

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 27, 2009

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. 2008AP1536

Cir. Ct. No. 2007CV1810

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

KATHLEEN A. JOHNSON,

PLAINTIFF-RESPONDENT,

v.

**AMERICAN FAMILY MUTUAL INSURANCE COMPANY, NEIL E. SAWINSKI
AND CHRISTIAN BROTHERS EMPLOYEE BENEFIT SERVICES,**

DEFENDANTS,

ROYAL INDEMNITY COMPANY A/K/A ARROWOOD INDEMNITY COMPANY,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
DAVID A. HANSHER, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 KESSLER, J. Royal Indemnity Company, now known as Arrowood Indemnity Company (“Royal”),¹ appeals from a trial court order denying its WIS. STAT. § 806.07(1)(h) (2007-08)² motion for relief from a default judgment for its insured Kathleen A. Johnson.³ Royal argues the trial court erroneously exercised its discretion when it denied Royal’s motion because two independent reasons justified granting relief from the judgment: (1) the complaint was insufficient; and (2) the doctrine of claim preclusion barred Johnson’s claim for underinsured motorist (“UIM”) benefits.

¶2 The parties debate whether Royal is required to establish excusable neglect before this court can consider the merits of its two challenges to the claim and whether Royal is required to establish extraordinary circumstances before relief can be granted under WIS. STAT. § 806.07(1)(h). We decline to address these issues concerning the potential application of § 806.07(1)(h) because even if we assume that Royal’s two legal challenges could form the basis for relief under § 806.07(1)(h), we conclude, as a matter of law, that the complaint was sufficient and that claim preclusion does not apply. Therefore, the trial court did not

¹ The record consistently refers to the appellant using its former name, Royal Indemnity Company, rather than its new name, Arrowood Indemnity Company. To avoid confusion, we likewise will refer to the appellant using its former name.

We also note that the final order amended the default judgment to reflect Royal’s new name. Royal does not challenge this amendment.

² All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

³ Royal also moved the trial court for relief from the default judgment based on WIS. STAT. § 806.07(1)(a), citing excusable neglect. The trial court denied this motion, finding that Royal had not established excusable neglect. On appeal, Royal does not challenge the trial court’s order with respect to § 806.07(1)(a).

erroneously exercise its discretion when it denied Royal's § 806.07(1)(h) motion. We affirm the order denying Royal's motion for relief from judgment.

BACKGROUND

¶3 In September 2004, Johnson was injured when her car collided with a car driven by a man who was allegedly operating under the influence of an intoxicant and/or a controlled substance. The driver of the other car was insured by American Family Mutual Insurance Company. Johnson sued the driver and American Family, seeking compensation for significant injuries. Johnson's lawsuit also included as a defendant her own insurance company, Royal. The complaint alleged that Royal had paid medical payment benefits on behalf of Johnson, but was not entitled to reimbursement or subrogation.

¶4 Johnson filed the summons and complaint on February 16, 2007. Royal was served through its registered agent. Royal did not appear, answer or otherwise file a responsive pleading.⁴ On April 12, 2007, Johnson moved for default judgment against Royal to extinguish its subrogation claim. Royal was served with the motion for default judgment, but again did not appear or otherwise submit any responsive pleading. On May 18, 2007, the trial court entered default judgment against Royal. The order stated, in relevant part: "Judgment, both jointly and severally, [is] entered in favor of the Plaintiff, and any subrogation interests of ... [Royal] are hereby extinguished, and ... [Royal] is hereby dismissed from this action, with prejudice."

⁴ According to Royal, its independent subrogation adjuster "made the conscious decision not to pursue Royal's small subrogation interest in the medical payments Royal made on behalf of Johnson."

