

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 29, 2003

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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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. 03-0354
STATE OF WISCONSIN**

Cir. Ct. No. 01CV001551

**IN COURT OF APPEALS
DISTRICT II**

**GREGORY T. ISERMANN,

PLAINTIFF-APPELLANT,**

V.

**ELIZABETH A. ISERMANN,

DEFENDANT-RESPONDENT.**

APPEAL from an order of the circuit court for Waukesha County:
LEE S. DREYFUS, Judge. *Affirmed.*

Before Anderson, P.J., Nettesheim and Snyder, JJ.

¶1 NETTESHEIM, J. Gregory T. Isermann appeals from a trial court order dismissing this civil action against his former spouse, Elizabeth A. Isermann,

on grounds of claim and issue preclusion.¹ Gregory's complaint against Elizabeth alleges intentional misrepresentation and fraud in Elizabeth's handling of his jewelry business during their marriage. Gregory contends that the trial court erred in its determination that he had fully litigated, or had the opportunity to fully litigate, his claims against Elizabeth in the context of their earlier divorce proceeding.

¶2 Because the record of the divorce proceeding establishes that Gregory litigated the current claims in that forum, and because the divorce judgment resolved the current claims, we hold that the claims are barred under principles of claim and issue preclusion. We therefore affirm the order dismissing Gregory's complaint. However, we deny Elizabeth's request that we find Gregory's appeal frivolous.

FACTS

¶3 Although we review the ruling of Judge Lee S. Dreyfus in this case, much of our discussion will focus on the parties' earlier divorce proceeding which was heard by Judge Patrick L. Snyder.

¶4 The relevant history dates back to March 2, 1999, when Gregory filed a prior civil action against his then wife, Elizabeth, alleging various claims based on Elizabeth's alleged mismanagement of marital assets. In that action, Gregory requested the court to transfer certain marital assets to him and to limit Elizabeth's future control over those assets. Some of the alleged mismanagement

¹ The term "claim preclusion" replaces the concept of *res judicata*; the term "issue preclusion" replaces the concept of collateral estoppel. *N. States Power Co. v. Bugher*, 189 Wis. 2d 541, 550, 525 N.W.2d 723 (1995).

pertained to Elizabeth's employment at Gregory's jewelry store. While that action was pending, Elizabeth filed an action for legal separation, which was later converted into an action for divorce. Thereafter, Gregory's civil action was dismissed without prejudice by stipulation of the parties.

¶5 Judge Snyder presided at the divorce trial. The record in this case includes an affidavit of Gregory's divorce attorney, Jacob A. Schwei, concerning an unreported chambers conference during the trial between Judge Snyder and the attorneys regarding various issues in the divorce case.² According to Attorney Schwei, Judge Snyder indicated that "he would not be rendering any decision regarding the parties' ... jewelry business and in particular regarding allegations of theft of business assets or fraud or other issues regarding the business." Attorney Schwei also states that Judge Snyder further "indicated that he felt this should be resolved in another forum rather than as part of the divorce trial."³

¶6 As a result, Gregory filed the instant action against Elizabeth, alleging intentional misrepresentation and fraud in Elizabeth's operation of the jewelry business. Elizabeth responded with a motion to consolidate this case with the divorce case, stating in her supporting affidavit, "In our divorce trial, there has been extensive testimony regarding all issues of property division, including [the jewelry business]." Judge Kathryn W. Foster, the judge originally assigned to this action, denied the consolidation motion. Thereafter, this case was assigned to Judge Dreyfus.

² Gregory is represented by different counsel in this case.

³ Elizabeth did not register any objection to Attorney Schwei's affidavit. Therefore, we are not required to determine whether the affidavit was admissible or was the proper method by which the record of the unreported chambers conference could be reconstructed.

¶7 In the meantime, the divorce trial proceeded before Judge Snyder. While Gregory was testifying, Judge Snyder and Attorney Schwei had the following exchange on the record:

THE COURT: Can I just interrupt on this issue, and maybe I can short-circuit some of the testimony? I'm aware [Gregory] has started a separate civil action against [Elizabeth] concerning this jewelry. That will be the subject of another court.... [B]ut in any event, this court is going to value the jewelry that it now has in this trial as of the date of the divorce, and these allegations are the subject of yet a future action. I would not hear the civil action within the confines of the divorce action, so to speak.

