COURT OF APPEALS
DECISION
DATED AND RELEASED

December 27, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62(1), STATS.

NOTICE

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No. 95-2099-FT

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

AUDREY ROEMING, D/B/A ROEMING INDUSTRIAL SALES, and DAVID A. ROEMING,

Plaintiffs-Appellants,

v.

PETERSON BUILDERS, INC., ROGER PINKERT, AMERICAN GASKET COMPANY, CARL NEUBAUER, and GERARD KUCHLER,

Defendants-Respondents.

APPEAL from an order of the circuit court for Door County: RICHARD G. GREENWOOD, Judge. *Affirmed in part; reversed in part; and cause remanded.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Audrey Roeming, d/b/a Roeming Industrial Sales, and David Roeming appeal an order dismissing their complaint against

the respondents.[1] The Roemings raise three issues on appeal: (1) whether their complaint states any claims upon which relief could be granted; (2) whether res judicata or collateral estoppel bar any of their claims; and (3) whether Audrey has standing despite the fact that she was not named as a party in the previous action.

We conclude that: (1) the complaint states claims upon which relief could be granted for breach of contract, frivolous action, abuse of process, unjust enrichment, injury to business, tortious interference with contractual and business relations, fraud and misrepresentation; (2) res judicata only bars claims that would nullify the initial judgment or impair rights established in the initial action and accordingly only bars the Roemings' claims for frivolous action, unjust enrichment, fraud and misrepresentation; and (3) Audrey does have standing in this lawsuit. Therefore, we affirm in part, reverse in part and remand to the trial court for further proceedings consistent with this opinion.

Peterson Builders, Inc. (PBI) contracted to purchase Union Carbide GTK gaskets from American Gasket Company. American obtained the gaskets from David Roeming at Roeming Industrial Sales and delivered them to PBI. PBI later installed the gaskets into a ship it was constructing for the United States Navy. After the gaskets were installed, the gaskets began to ooze glue, indicating they were not sealing properly.

PBI notified American, which notified Roeming Industrial Sales. As a result, PBI obtained new gaskets from the manufacturer. PBI removed the old gaskets and replaced them with the new ones. PBI then demanded that American pay PBI's labor costs required to replace the gaskets. PBI claimed that the total amount was $12,160, which equals 380 man hours at a cost of $32 per hour, the rate PBI charged third parties.

American refused to pay the claim and PBI brought suit against American. American in turn filed a third-party complaint against David Roeming, d/b/a Roeming Industrial Sales, claiming that he was responsible for any damages PBI suffered because he supplied the gaskets. Roeming denied all

[1] This is an expedited appeal under RULE 809.17, STATS.

material allegations in the third-party complaint and the parties conducted full discovery. PBI then filed a cross-claim against David Roeming, d/b/a Roeming Industrial Sales, claiming that Roeming had misrepresented the gaskets.

After the trial court denied both PBI's and Roeming's motions for summary judgment, the parties engaged in settlement negotiations. Despite PBI's indication that it would settle for $8,000, Roeming paid the entire $12,160 to PBI and the case was dismissed with prejudice. Prior to the dismissal, Roeming's attorney in a letter to opposing counsel claimed he reserved the right to sue on all claims and confirmed that the dismissal only related to PBI and American's claims pled in the action. The letter was not incorporated into the dismissal order.

Audrey Roeming,[2] d/b/a Roeming Industrial Sales, subsequently commenced an action against PBI, PBI's attorney (Roger Pinkert), American, American's owner (Carl Neubauer), and American's attorney (Gerard Kuchler) alleging various causes of action. An amended complaint was later filed naming David Roeming as an additional plaintiff. The amended complaint also listed the individual causes of action as breach of contract, abuse of process, unjust enrichment, commission of unfair trade practices pursuant to § 100.20, STATS., injury to business pursuant to § 134.01, STATS., tortious interference with business relationship, conspiracy, fraud and misrepresentation. All defendants brought motions to dismiss claiming among other things that the Roemings' claims were barred by the doctrine of res judicata, the complaint did not state any claims upon which relief could be granted, and Audrey did not have standing. The parties submitted briefs and affidavits and the court dismissed the action. The Roemings appeal.

