COURT OF APPEALS
DECISION
DATED AND FILED

May 9, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2017AP1269 **Cir. Ct. No. 2016CV500**

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

JOHN TESKE, JULIE A. TESKE, KATHERINE TESKE AND ELLE TESKE,

PLAINTIFFS-APPELLANTS,

UNITED HEALTHCARE INSURANCE COMPANY,

SUBROGATED PARTY-PLAINTIFF,

V.

WILSON MUTUAL INSURANCE COMPANY,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Fond du Lac County: PETER L. GRIMM, Judge. *Reversed and cause remanded.*

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

¶1 REILLY, P.J. On November 24, 2013, a multi-car traffic accident caused severe injuries to multiple persons when a vehicle driven by Sabrina Srock rear-ended Emily Teske's vehicle, propelling Emily's vehicle into a vehicle driven by Patrice Rog.[1] Members of Emily's family[2] were passengers in her vehicle and suffered injuries. Medical bills for the Teske family exceeded $700,000. The Teske vehicle was insured by Wilson Mutual Insurance Company (Wilson) and had $500,000 in underinsured motorist (UIM) coverage and $500,000 in liability coverage. The parties first litigated UIM coverage issues. The Teskes then brought this negligence action against Wilson on allegations that Emily was negligent in the operation of her vehicle. Wilson objected to the negligence lawsuit on grounds of claim preclusion. The circuit court agreed with Wilson and dismissed the Teskes' negligence action. We reverse. Given the unique facts of this case, claim preclusion does not apply as there is no identity between causes of action. The Teskes' UIM action sought a declaration as to coverage and was a distinct and different type of action from the Teskes' current tort action alleging causal negligence by Emily.

[1] The facts were also detailed in ***Teske v. Wilson Mut. Ins. Co.***, No. 2015AP208, unpublished slip op. ¶¶1-5 (WI App Aug. 19, 2015).

[2] Julie A. Teske, Katherine Teske, and Elle Teske were in the vehicle at the time of the accident and suffered various injuries. John Teske claimed "loss of society, services and companionship of his wife."

Background

¶2 Julie Teske filed suit on January 29, 2014, against Srock.[3] Srock had $300,000 of liability coverage with her insurer, State Farm Mutual Automobile Insurance Company (State Farm). State Farm tendered their $300,000 coverage limit under a settlement agreement.[4] The Teskes then reached a partial settlement agreement on June 20, 2014, with Wilson pursuant to their UIM coverage. Wilson paid the Teskes $245,000—the per accident limit ($500,000) minus the amount tendered from State Farm ($255,000) pursuant to a reducing clause in Wilson's policy. The settlement agreement provided that the Teskes were not waiving any rights to contest the applicability of the reducing clause. The Teskes amended their complaint on July 3, 2014, to add Elle and Katherine as plaintiffs, dismiss Srock, and join Wilson as a defendant. Both Wilson and the Teskes filed motions for declaratory judgment as to whether the reducing clause applied. The circuit court sided with Wilson that the reducing clause was effective. We affirmed. ***Teske v. Wilson Mut. Ins. Co.***, No. 2015AP208, unpublished slip op. ¶19 (WI App Aug. 19, 2015).

¶3 John, Julie, Katherine and Elle Teske thereafter filed the present suit in November 2016 against Wilson, alleging that Emily was negligent in the operation of the Teske vehicle and that her negligence was a cause of their

[3] Wilson was not a party to the litigation. The Teskes claim that the purpose of filing the complaint against Srock and State Farm was to compel Srock's cell phone records to determine whether she was using her cell phone at the time of the accident and, thus, whether another party might be responsible for Srock's negligent operation of her vehicle. Once the evidence revealed no other responsible party, State Farm and the Teskes reached a settlement.

