COURT OF APPEALS
DECISION
DATED AND FILED

March 9, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

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.

No. 99-1170

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

SHAWN K. BERGSBAKEN,

PLAINTIFF-RESPONDENT,

V.

JEFFREY D. BURDEY,

DEFENDANT,

AND

PEKIN INSURANCE COMPANY, MILWAUKEE SAFEGUARD INSURANCE COMPANY, PRINCIPAL MUTUAL LIFE INSURANCE COMPANY, RON A. SORTINO AND BEVERLY SORTINO,

DEFENDANTS-RESPONDENTS,

AND

LARRY L. SPERBERG, CLABOUGH & ASSOCIATES, INC., AND UTICA MUTUAL INSURANCE COMPANY,

DEFENDANTS-THIRD-PARTY PLAINTIFFS-APPELLANTS,

V.

RON A. SORTINO AND BEVERLY SORTINO,

THIRD-PARTY DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Waupaca County: JOHN P. HOFFMANN, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront and Roggensack, JJ.

¶1 PER CURIAM. Insurance agent Larry Sperberg, Sperberg's employer, Clabough & Associates, and Clabough's errors and omissions carrier, Utica Mutual Insurance Co. (collectively Sperberg), appeal from an order dismissing all claims and third-party claims against Ron and Beverly Sortino arising from the Sortinos' alleged failure to provide uninsured motorist coverage for a car which they loaned to customers. Sperberg claims that the Sortinos' motion to dismiss should be treated as a motion for summary judgment; that the doctrine of issue preclusion bars the Sortinos from seeking dismissal of the claims against them; and that there is a material, factual dispute necessitating a trial about whether the Sortinos voluntarily assumed a duty to provide insurance for their customers. However, even if the Sortinos' motion is treated as one for summary judgment, we conclude that it raises an issue distinct from any issue previously litigated in the case, and that neither the plaintiff nor the third-party plaintiffs have alleged facts which, if proved, would entitle them to recover from the Sortinos at trial. Accordingly, we affirm.

BACKGROUND

¶2 The Sortinos ran an automotive body repair shop. In early February of 1997, they met with Sperberg to obtain a business auto policy from Pekin Insurance. There is a dispute of fact as to whether the Sortinos orally requested coverage for a Ford Tempo, which they used as a loaner to customers whose vehicles were being repaired. In any event, the Tempo was not listed on the policy Pekin issued to the Sortinos. Later that month, the Sortinos loaned the Tempo to Shawn Bergsbaken while they worked on his car. While driving the Tempo, Bergsbaken was involved in a collision with Jeffrey Burdey, who was not insured.

¶3 Bergsbaken eventually sued Burdey, the Sortinos, Pekin, Sperberg, and his own insurers Milwaukee Safeguard and Principal Mutual Life. Sperberg filed a third-party complaint against the Sortinos. Pekin filed a motion for summary judgment, which was joined in the alternative by Sperberg. The trial court refused to dismiss either Pekin or Sperberg from the suit. The Sortinos subsequently filed a motion to dismiss all claims against them, which was granted, and Sperberg appealed.

DISCUSSION

Standard of Review.

¶4 Whether issue preclusion may be applied to a particular set of facts is a question of law which we review *de novo*. *See* ***Paige K.B. v. Steven G.B.***, 226 Wis. 2d 210, 224, 594 N.W.2d 370 (1999). However, once we determine that issue preclusion may be applied, we address some of the decisions about whether to actually apply it in a given case as questions of law, while other such

determinations are discretionary. *See* ***id.*** at 225. We treat the determination of whether there is an identity of issues as a question of law. *See* ***id.*** at 224.

¶5 The appellants submitted an affidavit and other materials in opposition to the Sortinos' motion to dismiss. They are therefore correct that the motion may be treated as one for summary judgment. *See* WIS. STAT. § 802.06(2)(b) (1997-98).[1] It is well established that this court applies the same summary judgment methodology as that employed by the circuit court. *See* WIS. STAT. § 802.08; ***State v. Dunn***, 213 Wis. 2d 363, 368, 570 N.W.2d 614 (Ct. App. 1997), *review denied*, 217 Wis. 2d 520, 580 N.W.2d 690 (1998). We first examine the complaint to determine whether it states a claim, and then review the answer to determine whether it joins issue.[2] *See* ***id.*** If they do, we examine the moving party's affidavits to determine whether they establish a *prima facie* case for summary judgment. *See* ***id.*** We then look to the opposing party's affidavits to determine whether there are any material facts in dispute which require a trial. *See* ***id.***

Issue Preclusion.

¶6 The application of issue preclusion prevents relitigation, by the same parties, of an issue of fact or law which has been actually litigated and is necessary to the resulting judgment or order. *See* ***Paige K.B.***, 226 Wis. 2d at 219.

[1] All references to the Wisconsin Statutes in this opinion are to the 1997-98 version unless otherwise noted.

