COURT OF APPEALS
DECISION
DATED AND FILED

November 23, 2011

A. John Voelker
Acting 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. 2010AP1695 **Cir. Ct. No. 2005CV110**

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

DANIEL S. BERG,

PLAINTIFF,

V.

GENERAL CASUALTY INSURANCE COMPANY OF WISCONSIN, WASTE SYSTEMS, INC., AND ST. PAUL SURPLUS LINES INSURANCE COMPANY,

DEFENDANTS,

TENNECO, INC., AND ACE AMERICAN INSURANCE COMPANY,

DEFENDANTS-THIRD-PARTY PLAINTIFFS-APPELLANTS,

V.

GULF UNDERWRITERS INSURANCE COMPANY, ELMRIDGE GROUP, INC., MCCLAIN GROUP, INC., ELMRIDGE HOLDINGS, INC. AND MCCLAIN INDUSTRIES, INC.,

THIRD-PARTY DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for La Crosse County: TODD W. BJERKE, Judge. *Affirmed and cause remanded*.

Before Lundsten, P.J., Vergeront and Higginbotham, JJ.

¶1 VERGERONT, J. Tenneco, Inc., appeals an order granting summary judgment in favor of Gulf Underwriters Insurance Company and Elmridge Group, McClain Group, Elmridge Holdings, and McClain Industries (collectively, McClain) dismissing Tenneco's third-party complaint against these defendants.[1] The circuit court concluded that Tenneco's third-party complaint was barred by this court's decision affirming on appeal the circuit court's prior dismissal order on summary judgment of Tenneco's cross-claims against these same defendants. ***Berg v. Gulf Underwriters Ins. Co.***, No. 2007AP1629, unpublished slip op. (WI App June 26, 2008) (***Berg I***). We conclude Tenneco's third-party claims were properly dismissed.

¶2 On Gulf's and McClain's motion for attorney fees under WIS. STAT. § 809.25(3)(c)2. (2009-10) on the ground of a frivolous appeal, we conclude the appeal is frivolous.

¶3 Accordingly, we affirm the circuit court's order dismissing the third-party complaint and remand to the circuit court for a determination of costs, fees, and reasonable attorney fees under WIS. STAT. § 809.25(3) (2009-10).

[1] Ace American Insurance Company is Tenneco's insurer and also an appellant, but we do not refer separately to Ace American.

BACKGROUND

¶4 This action was filed by Daniel Berg, who was injured by a trash compactor that was manufactured and distributed by Michigan corporations who were predecessors to McClain. Through a series of mergers and acquisitions, Tenneco became liable for those damages, but Tenneco and McClain were successors in interest to an assumption agreement under which McClain was obligated to indemnify Tenneco for that liability. Gulf, a Connecticut-based insurance company, had issued to McClain a commercial general liability policy that was in effect at the time of Berg's injury.

¶5 Berg filed this action against Gulf, McClain, and Tenneco in 2005. By that time, McClain, a Michigan corporation, had dissolved. Tenneco filed a cross-claim against McClain based on the assumption agreement and a cross-claim against Gulf, alleging that Gulf was obligated under the insurance policy to indemnify Tenneco for the damages for which McClain was liable under the assumption agreement. Both McClain and Gulf moved for summary judgment on Tenneco's cross-claims.

¶6 The circuit court granted McClain's motion for summary judgment. The court concluded that Tenneco's claim against McClain was barred because the claim had not been filed and served on McClain within one year of publication of notice of McClain's dissolution as required by Michigan's dissolution statute. *See* MICH. COMP. LAWS ANN. § 450.1842a (2007).

¶7 The circuit court granted Gulf's motion for summary judgment on two grounds. First, the court stated, it agreed with the parties that Tenneco could not bring a direct action against Gulf under WIS. STAT. § 632.24 (2005-06) because of ***Kenison v. Wellington Insurance Co.***, 218 Wis. 2d 700, 582 N.W.2d

69 (1998), (*overruled by* ***Casper v. American International South Insurance Co.***, 2011 WI 81, ___ Wis. 2d ___, 800 N.W.2d 880). In ***Kenison*** we held that § 632.24 applies only if the insurer delivers or issues for delivery the policy of insurance in Wisconsin. ***Kenison***, 218 Wis. 2d at 710. Second, the circuit court held, the permissive joinder statute, WIS. STAT. § 803.04(2) (2005-06), was not applicable because that statute provides that an insurer may be joined if it has "an interest in the outcome of [the] controversy." Given that a Michigan court had ruled there was no coverage under the insurance policy because McClain had failed to pay its self-insured retention (the Michigan judgment), the circuit court concluded that Gulf had no interest in the outcome of this action.