[4] The Teskes received $255,000 and Rog received $45,000.

injuries. Under Wisconsin's direct action statute, WIS. STAT. § 632.24 (2015-16),[5] the Teskes sued Wilson directly as its policy provides separate liability coverage for its insured's, Emily's, negligence. Wilson moved for summary judgment on grounds of claim preclusion. The circuit court agreed and dismissed the Teskes' negligence action. The Teskes appeal.

Claim Preclusion

¶4 Summary judgment is proper if there are no genuine issues of material fact and one party is entitled to judgment as a matter of law. *See* ***Estate of Sheppard ex rel. McMorrow v. Schleis***, 2010 WI 32, ¶15, 324 Wis. 2d 41, 782 N.W.2d 85; *see also* WIS. STAT. § 802.08(2). Whether claim preclusion applies is a question of law we determine independently from the circuit court. *See* ***Kruckenberg v. Harvey***, 2005 WI 43, ¶17, 279 Wis. 2d 520, 694 N.W.2d 879. Claim preclusion is a common law doctrine representing policy considerations of fairness and judicial efficiency. ***Northern States Power Co. v. Bugher***, 189 Wis. 2d 541, 549-50, 525 N.W.2d 723 (1995). "[U]nder claim preclusion 'a final judgment is conclusive in all subsequent actions between the same parties [or their privies] as to all matters which were litigated or which might have been litigated in the former proceedings.'" ***Id.*** at 550 (alteration in original; citation omitted). The purpose of claim preclusion is to "draw a line between the meritorious claim on the one hand and the vexatious, repetitious and needless claim on the other hand." ***Id.*** (citation omitted).

[5] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

¶5 In order for claim preclusion to operate as a bar based on prior proceedings, three elements must be established: "(1) an identity between the parties or their privies in the prior and present suits; (2) an identity between the causes of action in the two suits; and, (3) a final judgment on the merits in a court of competent jurisdiction." ***Id.*** at 551; *see also* ***Menard, Inc. v. Liteway Lighting Prods.***, 2005 WI 98, ¶26, 282 Wis. 2d 582, 698 N.W.2d 738. We conclude that there is no identity between the causes of action, and, therefore, we reverse for a determination on the merits of the negligence claim.[6]

¶6 Wisconsin courts have adopted the "transactional approach" to determine whether there is an identity between the causes of action in two separate suits. ***Menard***, 282 Wis. 2d 582, ¶30; ***Kruckenberg***, 279 Wis. 2d 520, ¶25. "Under the doctrine of claim preclusion, a valid and final judgment in an action extinguishes all rights to remedies against a defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose." ***Kruckenberg***, 279 Wis. 2d 520, ¶25. According to the RESTATEMENT (SECOND) OF JUDGMENTS § 24(2) (1982):

> What factual grouping constitutes a "transaction", and what groupings constitute a "series", are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

¶7 What constitutes a "transaction" is "not capable of a mathematically precise definition; it invokes a pragmatic standard to be applied with attention to

[6] As we find element two to be conclusive, we do not reach the issue of identity between the parties or their privies. *See* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (noting that "cases should be decided on the narrowest possible ground").

the facts of the cases." RESTATEMENT (SECOND) OF JUDGMENTS § 24(2) cmt. b. "The concept of a transaction connotes a common nucleus of operative facts." ***Kruckenberg***, 279 Wis. 2d 520, ¶26. "The transactional approach to claim preclusion reflects 'the expectation that parties who are given the capacity to present their "entire controversies" shall in fact do so.'" ***Id.***, ¶27 (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 24(2) cmt. a).

¶8 Wilson argues that under the transactional approach, "it is clear that all of the facts giving rise to the Teskes' claims are related in time, space and origin to one salient event, namely the November 24, 2013 accident." According to Wilson, the Teskes not only had the opportunity to present all of their claims and legal theories in the prior lawsuit, but were required to do so under the transactional approach.

