

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 8, 2008

David R. Schanker
Clerk of Court of Appeals

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.

Appeal No. 2007AP1569

Cir. Ct. No. 2004CV819

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

**BRUCE BLACK AND TRACIE BLACK,
D/B/A WESTSIDE AUTO CENTER LLC,**

PLAINTIFFS-APPELLANTS,

v.

TIM BACH,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Washington County:
DAVID C. RESHESKE, Judge. *Affirmed.*

Before Brown, C.J., Snyder and Neubauer, JJ.

¶1 PER CURIAM. Bruce and Tracie Black, doing business as Westside Auto Center, LLC (the Blacks), appeal from an order dismissing their complaint against Tim Bach alleging breach of contract and negligence in the

construction of a commercial building. They argue that Bach's motion for summary judgment was untimely and issue preclusion does not apply. We affirm the order of the circuit court.

¶2 The Blacks' complaint alleges that the defendants, Bach and Kahl Construction, Inc., breached a construction contract by failing to build in accordance with subsoil conditions, industry standards and warranties, and were negligent in failing to provide a stabilized foundation. Partial summary judgment was granted dismissing the complaint against Bach because he was an agent of Kahl Construction. This court reversed that judgment concluding that a material issue of fact existed as to whether the Blacks had actual or constructive notice that Bach was acting as an agent for a corporate entity. *Black v. Bach*, 2005AP3010, unpublished slip op. at ¶9 (Wis. Ct. App. Jan. 10, 2007). While the appeal was pending, on November 30, 2006, the Blacks' complaint against Kahl Construction was dismissed on summary judgment because the Blacks could not establish causation or the standard of professional care.¹ That decision was not appealed. On January 26, 2007, following this court's remand, Bach moved for dismissal on

¹ After the time for naming expert witnesses and providing their reports was closed, Kahl Construction moved for summary judgment. The circuit court noted that there was no expert opinion with respect to causation and concluded that the Blacks could not establish the applicable professional standard. It held:

Plaintiff's causes of action, whether in contract or tort, depend on expert testimony to establish industry standards, whether the work was done in a workmanlike manner and whether Kahl Construction Inc. properly exercised the professional skill required of engineers under these circumstances. To the extent these claims require proof of causation, no expert witness has timely rendered that opinion.

The circuit court also determined that the economic loss doctrine applies to bar the Blacks' negligence claim.

the ground that it was already determined that the Blacks are unable to establish causation and liability. The motion was granted and the Blacks appeal.

¶3 The Blacks first argue that Bach’s post-remand motion for summary judgment was “illegal,” because it was filed more than eight months after the commencement of the action. *See* WIS. STAT. § 802.08(1) (2005-06) (“A party may, within 8 months of the filing of a summons and complaint or within the time set in a scheduling order under s. 802.10, move for summary judgment on any claim”).² It is sufficient to note that “the eight-month deadline is not an inflexible rule that the trial courts must blindly apply.” *Lentz v. Young*, 195 Wis. 2d 457, 465, 536 N.W.2d 451 (Ct. App. 1995). It is within the circuit court’s discretion to permit a party to file a motion beyond the statutory time limit. *Id.* at 466. Although the circuit court did not explicitly address the Blacks’ argument that the motion was unauthorized, it implicitly rejected the notion that the motion was untimely. When a circuit court fails to set forth reasons for a discretionary decision, this court may examine the record to determine whether facts exist which support the circuit court’s decision. *Hedtcke v. Sentry Ins. Co.*, 109 Wis. 2d 461, 471, 326 N.W.2d 727 (1982).

¶4 Here the litigation against Bach was revived by this court’s reversal in the appeal. The motion for summary judgment came on the heels of that reversal and when the litigation was fresh. The purpose of the eight-month time limit is to prevent parties from using a motion for summary judgment for delay. *Lentz*, 195 Wis. 2d at 466. Bach’s motion for summary judgment served to

² All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

expedite the litigation and avoid a potential waste of judicial time and resources based on the changed circumstances in the litigation. Such a motion would be appropriate at any time. *See Michelle T. v. Crozier*, 173 Wis. 2d 681, 685, 495 N.W.2d 327 (1993) (implicitly approving the circuit court’s rationale that a motion raising issue preclusion may be brought at any time because preclusion “is a legal theory that may be raised at any point in the trial to prevent the relitigation of particular issues”). The circuit court reasonably exercised its discretion by permitting the summary judgment motion after remand from this court.

¶5 We review the circuit court’s grant of summary judgment using the same methodology as the circuit court. *City of Beaver Dam v. Cromheecke*, 222 Wis. 2d 608, 613, 587 N.W.2d 923 (Ct. App. 1998). There is no need to repeat the well-known methodology; the controlling principal is that when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law, summary judgment is appropriate. *Id.*; WIS. STAT. § 802.08(2).

¶6 The first step of the summary judgment methodology is to examine the pleadings. The Blacks’ complaint makes no separate claims against Bach. The complaint does not allege that Bach acted as anything other than an agent of the corporation. *See Black*, 2005AP3010, slip op. at ¶3 (“It is undisputed that Bach is an agent of Kahl Construction, Inc.”) It alleges that the defendants, Bach and Kahl Construction, breached the construction contract and were negligent.³

³ The Blacks characterize their complaint as alleging that Bach, as an individual, performed design and engineering services. Even a liberal reading of the complaint will not permit that interpretation. *See Midway Motor Lodge v. Hartford Ins. Group*, 226 Wis. 2d 23, 35, 593 N.W.2d 852 (Ct. App. 1999) (complaint must give the defendant fair notice of the grounds upon which the claims rests; “the objective of viewing a complaint in a liberal light cannot be used by a party to supply the missing or forgotten elements”).