¶8 At the same time that the circuit court dismissed Tenneco's cross-claims against McClain and Gulf, the court dismissed on summary judgment Berg's claim against McClain because of the untimely filing of the claim under the Michigan dissolution statute. The court also dismissed Berg's claim against Gulf because the court determined that the Michigan judgment was a bar under the doctrine of claim preclusion.

¶9 The circuit court's order of dismissal thus entirely dismissed McClain and Gulf from the action. They were both dismissed without prejudice. In its oral ruling, the court explained that it was making the dismissal of both McClain and Gulf without prejudice because it did not agree with the Michigan judgment and, although that judgment was entitled to full faith and credit, it was being appealed. The court stated that it would be an injustice if there was a dismissal with prejudice of this action and the Michigan judgment was reversed on appeal.

¶10 On Tenneco's appeal of the dismissal of its cross-claims, we affirmed the circuit court's grant of summary judgment in favor of McClain and Gulf. ***Berg I***, No. 2007AP1629, unpublished slip op., ¶¶1, 37. With respect to Tenneco's cross-claim against McClain, we held that the undisputed facts showed that Tenneco did not file a claim against McClain within one year of the publication of the notice of dissolution, as required by the Michigan statute. ***Id.***, ¶17. Therefore, we concluded, "Tenneco's claim for indemnification from McClain under the assumption agreement is barred." ***Id.***

¶11 With respect to Tenneco's cross-claim against Gulf, we rejected Tenneco's argument that it was a third-party beneficiary to the insurance contract against Tenneco. ***Id.***, ¶35. We then stated that because Tenneco had "not presented us with any other legal theory under which it has a claim against Gulf," it was unnecessary for us to decide whether "the Michigan judgment bars its litigation in this action" and it was also unnecessary for us to decide whether Tenneco "could proceed against Gulf in this action even though [Tenneco] could not recover from McClain because of the Michigan corporate dissolution statute." ***Id.***, ¶36. This latter theory we will refer to as Tenneco's "nominal-party theory." Under this theory, according to Tenneco, despite the Michigan dissolution statute, Tenneco could name McClain as a "nominal party" and could then join Gulf under the permissive joinder statute, WIS. STAT. § 803.04(2) (2005-06). ***Id.***, ¶36 n.13.[2]

¶12 Tenneco did not file a petition for review of our decision in ***Berg I***.

[2] Tenneco first presented its nominal-party theory in its motion for reconsideration in the ***Berg I*** circuit court. While the circuit court confirmed its ruling that the Michigan judgment was entitled to full faith and credit, it did not rule on the nominal-party theory.

¶13 On August 5, 2008, the Michigan court of appeals reversed the Michigan judgment. ***Gulf Underwriters Ins. Co. v. McClain Indus., Inc.***, No. 273768, unpublished slip op. (Mich. Ct. App. Aug. 5, 2008). The Michigan court of appeals concluded that McClain was not prevented by its failure to pay its self-insured retention from receiving all benefits under the Gulf policy; instead, that failure to pay meant that Gulf was obligated to pay only amounts above that amount. ***Id.***

¶14 In January 2009, with Berg's action against Tenneco still pending, Tenneco filed a third-party complaint against McClain and Gulf. The allegations are substantially the same as those in the dismissed cross-claims. Tenneco's position was that the Michigan court of appeals' decision and the circuit court's order of dismissal without prejudice permitted it to go forward with its claims against Gulf and McClain on its nominal-party theory. Tenneco contended that the circuit court's dismissal without prejudice and this court's affirmance without expressly modifying the "without prejudice" portion prevented application of the doctrines of claim preclusion, issue preclusion, and law of the case.

¶15 The circuit court granted McClain's and Gulf's motions for summary judgment, dismissing Tenneco's third-party complaint. The court concluded that, based on our opinion in ***Berg I***, the doctrines of claim preclusion, issue preclusion, and law of the case all applied. (We will refer to all three doctrines collectively as "the preclusion doctrines," although we recognize that the doctrine of law of the case does not fit neatly under this label.) The court also rejected Tenneco's nominal-party theory on the ground that we had rejected it in ***Berg I***.

DISCUSSION

I. Dismissal of Third-Party Complaint

¶16 Tenneco contends the circuit court erred in dismissing its third-party complaint because: (1) in ***Berg I*** we affirmed the circuit court's order of dismissal without prejudice, thus permitting a refiling of the claims against McClain and Gulf; (2) ***Berg I*** permits a refiling of the claims, and for other reasons, none of the three preclusion doctrines apply; and (3) its nominal-party theory should be adopted. Tenneco also contends that ***Casper***, ___ Wis. 2d ___, ¶8, decided after briefing on appeal was complete and overruling ***Kenison***, is an additional reason to reverse the circuit court's dismissal of its third-party complaint.