¶5 Meanwhile, in the course of discovery, Johnson learned on March 21, 2007, that the American Family policy limits would not cover the damages Johnson believed she had sustained. On June 20, 2007, within the six-month period a plaintiff is permitted to file an amendment to the original complaint, *see* WIS. STAT. § 802.09(1),⁵ Johnson filed an amended summons and complaint. The amended complaint alleged as follows with respect to Royal:

[T]hat the Defendant, Royal Indemnity Company, issued its policy of insurance to the Plaintiff, Kathleen A. Johnson in the state of Wisconsin, insuring her against the liability of the type hereinafter alleged; including but not limited to an underinsured motorist policy, and that this policy of insurance was in full force and effect at all times material hereto.

Johnson sought compensatory damages from all the defendants and punitive damages from the offending driver.

¶6 Royal was served with the amended summons and complaint through its registered agent. Royal did not answer, appear or otherwise submit any responsive pleading. On October 31, 2007, Johnson filed and mailed a motion for default judgment against Royal based on Royal's failure to answer the amended complaint. Subsequently, Johnson filed and mailed to Royal notice of a new hearing date, which was scheduled for January 2, 2008. Royal again did not respond, appear or otherwise submit any responsive pleading.

⁵ WISCONSIN STAT. § 802.09 provides in relevant part: “**Amended and supplemental pleadings.** (1) Amendments. A party may amend the party's pleading once as a matter of course at any time within 6 months after the summons and complaint are filed or within the time set in a scheduling order under s. 802.10.” In this case, a scheduling order was not entered until June 20, 2007.

¶7 On January 2, 2008, the trial court entered an Order for Default Judgment against Royal that stated in relevant part: “Judgment, both jointly and severally, [is] entered in favor of the Plaintiff, and any interests of ... [Royal] are hereby extinguished, and ... [Royal] is hereby found liable under their underinsured motorist insurance coverage to the plaintiff in an amount to be determined by the Court and/or jury.” Royal was served with a copy of this order. A hearing on damages was scheduled for January 28, 2008. Notice of that hearing was served on Royal, again through its registered agent. Again, Royal did not respond to the notice or appear at the hearing.

¶8 After hearing testimony from Johnson, the trial court set damages at \$409,000. The proposed Order for Judgment was served on Royal through its registered agent on January 30, 2008. On February 6, 2008, the trial court entered the Order for Judgment against Royal for \$409,000, plus costs and disbursements.

¶9 On February 7, 2008, having recently learned that Royal changed its name to Arrowood Indemnity Company, Johnson filed a notice of motion and motion to amend the default judgment to correct Royal’s name. This motion was served on Royal through its registered agent.⁶ The motion hearing was set for March 3, 2008.

¶10 On February 25, 2008, Royal for the first time filed a notice of appearance—its first response to any of the aforementioned motions and notices. Royal moved for relief from the previously entered orders and sought leave to file and serve a response to the amended complaint. Royal’s brief in support of its

⁶ The registered agent for service of process was the same for both Royal and Arrowood.

motion opposed amending the default judgment on grounds that the default judgment should not have been entered at all. Royal challenged the default judgment on the amended complaint on four bases: (1) the amended complaint did not sufficiently plead a claim for UIM benefits; (2) the UIM claim was barred by claim preclusion; (3) Royal's delay in answering the amended complaint was based on excusable neglect, and therefore the judgment should be reopened pursuant to WIS. STAT. § 806.07(1)(a); and (4) the trial court should relieve Royal from the judgment based on § 806.07(1)(h), because the claim is legally insufficient and Johnson would not suffer prejudice if Royal were allowed to defend the claim.

¶11 After a hearing, the trial court rejected all of Royal's arguments. It specifically found that Royal had demonstrated neither the excusable neglect nor the extraordinary circumstances required for relief under WIS. STAT. § 806.07(1)(a) and (h), respectively. The court found that Royal's failure to answer was not excusable neglect because no one at Royal read the documents it received or consulted any of the ten lawyers in the claims department.

¶12 The trial court also concluded that Royal had not offered a meritorious defense or shown extraordinary circumstances. The court rejected Royal's argument that the amended complaint did not state a claim on which relief could be granted and rejected the assertion that the UIM claim was barred by claim preclusion. The court denied Royal's motion for relief from the default judgment and entered an order reflecting its rulings. That order also granted Johnson's motion to amend Royal's name to reflect its name change; Royal did not oppose that motion at the hearing. This appeal follows.