[GREGORY'S ATTORNEY]: So, in effect, your Honor, are you saying with respect to any decision that you'd make in this case, you're not going to deal with the issue of possible waste of marital assets or missing jewelry, the value of that --

THE COURT: You may present whatever testimony you feel inclined to. I'm aware there's a civil suit out there that can easily handle that type of situation. I don't know what kind of proofs you have that would force me to find waste in a divorce case. If you feel you have that case, you proceed. I offered it as a manner to expedite this. Since there's another forum that's going to handle it, I'm offering it as a potential solution. Do with it as you wish.

[GREGORY'S ATTORNEY]: Well, we don't have that much more to put in on it. We'll proceed and finish this portion....

Gregory then continued with his testimony, which included evidence about the jewelry business.

¶8 In his oral decision at the conclusion of the divorce trial, Judge Snyder ruled, in part:

The jewelry business. Neither side has met any burden of showing me that either side is entitled to a credit from the other. Both parties had opportunity and method and motive to deal with this business as they saw fit....

[Gregory] in particular, has not satisfied this court that anything was missing that can be charged to [Elizabeth].

¶9 Gregory followed with an appeal from the divorce judgment. He raised numerous issues, some of which related to the jewelry business. We rejected Gregory's arguments and affirmed the divorce judgment.⁴

¶10 Shortly before Gregory took his appeal in the divorce case, Elizabeth filed a motion to dismiss the instant action based on claim preclusion.⁵ Elizabeth argued that the marital property issues pertaining to the jewelry business had been addressed by Judge Snyder in the divorce proceeding and that Judge Snyder had determined that Gregory had not met his burden to show that Elizabeth had mismanaged any marital property. Gregory opposed the motion, arguing that the ultimate application of claim preclusion rests on fairness and that he had not been afforded a full and fair determination of the jewelry business issues during the divorce proceedings.

¶11 In an oral decision, Judge Dreyfus agreed with Elizabeth. The judge ruled: (1) that the issues addressed in the divorce action were the very issues raised in the current action, and (2) that the record of the divorce proceeding did not establish that Judge Snyder had restricted or precluded Gregory from addressing any issues relating to the jewelry business. Therefore, Judge Dreyfus determined that Gregory's civil action was barred by both claim and issue preclusion.

⁴ See *Isermann v. Isermann*, No. 02-2162, unpublished slip op. (WI App. April 2, 2003).

⁵ Elizabeth's motion also contended, in the alternative, that Gregory's exclusive remedy was in the divorce forum. She does not renew this argument on appeal.

¶12 Gregory appeals.

DISCUSSION

1. Claim and Issue Preclusion

¶13 “Over the years, courts have evolved principles that preclude re-litigation of matters that have already been decided. These principles are subsumed in the doctrines of claim preclusion and issue preclusion, which were formerly known as res judicata and collateral estoppel respectively.” *Beloit Liquidating Trust v. Grade*, 2003 WI App 176, ¶15, No. 02-2035, review granted (Wis. Oct. 21, 2003). Under claim preclusion, a final judgment in an earlier matter is conclusive upon the parties in that earlier matter and those in privity with those parties, and the final judgment governs all issues that were either litigated or might have been litigated. *Id.* Issue preclusion, on the other hand, can apply even though there is not an “identity of parties” in the earlier and later matters so long as the “issue of law or fact” for which preclusive effect is sought “has been actually litigated and decided in a prior action and reduced to judgment.” *Id.* (citation omitted). Whether either preclusion doctrine applies to bar an action is a legal issue we review de novo. *State v. Parrish*, 2002 WI App 263, ¶4, 258 Wis. 2d 521, 654 N.W.2d 273, review denied, 2003 WI 16, 259 Wis. 2d 101, 657 N.W.2d 706 (Wis. Jan. 21, 2003) (No. 00-2524). Despite this de novo standard of review, we value a trial court’s ruling on the matter. See *Scheunemann v. City of West Bend*, 179 Wis. 2d 469, 475, 507 N.W.2d 163 (Ct. App. 1993). Here, Judge Dreyfus issued a well-reasoned and thorough bench decision with which we fully agree.

¶14 To determine whether claim preclusion bars an action, a court considers whether: (1) both the prior action and the challenged action have the

same parties, (2) both the prior action and the challenged action have the same causes of action, and (3) the prior action resulted in a final judgment on the merits in a court of competent jurisdiction. *See N. States Power Co. v. Bugher*, 189 Wis.2d 541, 551, 525 N.W.2d 723 (1995). However, even where these requirements are satisfied, the ultimate application of claim or issue preclusion must also satisfy the additional factor of fairness. *See Steffen v. Luecht*, 2000 WI App 56, ¶28, 233 Wis. 2d 475, 608 N.W.2d 713.