¶17 We review a grant or denial of summary judgment de novo, applying the same methodology as the circuit court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 314-16, 401 N.W.2d 816 (1987). Where, as here, the facts are undisputed, the issue is which party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2) (2009-10).

¶18 For the reasons that follow, we conclude that our decision in ***Berg I*** does not permit the refiling of Tenneco's claims against McClain and Gulf and that the doctrine of claim preclusion bars the refiling. Because of these conclusions, we do not discuss the merits of Tenneco's nominal-party theory. We consider ***Casper*** and conclude it does not provide a basis for reversing the circuit court.

A. Dismissal of Cross-Claims With or Without Prejudice

¶19 Tenneco contends that, because the circuit court in ***Berg I*** dismissed its cross-claims against McClain and Gulf without prejudice and this court's

mandate was a simple "affirmed," Tenneco may bring its claims against them "anew." Tenneco relies on the proposition that a dismissal "without prejudice" means the absence of a decision on the merits, leaving the parties "free to litigate the matter in a subsequent action, as though the dismissed action had not been commenced," citing 46 AMERICAN JURISPRUDENCE SECOND, JUDGMENTS § 611 (2d ed. 1994).

¶20 Tenneco's reading of ***Berg I*** interprets the "affirmed" mandate while ignoring the contents of our opinion. It is true that our mandate was a simple "affirmed," and we did not state in the mandate whether we were affirming the circuit court's order of dismissal without prejudice or affirming it with prejudice. A clearer and more complete mandate would have been one that modified the circuit court order to delete the "without prejudice" portion and affirmed the order as modified. However, a reading of our opinion leaves no doubt that we were deciding on the merits that McClain and Gulf were entitled to summary judgment dismissing them on the merits and that we were not affirming the "without prejudice" component of the circuit court's dismissal order.

¶21 Both our introductory and concluding paragraphs in ***Berg I*** state that McClain and Gulf were both entitled to summary judgment on Tenneco's cross-claims and that, "although our analysis differs from that of the circuit court, … the circuit court properly granted summary judgment in favor of both Gulf and McClain." ***Berg I***, No. 2007AP1629, unpublished slip op., ¶¶1, 37. We noted that the circuit court had dismissed without prejudice because it did not agree with the Michigan judgment and wanted to allow for the possibility that it would be reversed on appeal. ***Id.***, ¶10 n.5. Later in the opinion, after concluding that Tenneco's claim against McClain was barred by the Michigan dissolution statute and Gulf was not liable to Tenneco on a third-party beneficiary theory, we

explicitly stated that it was unnecessary for us to decide if the Michigan judgment barred litigation against Gulf. ***Id.***, ¶36. There is therefore no basis for reading our opinion to affirm a dismissal without prejudice because of the Michigan judgment, which is the reason the circuit court gave for dismissing without prejudice.

¶22 Tenneco's position that it is proper to interpret the meaning of the mandate "affirmed" without regard to the contents of our opinion is not supported by case law. In ***Gross v. Midwest Speedways, Inc.***, 81 Wis. 2d 129, 138-39, 260 N.W.2d 36 (1977), the court stated:

> It may be argued that the mandate of this court on the first appeal, if not inconsistent with the opinion, is less explicit than the opinion is on the consequences on retrial of holding that plaintiff's negligence is at least equal that of Midwest. We find no inconsistency between the mandate and the opinion, but acknowledge that the mandate might well have proceeded to state the obvious enough consequence that on retrial of the negligence issue, Midwest must be dismissed as a party defendant. However, what was not stated in the mandate was clearly held in the opinion, and we hold the trial court here was obliged to apply the mandate in the light of the opinion. [Footnote omitted.]

See also ***Tietsworth v. Harley-Davidson, Inc.***, 2007 WI 97, ¶45, 303 Wis. 2d 94, 735 N.W.2d 418 (consulting the supreme court opinion for aid in construing the mandate and "[finding] further evidence that [the supreme] court intended that, upon reversing the court of appeals, this case would be ended"); ***Kocinski v. Home Ins. Co.***, 154 Wis. 2d 56, 58 n.1, 452 N.W.2d 360 (1990) (describing in the text a decision of this court as "reversing" a circuit court order, while noting in the footnote that our actual mandate, "affirmed in part and reversed in part," was incorrect because it was inconsistent with the opinion).