DISCUSSION

¶13 At the outset, it is important to acknowledge that Royal is not appealing the trial court’s finding that it did not establish excusable neglect concerning its failure to respond to the numerous motions it received. The only issue on appeal is whether the trial court erroneously exercised its discretion when it denied Royal’s motion for relief from judgment pursuant to WIS. STAT. § 806.07(1)(h), which provides that a party may be relieved from an order or judgment for “[a]ny other reasons justifying relief from the operation of the judgment.” This is the catchall provision of § 806.07(1) that ““gives the trial court broad discretionary authority and invokes the pure equity power of the court.”” *Sukala v. Heritage Mut. Ins. Co.*, 2005 WI 83, ¶9, 282 Wis. 2d 46, 698 N.W.2d 610 (citation omitted). *Sukala* summarized the standard of review applicable to motions for relief based on this provision:

Whether to grant relief from judgment under WIS. STAT. § 806.07(1)(h) is a decision within the discretion of the [trial] court. A [trial] court’s discretionary decision will not be reversed unless the court erroneously exercised its discretion. A discretionary decision contemplates a process of reasoning that depends on facts that are in the record, or reasonably derived by inference from facts of record, and a conclusion based on the application of the correct legal standard. We will not reverse a discretionary determination by the trial court if the record shows that discretion was in fact exercised and we can perceive a reasonable basis for the court’s decision.

Sukala, 282 Wis. 2d 46, ¶8 (internal quotation marks and citations omitted).

¶14 Relief pursuant to WIS. STAT. § 806.07(1)(h) “is warranted only when ‘extraordinary circumstances’ are present.” *Connor v. Connor*, 2001 WI 49, ¶41, 243 Wis. 2d 279, 627 N.W.2d 182 (citation omitted). *Connor* restated the

factors that a court considers in determining whether extraordinary circumstances exist, including:

“whether the judgment was the result of the conscientious, deliberate and well-informed choice of the claimant; whether the claimant received the effective assistance of counsel; whether relief is sought from a judgment in which there has been no judicial consideration of the merits and the interest of deciding the particular case on the merits outweighs the finality of judgments; whether there is a meritorious defense to the claim; and whether there are intervening circumstances making it inequitable to grant relief.”

Id. (quoting *State ex rel. M.L.B. v. D.G.H.*, 122 Wis. 2d 536, 552-53, 363 N.W.2d 419 (1985)). In *M.L.B.*, our supreme court recognized that § 806.07(1)(h) “should be used only when the circumstances are such that the sanctity of the final judgment is outweighed by ‘the incessant command of the court’s conscience that justice be done in light of all the facts.’” *M.L.B.*, 122 Wis. 2d at 550 (citation and emphasis omitted).

¶15 On appeal, Royal argues that it is entitled to relief pursuant to WIS. STAT. § 806.07(1)(h) for two reasons: (1) the complaint was insufficient; and (2) the doctrine of claim preclusion barred Johnson’s claim for UIM benefits. Thus, Royal argues, the default judgment against it is “contrary to law” and “cannot stand.” Johnson disagrees on the merits of those two issues, and also asserts that this court should not even consider the merits of Royal’s two issues until Royal establishes excusable neglect and extraordinary circumstances. We decline to address Johnson’s challenges to the potential application of § 806.07(1)(h) because even if we assume that Royal’s two legal challenges *could* form the basis for relief under § 806.07(1)(h), we conclude, as a matter of law, that the complaint was sufficient and claim preclusion does not apply. Therefore, Royal’s appeal fails.

A. Sufficiency of the complaint.

¶16 Royal challenges the sufficiency of the amended complaint. Specifically, it argues that Johnson was required to allege “the necessary prerequisites to a UIM claim,” and that “simply assert[ing] that Royal issued an insurance policy to Johnson that included UIM coverage” is insufficient.

