

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 22, 2012

Diane M. Fremgen
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. 2010AP2646

Cir. Ct. No. 2010CV2636

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

UNITED ASIAN SERVICES OF WISCONSIN, INC.,

PLAINTIFF-APPELLANT,

v.

**FUECHOU THAO A/K/A CHOU THAO, ALEX THOR, QOUA HER AND
MARLYS MACKEN,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Dane County:
DANIEL R. MOESER, Judge. *Affirmed.*

Before Vergeront, Higginbotham and Blanchard, JJ.

¶1 PER CURIAM. United Asian Services of Wisconsin appeals an order dismissing its lawsuit against its former board members Fuechou Thao, Alex Thor, Qoua Her and Marlys Macken on the grounds of claim preclusion. In

addition to the claim preclusion issue, United Asian Services contends that it was entitled to default judgment against two of the board members for failure to file timely answers, and that the court erred in imposing separate taxable costs for each of the board members. We affirm the decision of the circuit court on all three issues for the reasons discussed below.

BACKGROUND

¶2 In a prior lawsuit, Dane County Circuit Court Case No. 2008CV266, Koua Vang (a former executive director of United Asian Services) and Chia Vang (a former board member), sued the then-acting board members Thor, Thao, Macken, Her, and Vankham Souannoy seeking a declaratory judgment that the board members had improperly continued to serve after an amendment to the bylaws. United Asian Services was added as a defendant to the action and shared counsel with the old board members. The circuit court ultimately determined that the bylaw amendment had in fact inadvertently accomplished the wholesale removal of the old board members, and therefore ruled that employment actions the board had taken with respect to the Vangs during the period in question were void. In the present lawsuit, United Asian Services, acting under the direction of new board members, is suing the old board members for the recovery of expenditures they made on behalf of United Asian Services during their invalid tenure.

STANDARD OF REVIEW

¶3 Whether claim preclusion applies under a given set of facts is a question of law that we review *de novo*. *Menard, Inc. v. Liteway Lighting Prods.*, 2005 WI 98, ¶23, 282 Wis. 2d 582, 698 N.W.2d 738.

¶4 We review a circuit court's decision whether to grant a default judgment under the erroneous exercise of discretion standard. *Connor v. Connor*, 2001 WI 49, ¶18, 243 Wis. 2d 279, 627 N.W.2d 182.

DISCUSSION

Claim Preclusion

¶5 The doctrine of claim preclusion bars parties from relitigating any claim that arises out of the same relevant facts, transactions, or occurrences that were the subject of a prior action when: (1) there is identity between the parties or their privies in the prior and present suits; (2) the prior litigation resulted in a final judgment on the merits by a court with jurisdiction; and (3) the identical cause of action is being raised in the two suits. *Kruckenberg v. Harvey*, 2005 WI 43, ¶¶19, 21, 279 Wis. 2d 520, 694 N.W.2d 879. We are satisfied that all three elements have been met here.

¶6 United Asian Services does not dispute that the first litigation resulted in a final judgment. It challenges the common identity of the parties and the causes of actions. Its multiple arguments on both those elements essentially boil down to the contention that United Asian Services could not reasonably have been expected to assert its current claim for money damages against the invalid board members in the prior lawsuit when it was still acting under the direction of those board members and was being represented by their attorney at that time. We are not persuaded.

¶7 Aside from the indisputable point that all of the parties to the current litigation were, in fact, also named parties to the prior litigation, United Asian Services was also in privity with the Vangs in the prior litigation on the current

issue, notwithstanding their nominal status as opposing parties. Privity does not require that either of the Vangs was acting as the actual legal representative of United Asian Services, just that they shared the same interest. United Asian Services' claims for damages in the current lawsuit are premised upon the exact same proposition successfully asserted by the Vangs in the prior lawsuit—namely, that the old board members lacked the authority to act on behalf of United Asian Services. We are therefore satisfied that there was identity of parties between the two suits, and reject United Asian Services' claim that it is fundamentally unfair to deem them to have been participants in the prior action.

¶8 In addition, United Asian Services acknowledges that the Vangs' prayer for relief in the prior litigation included a request for reimbursement from the board members. Although the Vangs did not develop that claim with more specific factual allegations relating to the specific expenditures for which United Asian Services now seeks reimbursement, the broader issue of whether actions taken by the board during the invalid tenure of the old board members were void was certainly before the court. The fact that the primary relief sought in the original lawsuit was declaratory judgment did not preclude additional claims for money judgment from also being brought, as the prayer for relief indicated. To the extent that the details of the invalid board's expenditures were not known, that could have been handled by discovery had the claims been brought, and the complaint could have been amended accordingly. In sum, we conclude that the prior and current actions did arise from a "common nucleus of facts," and were sufficiently related to constitute identity between the causes of action. *See Parks v. City of Madison*, 171 Wis. 2d 730, 740, 492 N.W.2d 365 (Ct. App. 1992) (citation omitted).

Default Judgment

¶9 When a respondent files an untimely answer, a plaintiff may move to strike the answer and seek default judgment. *Connor*, 243 Wis. 2d 279, ¶14. In considering whether to grant the requested relief, the circuit court must first determine whether the noncompliance with the statutory time period was the result of excusable neglect. *Hedtcke v. Sentry Ins. Co.*, 109 Wis. 2d 461, 468, 326 N.W.2d 727 (1982). Excusable neglect in this context is conduct “which might have been the act of a reasonably prudent person under the same circumstances.” *Id.* (citation omitted).

¶10 United Asian Services argues that the circuit court erroneously exercised its discretion when it determined that Thao and Macken’s respective failures to file timely answers were the result of excusable neglect, and therefore denied its motion for default judgment. We disagree.

¶11 First, with respect to Thao, United Asian Services has not replied to Thao’s assertion that his answer was not in fact untimely, because he should have had 45 days to answer under the deadline applicable to tort claims set forth in WIS. STAT. § 801.09(2)(a)3.b. (2009-10).¹ We therefore deem United Asian Services to have conceded that argument. See *Schlieper v. DNR*, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994).

¶12 With respect to Macken, the circuit court found excusable neglect based upon the facts she averred in her affidavit. Those facts included dealing

¹ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

with her father's cancer treatment and her own biopsy on a skin growth. The circuit court was well within its discretion to determine that such emotional personal circumstances were sufficient to excuse Macken's minor delinquency in filing her answer.

Costs

¶13 WISCONSIN STAT. § 814.03(2) authorizes separate awards of costs to defendants “who are not united in interest and who make separate defenses by separate answers.” Here, although the claims against each of the defendants plainly overlapped, the circuit court found that some of the allegations against them were identical while others were not, and that the allegations could have led to counter and cross claims among the parties. Because the parties did not share completely identical interests, particularly with respect to the default judgment issues and joint and several liability for any damages, it was permissible for the court to award multiple fees. *See Hein v. State Farm Mut. Auto. Ins. Co.*, 29 Wis. 2d 705, 712-13, 139 N.W.2d 611 (1966).

By the Court.—Judgment affirmed.

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

