

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 3, 2002

Cornelia G. Clark
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. 01-2951
STATE OF WISCONSIN**

Cir. Ct. No. 00-CV-665

**IN COURT OF APPEALS
DISTRICT IV**

**SHAWN WERNER, PERSONALLY AND AS GUARDIAN OF
RACHEL WERNER, A MINOR CHILD, AND TERRY L.
WERNER, AS PERSONAL REPRESENTATIVE OF THE
ESTATE OF LINDA A. WERNER AND AS THE SPECIAL
ADMINISTRATOR OF THE ESTATE OF SARAH A. WERNER,**

PLAINTIFFS-APPELLANTS,

v.

**PRUDENTIAL PROPERTY AND CASUALTY INSURANCE
COMPANY, ORIGIN INVESTIGATORS ASSOCIATES, INC.,
AND COULEE CLAIMS SERVICE INC.,**

DEFENDANTS-RESPONDENTS,

GENERAL INSURANCE COMPANY OF AMERICA,

INTERVENOR-RESPONDENT.

APPEAL from an order of the circuit court for La Crosse County:
DALE T. PASSELL, Judge. *Affirmed.*

Before Roggensack, Deininger and Lundsten, JJ.

¶1 PER CURIAM. Shawn Werner, on his own and on his daughter Rachel’s behalf, and Terry L. Werner, on behalf of the estate of Linda and Sarah Werner, appeal an order dismissing their claims against Prudential Property and Casualty Insurance Company, Coulee Claims Service Inc., and General Insurance Company of America. A house fire that injured Shawn and Rachel and killed Linda and Sarah, gave rise to this proceeding and to a prior action the Werners litigated in federal court. The issue is whether the circuit court properly held the Werners’ claims were barred by issue preclusion. We affirm.

¶2 The Werners brought a prior action against the maker of the smoke and carbon monoxide detectors in their house. On summary judgment, the federal district court concluded that undisputed facts disproved any connection between the performance of the detectors and the Werners’ injuries and fatalities.¹ Specifically, the district court held it undisputed that an upstairs detector worked and gave Linda, Sarah and Rachel adequate notice of the fire. The court also concluded that it was irrelevant whether the basement detector failed to warn Shawn, because he had no proof that he was in the basement when the fire started. The Werners subsequently appealed the district court’s decision to the Seventh Circuit Court of Appeals, but voluntarily dismissed the appeal after the parties settled.

¹ The court stated “I conclude that it is not necessary to decide any of the issues relating to the alleged design defects in the detectors or the alleged failure of defendants to warn about the limitations of their detectors or to test them properly because plaintiffs cannot establish that any design defect, inadequate warning or improper marketing caused their injuries.”

¶3 The Werners then commenced this action, alleging that Prudential, the Werners' home insurance provider, and its fire investigators, Origin Investigators and Coulee Claims Service, negligently lost the basement detector during their investigation of the fire. The Werners further alleged that losing the detector damaged them by causing dismissal of the prior federal court lawsuit.

¶4 The doctrine of issue preclusion bars the relitigation of issues that have been actually litigated in a previous action involving the party against whom it is asserted. *Paige K.B. v. Steven G.B.*, 226 Wis. 2d 210, 219, 594 N.W.2d 370 (1999). We review the circuit court's decision on whether issue preclusion can be applied as a question of law. *Amber J.F. v. Richard B.*, 205 Wis. 2d 510, 515, 557 N.W.2d 84 (Ct. App. 1996). However, we review whether issue preclusion was properly applied in the action before us under the erroneous exercise of discretion standard. *County of Milwaukee v. Superior of Wisconsin*, 2000 WI App 75, ¶30, 234 Wis. 2d 218, 610 N.W.2d 484.

¶5 In exercising its discretion, the circuit court should consider the following factors: (1) whether the party against whom issue preclusion is raised could have obtained review of the prior judgment; (2) whether the issue is one of law that involves two distinct claims or intervening contextual shifts in the law; (3) whether a significant difference in the quality or extensiveness of the proceedings between the two courts warrants relitigation of the issue; (4) whether the prior action involved a lower burden of persuasion; and (5) whether it would be fundamentally unfair to apply issue preclusion for reasons of public policy or individual circumstances, including an inadequate opportunity or incentive to obtain a full and fair adjudication in the initial action. *Michelle T. v. Crozier*, 173 Wis. 2d 681, 688-89, 495 N.W.2d 327 (1993).

¶6 In addressing these factors, the circuit court held that the Werners did pursue review of the district court's decision; that the federal court action did not involve distinct claims or contextual shifts in the law; that the matter was extensively litigated in federal court under the same burden of persuasion; and that there were no matters of public policy or individual circumstances that would render applying the doctrine fundamentally unfair. Consequently, the circuit court held that the Werners were precluded on the issue of causation, resulting in dismissal of their complaint. This appeal concerns that decision.

¶7 The circuit court reasonably and properly held that the Werners' claim was barred by issue preclusion. We affirm a discretionary decision if the court applies the correct legal standard to the facts of record and in a reasoned manner reaches a rational result. *Hokin v. Hokin*, 231 Wis.2d 184, 190, 605 N.W.2d 219 (Ct. App. 1999). The circuit court reasoned that causation was a critical issue in both lawsuits; that the issue, although decided on summary judgment,² was extensively litigated in the federal court action; and that the Werners were able to appeal the prior decision and relinquished that opportunity voluntarily. Under those circumstances, the circuit court reasonably concluded that the Werners were precluded from litigating the same issue twice.

¶8 As the circuit court noted, the focus of the Werners' argument is that the federal district court erred by dismissing their action on summary judgment, based on the lack of any proof of causation. However, the failure to provide any proof that the detectors were a cause of the Werners' injuries resulted in the

² The requirement that an issue has been previously "actually litigated" is met when the issue is decided on summary judgment. *Randall v. Felt*, 2002 WI App 157, ¶9 n.4, ___ Wis. 2d ___, 647 N.W.2d 373.

federal court making a factual determination, as a matter of law. That finding became conclusive of the issue of causation when the Werners dismissed their appeal.

By the Court.—Order affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5 (1999-2000).