Although the defendants brought a motion for dismissal, all parties submitted affidavits in support of their positions. Because the trial court did not exclude the affidavits, the motion is to be treated as one for summary judgment. Section 802.06(3), STATS.[3] However, the trial court appears to have

[2] Audrey is the sole proprietor of Roeming Industrial Sales. David Roeming is her son and employee.

[3] Section 802.06(3), STATS., provides in relevant part:

If, on a motion for judgment on the pleadings, matters outside the pleadings are

resolved the issues on other grounds. In its decision, the trial court first determined that many of the causes of action in the complaint did not state a claim upon which relief could be granted. Then the trial court appeared to determine that all of the Roemings' claims were barred by the doctrine of res judicata. Accordingly, we will first determine whether any of the causes of action alleged by the Roemings state a claim, and then whether res judicata bars any of the claims. Because we conclude that the Roemings state claims upon which relief could be granted and res judicata does not bar all of their claims, we affirm in part, reverse in part and remand for the trial court to apply summary judgment methodology. We have the authority to address summary judgment issues on appeal even though the trial court did not do so because the standard of review is the same. *See* ***Brown v. LaChance***, 165 Wis.2d 52, 60, 477 N.W.2d 296, 300 (Ct. App. 1991). In this case, however, we believe we could benefit from the trial court's analysis of summary judgment methodology.

The primary purpose of pleading in Wisconsin is notice giving. ***Hertlein v. Huchthausen***, 133 Wis.2d 67, 72, 393 N.W.2d 299, 301 (Ct. App. 1986). The complaint need only give adequate notice of the circumstances of the claim and the nature of the claim asserted. ***Grams v. Boss***, 97 Wis.2d 332, 351, 294 N.W.2d 473, 483 (1980). A complaint is not required to state all ultimate facts that constitute each cause of action. ***Id.*** Resolution of precise facts which sustain the claim is left to discovery. ***Studelska v. Avercamp***, 178 Wis.2d 457, 463, 504 N.W.2d 125, 127 (Ct. App. 1993). The facts pleaded and all reasonable inferences therefrom are accepted as true for the purpose of testing the legal sufficiency of the claims. ***Prah v. Maretti***, 108 Wis.2d 223, 229, 321 N.W.2d 182, 186 (1982). The pleadings are to be liberally construed to provide substantial justice to the parties and the complaint should be dismissed only if it is clear that the plaintiff cannot recover under any conditions. ***Grams***, 97 Wis.2d at 351, 294 N.W.2d at 483. With this in mind, we will analyze the Roemings' complaint to see if it states any claims upon which relief could be granted.

(..continued)

> presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in s. 802.08, and all parties shall be given reasonable opportunity to present all material made pertinent to the motion by s. 802.08.

CLAIMS

First, under the heading "Breach of Contract," the Roemings claim that PBI and American breached an implied covenant of good faith and that the lawyers for PBI and American did not act in good faith or assert claims that were fairly debatable in the law. Under Wisconsin law, every contract implies good faith and fair dealing between the parties to it, and a duty of cooperation on the part of both parties. ***Super Valu Stores, Inc. v. D-Mart Food Stores, Inc.***, 146 Wis.2d 568, 577, 431 N.W.2d 721, 726 (Ct. App. 1988).