¶23 Tenneco argues that Gulf did not file a cross-appeal in ***Berg I*** on the issue of the circuit court's order of dismissal without prejudice and that it was required to do so in order to obtain a modification of the circuit court's order on this point. *See* WIS. STAT. § 809.10(2)(b) (2005-06)[3] ("A respondent who seeks a modification of the judgment or order appealed from … shall file a notice of cross-appeal …."). We do not see how this rule relates to interpreting the ***Berg I*** opinion and mandate. In any case, if Tenneco means that, because there was no cross-appeal in ***Berg I***, we did not have the authority to affirm the circuit court's dismissal order on any terms other than "without prejudice," we disagree. Section 809.10(2)(b) does not limit this court's authority to modify a judgment or order that is properly before us on appeal. WISCONSIN STAT. § 808.09 provides that "[u]pon an appeal from a judgment or order an appellate court may reverse, affirm or modify the judgment or order …." Tenneco's appeal of the ***Berg I*** circuit court's order dismissing McClain and Gulf without prejudice brought the order before this court. We have the authority to affirm the dismissal order on grounds other than those relied upon by the circuit court, *see* ***Vanstone v. Town of Delafield***, 191 Wis. 2d 586, 595, 530 N.W.2d 16 (Ct. App. 1995); and, under § 808.09, we have the authority to modify the terms of the circuit court's order accordingly without a cross-appeal seeking that relief.

¶24 Because the discussion portion of our ***Berg I*** opinion makes clear that we rejected the circuit court's "without prejudice" reasoning, our ***Berg I*** opinion does not allow Tenneco to refile its claims against McClain and Gulf.

[3] All references to the Wisconsin Statutes in subsections A, B, and C are to the 2005-06 version.

B. Claim Preclusion

¶25 Given that ***Berg I*** does not allow Tenneco to refile its claims against McClain and Gulf, there are three potentially applicable doctrines that might require dismissal of these claims: law of the case, claim preclusion, and issue preclusion. The doctrine of law of the case addresses the effect of an appellate court's ruling on a legal issue on subsequent proceedings in the circuit court or later appeals in the same action. *See* ***State v. Stuart***, 2003 WI 73, ¶23, 262 Wis. 2d 620, 664 N.W.2d 82 (citations omitted). In contrast, the doctrines of claim preclusion and issue preclusion address the effect of a judgment in a prior action on a subsequent action. *See* ***Kruckenberg v. Harvey***, 2005 WI 43, ¶¶19, 57 & n.55, 279 Wis. 2d 520, 694 N.W.2d 879 (discussing elements of claim preclusion and issue preclusion). Tenneco contends that the law of the case doctrine does not apply because its claims against McClain and Berg were dismissed and its third-party complaint is a new action. We will assume without deciding that Tenneco is correct on this point, in which case the doctrines of claim preclusion and issue preclusion are potentially applicable.[4]

¶26 We first discuss claim preclusion. When the doctrine of claim preclusion applies, a final judgment on the merits in one action bars litigation in a

[4] If we did not make this assumption, we would agree with the circuit court that the law of the case doctrine bars Tenneco from pursuing the third-party claim against McClain and Gulf. Under the doctrine of law of the case, a decision on a legal issue by an appellate court establishes the law of the case, which must be followed in all subsequent proceedings in the circuit court or on later appeals. ***State v. Stuart***, 2003 WI 73, ¶23, 262 Wis. 2d 620, 664 N.W.2d 82 (citations omitted). A court should adhere to the law of the case unless the interests of justice require otherwise, such as when the evidence on a subsequent trial was substantially different, or controlling authority has since made a contrary decision of the law applicable to such issues. ***Id.***, ¶24. For reasons similar to those we discuss in paragraphs 30-33, we would reject Tenneco's argument that the interests of justice require not applying the law of the case here.

subsequent proceeding of all matters that arise "from the same relevant facts, transactions, or occurrences" and "which were litigated or which might have been litigated in the former proceedings." ***Kruckenberg,*** 279 Wis. 2d 520, ¶19. In order 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 resulting in a final judgment on the merits in a court with jurisdiction; and (3) identity between the causes of action in the two suits. ***Id.***, ¶21 (citation omitted).[5] The policies underlying the doctrine of claim preclusion include a recognition that, "after a party has had his day in court, justice, expediency, and the preservation of the pubic tranquility requires that the matter be at an end." ***Id.***, ¶20 (citation omitted).

¶27 Tenneco makes no argument as to the first and third elements, and we conclude they are fulfilled. Tenneco asserts that the second element is not met because of our affirmance in ***Berg I***. According to Tenneco, because in ***Berg I*** we affirmed the circuit court's dismissal order without modifying the "without prejudice" portion, that order was not a final judgment on the merits. However, we have already explained that our opinion in ***Berg I*** did not affirm the "without prejudice" portion of the circuit court's dismissal order and that we did decide the claims against McClain and Gulf on the merits. We therefore conclude that Tenneco's cross-claims against McClain and Gulf did result in a final judgment on the merits when no petition for supreme court review was filed.