[2] Contrary to the appellants' apparent contention, this methodology does not progress to consideration of materials outside of the pleadings, if the pleadings themselves are inadequate.

¶7 Sperberg claims that an insurance agent cannot, as a matter of public policy and consistent with Wisconsin case law, be liable to a third-party beneficiary for failure to acquire insurance unless the insured could also be liable to the third party. Based on this premise, he argues that the trial court could not have reached a determination that Pekin and Sperberg could be liable to Bergsbaken without also determining that the Sortinos could be liable to Bergsbaken; and therefore, the matter of the Sortinos' liability was actually litigated. We disagree.

¶8 Pekin based its summary judgment motion on the assertion that it had no contractual obligation to Bergsbaken as a third-party beneficiary, since the Tempo was not listed on the Sortinos' insurance policy. Sperberg opposed Pekin's motion on the ground that there were disputed factual issues which could result in the reformation of the insurance policy. In the last sentence of its brief opposing Pekin's dismissal from the suit, Sperberg suddenly and without any discussion or citation to authority, claimed in the alternative that he too should be dismissed for lack of contractual privity in the event that Pekin was. The trial court denied Pekin and Sperberg's motions because it determined that Bergsbaken, as a potential third-party beneficiary of the Sortinos' insurance policy, had standing to seek reformation of the contract. Neither the parties nor the trial court ever addressed the issue of whether the Sortinos had any duty to Bergsbaken to request Sperberg to include insurance for the Tempo on the policy.

Negligence, Contribution and Subrogation Claims.

¶9 In order to state a claim for negligence, Bergsbaken's complaint needed to allege facts which, if true, would be sufficient to show that the Sortinos breached a duty, thereby causing him injury. *See* ***Antwaun A. v. Heritage Mut.***

Ins. Co., 228 Wis. 2d 44, 55, 596 N.W.2d 456 (1999). Sperberg does not argue on appeal that the Sortinos had any initial duty, statutory or otherwise, to provide uninsured motorist insurance for a car which they loaned to customers. *See, e.g.,* ***Janikowski v. State Farm Mut. Auto. Ins. Co.***, 187 Wis. 2d 424, 523 N.W.2d 130 (Ct. App. 1994) (self-insurers are not required to provide uninsured motorist coverage absent specific statutory provision). Instead, he claims the Sortinos assumed a duty to any future third-party beneficiaries to take due care in obtaining appropriate coverage for the Tempo once they decided to obtain insurance for that car.

He contends the RESTATEMENT (SECOND) OF TORTS § 324A is applicable. It provides:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for *physical* harm resulting from his failure to exercise reasonable care to protect his undertaking, if
>
> (a) his failure to exercise reasonable care increases the risk of such harm, or
>
> (b) he has undertaken to perform a duty owed by the other to the third person, or
>
> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

See ***American Mut. Liab. Ins. Co. v. Saint Paul Fire & Marine Ins. Co.***, 48 Wis. 2d 305, 313, 179 N.W.2d 864 (1970) (emphasis added) (citation omitted). Sperberg contends this doctrine has been expanded by cases such as ***Coffey v. City of Milwaukee***, 74 Wis. 2d 526, 247 N.W.2d 132 (1976), to include the undertaking of services designed to protect a third party from economic loss, as well as from physical harm.

¶10 ***Coffey*** held that a city inspector who undertook to inspect standpipes, which provided the water necessary to fight a fire, assumed a duty to take reasonable care in his inspection, and could be liable for subsequent loss caused by a fire. *See* ***id.*** at 543. Sperberg attempts to analogize the injury caused by fire in ***Coffey*** to the injury caused by an automobile collision here, arguing that both were economic in nature. We disagree with that characterization. The physical harm which could have been prevented by a proper inspection in ***Coffey*** was the fire itself. There is no reason to believe that different insurance coverage would have prevented the collision between Bergsbaken and Burdey.

¶11 We next consider the third-party complaint. Because common liability to an injured plaintiff is a prerequisite for a contribution claim, *see* ***General Accident Insurance Co. v. Schoendorf & Sorgi***, 202 Wis. 2d 98, 103, 549 N.W.2d 429 (1996), the attempted contribution claim fails because the Sortinos and Sperberg are not joint tortfeasors, for the reasons already discussed above. Additionally, Sperberg's attempted indemnification claim fails because indemnity is only available "'where one person is exposed to liability by the wrongful act of another in which he does not join,'" *see* ***Brown v. LaChance***, 165 Wis. 2d 52, 64, 477 N.W.2d 296 (Ct. App. 1991) (citation omitted), and Sperberg has presented no scenario in which he could be liable to Bergsbaken absent his own negligence. Because the complaint and third-party complaint failed to state any proper claims against the Sortinos, the trial court correctly dismissed them from the suit.

By the Court.—Order affirmed.

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