The complaint states a claim for breach of contract against both PBI and American. The Roemings allege that they had a contract with American and they were third-party beneficiaries to the contract between PBI and American. They further allege that PBI and American breached the implied covenant of good faith by conspiring to injure the Roemings. *See* ***Foseid v. State Bank***, No. 94-0670 slip op. at 22 (Wis. Ct. App. Oct. 19, 1995, ordered published Nov. 28, 1995) (party may be liable for breach of implied covenant of good faith even though all the terms of the agreement may have been fullfilled). This is sufficient under notice pleading. The allegations are also sufficient to state a claim for frivolous action. However, the complaint fails to state a claim for breach of contract against the attorneys because Roeming did not allege that it had a contract with either Pinkert or Kuchler.

Second, the Roemings claim that all defendants are guilty of abuse of process because they all acted together to use legal process against Roeming for a purpose the process was not designed for—to injure the business of obviously innocent persons. Abuse of process lies even where legal procedure has been set in motion in proper form, with probable cause, and even with ultimate success, but nevertheless has been perverted to accomplish an ulterior purpose for which it was not designed. ***Sell v. Thompson & Coates, Ltd.***, 163 Wis.2d 765, 776-77, 472 N.W.2d 834, 838 (Ct. App. 1991). Because the Roemings allege that the defendants conspired to bring the lawsuit and continued the suit for the purpose of injuring the Roemings, the complaint is sufficient under notice pleading with respect to this cause of action.

Third, the Roemings claim that PBI was unjustly enriched because they were not entitled to the $12,160. The elements of a claim for unjust

enrichment are: (1) plaintiff conferred a benefit on defendant; (2) defendant knew of and accepted or retained the benefit; and (3) circumstances make it equitable for the defendant to retain the benefit without paying its value. ***Watts v. Watts***, 137 Wis.2d 506, 531, 405 N.W.2d 303, 313 (1987). The complaint alleges that Roeming paid $12,160 to PBI, PBI accepted the money, and PBI was not entitled to that amount. Therefore, we conclude that the complaint states a claim for unjust enrichment.

Next, the Roemings claim that all the defendants participated in misconduct in violation of § 100.20, STATS. Section 100.20 prohibits unfair methods of competition in business and unfair trade practices. We agree with the trial court that there is nothing in the amended complaint to support this claim. Therefore, the trial court properly dismissed this cause of action and the claim that the defendants conspired to violate § 100.20, STATS.

Fifth, the Roemings claim that the defendants violated § 134.01, STATS., which prohibits any two or more persons from combining, associating, agreeing, mutually undertaking or concerting together for the purpose of willfully or maliciously injuring another in his reputation, trade, business or profession. The Roemings allege that the defendants conspired to injure their business and allege injury from the conspiracy. Therefore, the Roemings have stated a claim upon which relief could be granted. *See* ***Radue v. Dill***, 74 Wis.2d 239, 242, 246 N.W.2d 507, 510 (1976); ***Segall v. Hurwitz***, 114 Wis.2d 471, 484, 339 N.W.2d 333, 340 (Ct. App. 1983).

Sixth, the Roemings claim that PBI intended to and did tortiously interfere with a contractual and business relationship Roeming had with American by pursuit of meritless claims. The Roemings also claim that PBI, American, Neubauer and Kuchler tortiously interfered with David's employment contract with Roeming Industrial Sales by pursuit of the claims against David. Wisconsin has recognized an action for tortious interference with contractual or business relations adopting the RESTATEMENT (SECOND) OF TORTS § 766 (1979). *See* ***Cudd v. Crownhart***, 122 Wis.2d 656, 659, 364 N.W.2d 158, 160 (Ct. App. 1985). Because this is a valid claim in Wisconsin and the complaint gives sufficient notice of the claim, we conclude that the claim is sufficient under notice pleading.

The last claim involves allegations of fraud and misrepresentation against PBI, American and their attorneys. The Roemings allege in the complaint that PBI and Pinkert represented with the intent to defraud that the Navy would not accept the gaskets when they knew that was not true and that the labor costs to replace the gaskets were greater than they actually were. The complaint also alleged that American and Kuchler misrepresented by omission the terms of American's contract with PBI for the purpose of defrauding Roeming. The Roemings further allege that they relied on the representations to their detriment. Accordingly, we conclude that the amended complaint states a claim for fraud and misrepresentation against the defendants.