¶28 Tenneco also contends that, in addition to the three elements of claim preclusion, there is a fairness component and it is unfair to apply claim

[5] Whether there is an "identity between the causes of action" is determined using the transactional approach, asking whether there is a common nucleus of operative facts. ***Kruckenberg v. Harvey***, 2005 WI 43, ¶¶25-26, 279 Wis. 2d 520, 694 N.W.2d 879.

preclusion in this case. However, the language to this effect in ***Steffen v. Luecht,*** 2000 WI App 56, 233 Wis. 2d 475, 608 N.W.2d 713, on which Tenneco relies, has since been disavowed on this point by the supreme court in ***Kruckenberg,*** 279 Wis. 2d 520, ¶¶60 n.59, 62. The court in ***Kruckenberg*** held that fundamental fairness is not an element of claim preclusion. ***Id.***, ¶62.

¶29 Although the court in ***Kruckenberg*** rejected "[c]ase-by-case exceptions to the application of the doctrine of claim preclusion based on fairness," it did recognize that there can be "narrow, clear, special circumstances exceptions to claim preclusion." ***Id.***, ¶55. The court explained that there are "rare" exceptions to the doctrine when "in certain types of cases 'the policy reasons for allowing an exception override the policy reasons for applying the general rule.'" ***Id.***, ¶37 (citation omitted). The court concluded that one of the exceptions recognized in RESTATEMENT (SECOND) OF JUDGMENTS § 26(1)(f) (1982)—"the failure of the prior litigation to yield a coherent disposition of the controversy"—was applicable to the boundary line dispute before it, ***id.***, ¶39, and it adopted this exception to the application of claim preclusion:

> When an action between parties or their privies does not explicitly determine the location of a boundary line, the doctrine of claim preclusion will not bar a future declaratory judgment action to determine the proper location of the boundary line.

Id., ¶41.

¶30 Tenneco contends that in this case, too, there is a "failure of the prior litigation to yield a coherent disposition of the controversy." This is so, according to Tenneco, because it presented its nominal-party theory on appeal in ***Berg I***, but we did not decide the merits of this theory. Public policy favors deciding the validity of this theory, Tenneco argues, because it is a viable way to sue an insurer

that could not otherwise be sued because of ***Kenison***'s holding that the direct action statute allows suit against an insurer only if the insurer delivers or issues for delivery the policy of insurance in this state.

¶31 We agree with Tenneco that in ***Berg I*** we did not resolve its nominal-party theory on the merits. Instead, we concluded we did not need to address it because we had determined that Tenneco was not a third-party beneficiary to the insurance contract between McClain and Gulf, and we had determined that Tenneco did not have a claim against McClain because of the dissolution statute. ***Berg I***, No. 2007AP1629, unpublished slip op., ¶36. Tenneco disagrees with this ruling. Tenneco's position is that its nominal-party theory provides a basis for a claim against Gulf even if Tenneco is not a third-party beneficiary and even if McClain is not liable because of the Michigan dissolution statute.

¶32 However, Tenneco's disagreement with our conclusion that it was unnecessary to address its nominal-party theory does not constitute an "[in]coherent disposition of the controversy" and it is not "an extraordinary reason" that overcomes the policy reasons underlying claim preclusion." *See* ***Kruckenberg***, 279 Wis. 2d 520, ¶39. Tenneco's disagreement with a ruling against it is an expected response for losing parties. The recourse available to Tenneco was to seek reconsideration from this court or to petition for review by the supreme court, not to refile its claims.

¶33 Tenneco also appears to argue that the reversal on appeal of the Michigan judgment requires an exception to application of claim preclusion here. This argument is easily rejected because, like Tenneco's other arguments, it fails to come to grips with our opinion in ***Berg I***. Instead, Tenneco relies on the ***Berg I***

circuit court's order of dismissal without prejudice and on an unreasonable reading of our disposition in ***Berg I***. In dismissing Tenneco's third-party complaint, the circuit court here pointed out what should have been obvious to Tenneco: reversal of the Michigan judgment does not affect our holding in ***Berg I*** that McClain was entitled to summary judgment on Tenneco's cross-claim because of the Michigan dissolution statute. Nor does the reversal affect our holding that Gulf was entitled to summary judgment on Tenneco's cross-claim because Tenneco was not a third-party beneficiary to the insurance contract between Gulf and McClain.

¶34 We conclude that Tenneco's third-party claims against McClain and Gulf are barred by the doctrine of claim preclusion. Because we conclude that claim preclusion applies, we do not discuss the doctrine of issue preclusion.