¶17 “The sufficiency of a complaint is a question of law we review de novo.” *Wolnak v. Cardiovascular & Thoracic Surgeons of Cent. Wis.*, 2005 WI App 217, ¶47, 287 Wis. 2d 560, 706 N.W.2d 667. Wisconsin, which is a notice-pleading state, requires that “one need only give the opposing party fair notice of what the claim is and the grounds upon which it is based.” *Id.* A pleading that sets forth a claim for relief must contain “[a] short and plain statement of the claim, identifying the transaction or occurrence or series of transactions or occurrences out of which the claim arises and showing that the pleader is entitled to relief.” WIS. STAT. § 802.02(1)(a). Furthermore, “[a]ll pleadings shall be so construed as to do substantial justice.” Sec. 802.02(6); *see also Meyers v. Bayer AG*, 2007 WI 99, ¶41, 303 Wis. 2d 295, 735 N.W.2d 448 (Wisconsin Supreme Court has long recognized ““that pleadings shall be liberally construed with a view to substantial justice between the parties.””) (citation omitted).

¶18 With these standards in mind, we consider Royal’s challenges to the sufficiency of the amended complaint. Royal argues that the amended complaint was insufficient because it failed to allege that: (1) Johnson’s damages exceeded the limits of the American Family liability policy; (2) Johnson’s vehicle was an “underinsured motor vehicle” on grounds that “American Family’s liability limits were less than Royal’s UIM limits”; and (3) “American Family tendered its liability limits as payment to Johnson.”

¶19 We reject Royal’s argument because we conclude that the amended complaint gave Royal fair notice that Johnson was seeking UIM coverage for her injuries. The amended complaint alleged that Johnson was injured due to the negligence of another driver and that Royal provided insurance that insured Johnson “against the liability of the type hereinafter alleged, including but not limited to an underinsured motorist policy.” The amended complaint sought compensatory damages from all the defendants, including Royal. Liberally construing the allegations in the amended complaint, we conclude that these allegations were sufficient to give Royal “fair notice of what the claim is and the grounds upon which it is based.” See *Wolnak*, 287 Wis. 2d 560, ¶47. Whether Johnson would ultimately be entitled to UIM benefits is an issue that would have been developed during discovery; the pleading is sufficient to put Royal on notice of the UIM claim.

B. Claim preclusion.

¶20 Royal argues that Johnson’s initial default judgment against Royal, which dismissed its subrogation interest, serves as a bar to Johnson’s UIM claim, based on the doctrine of claim preclusion. We reject Royal’s arguments and conclude that Wisconsin case law does not support the application of claim preclusion to claims within the same lawsuit.

¶21 “Claim preclusion is designed to draw a line between the meritorious claim on the one hand and the vexatious, repetitious and needless claim on the other hand.” *Aldrich v. LIRC*, 2008 WI App 63, ¶6, 310 Wis. 2d 796, 751 N.W.2d 866 (citations and two sets of quotation marks omitted). Whether claim preclusion applies to a given set of facts is a question of law we review *de novo*. *Menard, Inc. v. Liteway Lighting Prods.*, 2005 WI 98, ¶23, 282 Wis. 2d 582, 698

N.W.2d 738. For claim preclusion to apply there must be: “(1) identity between the parties or their privies in the prior and present suits; (2) prior litigation resulted in a final judgment on the merits by a court with jurisdiction; and (3) identity of the causes of action in the two suits.” *Kruckenberg v. Harvey*, 2005 WI 43, ¶21, 279 Wis. 2d 520, 694 N.W.2d 879 (citation omitted). Fairness is not a factor.⁷ *Id.*, ¶52.