¶9 We disagree. The current tort action involves litigation of different facts and legal theories, specifically the facts of the accident versus the interpretation of whether the reducing clause in Wilson's policy applied. The current action will examine Emily's alleged negligence and, if any, whether her negligence was a cause of the Teskes' injuries. The prior action was a contract action, which required the court to interpret Wilson's UIM policy provisions. Wilson's answer to the Teskes' amended complaint acknowledged that its policy limits for UIM had been exhausted and further stated that Wilson had paid its limits of the UIM policy "based on the terms, conditions, exclusions, and exceptions as contained in its [UIM] policy." On cross-motions for declaratory judgment, the circuit court concluded, and we affirmed, that Wilson's policy and its reducing clause were unambiguous and were in accordance with WIS. STAT. § 632.32(5)(i)1. (2013-14). The only issue in the prior case was whether the UIM reducing clause applied. The two actions involve neither a common "nucleus of

facts" nor legal question. Accordingly, there is no requirement in law or equity requiring these distinctly separate claims to be litigated together.[7]

¶10 Wilson does not cite a Wisconsin case, and we have found none, that applies claim preclusion to bar a tort action after a UIM coverage dispute has been resolved.[8] While the doctrine of claim preclusion is important to our justice system, we do not "blindly" apply the doctrine in Wisconsin. ***Sopha v. Owens-Corning Fiberglas Corp.***, 230 Wis. 2d 212, 235-36, 601 N.W.2d 627 (1999).[9]

[7] Courts in other jurisdictions have reached the same conclusion. *See, e.g.*, ***Camus v. State Farm Mut. Auto. Ins. Co.***, 151 P.3d 678, 681 (Colo. App. 2006); ***Oshana v. FCL Builders, Inc.***, 2013 IL App (1st) 120851, ¶39; ***Porta-Mix Concrete, Inc. v. First Ins. E. Grand Forks***, 512 N.W.2d 119, 120 (Minn. Ct. App. 1994); ***Hill v. Grandey***, 321 A.2d 28, 31-32 (Vt. 1974). Some courts, however, have found that claim preclusion bars a separate suit where one suit is a breach of contract claim and one is a bad faith claim. *See, e.g.*, ***Viscusi v. Progressive Universal Ins. Co.***, No. 2009AP942, unpublished slip op. ¶8 (WI App Jan. 12, 2010); *see also* ***Salazar v. State Farm Mut. Auto. Ins. Co.***, 148 P.3d 278, 281 (Colo. App. 2006). Unlike a negligence claim, breach of contract and bad faith claims both flow from the same facts: the insurance company's failure to pay the policy benefits.

[8] The parties discuss WIS. STAT. § 803.04(2)(b), which permits bifurcation of liability and the related insurance coverage issues, i.e., whether the insurer has a duty to defend or indemnify the insured for the claims. We fail to see the statute's relevance. Here, the Teskes' negligence claim against Emily is brought as a direct action against Wilson, and there is no liability coverage issue raised. Even if Wilson does contest liability coverage, that too, would be an entirely separate coverage claim from the UIM dispute.

[9] We caution the bench and bar that the facts of this case are unique. If the Teskes' damages were arguably within UIM coverage limits, our answer may have been different. In many UIM cases, how the accident happened, i.e., who is at fault, as well as whether the alleged damages are such that a UIM claim is present are material issues. What makes the Teskes' claim distinct is that the parties were only arguing over the application of the reducing clause. We can envision a scenario where the *existence* of a UIM claim is at issue that would, from a pragmatic standpoint, require that the negligence claim against Emily be brought in the same action as the contract claim for UIM coverage so that the apportionment of negligence and damages could be arrived at in one hearing, for one accident. Our answer in this action is a pragmatic answer that takes into account the unique facts of this case and considerations of fairness and judicial efficiency.

¶11 Accordingly, for the reasons stated, we reverse the order of the circuit court granting Wilson's motion for summary judgment and remand for further proceedings.

By the Court.—Order reversed and cause remanded.

Not recommended for publication in the official reports.