

**IN THE COURT OF APPEALS OF IOWA**

No. 3-1121 / 13-0770  
Filed January 9, 2014

**ROBERT J. HEMMINGSEN and  
CHERYL R. HEMMINGSEN,**  
Plaintiffs-Appellants,

**vs.**

**ROBERT J. MINGS, JANI S. MINGS  
and KATHLEEN L. MINGS,**  
Defendants-Appellees.

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Appeal from the Iowa District Court for Pottawattamie County, Greg W.  
Steensland, Judge.

Robert and Cheryl Hemmingsen appeal from the district court order  
dismissing their negligence petition. **REVERSED AND REMANDED.**

Robert J. Hemmingsen and Cheryl R. Hemmingsen, Council Bluffs,  
appellants pro se.

Marti S. Sleister, Council Bluffs, for appellees.

Considered by Danilson, C.J., Potterfield, J., and Miller, S.J.\*

\*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2013).

**PER CURIAM.**

Robert and Cheryl Hemmingsen appeal from the district court order dismissing their petition against Robert, Jani, and Kathleen Mings on res judicata grounds. They allege the court erred in finding their claim was precluded by previous litigation. Because the district court improvidently dismissed the action, we reverse and remand.

**I. Background Facts and Proceedings.**

The Hemmingsens own property bordered on the south by property owned by the Mings. In 2009, the Hemmingsens and Mings were involved in a boundary dispute. The resulting litigation was settled by agreement of the parties.

Before the district court approved the settlement in the boundary dispute, the Hemmingsens brought a new action alleging the Mings were negligent in constructing a nearby subdivision. Their petition alleges that several negligent acts relating to the installation and maintenance of drainage protection led to property damage and the diminution of their property value. The Mings answered, denominating several affirmative defenses; their answer did not raise a claim of res judicata.

Some two years after answering, the Mings filed a motion to dismiss the negligence action, alleging that the boundary dispute settlement resolved all claims against them and principles of res judicata precluded the claim. The Hemmingsens resisted. After reviewing the file in the boundary dispute

proceedings, the district court agreed with the Mings' position and dismissed the Hemmingsens' petition.

The Hemmingsens filed a timely appeal.

## **II. Scope of Review.**

We review a ruling on a motion to dismiss for the correction of errors at law. *Rucker v. Taylor*, 828 N.W.2d 595, 598 (Iowa 2013); *U.S. Bank v. Barbour*, 770 N.W.2d 350, 353 (Iowa 2009).

## **III. Analysis.**

The doctrine of res judicata includes both claim and issue preclusion; claim preclusion is a bar to further litigation of a claim, while issue preclusion is a bar to further litigation of a specific issue. *Robbins v. Heritage Acres*, 578 N.W.2d 262, 265 (Iowa Ct. App. 1998). To obtain dismissal on claim preclusion grounds, the party seeking dismissal must establish: (1) "the parties in the first and second action were the same"; (2) "the claim in the second suit could have been fully and fairly adjudicated in the prior case"; and (3) "there was a final judgment on the merits in the first action." *Spiker v. Spiker*, 708 N.W.2d 347, 353 (Iowa 2006). Res judicata should not be raised by a motion to dismiss "unless the nature of the prior adjudication appears on the face of the petition or arises from matters of which the court may take judicial notice." *Johnson v. Ward*, 265 N.W.2d 746, 749 (Iowa 1978). Nothing in the Hemmingsens' petition references the prior adjudication.

The only question then is whether the court could take judicial notice of the court file in the boundary dispute. We find it could not. The general rule is

that it is improper for the court to consider or take judicial notice of the records of the same court in a different proceeding without an agreement of the parties. *Leuchtenmacher v. Farm Bureau Mut. Ins. Co.*, 460 N.W.2d 858, 861 (Iowa 1990). Here, there was no such agreement. Accordingly, the district court erred in considering facts outside of the pleadings in granting the motion to dismiss.

The district court relied on our supreme court's holding in *Johnson v. Ward*, 265 N.W.2d at 749, in determining it could take judicial notice of the prior litigation. In that case, the district court sustained the defendant's motion to dismiss the plaintiff's contract action on the ground the contract violated section 622.32(4) because it was not in writing and was not performed within one year. *Johnson*, 265 N.W.2d at 747. The plaintiff appealed. *Id.* While the matter was on appeal, the plaintiff brought a new action "to enforce the same rights arising out of the same contract against the same defendant as had been the subject of the first suit." *Id.* at 749. The defendant filed a motion to dismiss, which the trial court sustained. The plaintiff appealed. *Id.* Our supreme court consolidated the two appeals. *Id.* at 747. Our supreme court held that under such circumstances the trial court "could take judicial notice of the petitions in the pending cases" and "the ruling in the original case is res judicata of the issues there decided while that ruling is on appeal." *Id.* at 749. Although the district court had dismissed the new action on other grounds, the supreme court affirmed on res judicata grounds after considering the two consolidated appeals. *Id.* at 749. This unique set of facts is not present here.

Because the nature of the prior adjudication does not appear on the face of the petition or arise from matters of which the court may take judicial notice, the district court erred in granting the motion to dismiss. We reverse the order dismissing the action and remand to the district court for further proceedings.

**REVERSED AND REMANDED.**