¶22 Royal asserts that “[a]lthough the frequently-recited elements of claim preclusion could be read to suggest the defense is available only in a separate suit ... those statements simply reflect claim preclusion’s usual application in a subsequent action.” Royal argues that claim preclusion can be applied in the same suit. Royal cites no Wisconsin case that has applied claim preclusion to two claims in the same lawsuit, but points out that in *Precision Erecting, Inc. v. M & I Marshall & Ilsley Bank*, 224 Wis. 2d 288, 303-04, 592 N.W.2d 5 (Ct. App. 1998), we applied the doctrine of *issue* preclusion in a single

⁷ In *Kruckenberg v. Harvey*, 2005 WI 43, ¶21, 279 Wis. 2d 520, 694 N.W.2d 879, our supreme court clarified that fairness is not a factor when considering application of the doctrine of claim preclusion, although it is a factor when considering application of issue preclusion. *Id.*, ¶52. *Kruckenberg* explained:

[A]n ad hoc exception to the doctrine of claim preclusion cannot be justified simply by concluding that it is too harsh to deny an apparently valid claim by balancing the values of claim preclusion against the desire for a correct outcome in a particular case. Case-by-case exceptions to the application of the doctrine of claim preclusion based on fairness “weaken the repose and reliance values of [claim preclusion] in all cases.” Nevertheless, narrow, clear, special circumstances exceptions to claim preclusion have been recognized; they are viewed as less likely to undermine certainty in the doctrine of claim preclusion than are case-by-case determinations based on fairness.

Id., ¶55 (citations and footnotes omitted).

lawsuit. Royal asserts that in *Precision Erecting*, this court “favorably cited cases” from other jurisdictions that appeared to apply claim preclusion in the same lawsuit. *See id.* at 303-04. However, as we noted in *Precision Erecting*, some jurisdictions use the term *res judicata* to apply to both claim preclusion and issue preclusion, *see id.* at 303-04 & n.3, and it is not always clear which doctrines are being applied. In any event, regardless of whether other jurisdictions may have applied claim preclusion within the same lawsuit, we reject the suggestion that *Precision Erecting* decided that claim preclusion can be applied in the same suit; the issue presented in that case was whether *issue* preclusion could be applied in the same suit—not *claim* preclusion.

¶23 We are unpersuaded that we could simply expand the holding of *Precision Erecting* and apply claim preclusion within the same lawsuit. The doctrines of issue preclusion and claim preclusion, while related, are not the same. Significantly, “[t]here is a two-step analysis for whether the doctrine of issue preclusion bars an action: (1) whether issue preclusion can, as a matter of law, be applied and, if so, (2) whether the application of issue preclusion would be fundamentally fair.” *Ellifson v. West Bend Mut. Ins. Co.*, 2008 WI App 86, ¶12, 312 Wis. 2d 664, 754 N.W.2d 197. Application of the first step presents a question of law, while the second step involves an exercise of discretion. *Id.* In *Precision Erecting*, the court’s considerations of fundamental fairness were crucial to its decision to apply issue preclusion within the same case. *See id.*, 224 Wis. 2d at 304. In contrast, considerations of fairness are irrelevant in a claim preclusion case. *See Kruckenberg*, 279 Wis. 2d 520, ¶52.

¶24 We are aware of no Wisconsin case that has directly addressed the issue of whether claim preclusion can be applied in the same case and Royal does not identify any case where Wisconsin courts have implicitly applied claim

preclusion in the same case.⁸ When our supreme court has identified the elements of claim preclusion, it has consistently referred to “an identity between the parties or their privies in the prior and present suits” and “an identity between the causes of action in the two suits.” *See, e.g., Wickenhauser v. Lehtinen*, 2007 WI 82, ¶22, 302 Wis. 2d 41, 734 N.W.2d 855; *Kruckenber*, 279 Wis. 2d 520, ¶21; *Sopha v. Owens-Corning Fiberglas Corp.*, 230 Wis. 2d 212, 233, 601 N.W.2d 627 (1999); *Northern States Power Co. v. Bugher*, 189 Wis. 2d 541, 551, 525 N.W.2d 723 (1995); *DePratt v. West Bend Mut. Ins. Co.*, 113 Wis. 2d 306, 311, 334 N.W.2d 883 (1983). We are unconvinced that our supreme court’s development of the doctrine of claim preclusion supports application of the doctrine to two claims within the same case.

