COURT OF APPEALS
DECISION
DATED AND RELEASED

October 24, 1995

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-2774

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

IN THE MATTER OF THE ESTATE OF LUELLA BAILEY:

L.A. WILLENSON and DOROTHY DALE,

Appellants,

v.

ESTATE OF LUELLA BAILEY,

Respondent.

APPEAL from an order of the circuit court for Milwaukee County: JOHN F. FOLEY, Judge. *Affirmed and cause remanded with directions.*

Before Wedemeyer, P.J., Sullivan and Schudson, JJ.

PER CURIAM. Dorothy Dale and L.A. Willenson, Dale's attorney, appeal from an order declaring their underlying claim for costs and attorneys' fees *res judicata*. Appellants' brief presents the following issues for our review:

(1) Did the trial court abuse his discretion when he arbitrarily dismissed the appellant's motion solely because of his anger and resentment toward counsel for having filed a complaint against him with the Judicial Commission? Was the written order only a cover-up for his true feelings as orally expressed by him at the termination of the oral arguments?

(2) Should the trial court be ordered to compel the estate to pay the expenses of administration, as well as some or all of the costs of trial as "expenses of administration" as can be embodied in the order of September 12, 1990?

(3) Were these issues covered by the previous appeal?

Additionally, the attorneys for the Estate of Luella Bailey move this court for attorneys' fees and costs for a frivolous appeal.

We conclude that the trial court properly applied the doctrine of claim preclusion to this appeal and, therefore, affirm its judgment. We also conclude that Willenson and Dale's appeal is frivolous pursuant to § 809.25(3), STATS., and remand the matter to the trial court for determination of those reasonable fees and costs.

By an October 1980 will, Dale was nominated as personal representative for the estate of her aunt, Luella Bailey. When Bailey died in November 1989, Dale made funeral arrangements and filed a petition for probate of Bailey's 1980 will. Months later, Dale was notified that a February 1987 will that nominated Mabel Horton as personal representative had also been petitioned for probate. Dale contested the 1987 will on multiple grounds, but the trial court admitted it to probate in May 1991.

After losing the will contest, Dale relied on a September 12, 1990, order declaring that various costs of contesting the will were to be paid by the estate as the basis to exercise her power of attorney for Bailey to withdraw those costs directly from the estate. On May 13, 1991, the trial court denied Dale's request for expenses of contesting the will, but the court subsequently amended

the order to require that the estate pay Dale's expenses in connection with the action and attorneys' fees, amounting to $2,789.37 and $4,430.00, respectively.[1]

In June 1991, Horton brought an action for an accounting of the estate's funds. Attorney Willenson again raised the issue of reimbursement and attorneys' fees, claiming that he had never received copies of the amended order. The court appointed a referee, pursuant to RULE 805.06, STATS., to resolve the question, and the referee reported to the court that $3,909.84 was missing from the estate's funds.

The trial court determined that Dale had withdrawn the money and that a portion of it had been used to pay Willenson. On the recommendation of the referee, the court ordered a credit due to the estate from Willenson in the amount of $3,909.84, leaving him due $520.16 in fees, and further denied reimbursement of Dale in the amount of $2,789.37. Willenson and Dale appealed from this order.

In ***Willenson v. Estate of Luella Bailey***, No. 92-0408 (Wis. Ct. App. Jan. 26, 1993) (unpublished *per curiam*), we reasoned that the estate could not be

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[1] Section 879.35, STATS., provides:

> Costs may be awarded out of the estate to an unsuccessful proponent of a will if the unsuccessful proponent is named as an executor therein and propounded the document in good faith, and to the unsuccessful contestant of a will if the unsuccessful contestant is named as an executor in another document propounded by the unsuccessful contestant in good faith as the last will of the decedent.

Section 879.37, STATS., provides:

> Reasonable attorney fees may be awarded out of the estate to the prevailing party in all appealable contested matters, to an unsuccessful proponent of a will if the unsuccessful proponent is named as an executor therein and propounded the document in good faith, and to the unsuccessful contestant of a will if the unsuccessful contestant is named as an executor in another document propounded by the unsuccessful contestant in good faith as the last will of the decedent.

ordered to pay costs a second time for expenses already obtained from the estate. The record clearly indicated that Dale had been reimbursed. In addition, evidence presented in the trial court demonstrated that Willenson had received portions of these funds from Dale, knew that Dale no longer had power of attorney, and yet had advised her to withdraw said funds. Accordingly, we affirmed the decisions of the trial court concerning the award of attorneys' fees to Willenson and the allowance to Dale.

