

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

October 12, 1995

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.

NOTICE

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No. 95-0604

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

MARY FREDETTE,

Plaintiff-Appellant,

v.

**WOOD COUNTY NATIONAL BANK,
WOOD COUNTY TRUST COMPANY,
DIANA PELOT, PERSONAL REPRESENTATIVE,
ESTATE OF GEORGE PELOT, SR.,
CORPORATIONS 1 THROUGH 20,
DOES 2 THROUGH 20,**

Defendants-Respondents.

APPEAL from judgments of the circuit court for Wood County:
EDWARD F. ZAPPEN, JR., Judge. *Affirmed and cause remanded with directions.*

Before Eich, C.J., Gartzke, P.J., and Vergeront, J.

PER CURIAM. This appeal represents this court's second visit to the Estate of Frank Godon. We previously rejected Mary Fredette's objection to

various rulings of the probate court and affirmed the final probate judgment. *Fredette v. Wood County Trust Company*, No. 94-0486, (Wis. Ct. App. September 7, 1995). In this appeal, we affirm judgments dismissing Fredette's complaint against the initial and successor personal representatives of the Frank Godon estate. We also affirm the trial court's award of costs and attorney fees under § 814.025, STATS.

Fredette was a residual beneficiary under Frank Godon's will. Fredette actively disputed several of the rulings made by the court in the probate proceedings. Fredette took issue with the inventory of Frank's estate, the disposition of proceeds from a farm auction, and the settlement of a personal injury claim against the estate. The probate court ruled against Fredette, and this court affirmed.

After the final judgment in the probate matter was entered, Fredette commenced this action. In her complaint, Fredette alleged that George Pelot, Sr., while acting as personal representative of Frank's estate, converted assets from Frank's estate to the estate of George Godon, Frank's brother.¹ Fredette also alleged that the successor personal representative, the Wood County Trust Company,² breached its fiduciary duty to Frank's estate by not objecting to the conversion; that the trust company improperly transferred a parcel of real estate in settlement of the personal injury claim; and that the trust company was improperly appointed successor personal representative. After ruling that all of Fredette's allegations had been made and rejected in the probate proceedings, the trial court dismissed the complaint. The court also ruled that Fredette's complaint was frivolous under § 814.025, STATS., and awarded costs and attorney fees to the defendants.

Before examining the factual aspects of Fredette's causes of action, we address Fredette's argument that the circuit court that presided over the probate of Frank's estate lacked the authority to make the rulings that she now

¹ Because George Pelot, Sr., is deceased, the named defendants are Pelot's estate and Diana Pelot, as personal representative of Pelot's estate.

² The Wood County National Bank is also a named defendant, apparently as the trust company's "master." For sake of simplicity, we will refer to both institutional defendants as the trust company.

attempts to relitigate. Fredette cites to cases which pre-date the 1978 court reorganization. See e.g., *Gerlach v. Thieme*, 58 Wis.2d 113, 205 N.W.2d 779 (1973). The limited jurisdiction formerly possessed by a county court handling a probate matter was removed in court reorganization. Under § 753.03, STATS., a circuit court has general jurisdiction "to hear and determine ... all civil and criminal actions ... and they have all powers, ... necessary to the full and complete jurisdiction of the causes and parties and the full and complete administration of justice," The circuit court had the authority to rule on disputed issues that arose in the course of the probate proceeding.

Issue Preclusion

Whether the trial court correctly dismissed Fredette's complaint presents a question of law that this court reviews without deference to the trial court. See *Lindas v. Cady*, 183 Wis.2d 547, 552, 515 N.W.2d 458, 460 (1994) (the application of preclusion doctrines to a given set of facts is a question of law). Under the principle of issue preclusion, a party cannot relitigate issues that were actually litigated in a previous action. *Id.* at 558, 515 N.W.2d at 463. Presented with an issue preclusion argument, a court should consider a series of factors to determine whether issue preclusion may be equitably applied. *Id.* at 560-61, 515 N.W.2d at 464. Those factors include:

- (1) could the party against whom preclusion is sought, as a matter of law, have obtained judicial review of the judgment; (2) is the question one of law that involves two distinct claims or intervening contextual shifts in the law; (3) do significant differences in the quality or extensiveness of proceedings between the two courts warrant relitigation of the issue; (4) have the burdens of persuasion shifted such that the party seeking preclusion had a lower burden of persuasion in the first trial than in the second; or (5) are matters of public policy and individual circumstances involved that would render the application of collateral estoppel to be fundamentally unfair, including inadequate opportunity or incentive to obtain a full and fair adjudication in the initial action.

