IN THE COURT OF APPEALS OF IOWA

No. 8-615 / 07-2032
Filed October 29, 2008

BRIDGET MARIE ROCHEFORD KEARNEY
a/k/a BRIDGE MARIE BARLOON ROCHEFORD,
Plaintiff-Appellee,

vs.

MARCIA A. PITTMAN,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Karen A. Romano, Judge.

Defendant appeals from the district court's ruling finding plaintiff's lawsuit was not barred by issue or claim preclusion. **AFFIRMED.**

Eric Parrish of Parrish, Kruidenier, Dunn, Boles, Gribble, Parrish, Gentry & Fisher, L.L.P., Des Moines, for appellant.

Thomas Boyd and Ryan Crayne of Winthrop & Weinstine Law Firm, Minneapolis, Minnesota, for appellee.

Considered by Sackett, C.J., and Miller and Potterfield, JJ.

MILLER, J.

Defendant-appellant, Marcia Pittman, appeals from the district court's ruling denying her motion for summary judgment and granting plaintiff judgment in the amount of $21,095.55 plus interest. Appellant contends the court erred in concluding plaintiff's action was not barred by claim preclusion. We affirm.

I. BACKGROUND

On January 14, 1999, Donald Barloon was killed by Cynthia Zapp. Donald died intestate and was survived by his daughter and sister, the parties to this action. In January of 1999, Donald's sister, Marcia Pittman, petitioned to be appointed personal representative of Donald's estate. In her petition she acknowledged that Donald had a daughter, but stated the daugher's whereabouts were unknown and she believed that Donald had voluntarily terminated his parental rights so the daughter could be adopted by her stepfather. Pittman was appointed personal representative.

In August 1999 Zapp was found guilty of involuntary manslaughter. In a September 1999 judgment entry Zapp was ordered to pay restitution to Donald's estate in the amount of $150,000. Pittman was aware of the restitution award while administering Donald's estate, but never listed it as an asset of the estate. In April 2000 the probate court approved the final report for the estate and authorized Pittman to make a final distribution of the assets to herself as the sole heir. Pittman did so. In August 2000 Pittman began receiving restitution payments from Zapp.

In June 2001, Donald's daughter, Bridget Kearney, learned of her father's death while doing genealogical research on the Internet. Kearney contacted Pittman about the estate and eventually filed an action against her in December of 2001 for mishandling the estate in various ways, including failing to list her as an heir or to give her notice of the proceedings. While the suit was pending, Pittman received substantial restitution payments, but retained them and did not petition to reopen the estate to report the assets. She did not disclose the payments to her attorney or to Kearney during the litigation. In April of 2003, the court found Pittman was negligent and breached her fiduciary duty as personal representative for failing to use ordinary care to locate Kearney, ascertain she had not been adopted, and give her notice of the probate proceeding. The court ordered Pittman to pay Kearney the net value, as then known by Kearney and the court, of the estate. The court did not find Pittman liable under theories of conversion, negligent misrepresentation, or fraud (intentional misrepresentation). In August 2004, after Pittman paid the amount of damages set forth in the judgment, Kearney signed a release stating the payment "represents full satisfaction of the judgment entered in her favor and that the judgment against Marcia Pittman is hereby released from any further obligation."

In 2005, while researching information about her father's death, Kearney learned Zapp was ordered to make restitution payments and they were disbursed to Pittman. In August of 2005, on the State's petition, the district court ordered that future restitution payments be paid to Kearney. After an unsuccessful attempt to obtain the previously paid restitution from Pittman, Kearney filed the

present lawsuit in November of 2006, alleging Pittman (1) was negligent in her administration of the estate, (2) breached her fiduciary duty as personal representative of the estate, and (3) wrongfully converted and distributed assets of the estate to herself when they rightfully belonged to Kearney.

Pittman filed a motion for summary judgment, contending Kearney's claim was litigated in the previous lawsuit and thus barred by issue and claim preclusion. The district court denied the motion as untimely. The court noted the first "lawsuit dealt with the known assets of the estate when the final disbursement was made." Concerning the release Kearney signed, the court found "that the clear language of the release pertains only to the judgment entered in that case. The release and satisfaction has no bearing on the claim presented in the current lawsuit." The court also denied Kearney's motion for summary judgment for failure to attach a memorandum of authorities.

The lawsuit was tried to the district court in September 2007, and a ruling followed in December. The court concluded the lawsuit was not barred by issue or claim preclusion because the first lawsuit had sought to determine who the rightful heir was and whether Pittman violated her fiduciary duties by failing to locate and identify Kearney as an heir. It concluded the current lawsuit, in contrast, concerned the estate assets and whether Pittman wrongfully failed to disclose an asset of Donald's estate and retained an asset that should have been distributed to Kearney. The court further determined Pittman was negligent and breached her fiduciary duties as personal representative by failing to report the restitution award as an asset during the probate proceeding and by retaining the

payments, knowing Kearney was Barloon's only legal heir and entitled to the payments. It concluded Pittman's actions in doing so constituted negligence, a breach of a fiduciary duty to Kearny, and conversion. The court entered judgment in favor of Kearney and against Pittman for $21,095.55 of restitution payments Pittman had received and retained, plus interest from the date of commencement. On appeal, Pittman contends the court erred in concluding this lawsuit was not barred by claim preclusion and in ignoring the release and satisfaction.