¶15 Gregory raises two arguments against the application of claim and issue preclusion. First, he contends that the claims in the divorce case were different from those in the instant case. Second, he contends that the application of claim and issue preclusion is unfair under the historical circumstances. We address both of these arguments in a single discussion.

¶16 We begin by precisely defining Gregory's argument. Gregory does not dispute that his claims regarding the jewelry business could have been litigated in the divorce action. In fact, Gregory had already presented testimony from his father and Elizabeth regarding the jewelry business before Judge Snyder introduced the thought that the issues should be litigated in the civil action. Rather, Gregory's argument is that the jewelry business claims were not *fully* litigated because Judge Snyder shut down that process mid-trial. To compound the prejudice, Gregory complains that Judge Snyder then did an about face by ruling on the merits regarding the claims in his bench decision.

¶17 However, the record does not support Gregory's characterization of Judge Snyder's remarks. True, Judge Snyder initially signaled to the parties that he thought the jewelry business issues should be litigated in the pending civil action. However, we disagree with Gregory's argument that Judge Snyder

therefore “stopped the introduction of evidence as to [Elizabeth’s] theft of jewelry store assets.” The record reflects that after Judge Snyder expressed his opinion that the jewelry business claims should be litigated in the civil action, Attorney Schwei inquired whether the judge was “not going to deal with the issue of possible waste of marital assets or missing jewelry.” Judge Snyder responded, “You may present whatever testimony you feel inclined to.... If you feel you have that case, you proceed. I offered it as a manner to expedite this. Since there’s another forum that’s going to handle it, *I’m offering it as a potential solution. Do with it as you wish.*” (Emphasis added.)

¶18 This record, read in its totality and in proper context, reveals that Judge Snyder was offering Gregory the option of continuing to litigate the jewelry business issues in the divorce proceeding or to reserve them for trial in the accompanying civil action. It is clear from the record that Gregory opted for the former. This made sense since Gregory’s father and Elizabeth had already presented testimony regarding the jewelry business claims. Moreover, Attorney Schwei responded to Judge Snyder’s offer with the following: “[W]e don’t have that much more to put in on it. *We’ll proceed and finish this portion.*” (Emphasis added.) With that, Attorney Schwei continued with his questioning of Gregory, who proceeded to testify about missing jewelry business inventory, unexplained deposits and withdrawals from the business account and other forms of alleged mismanagement by Elizabeth.

¶19 We have reviewed the complaint in this civil action and, like Judge Dreyfus, are satisfied that the claims in this action are the same as those made in the context of the divorce proceeding. As in the divorce action, Gregory’s claims in this action focus generally on allegations that Elizabeth mishandled the business inventory, misrepresented the inventory, and sold jewelry in exchange for cash,

which she used for her personal purposes. We also note that Gregory does not advise as to any additional evidence in this case that had not already been presented in the divorce case. In summary, the claims in the divorce case share identity with those alleged in this case, and the claims were fully and fairly tried in the divorce case before Judge Snyder. We therefore hold that Judge Dreyfus properly dismissed Gregory's complaint in this case.

2. Frivolous Appeal

¶20 Elizabeth argues that Gregory's appeal is frivolous because it is without any reasonable basis in law or equity and is not supported by any good faith argument for an extension, modification or reversal of existing law. *See* WIS. STAT. RULE 809.25(3)(c)1, 2. We disagree. Although we have held that Gregory's claims regarding the jewelry business were fully tried in the divorce case, we must allow that a portion of Judge Snyder's remarks indicated the judge's intent to bar a trial of the jewelry business claims in the divorce case. Although Judge Snyder did not ultimately carry out that intent, we hold that those remarks offered Gregory an arguable basis for this appeal.

CONCLUSION

¶21 We conclude that the claims in the instant case were fully litigated in the prior divorce proceeding. As such, those claims are barred by the doctrines of issue and claim preclusion.⁶ We affirm the trial court's order granting Elizabeth's

⁶ Based on our conclusion that Gregory's claims were fully litigated and therefore are barred by issue and claim preclusion, we need not address his further argument that WIS. STAT. §§ 766.70(1) or 767.05(7) (2001-02) did not bar this action.

motion to dismiss. However, we deny Elizabeth's motion to find Gregory's appeal frivolous.

By the Court.—Order affirmed.

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