Id. at 561, 515 N.W.2d at 464, quoting *Michelle T. v. Crozier*, 173 Wis.2d 681, 689, 495 N.W.2d 327, 330-31 (1993).

After consideration of those factors, we conclude that issue preclusion defeats Fredette's complaint.

A. Conversion

In the probate proceeding, Fredette challenged the disposition of proceeds of an auction at which property found on Frank Godon's farm was sold. Both Frank and his brother George had been farmers, and property belonging to both men was found on the farm. At an evidentiary hearing, Fredette challenged the inventory submitted in Frank's estate and argued that proceeds attributed to George's property should have been attributed to Frank. At the conclusion of the hearing, Fredette's counsel conceded that the evidence supported the disposition of property between the brothers. The court then approved the inventory submitted by Pelot, then-personal representative of Frank's estate.

Fredette argues that Pelot "converted" money from Frank's estate to George's estate. Fredette also faults the trust company for not objecting to Pelot's actions when it was appointed successor personal representative. The factual underpinnings of Fredette's claims involve the property sold at auction. That matter was litigated by the probate court, and issue preclusion may be fairly applied to prevent Fredette from relitigating the issue.

B. Settlement of the Personal Injury Claim

One of Frank's neighbors, Larry Winters, was injured while trying to save Frank from a house fire. Winters filed a personal injury lawsuit against the estate. The estate retained counsel, and a compromise settlement was reached. Under the terms of the settlement, Winters received a piece of real estate from the estate. He also agreed to forfeit any further interest in the estate arising from his status as a residual beneficiary under the will. The tentative settlement was presented to the probate court, and it approved the proposed

resolution of the claim. Fredette appeared at that hearing, and expressly approved the settlement.

Fredette argues that the trust company breached its fiduciary duty by compromising Winters' claim. However, the settlement was expressly approved by the probate court. Thus, the trust company did not breach its fiduciary duty to Frank's estate when it transferred real estate pursuant to the settlement. Issue preclusion prevents Fredette from reopening the settlement.³

C. Appointment of the Successor Personal Representative

Fredette's complaint also alleges that the trust company was improperly appointed successor personal representative. That appointment, however, was made by the probate court, and the trust company acted pursuant to its judicially bestowed authority. Any challenge to the appointment must have been made in the probate proceedings.

Costs and Fees under § 814.025, STATS.

The trial court found that Fredette's action was frivolous under § 814.025(3)(b), STATS. An action is frivolous under that section if the party "knew or should have known" that the action was "without any reasonable basis in law or equity." A finding of frivolousness under subsection (3)(b) is based on an objective standard. *Stern v. Thompson & Coates, Ltd.*, 185 Wis.2d 220, 241, 517 N.W.2d 658, 665-66 (1994). A mixed question of law and fact is presented. *Id.* at 241, 517 N.W.2d at 666. Findings of historical fact will not be upset unless against the great weight and clear preponderance of the evidence, and the ultimate question of whether those facts support a conclusion of frivolousness under § 814.025 is a question of law that we review *de novo*. *Id.*

³ As we did in the prior appeal, we note that Fredette ultimately approved the settlement of Winters' claim during the hearing before the probate court. Fundamental considerations of estoppel would prevent Fredette from objecting to the settlement at this point.

The trial court found that each of Fredette's causes of action was previously litigated during the probate of Frank's estate. The court further found that Fredette had been warned by the probate judge that continued litigation of the conversion claim would likely result in a finding of frivolousness. Fredette litigated her claims before the probate court. She then appealed to this court. A reasonable person should have known that a subsequent action raising identical claims would be without any reasonable basis in law or equity. The court's factual findings are not clearly erroneous, and we agree with the trial court's legal conclusion. We affirm the trial court's award of costs and fees under § 814.025, STATS.

Frivolous Appeal under RULE 809.25(3), STATS.

The final question is whether Fredette's appeal was frivolous. Fredette's appeal is frivolous for the same reasons that her litigation in the circuit court was frivolous. Factual findings are not required, and we conclude as a matter of law that Fredette's appeal is frivolous. See *Stern* at 252-53, 517 N.W.2d at 670. We remand to the circuit court for a determination of costs and fees expended by the respondents on this appeal. We deny Fredette's motion to strike Diana Pelot's motion for fees and costs.

By the Court.— Judgments affirmed, and cause remanded with directions.

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