COURT OF APPEALS
DECISION
DATED AND FILED

January 12, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP942 **Cir. Ct. No. 2008CV774**

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

GIOVANNI A. VISCUSI,

PLAINTIFF-APPELLANT,

V.

PROGRESSIVE UNIVERSAL INSURANCE COMPANY,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Eau Claire County: LISA K. STARK, Judge. *Affirmed.*

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

¶1 PER CURIAM. Giovanni Viscusi appeals a judgment dismissing his bad faith action against Progressive Universal Insurance Company. The circuit court concluded claim preclusion barred Viscusi's action. Viscusi argues the

circuit court erred because there was no identity of claims between his bad faith claim and earlier breach of contract claim. We disagree and affirm.

BACKGROUND

¶2 On December 21, 2006, Viscusi struck a pothole with his vehicle, causing damage to his bumper, fender, exhaust, and oil pan. Several hours later, the engine ceased running because the oil had leaked out. Progressive paid for the external vehicle damage, but on January 8, 2007, denied coverage for the engine damage. Progressive cited the policy language requiring insureds to "take reasonable steps after a loss to protect the covered vehicle ... from further loss." (Emphasis deleted.)

¶3 Viscusi subsequently recovered over four thousand dollars in a small claims suit alleging breach of contract. Progressive appealed to the circuit court. It then admitted coverage for the engine damage prior to the April 28, 2008 trial, but disputed the amount of damages. Just before trial, Viscusi's counsel informed Progressive he was seeking consequential damages on the theory of bad faith. During trial, Progressive objected to trying any bad faith claim because it was not sufficiently pled. Alternatively, Progressive requested bifurcation if the court concluded bad faith was adequately pled. The court then inquired of Viscusi's counsel, who responded he was not yet pursuing a bad faith claim.

¶4 On August 18, 2008, after the circuit court had entered its final order setting damages, Viscusi sought to amend the complaint to add a bad faith claim and request punitive damages. When the court denied that request on August 29, Viscusi filed a new action presenting those claims. The circuit court later dismissed the new action on the basis of claim preclusion. Viscusi now appeals that dismissal.

DISCUSSION

¶5 Viscusi argues his bad faith claim is not barred by claim preclusion. The question of whether claim preclusion applies under a given factual scenario is a question of law that we resolve independently of the circuit court. *See* ***DePratt v. West Bend Mut. Ins. Co.***, 113 Wis. 2d 306, 310, 334 N.W.2d 883 (1983).[1] Under claim preclusion "a final judgment is conclusive in all subsequent actions between the same parties as to all matters which were litigated or which might have been litigated in the former proceedings." ***Id.*** "The purpose of the doctrine of [claim preclusion] is to prevent repetitive litigation. Fairness to the defendant and sound judicial administration require that at some point litigation over the particular controversy must come to an end." ***Id.*** at 311.

¶6 In order for the earlier proceedings to preclude a claim in the present suit, three factors must be present: (1) an identity between the parties or their privies in the prior and present suits; (2) an identity between the claims or causes of action in the two suits; and, (3) a final judgment on the merits in a court of competent jurisdiction. ***Northern States Power Co. v. Bugher***, 189 Wis. 2d 541, 550, 525 N.W.2d 723 (1995) (citing ***DePratt***, 113 Wis. 2d at 311). In the present case, only the second factor, identity between claims, is disputed.

¶7 The RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1982), recognized a transactional view of claim or cause of action, which the Wisconsin supreme court adopted in ***DePratt***, 113 Wis. 2d at 311. ***DePratt*** explained:

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[1] In ***DePratt v. West Bend Mut. Ins. Co.***, 113 Wis. 2d 306, 334 N.W.2d 883 (1983), our supreme court referred to *res judicata*. The court later replaced that terminology with claim preclusion in ***Northern States Power Co. v. Bugher***, 189 Wis. 2d 541, 550, 525 N.W.2d 723 (1995).

> The present trend is to see claim in factual terms and to make it coterminous with the transaction regardless of the number of substantive theories, or variant forms of relief flowing from those theories, that may be available to the plaintiff; regardless of the number of primary rights that may have been invaded; and regardless of the variations in the evidence needed to support the theories or rights. The transaction is the basis of the litigative unit or entity which may not be split.

Id. (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 24, cmt a). ***DePratt*** further explained: "Section 25 of the Restatement states that a plaintiff's second claim is barred even though he or she is prepared in the second action: (1) to present evidence or grounds or theories of the case not presented in the first action; or (2) to seek remedies or forms of relief not demanded in the first action." ***Id.*** at 312.

¶8 Applying the transactional approach to the present case, we conclude there is identity of claims between the causes of action in the two proceedings. Simply put, both the breach of contract and bad faith claims flow from the same nexus of facts: Progressive's failure to pay policy benefits for the engine damage to Viscusi's vehicle. Contrary to Viscusi's arguments, it is irrelevant that one claim would permit contract damages while the other might allow tort and punitive damages. According to the Restatement, it is also of no consequence that Viscusi would be required to present additional facts to support his bad faith claim.

¶9 Viscusi asserts his bad faith claim was not ripe until after the April 28, 2008 trial because Progressive's bad faith continued through that time. He does not, however, develop this argument or cite any law in support. Indeed, bad faith claims are customarily brought together with coverage claims in the same action. Further, even if Viscusi were correct that the bad faith claim could not be addressed in the same trial, his position ignores the practice of holding

bifurcated coverage and bad faith trials within the same action. *See, e.g.*, ***Dahmen v. American Fam. Mut. Ins.***, 2001 WI App 198, 247 Wis. 2d 541, 635 N.W.2d 1. Viscusi offers no explanation why he could not have proceeded in such fashion. The facts pertaining to Progressive's investigation and nonpayment of Viscusi's policy claim were already in existence at the time he initiated the first action.[2]

¶10 Finally, Viscusi claims ***Heyden v. Safeco Title Ins. Co.***, 175 Wis. 2d 508, 515 n.2, 498 N.W.2d 905 (Ct. App. 1993) *overruled on other grounds by* ***Weiss v. United Fire and Cas. Co.***, 197 Wis. 2d 365, 541 N.W.2d 753 (1995), held "unambiguously that a claim for bad faith against an insurance company is not barred by claim preclusion or *res judicata* by an earlier action against the insurer for breach of contract." ***Heyden***, however, merely mentioned in a footnote the prior disposition of the case on appeal pursuant to a summary order. The subsequent published decision did not include any analysis of the claim preclusion issue, and no legal precedent was established by the summary order. *See* WIS. STAT. RULE 809.23(3).[3]

¶11 We recognize that discrete exceptions to the claim preclusion rule exist and others may be recognized. *See* ***Kruckenberg v. Harvey***, 2005 WI 43, ¶¶35-40, 279 Wis. 2d 520, 694 N.W.2d 879. "Exceptions to the doctrine of claim preclusion are rare, but in certain types of cases 'the policy reasons for allowing an exception override the policy reasons for applying the general rule.'" ***Id.***, ¶37

[2] In order to show bad faith, an insured must show the absence of a reasonable basis for denying benefits of the policy and the insurance company's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim." ***Anderson v. Continental Ins. Co.***, 85 Wis. 2d 675, 691, 271 N.W.2d 368 (1978).

[3] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

(quoting ***Sopha v. Owens-Corning Fiberglas Corp.***, 230 Wis. 2d 212, 235-36, 601 N.W.2d 627 (1999)). Viscusi has not, however, identified an applicable exclusion, nor has he argued one should be recognized.

By the Court.—Judgment affirmed.

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