COURT OF APPEALS
DECISION
DATED AND FILED

March 7, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP922 **Cir. Ct. No. 2002CV854**

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

SOCIETY INSURANCE,

PLAINTIFF-APPELLANT,

V.

CITIES AND VILLAGES MUTUAL INSURANCE CO. AND CITY OF GREEN BAY,

DEFENDANTS-RESPONDENTS.

APPEAL from judgments of the circuit court for Brown County: KENDALL M. KELLEY, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Society Insurance appeals a summary judgment dismissing its claims against the City of Green Bay and the City's insurer, Cities and Villages Mutual Insurance Company (CVMIC). Society argues the circuit

court erred when it concluded Society's claims were barred by claim preclusion.[1] We disagree and affirm the judgments.

BACKGROUND

¶2 Jeffrey Block was seriously injured when he fell while walking at a marina located at the Holiday Inn City Centre. The marina was owned by the City, but operated and managed by Holiday Inn.[2] Block sued the Holiday Inn and its insurer, Society, but did not sue the City or CVMIC.

¶3 In May 2000, Society impleaded the City and its insurer, "ABC Insurance Company," in the Block litigation. Society alleged the City and Holiday Inn had an agreement regarding the operation of the marina, the agreement required the City to insure the marina, and "[u]pon information and belief, ABC Insurance Company provided a policy of general liability insurance naming the Holiday Inn City Centre and/or Great Lakes Inn Management, Inc. as insureds on its policy of insurance with the City of Green Bay." Society also sought contribution or indemnification from the City.

¶4 The City moved for summary judgment in the Block litigation on the basis of recreational immunity. Society did not oppose the City's motion and, in October 2000, the third-party complaint was dismissed with prejudice.

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[1] Society raises a number of additional arguments relating to coverage under the CVMIC policy. However, because we conclude Society's claims are barred by claim preclusion, we do not address Society's arguments. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (only dispositive issues need be addressed).

[2] The Holiday Inn City Centre is actually operated by Great Lakes Inn Management, Inc., which is Society's named insured. Because the distinction is irrelevant for the purposes of our discussion, we follow the parties' lead and refer to both entities collectively as Holiday Inn.

¶5 On September 17, 2001, Society learned that the City had a CVMIC policy that potentially provided coverage for the events giving rise to the Block litigation. The remaining claims in the Block litigation proceeded to trial, commencing on October 8, 2001. A few days later, Society settled the Block litigation.

¶6 Society then commenced this action against the City and CVMIC to recover the money Society paid to settle the Block litigation. Society claimed that Holiday Inn was insured under the City's CVMIC policy and therefore CVMIC breached its duty to defend Holiday Inn in the Block litigation. Society also alleged that the City breached a contract with Holiday Inn, which included mutual promises to name each other as a named insured under their insurance policies.

¶7 All parties moved for summary judgment. The circuit court concluded Society's claims were barred by claim preclusion and dismissed Society's complaint.

STANDARD OF REVIEW

¶8 We review a summary judgment independently, using the same methodology as the circuit court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).[3] Summary judgment methodology is well established and need not be repeated here. *See*, *e.g.*, ***Lambrecht v. Estate of***

[3] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

Kaczmarczyk, 2001 WI 25, ¶¶20-24, 241 Wis. 2d 804, 623 N.W.2d 751. The dispositive issue on appeal is whether claim preclusion applies to the facts, which presents a question of law that we review independently. ***Kruckenberg v. Harvey***, 2005 WI 43, ¶17, 279 Wis. 2d 520, 694 N.W.2d 879.

DISCUSSION

¶9 "The doctrine of claim preclusion provides that a final judgment on the merits in one action bars parties from relitigating any claim that arises out of the same relevant facts, transactions, or occurrences." ***Id.***, ¶19. When claim preclusion is applied, "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." ***Northern States Power Co. v. Bugher***, 189 Wis. 2d 541, 550, 525 N.W.2d 723 (1995) (citations omitted). Claim preclusion applies when the following three factors are present: "(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.