RES JUDICATA

Next, we will examine the respondents' contention that res judicata and collateral estoppel bar the Roemings' claims. Whether the doctrines of res judicata or collateral estoppel apply under a given set of facts presents a question of law that we review without deference to the trial court. ***A.B.C.G. Enters. v. First Bank S.E.***, 184 Wis.2d 465, 472, 515 N.W.2d 904, 906 (1994).

Res judicata provides that a final adjudication on the merits in a prior action is conclusive in a subsequent action between the same parties, or their privies, for all matters that were litigated or might have been litigated. ***Id.*** at 472-73, 515 N.W.2d at 906. Collateral estoppel precludes relitigation of issues that have actually been litigated in former proceedings. ***Id.*** at 472-73, 515 N.W.2d at 907.

These doctrines are founded upon principles of fundamental fairness and are designed to balance judicial economy and the need to bring litigation to a final conclusion with the party's right to have a judicial determination of their claims. ***Desotelle v. Continental Cas. Co.***, 136 Wis.2d 13, 21, 400 N.W.2d 524, 527 (Ct. App. 1986). These doctrines may not be applied in such a fashion as to deprive a party the opportunity to have a full and fair determination of an issue. ***Id.*** at 22, 400 N.W.2d at 527.

The general rule is that a stipulation of dismissal with prejudice constitutes a final judgment for the purpose of res judicata, but not for the purpose of collateral estoppel. ***Sullivan v. Easco Corp.***, 662 F.Supp. 1396, 1408 (D. Md. 1987) (citing ***Lawlor v. National Screen Serv. Corp.***, 349 U.S. 322, 327 (1955)); *see also* RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. e (1982). Because this dismissal was not accompanied by findings, collateral estoppel does not apply and only res judicata is at issue. *See* ***Lawlor***, 349 U.S. at 327.

Counterclaims are permissive and not mandatory in Wisconsin. Section 802.07(1), STATS. However, a defendant who may counterclaim in a prior action but does not is precluded from bringing a subsequent action on the claim if it was a common law compulsory counterclaim. ***A.B.C.G Enters.***, 184 Wis.2d at 476, 515 N.W.2d at 909. The common law compulsory counterclaim rule is narrow; it applies only if a favorable judgment in the second action would nullify the initial judgment or impair rights established in the initial action. ***Id.*** at 476, 515 N.W.2d at 908. Therefore, if any of the Roemings' claims nullify the initial judgment involving PBI's claim for $12,160 for labor costs in replacing the gaskets, they are barred by res judicata. *See* ***id.*** However, if the claim does not nullify the initial judgment it is not barred. *See* ***id.***

Under this standard, we conclude that the doctrine of res judicata does not bar the Roemings' claims for breach of contract, abuse of process, injury to business, or tortious interference with contractual or business relations. These causes of action do not deny the essence of PBI's claim for $12,160 in the initial action and could exist even if PBI's claim was legitimate. Recovery under those theories would not establish that the prior judgment was incorrect and thus would not nullify the prior judgment.

However, we conclude that the Roemings' claims for frivolous action, unjust enrichment, fraud and misrepresentation are barred by the doctrine of res judicata. The Roemings are claiming PBI and American committed fraud and that PBI was unjustly enriched because it was not entitled to the $12,160. Recovery under any of these causes of action would nullify the initial judgment because it would establish that the prior judgment was incorrect. *See* ***id.*** at 477-78, 515 N.W.2d at 908 (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 22 cmt. f (1982)). In addition, the Roemings under these theories are seeking to recover the amount of the judgment paid on a restitution

theory. *See* ***id.*** Therefore, the claims for frivolous action, unjust enrichment, fraud and misrepresentation are common law compulsory counterclaims.