II. SCOPE OF REVIEW

The parties disagree as to the standard of our review. Kearney contends doctrines of preclusion are reviewed for an abuse of discretion. However, the cases she cites all involve *issue* preclusion. Pittman argues the error occurred in the court's denial of her motion for summary judgment, which is reviewed for correction of errors at law. However, for reasons stated hereafter we are reviewing the decision of the district court after a trial on the merits, and the case was filed and tried as a law action. We conclude our review is for correction of errors at law, as held in a case in which our supreme court stated, in dealing with *claim* preclusion following a trial on the merits:

> This case was tried as a law action before the district court. Therefore, our review is for correction of errors at law. The trial court's findings have the effect of a special verdict and are binding if supported by substantial evidence. Evidence is substantial when a reasonable mind would accept it as adequate to reach a conclusion. We are not bound by the trial court's legal conclusions. However, we will construe the trial court's findings broadly in favor of upholding the judgment.

Arnevik v. Univ. of Minn. Bd. of Regents, 642 N.W.2d 315, 318 (Iowa 2002) (citations and quotations omitted).

III. CLAIM PRECLUSION

"The general rule of claim preclusion provides a valid and final judgment on a claim precludes a second action on that claim or any part of it." *Arnevik*, 642 N.W.2d at 319. The rule applies to matters actually raised in the first action and to matters that could have been raised and thus "[c]laim preclusion, as opposed to issue preclusion, may foreclose litigation of matters that have never been litigated." *Id.* It prevents piecemeal litigation and requires a party to litigate all matters growing out of a claim in one action. *Penn v. Iowa Bd. of Regents*, 577 N.W.2d 393, 398 (Iowa 1998); *B & B Asphalt Co., Inc. v. T. S. McShane Co.*, Inc., 242 N.W.2d 279, 286 (Iowa 1976). The doctrine will only be applied, however, if there was "full and fair opportunity" to litigate the claim in the initial action. *Arnevik*, 642 N.W.2d at 319 (citing *Whalen v. Connelly*, 621 N.W.2d 681, 685 (Iowa 2000)). In determining whether the second suit is precluded, we consider "(1) the protected right, (2) the alleged wrong, and (3) the relevant evidence." *Iowa Coal Mining Co., Inc. v. Monroe County*, 555 N.W.2d 418, 441 (Iowa 1996).

> If the same facts or evidence would sustain both, the two actions are considered the same within the rule that the judgment in the former is a bar to the subsequent action. If, however, the two actions rest upon different states of facts, or if different proofs would be required to sustain the two actions, a judgment in one is no bar to the maintenance of the other.

Id. (quoting *Phoenix Fin. Corp. v. Iowa-Wisc. Bridge Co.*, 237 Iowa 165, 175-76, 20 N.W.2d 457, 462 (1946)).

The defendant-appellant Pittman states as the only issue on appeal the following:

> **WHETHER THE DISTRICT COURT ERRED BY REJECTING DEFENDANT PITTMAN'S MOTION FOR SUMMARY JUDGMENT ON THE BASIS OF CLAIM PRECLUSION AND FINDING INSTEAD EACH OF PLAINTIFF'S LAWSUITS REPRESENT DIFFERENT "WRONGS" AND DIFFERENT "PROTECTED RIGHTS."**

Thus, the sole issue raised on appeal is whether the district court erred by denying Pittman's motion for summary judgment on the basis of claim preclusion. However,

> [a]fter a full trial on the merits, a previous order denying a motion for summary judgment is no longer appealable or reviewable. At this point in the proceedings, the denial of the motion for summary judgment merges with the trial on the merits where the trier of fact reviewed the exhibits and listened to the testimony of the witnesses. We, therefore, decline to consider the assignments of error relating to the denial of the motion for summary judgment and consider only those claims in connection with the other issues raised by [the defendant] on appeal.

Kiesau v. Bantz, 686 N.W.2d 164, 174 (Iowa 2004) (citations omitted). In this case there are no "other issues raised by [Pittman] on appeal." The appeal thus arguably presents no justiciable issue, and we should perhaps summarily affirm the judgment of the trial court.

Nevertheless, we find it unnecessary to decide this appeal on the above-described procedural basis, because for the reasons stated below we conclude the district court did not err either in deciding that under the facts of this case the plaintiff-appellee Kearney's claim is not barred by the doctrine of claim

preclusion,[1] or in deciding that Kearney's release and satisfaction did not apply to the claim asserted in this case.