C. ***Casper***'s Reversal of ***Kenison***

¶35 After briefing on this appeal was complete, the supreme court decided ***Casper***, in which it concluded that a liability insurance policy need not be delivered or issued in this state in order to subject the insurer to a direct action under WIS. STAT. §§ 632.24 and 803.04(2). ***Casper***, ___ Wis. 2d ___, ¶8. Accordingly, the supreme court overruled ***Kenison***. ***Id.***

¶36 Tenneco subsequently brought ***Casper*** to our attention, contending that the overruling of ***Kenison*** "gives [this court] further reason to reverse" the dismissal of its third-party claims. It is clear, however, that the overruling of ***Kenison*** in ***Casper*** does not provide a basis for reversing the dismissal of the third-party complaint.

¶37 As our opinion in ***Berg I*** stated, "Tenneco conceded in the circuit court that its claim against Gulf is not based on the direct action statute [WIS.

STAT. § 632.24] and it does not argue otherwise on appeal." ***Berg I***, No. 2007AP1629, unpublished slip op., ¶36 n.12. Therefore, we did not make any ruling on the direct action statute. We did, however, explain that we had previously certified to the supreme court the issue whether ***Kenison*** was correct in holding that § 632.24 was limited to insurance policies delivered or issued for delivery in this state, that the supreme court had accepted certification, but that certification was dismissed because the parties settled. ***Id.*** Tenneco evidently decided not to pursue its objections to ***Kenison*** by preserving the issue in this court in ***Berg I*** and then petitioning for supreme court review.

¶38 Tenneco does not explain under what theory in these circumstances the overruling of ***Kenison*** entitles it to a reversal of the dismissal of its refiled claims, and we see no basis for this relief. The overruling of ***Kenison*** does not alter our conclusion that ***Berg I*** does not permit the refiling of Tenneco's claim, and it does not alter our conclusion that refiling is barred by the doctrine of claim preclusion.[6]

II. Motion for Attorney Fees

¶39 McClain and Gulf move for their costs, fees, and attorney fees for this appeal under WIS. STAT. § 809.25(3) (2009-10).[7] This statute provides that

[6] We note that, even if Tenneco were entitled to the beneift of ***Casper***'s overruling of ***Kenison***, it appears there would still be an issue regarding the effect of the Michigan dissolution statute on a claim against Gulf under the direct action statute. WISCONSIN STAT. § 632.24 makes "the insurer liable, up to the amounts stated … in the policy, *to the persons entitled to recover against the insured*…." (Emphasis added.) We held in ***Berg I*** that Tenneco's claim against McClain is barred by the Michigan dissolution statute. ***Berg v. Gulf Underwriters Ins. Co.***, No. 2007AP1629, unpublished slip op., ¶17 (WI App June 26, 2008).

[7] All references to the Wisconsin Statutes in section II are to the 2009-10 version.

this court "shall award to the successful party costs, fees, and reasonable attorney fees under this section" if we find an "appeal … to be frivolous."[8] § 809.25(3)(a). Subsection (3)(c)2, on which McClain and Gulf rely, provides that an appeal is frivolous if "[t]he party or the party's attorney knew, or should have known, that the appeal or cross-appeal was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law."

¶40 An appellate court decides as a matter of law whether an appeal is frivolous under this statutory subsection. ***Howell v. Denomie***, 2005 WI 81, ¶9, 282 Wis. 2d 130, 698 N.W.2d 621. Because the standard is an objective one, the inquiry is what a reasonable party or attorney knew or should have known in the same or similar circumstances. ***Id.***

¶41 McClain and Gulf contend that there is no reasonable basis for Tenneco's appeal from the circuit court's determination that, because of our decision in ***Berg I***, Tenneco's third-party complaint is barred by one or more of the preclusion doctrines.

¶42 We first consider Tenneco's argument on appeal that none of the preclusion doctrines apply because in ***Berg I*** we affirmed the circuit court's order dismissing the cross-claims against McClain and Gulf without prejudice. The inquiry here is whether there is a reasonable basis for contending that our "affirmed" mandate in ***Berg I*** means that we are affirming the circuit court's order of dismissal without prejudice, thereby authorizing Tenneco to refile the claims.

[8] McClain and Gulf also moved for attorney fees in the circuit court. Gulf informs us that the circuit court has not yet ruled on the motion.

¶43 We have already explained that case law supports what should be obvious in any event—that parties must look at the court's opinion to determine the meaning of a mandate. *See* ***Gross***, 81 Wis. 2d at 138-39. If one does that here, there is no reasonable basis for reading ***Berg I*** to mean that we are affirming the "without prejudice" portion of the circuit court's dismissal order. We are very clear in ***Berg I*** that, unlike the circuit court, we do not view the Michigan judgment as relevant to our ruling that McClain and Gulf are both entitled to summary judgment in their favor. ***Berg I***, No. 2007AP1629, unpublished slip op., ¶¶1, 36, 37.