On August 9, 1993, Willenson again moved the trial court for fees. The trial court dismissed the motion for fees on its merits under the doctrine of *res judicata*. On April 18, 1994, Willenson once again moved the trial court for fees, which the court denied, invoking *res judicata*. Willenson and Dale appeal from the order filed on September 19, 1994.

In ***Northern States Power Co. v. Bugher***, 189 Wis.2d 541, 550, 525 N.W.2d 723, 727 (1995), the supreme court formally adopted the phrase "claim preclusion" as a replacement for the phrase *res judicata*. Whether the doctrine of claim preclusion applies is a question of law that we review *de novo*. ***Id***. at 551, 525 N.W.2d at 728.

The doctrine of claim preclusion provides that "`a final judgment is conclusive in all subsequent actions between the same parties [or their privies] as to all matters which were litigated or which might have been litigated in the former proceedings.'" ***Id***. at 550, 525 N.W.2d at 727 (citation omitted). The doctrines of claim preclusion and collateral estoppel are designed to balance judicial economy and the need to bring litigation to a final conclusion with every party's right to have a judicial determination made as to their contentions. *See* ***Desotelle v. Continental Casualty Co***., 136 Wis.2d 13, 21, 400 N.W.2d 524, 527 (Ct. App. 1986).

The components of claim preclusion are: (1) the identity of parties in the prior and present suit; (2) the identity of the causes of action between the two suits; and (3) a final judgment on the merits in a court of competent jurisdiction. ***Northern States Power Co***., 189 Wis.2d at 551, 525 N.W.2d at 728.

The parties involved in the present case are identical to those in the previous order for costs. Willenson and Dale argue in their brief that this appeal is "to compel the Estate to pay the expenses of administration," and that the previous appeal involved issues concerning "payment of costs of trial" and "attorney's fees." They further claim that the court did not rule on the allowances for expenses of administration and "that left the door open for the appellants to try and get some justice by going back to the trial court to compel the estate to pay the expenses of administration."

Accordingly, we must examine the relief sought and the basis for the request to determine whether their cause of action falls within the doctrine of claim preclusion.

"Reasonable and necessary expenses" pursuant to § 879.35, STATS., were ordered by the trial court in a July 23, 1991, amendment to the order of May 13, 1991. At the same time, in a separate amendment to the May 1991 order, the estate was ordered to pay attorneys' fees in the amount of $4,430 to Willenson, pursuant to § 879.37, STATS.

On July 28, 1992, the court ordered a credit due the estate from Willenson in the amount of $3,909.82, leaving Willenson due $520.16, and denied Dale's claim for $2,789.37 because those costs were already paid from the funds of the Estate. Clearly, the trial court granted judgment on these issues previously, and, under the doctrine of claim preclusion, "`a final judgment is conclusive in all subsequent actions between the same parties [or their privies] as to all matters which were litigated or which might have been litigated in the former proceedings.'" ***Northern States Power Co.***, 189 Wis.2d at 550, 525 N.W.2d at 727 (citation omitted). Because the principles of claim preclusion control this action, the trial court's order denying Willenson and Dale's motion was properly denied under the doctrine of claim preclusion. We affirm the order.

In addition, we find the appellant's appeal to be frivolous and award costs and reasonable attorneys' fees under § 809.25(3)(a), STATS.[2]

[2] Section 809.2(3)(a), Stats., provides:

Accordingly, we remand this matter to the trial court for factual determination of costs and attorneys' fees.

By the Court.—Order affirmed and cause remanded with directions.

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

(..continued)

If an appeal or cross-appeal is found to be frivolous by the court, the court shall award to the successful party costs, fees and reasonable attorney fees under this section. A motion for costs, fees and attorney fees under this subsection shall be filed no later than the filing of the respondent's brief or, if a cross-appeal is filed, the cross-respondent's brief.