First, we agree with the district court that the claim in the current lawsuit is not the same claim as in the first lawsuit. As personal representative of Donald Barloon's estate Pittman had certain fiduciary duties. The claims in the first lawsuit were that Pittman was negligent and breached fiduciary duties, engaged in intentional or negligent misrepresentation, and converted assets of the estate by not taking reasonable steps to identify, locate, and give notice to Kearney, and by distributing to herself property she had identified as constituting the probate estate. The claim in the current lawsuit is that Pittman was negligent, breached a fiduciary duty, and converted an asset of the estate by not at some point disclosing Zapp's obligation to make restitution payments as an asset of the estate and by distributing those restitution payments to herself. The acts complained of in the two lawsuits are different, the recoveries demanded are different, and although some of the evidence that supports the first action also supports the second, each action requires evidence that is not relevant to the other and does not support the other. The current lawsuit therefore should not be precluded. *See, e.g., Geneva Corporate Fin. v. G.E.B. Liquidation Corp.*, 598 N.W.2d 331, 334 (Iowa Ct. App. 1999) ("A second claim is likely to be considered precluded if the acts complained of, and the recovery demanded, are the same, or when the same evidence will support both actions."). Stated in somewhat

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[1] Pittman's statement of the issue presented for review raises only the issue of *claim preclusion*, and does not raise any issue concerning *issue preclusion*. We thus need not and should not address any question of *issue preclusion*.

different terms, claim preclusion does not apply because the protected right, the alleged wrong, and the relevant evidence in the current lawsuit are different than in the prior lawsuit. *See Westway Trading Corp. v. River Terminal Corp.*, 314 N.W.2d 398, 401 (Iowa 1982) ("In order to determine whether the cause of action is the same, we examine the protected right, the alleged wrong, and the relevant evidence.").

Second, even if we were to conclude the current lawsuit involves the same claim as the first lawsuit, we would nevertheless hold that it is not barred by the doctrine of claim preclusion. Claim preclusion applies not only to matters actually raised in an earlier action, but also to matters that could have been raised in that earlier action. However, claim preclusion does not apply unless the parties sought to be precluded had a full and fair opportunity to litigate the claim in the earlier action. *Arnevik*, 642 N.W.2d at 319. Here, Kearney did not have a full and fair opportunity in the first action to litigate her right to the restitution payments because of Pittman's knowing and deliberate concealment, in violation of her fiduciary duties, of the estate's right to restitution and Pittman's receipt of the payments. We thus agree with the trial court that for this additional reason Kearney's present lawsuit is not precluded.

Because claim preclusion does not apply, we briefly discuss Pittman's claim that Kearney's written release bars the current action and reject the claim. In its ruling following trial on the merits the district court did not address the release, Pittman did not file a motion requesting the court to address the release, and thus error, if any, concerning the release arguably is not preserved.

Concerning the merits of the issue, the language of the "Release and Satisfaction of Judgment" filed by Kearney clearly relates to and applies only to the money judgment entered in the first lawsuit and (in denying Pittman's motion for summary judgment) the district court correctly held that it had "no bearing on the claim presented in the current lawsuit."

We affirm the judgment of the trial court.

AFFIRMED.

Potterfield, J., concurs; Sackett, C.J., dissents.

SACKETT, C.J. (dissents)

I dissent. Clearly contrary to the majority's opinion, claim preclusion applies here and the case should be reversed on appeal and remanded for a dismissal. Claim and issue preclusion were addressed by the district court in its ruling. Consequently we should address the claims to the extent they were raised at trial.

The district court concluded claim preclusion did not apply to this suit because the claims were not the same as in the first suit. The majority has agreed and affirmed. The record does not support this conclusion. Claim preclusion provides that a valid and final judgment on a claim precludes a second action on that claim *or any part of it*." *Arnevik v. Univ. of Minn. Bd. of Regents*, 642 N.W.2d 315, 319 (Iowa 2002). The rule applies to matters actually raised in the first action and to matters that *could have been raised* and thus "[c]laim preclusion, as opposed to issue preclusion, may foreclose litigation of matters that have never been litigated." *Id.* (Emphasis added).

The pleadings in the first suit as well as in this suit reveal that Kearney claimed Pittman breached her fiduciary duty and converted assets of the estate to her own use. The district court, in its decision in the first lawsuit, after finding Pittman was negligent and had breached her fiduciary duties, assessed damages and ruled: "The Court does not find Marcia [Pittman] liable to Bridget [Kearney] under theories of conversion, negligent misrepresentation, or fraud."

Although the specific assets of the estate addressed in the conversion and fraud claims are different, the underlying claim is the same. The order for

restitution was a public record that was filed prior to the filing of the first lawsuit. It could have been discovered and included in the first suit. While the restitution judgment was not litigated in the first suit it could have been. There was a full and fair opportunity for it to be litigated, as the facts supporting it were of public record and clearly discoverable. An adjudication in a former suit between the same parties on the same claim is final as to all matters that *could have been presented* to the court for determination. *Israel v. Farmers Mut. Ins. Ass'n of Iowa*, 339 N.W.2d 143, 146 (Iowa 1983). Even though Kearney did not discover the restitution order until after the first suit, it was discoverable and there was a "full and fair opportunity" to litigate the claim in the initial action. *See Arnevik*, 642 N.W.2d at 319. Parties must litigate all matters growing out of their claims at one time rather than in separate actions. *Id*. I am therefore forced to conclude the claims raised in the second suit are all barred by claim preclusion and the district court abused its discretion in concluding they were not.