¶44 In opposition to the motion for attorney fees, Tenneco contends it is entitled to rely on the mandate "affirmed" without reference to the contents of the opinion. We do not suggest that Tenneco needs case law to support its position, but it must at least have a basis in logic for its position. We conclude Tenneco's position that the contents of the opinion are irrelevant in understanding an "affirmed" mandate is not logical.

¶45 Tenneco cites treatises on the importance of the disposition in appellate opinions, but nothing cited supports ignoring the contents of an opinion when determining the meaning of a mandate.

¶46 Tenneco also cites examples of cases that, in the body of the opinion, have either decided whether a dismissal should be with or without prejudice or have reversed and remanded for the circuit court to decide this.[9]

[9] ***Brew City Redevelopment Group, LLC v. Ferchill Group***, 2006 WI 128, ¶43, 297 Wis. 2d 606, 724 N.W.2d 879; ***Marshall-Wisconsin Co., Inc. v. Juneau Square Corp.***, 139 Wis. 2d 112, 142, 406 N.W.2d 764 (1987); ***State v. Lewis***, 2004 WI App 211, ¶15, 277 Wis. 2d 446, 690 N.W.2d 668; ***Haselow v. Gauthier***, 212 Wis. 2d 580, 583, 569 N.W.2d 97 (Ct. App. 1997); ***Lord v. Hubbell, Inc.***, 210 Wis. 2d 150, 169-70, 563 N.W.2d 913 (Ct. App. 1997).

However, these examples do not support Tenneco's position that it is reasonable to rely solely on the "affirmed" mandate in ***Berg I***, nor do they show that there is a reasonable basis to read the ***Berg I*** mandate and opinion together as affirming the "without prejudice" portion of the circuit court's dismissal order.

¶47 We conclude there is no reasonable basis for Tenneco's position that in ***Berg I*** we affirmed the "without prejudice" portion of the first circuit court's dismissal order. Therefore, Tenneco has a non-frivolous basis for appealing the circuit court's determination that it may not refile those claims *only* if Tenneco has a non-frivolous position that none of the preclusion doctrines applies. Continuing to accept for purposes of this opinion Tenneco's assertion that the third-party complaint is a new action, we conclude there is no reasonable basis for Tenneco's position that claim preclusion does not apply.[10]

¶48 Tenneco's first argument that claim preclusion does not apply is based on its contention that our opinion in ***Berg I*** did not result in a final judgment on the merits. From our conclusion that there is no reasonable basis for this reading of ***Berg I***, it follows that there is no reasonable basis for this argument against claim preclusion.

¶49 Tenneco's second argument against claim preclusion is based on a fundamental fairness consideration. As we have already explained, since ***Kruckenberg***, decided in 2005, the law is clear that this is not a proper

[10] As we have already noted, if we did not accept for purposes of this opinion Tenneco's position that the third-party complaint is a new action, we would conclude the doctrine of the law of the case bars that complaint. *See* ***supra***, ¶25 n.4. We would then conclude that Tenneco's arguments that the interests of justice warrant not applying law of the case is frivolous for reasons similar to those we discuss in paragraphs 53-54 relating to claim preclusion.

consideration for claim preclusion. ***Kruckenberg***, 279 Wis. 2d 520, ¶¶60 n.59, 62. In opposing the attorney fee motion, Tenneco does not argue that there is a reasonable basis for arguing otherwise.

¶50 Tenneco's third argument against claim preclusion is that there is an "extraordinary reason" overcoming the policies of claim preclusion of the type approved in ***Kruckenberg***. *See* ***id.***, ¶39. In opposition to the motion for attorney fees, Tenneco contends it is not frivolous to argue that our failure in ***Berg I*** to decide the nominal-party theory on the merits is a "failure of the prior litigation to yield a coherent disposition of the controversy," as was the case in ***Kruckenberg***. *See* ***id.*** Tenneco does not further discuss ***Kruckenberg***, but we do so because it is necessary to a determination of the reasonableness of Tenneco's argument.

¶51 As we have already noted, ***Kruckenberg*** concerned a boundary line dispute. In the prior action, Kruckenberg's predecessor in title had sued the defendant over the defendant's conduct on property the predecessor erroneously believed the defendant owned. ***Id.***, ¶¶5, 6. This conduct, the predecessor alleged, was causing damage to the predecessor's property. ***Id.*** That action was dismissed on the merits pursuant to a stipulation between the parties, with both parties at the time having a mistaken view of the correct property line. ***Id.***, ¶¶8, 31. In the subsequent action, Kruckenberg sued the defendant for conduct on property that the defendant and Kruckenberg's predecessor had believed the defendant owned, but which Kruckenberg had since learned, from a survey, that he owned. ***Id.***, ¶¶10-12. The court in ***Kruckenberg*** stated it was not necessary to decide the "difficult question" whether the elements of claim preclusion were met because it decided to adopt the "narrow exception" to that doctrine to permit a "declaratory judgment action to determine the location of a boundary line" when "[a prior]

action between parties or their privies [did] not explicitly determine the location of [the] boundary line." ***Id.***, ¶¶34, 41.