The circuit court has determined that the Blacks cannot establish their claims. Thus, even if Bach is personally liable under the contract because his agency was undisclosed or only partially disclosed, *see Benjamin Plumbing, Inc. v. Barnes*, 162 Wis. 2d 837, 848, 855, 470 N.W.2d 888 (1991), the Blacks cannot establish liability for breach of the contract or negligence.⁴

¶7 Dismissal of Bach flows from the application of issue preclusion. “[I]ssue preclusion is the appropriate term of art to use when, as here, one party seeks to bar another from rearguing a prior adjudication in the same lawsuit.” *Precision Erecting, Inc. v. M&I Marshall & Ilsley Bank*, 224 Wis. 2d 288, 301, 592 N.W.2d 5 (Ct. App. 1998). The provisions of a final judgment, and the findings and conclusions upon which it is based, are conclusive and binding upon all parties to the litigation. *Id.* at 293; *Haase v. R&P Indus. Chimney Repair Co., Inc.*, 140 Wis. 2d 187, 191, 409 N.W.2d 423 (Ct. App. 1987).

¶8 Whether issue preclusion applies in a particular case is one committed to the discretion of the circuit court. *Precision Erecting*, 224 Wis. 2d at 306. The circuit court weighs the following factors:

- (1) could the party against whom preclusion is sought, as a matter of law, have obtained review of the judgment;
- (2) is the question one of law that involves two distinct claims or intervening contextual shifts in the law;
- (3) do significant differences in the quality or extensiveness of proceedings between the two courts warrant relitigation of the issue;

⁴ We reject the Blacks’ contention that dismissal of their complaint against Bach is an affront to this court’s mandate on remand. It is no longer necessary to resolve the factual dispute of whether Bach’s status as an agent was disclosed or only partially disclosed.

(4) have the burdens of persuasion shifted such that a party seeking preclusion had a lower burden of persuasion in the first trial than in the second; or

(5) are matters of public policy and individual circumstances involved that would render the application of collateral estoppel to be fundamentally unfair, including inadequate opportunity or incentive to obtain a full and fair adjudication in the initial action?

Id. at 305. The weight assigned to each factor is within the circuit court's discretion but the most important factor to be considered is fairness to the party against whom preclusion is asserted. *Id.* at 305-06.

¶9 The circuit court observed that the Blacks could have but did not appeal the determination that they could not establish their breach of contract and negligence claims. It also observed that Bach and Kahl Construction are intimately connected with respect to the theories of liability and applicable standards of care. Indeed, the case proceeded against both defendants together. Experts were named and the time for naming experts closed before Bach was first dismissed from the action. The circuit court determined that the Blacks, unable to prove their claims against Kahl Construction, should not be given a second opportunity to prove the same claims against Bach. Implicit is the determination that it is not fundamentally unfair to apply issue preclusion. The first appeal and passage of time should not provide the Blacks the opportunity to bolster a case that could not survive summary judgment.

A court cannot adjudge the facts to be one way with regard to some parties to a multiparty claim and adjudge the same factual dispute another way as to other parties in the same action. That would be absurd. There can be only one finding of each historical fact per case. That the facts might be determined as a result of summary judgment is not material.

Id. at 310. We conclude the circuit court properly exercised its discretion in applying issue preclusion and dismissing the complaint against Bach.

¶10 *Landess v. Schmidt*, 115 Wis. 2d 186, 340 N.W.2d 213 (Ct. App. 1983), further demonstrates how the dismissal of the complaint against Kahl Construction has a preclusive effect as to Bach as a matter of claim preclusion. Claim preclusion, referred to as res judicata in *Landess*, bars another action by a plaintiff against the defendant on the same claim or cause of action. *Id.* at 191. It applies when there is an identity of parties and an identity of causes of action. *Id.* Whether claim preclusion applies is a question of law. *Id.*

¶11 Landess was a milk hauler and Borden Inc. ceased accepting milk delivered by Landess. *Id.* at 189. Landess's federal lawsuit against Borden alleging tortious interference with business relationships was dismissed. *Id.* Landess then sued Borden and several of its employees in state court alleging a conspiracy to injure his reputation and business. *Id.* at 189-90. The court held that just as the prior judgment of dismissal barred Landess from reasserting the conspiracy claim against Borden, it also extinguished his conspiracy claim against Borden's employees. *Id.* at 196-97. The court looked to RESTATEMENT (SECOND) OF JUDGMENTS § 51 (1982):

If two persons have a relationship such that one of them is vicariously responsible for the conduct of the other, and an action is brought by the injured person against one of them, the judgment in the action has the following preclusive effects against the injured person in a subsequent action against the other.

(1) A judgment against the injured person that bars him from reasserting his claim against the defendant in the first action extinguishes any claim he has against the other person responsible for the conduct unless:

(a) The claim asserted in the second action is based upon grounds that could not have been asserted against the defendant in the first action; or

(b) The judgment in the first action was based on a defense that was personal to the defendant in the first action.

Landess, 115 Wis. 2d at 195-96.

¶12 Bach, as employee of Kahl Construction, like the Borden employees, is only liable as an agent of Kahl Construction. Neither exception recognized in the RESTATEMENT (SECOND) JUDGMENTS § 51(1)(a) or (b) applies. Because Kahl Construction is not liable to the Blacks, it follows that Bach is not liable to the Blacks.

By the Court.—Order affirmed.

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