¶25 In addition, we are also troubled by the practical effects of expanding the doctrine of claim preclusion to apply to claims within the same lawsuit. For example, in the instant case, Johnson could not have brought her UIM claim against Royal in the initial complaint. Until Johnson was able to ascertain American Family’s policy limits—which were unknown to Johnson at the time of suit—she could not know whether the other driver was “underinsured” as that term is used in Johnson’s policy.⁹ While including the subrogation claim in the initial pleading is not only sanctioned but in fact required by WIS. STAT.

⁸ In contrast, we noted in *Precision Erecting* that the Wisconsin Court of Appeals had previously applied issue preclusion within the same case, although the application was “not termed as such.” *Id.*, 224 Wis. 2d at 302 (discussing *Haase v. R & P Indus. Chimney Repair Co.*, 140 Wis. 2d 187, 409 N.W.2d 423 (Ct. App. 1987)).

⁹ Here, the trial court found that Johnson filed her claim “after American Family ... divulged its policy limits which [she] determined are not sufficient to cover her potential damages.” Although the record suggests that Johnson may have been aware that her damages were significant, there is nothing in the record suggesting Johnson knew or should have known American Family’s policy limits prior to filing suit.

§ 803.03(2)(a),¹⁰ filing a UIM claim when one does not yet know the tortfeasor's policy limits, could violate an attorney's obligation to ensure that all allegations have factual evidentiary support. *See* WIS. STAT. § 802.05(2).¹¹ Further, the interests of judicial economy upon which the policy of claim preclusion rests would not be served by making plaintiffs sue their own insurance carriers before the facts concerning the alleged tortfeasor's policy limits and liability are discovered. Instead, a more efficient approach is for parties to begin discovery and, pursuant to WIS. STAT. § 802.09(1), amend their pleadings, as the legislature has specifically permitted, "once as a matter of course at any time within 6 months

¹⁰ WISCONSIN STAT. § 803.03 provides in relevant part:

Joinder of persons needed for just and complete adjudication....

....

(2) CLAIMS ARISING BY SUBROGATION, DERIVATION AND ASSIGNMENT. (a) *Joinder of related claims.* A party asserting a claim for affirmative relief shall join as parties to the action all persons who at the commencement of the action have claims based upon subrogation to the rights of the party asserting the principal claim, derivation from the principal claim, or assignment of part of the principal claim.

¹¹ WISCONSIN STAT. § 802.05(2) provides in relevant part:

REPRESENTATIONS TO COURT. By presenting to the court, whether by signing, filing, submitting, or later advocating a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, all of the following:

....

(c) The allegations and other factual contentions stated in the paper have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

after the summons and complaint are filed or within the time set in a scheduling order under [WIS. STAT. §] 802.10.” The application of claim preclusion to bar amendment of pleadings within the time specifically approved by the legislature would fly in the face of clearly expressed legislative intent; we decline to use claim preclusion to erase § 802.09(1) policy decisions.

¶26 Expanding the doctrine of claim preclusion to include application within the same lawsuit would not advance the policy goals of claim preclusion, which are to provide “an effective and useful means to establish and fix the rights of individuals, to relieve parties of the cost and vexation of multiple lawsuits, to conserve judicial resources, to prevent inconsistent decisions, and to encourage reliance on adjudication.” See *Kruckenber*, 279 Wis. 2d 520, ¶20. In order to prevent the application of claim preclusion within a case, parties may feel compelled to keep every claim in the case until the time to amend the pleadings has expired, to ensure that they have an opportunity to litigate all potential claims.

¶27 For the foregoing reasons, we conclude that the doctrine of claim preclusion is not applicable where, as here, a party seeks to apply it to two claims timely brought within the same case.

CONCLUSION

¶28 We conclude, as a matter of law, that the complaint was sufficient and that claim preclusion does not apply. Therefore, the trial court did not erroneously exercise its discretion when it denied Royal’s WIS. STAT. § 806.07(1)(h) motion for relief from judgment. We affirm the order denying Royal’s motion for relief from judgment.

By the Court.—Order affirmed.

Recommended for publication in the official reports.