¶52 In adopting this exception, the ***Kruckenberg*** court explained at length the "important policy considerations" served by this "narrowly drawn exception," which included: not encouraging unnecessary overlitigation of real property, not discouraging settlement of lawsuits relating to real property, and the benefit to present and future owners of definitively resolving boundary line disputes on the merits. ***Id.***, ¶¶42-46.

¶53 We conclude it is not reasonable to read ***Kruckenberg*** to permit an exception to the doctrine of claim preclusion in this case. A non-frivolous argument for an exception requires that the circumstances can be reasonably viewed as "narrow, clear, [and] special," ***id.***, ¶55, and that the policy reasons supporting the exception can be reasonably viewed as sufficiently important to "override the policy reasons for applying the general rule." ***Id.***, ¶37. Tenneco does not attempt to define a narrow, clear, and special exception. As we have already explained, Tenneco's argument is indistinguishable from what most losing parties would argue: the court in the prior action erred in deciding an issue. The fact that we did not rule on the merits of Tenneco's nominal-party theory but instead ruled that it was unnecessary to decide the issue does not alter the fact that, at bottom, Tenneco disagrees with our ruling in ***Berg I*** but did not appeal it. Tenneco's proposed exception cannot reasonably be viewed as one that is narrow, clear, and has special circumstances. *See* ***id.***, ¶55.

¶54 As already noted, Tenneco asserts there is an important public policy implicated here: allowing claims of insurance coverage under an indemnification agreement to be pursued against the insurer despite the insurance policy having

been delivered or issued for delivery outside Wisconsin (a requirement under ***Kenison***, now overruled) and despite a statutory bar against filing a claim against the insured. However, this is simply another way of saying that Tenneco believes public policy is best served if it prevails on its nominal-party theory and so an exception to claim preclusion is warranted to give it another chance to do so. It is readily apparent that the acceptance of this argument would make exceptions to claim preclusion common, contrary to ***Kruckenberg***'s description of them as "rare." *See* ***id.***, ¶37.[11]

¶55 Tenneco's situation falls in a category that the ***Kruckenberg*** court explains is not covered by an exception to the doctrine of claim preclusion. That is, at best, Tenneco might, in the words of ***Kruckenberg***, argue that if we "balanc[e] the values of claim preclusion against the desire for a correct outcome in a particular case," it is "too harsh to deny [Tenneco's] apparently valid claim." ***Id.***, ¶55. But the ***Kruckenberg*** court expressly states that this cannot justify an exception to the doctrine. ***Id.*** Thus, even if we assume Tenneco's nominal-party theory is valid, the validity of that theory is not a reasonable basis for arguing that an exception to claim preclusion is justified.

¶56 Because there is not a reasonable basis for Tenneco's argument that in ***Berg I*** we affirmed the circuit court's order of dismissal without prejudice and because there is not a reasonable basis for an exception to claim preclusion,

[11] Tenneco does not contend that there is a reasonable basis for the argument that the reversal of the Michigan judgment warrants an exception under ***Kruckenberg*** to the application of claim preclusion. We therefore do not address this argument, except to note that Tenneco's main brief did not provide any explanation for why the reversal of the Michigan judgment was relevant to the issue whether claim preclusion should apply. *See* ***supra***, ¶33.

Tenneco does not have a non-frivolous basis for appealing the dismissal of its third-party complaint.

¶57 Tenneco correctly points out that, in order to award attorney fees under WIS. STAT. § 809.25(3)(a), the entire appeal must be frivolous. *See* ***Howell***, 282 Wis. 2d 130, ¶9. We recognize that we have not discussed all of the arguments that Tenneco asserts are non-frivolous in its brief opposing attorney fees. In particular, we have not discussed the merits of Tenneco's nominal-party theory nor its criticisms of ***Kenison***. However, even if the nominal party theory is not frivolous and even though we know the criticisms of ***Kenison*** are not frivolous, Tenneco still has no reasonable basis for arguing that the circuit court erred in dismissing the third-party complaint on the grounds of claim preclusion. With no non-frivolous argument that would lead to a reversal of the dismissal of the third-party complaint, the entire appeal is frivolous.

CONCLUSION

¶58 We affirm the circuit court order dismissing the third-party complaint and remand for a determination of costs, fees, and reasonable attorney fees under WIS. STAT. § 809.25(3).

By the Court.—Order affirmed and cause remanded.

Not recommended for publication in the official reports.