills. Lehrer's personal liability was not

² The Torbecks spend significant portions of their argument criticizing our decision in *Torbeck v. CE Land Development, LLC*, No. 2005AP1999, unpublished slip op., ¶1 (WI App March 9, 2006), challenging our representation of the facts derived from the summary judgment record in that case. Regardless of the fact that we do not have the summary judgment record from *Torbeck* before us in this appeal, we note that the Torbecks' argument is misdirected because we are only reviewing the circuit court's decision in this case, not our decision in *Torbeck*. Our decision in *Torbeck* is only relevant here to discern whether the issue of Lehrer's liability was already litigated and decided in that case.

central to the Torbecks' claims against CE Land Development, nor was it litigated or determined in a manner essential to the judgment in that action. Our decision in *Torbeck* did not decide the issue of anyone's liability for the nuisance on the Torbecks' property other than CE Land Development's.

By the Court.—Order reversed and cause remanded.

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