¶10 Society's primary argument on appeal is that fundamental fairness prevents the application of claim preclusion here, because it did not learn of CVMIC's policy until a few weeks before trial in the Block litigation. However, our supreme court in ***Kruckenberg*** rejected the notion that courts should engage in a fundamental fairness analysis when applying claim preclusion or allow "litigation of an otherwise barred claim to continue simply because in that particular case, application of the doctrine of claim preclusion might appear unfair." ***Kruckenberg***, 279 Wis. 2d 520, ¶62.

¶11 Society also challenges whether the elements of claim preclusion are present here. It concedes that the final judgment element is met, but contends the other two elements are not. Society argues that there is no identity of claims because it raises different claims in this case than it did in the Block litigation. Indeed, Society contends it could not have brought its claims regarding the CVMIC policy in the Block litigation because it did not know the policy existed until a few weeks before trial.

¶12 However, claim preclusion bars a subsequent suit on claims that were or *could have been* brought in the first suit. *See* ***Northern States Power***, 189 Wis. 2d at 550. Wisconsin has adopted the transactional approach to determining whether there is an identity of claims. ***Kruckenberg***, 279 Wis. 2d 520, ¶25. Accordingly, a final judgment extinguishes all rights arising "with respect to all or any part of the transaction …." ***Id.*** A transaction consists of "a common nucleus of operative facts." ***Id.***, ¶26.

> The goal in the transactional approach is to see a claim in factual terms and to make a claim coterminous with the transaction, regardless of the claimant's substantive theories or forms of relief, regardless of the primary rights invaded, and regardless of the evidence needed to support the theories or rights.

Id.

¶13 Here, all of Society's claims arise from the same set of operative facts as those at issue in the Block litigation: who was responsible for Block's injuries. The contractual claims between the City and Society and the coverage issues between CVMIC and Holiday Inn all arise as part of that "transaction." All of Society's claims could have been raised in the Block litigation.

¶14 Additionally, most of Society's claims actually were brought in the Block litigation. Society's third-party complaint against the City and its insurer alleged that the City was a joint tortfeasor; that a contract governed the operation of the marina, including insurance obligations; and that the City had an insurance policy that named Holiday Inn as an insured. Even though Society did not know CVMIC's identity when it brought those third-party claims, Society did bring its contractual claims in the Block litigation. Society's strategic decision to not pursue or oppose the dismissal of those contractual claims in the Block litigation does not change the fact all the claims raised here were or could have been raised in the Block litigation.

¶15 Society also argues claim preclusion cannot apply to its claims against CVMIC because CVMIC was not a party to the Block litigation. Therefore, the identity of parties element is not met. However, claim preclusion applies when there is an identity of parties or their privies. *See* ***id.***, ¶21. CVMIC argues it was in privity with the City regarding the claims in the Block litigation, and Society offers no reply. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (arguments not refuted are generally deemed admitted). Thus, we conclude the elements of claim preclusion have been met.

¶16 In reply, Society points out that, even where the elements of claim preclusion are met, the ***Kruckenberg*** court acknowledged there are "narrow, clear, special circumstances exceptions to claim preclusion." Society argues that one of those exceptions applies here: comment j of the RESTATEMENT (SECOND) OF JUDGMENTS § 26 (1982), which states that claim preclusion should not apply where "an innocent misrepresentation prevented the plaintiff from including the entire claim in the original action." Society contends the City's failure to disclose

its CVMIC policy constitutes such an innocent misrepresentation. Society offers no authority that this exception has been adopted in Wisconsin. In any event, the exception does not apply here because any innocent misrepresentation the City made did not prevent Society from including the entire claim in the Block litigation. Society's third-party complaint against the City and its insurer in the Block litigation included claims that the City was contractually obligated to name the Holiday Inn on its insurance policy and that the City's policy provided coverage.

¶17 We conclude the elements of claim preclusion are met. Further, Society has failed to establish any exception to applying claim preclusion to the facts of this case. Accordingly, the circuit court did not err when it granted summary judgment in favor of the City and CVMIC on the basis of claim preclusion.

By the Court.—Judgments affirmed.

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