However, res judicata analysis does not end there. In addition to being a common law compulsory counterclaim, there must also be an identity of parties and an identity of causes of action for res judicata to apply. ***Id.*** at 481-82, 515 N.W.2d at 910. There is an identity of parties in this action because David Roeming, PBI and American were all parties to the first action. Although Audrey was not named as a party she was in privy because Audrey and David had an employer-employee relationship, David was sued for work he was doing for Roeming Industrial Sales, Audrey was involved in the defense of the suit, and Audrey paid the $12,160. *See* ***Great Lakes Trucking Co. v. Black***, 165 Wis.2d 162, 168, 477 N.W.2d 65, 68 (Ct. App. 1991). When a party in the second proceeding is a privy of a party in the first proceeding, there is an identity of parties. ***Id.***

There is also an identity of causes of action. To determine whether there is an identity of causes of action, we must examine the causes of action in both suits within the framework of the transactional analysis adopted from the RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1982). ***A.B.C.G Enters.***, 184 Wis.2d at 481-82, 515 N.W.2d at 910. "Under this analysis, all claims arising out of one transaction or factual situation are treated as being part of a single cause of action and they are required to be litigated together." ***Id.*** (quoting ***Parks v. City of Madison***, 171 Wis.2d 730, 735, 492 N.W.2d 365, 368 (Ct. App. 1992)). In determining if the claims arise from a single transaction, we may look to whether the facts are related in time, space, origin, or motivation. ***Id.***

We conclude that the claims for frivolous action, unjust enrichment, fraud and misrepresentation arise out of the same transaction or factual situation as the first suit. The Roemings are attacking the validity of the claim for replacing the gaskets. They allege that PBI and American committed fraud and that PBI was not entitled to the $12,160 and were thus unjustly enriched. The same replacement of gaskets that was at issue in the prior action are at issue in these claims. Accordingly, we conclude that there is an identity of causes of action and the Roemings' claims based on frivolous action, unjust enrichment, fraud and misrepresentation are barred by res judicata. *See* ***id.***

STANDING

Finally, the Roemings contend that the trial court erred when it determined that Audrey did not have standing in the present lawsuit. The essence of the standing requirement is whether the party seeking to invoke the court's jurisdiction has alleged a personal stake in the outcome that is at once related to a distinct and palpable injury and a fairly traceable causal connection between the claimed injury and the challenged conduct. ***Park Bancorporation, Inc. v. Slettleland***, 182 Wis.2d 131, 145, 513 N.W.2d 609, 615 (Ct. App. 1994). We will not construe the law of standing narrowly or restrictively. ***Id.***

Audrey is the sole proprietor of Roeming Industrial Sales and David was her employee. In the complaint, Audrey alleges that as a condition of David's continued employment with Roeming, Roeming agreed to indemnify David from all claims plus all litigation costs from the first suit. Audrey, as sole proprietor, paid the $12,160 and the costs of litigation. In addition, the respondents were informed that Audrey owned Roeming Industrial Sales as the sole proprietor when David was deposed during discovery in the first suit. Therefore, we conclude that Audrey has alleged an injury and a fairly traceable causal connection between the injury and the challenged conduct. Accordingly, Audrey has met the requirement of standing.

CONCLUSION

In sum, we conclude that the complaint does state claims upon which relief could be granted, res judicata only bars the Roemings' claims for frivolous action, unjust enrichment, fraud and misrepresentation, and Audrey does have standing. We caution, however, that this decision does not mean that the Roemings' claims are valid. We only decide that the complaint does state claims under notice pleading and that res judicata only bars the claims for frivolous action, unjust enrichment, fraud and misrepresentation. The validity of the remaining claims may be resolved on summary judgment. Based on the foregoing, we affirm in part; reverse in part and remand to the trial court to apply summary judgment methodology.

By the Court.—Order affirmed in part; reversed in part and cause remanded. No costs on appeal.

This opinion will not be published. RULE 809.23(1)(b)5, STATS.