COURT OF APPEALS
DECISION
DATED AND FILED

December 16, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-2298 **Cir. Ct. No. 99CV001931**

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

ILSE C. WOOD,

PLAINTIFF-APPELLANT,

V.

GERALD G. WOOD, JR. AND DEBRA L. WOOD,

DEFENDANTS-RESPONDENTS,

JOHN H. WOOD,

DEFENDANT-(IN T.CT.).

APPEAL from an order of the circuit court for Dane County: RICHARD J. CALLAWAY, Judge. *Reversed and cause remanded with directions*.

Before Deininger, P.J., Vergeront and Lundsten, JJ.

¶1 LUNDSTEN, J. Ilse Wood appeals an order dismissing her conversion action against her stepson, Gerald Wood, Jr., and his wife, Debra Wood. The action relates to a trucking business, Wood and Sons Trucking, Inc., which Ilse alleges was fraudulently converted by Gerald Jr. and Debra to their own use after the death of the previous owner, her husband, Gerald Sr. The action involves a dispute over whether the business was transferred by Gerald Sr., before his death, to his grandsons, Chad and Joseph. Chad and Joseph are the sons of Gerald Jr. and Debra. The central issue on appeal is whether the grandsons were "necessary" parties under the indispensable party statute. In dismissing Ilse's action, the circuit court determined that the grandsons were necessary parties and that it was too late for Ilse to join them. We conclude that the grandsons are necessary parties, and that it is not too late to join them. In addition, we reject other arguments that Gerald Jr. and Debra make in support of the circuit court's order dismissing Ilse's suit. Accordingly, we reverse the order and remand for further proceedings consistent with this decision.

Background

¶2 Prior to his death in December 1994, Gerald Sr. owned all of the stock in Wood and Sons Trucking. In August 1999, five years after Gerald Sr. died, Ilse filed this action for conversion against Gerald Jr. and Debra, alleging that they were intentionally interfering with her control over her ownership interest in Wood and Sons. Ilse asserts an ownership interest in Wood and Sons Trucking based on her allegations that Gerald Sr.'s stock was subject to her marital property rights and that, under his will, she was the beneficiary of his interest in the stock.

¶3 Gerald Jr. and Debra moved for summary judgment on a number of grounds, including their argument that Ilse did not have an ownership interest in Wood and Sons Trucking at the time of Gerald Sr.'s death because, by that time, Gerald Sr. had already sold all of the stock to his grandsons. In support of this assertion, Gerald Jr. and Debra relied on a stock certificate and a purchase agreement, both dated February 28, 1994, which evidenced a sale of Gerald Sr.'s stock to his grandsons for $10,000. Ilse disputed that the sale took place. She testified during her deposition that the signature on the stock certificate purporting to be Gerald Sr.'s was a fake.

¶4 Gerald Jr. and Debra also moved to dismiss, arguing that Ilse had failed to join the grandsons as necessary parties under WIS. STAT. § 803.03.[1] The circuit court dismissed Ilse's action, concluding that the statute of limitations against the grandsons had expired and that Ilse should have named the grandsons as parties before the statute of limitations had run. Ilse appeals.

Discussion

Whether the Grandsons Are Necessary Parties and Whether They May Be Named as Parties

¶5 Under the indispensable party statute, WIS. STAT. § 803.03, the first question is whether a party is "necessary" for one of the three reasons set forth in subsection (1). *See* ***Dairyland Greyhound Park, Inc. v. McCallum***, 2002 WI App 259, ¶9, 258 Wis. 2d 210, 655 N.W.2d 474. One of those three reasons is whether the person "claims an interest relating to the subject of the action and is so situated

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

that the disposition of the action in the person's absence may … [a]s a practical matter impair or impede the person's ability to protect that interest …." WIS. STAT. § 803.03(1)(b)1. We review Ilse's cause of action and the relief she seeks to determine whether the grandsons have an interest relating to the subject matter of the litigation.

¶6 In Ilse's complaint, her only claim against Gerald Jr. and Debra is for conversion by dispossession. The elements of conversion by dispossession, as set forth in the Wisconsin Civil Jury Instructions, are:

> 1. That (defendant) intentionally (controlled) (took) property belonging to (owner);
>
> 2. That (defendant) (controlled) (took) the property without the consent of (owner) or without lawful authority; and
>
> 3. That (defendant)'s act with respect to the property seriously interfered with the right of (owner) to possess the property.

WIS JI—CIVIL 2200; *see also* ***Bruner v. Heritage Cos.***, 225 Wis. 2d 728, 736, 593 N.W.2d 814 (Ct. App. 1999).[2]

¶7 Consistent with the elements set forth in the jury instruction, Ilse includes the following allegations in her complaint:

> 14. That following [Gerald Sr.'s] death on December 2, 1994, defendant Gerald G. Wood, Jr., seized control of the assets of Wood and Sons Trucking, Inc., including but not limited to the cash accounts, checking accounts, other current assets, fixed assets and goodwill

[2] The Wisconsin Civil Jury Instructions set forth different instructions for conversion claims depending on whether the claim is for "dispossession," "refusal to return upon demand (refusal by bailee)," or "destruction or abuse of property." WIS JI—CIVIL 2200, 2200.1, and 2200.2. The allegations in Ilse's complaint fall within the "dispossession" category.

> belonging to Wood and Sons Trucking, Inc., without plaintiff's consent.
>
> ….
>
> 16. Defendant Gerald G. Wood, Jr., has, without the plaintiff's consent, intentionally interfered with and prevented plaintiff's control over *her ownership interest in Wood and Sons Trucking, Inc.* Further, defendant, Gerald G. Wood, Jr., has wrongfully exercised dominion and control over *plaintiff's stock ownership and ownership interest in Wood and Sons Trucking, Inc.*
>
> 17. That defendant, Debra L. Wood has without the plaintiff's consent, intentionally interfered with and prevented plaintiff's control over *her ownership interest in Wood and Sons Trucking, Inc.* Further, defendant, Debra L. Wood, has wrongfully exercised dominion and control over *plaintiff's stock ownership interest in Wood and Sons Trucking, Inc.*
>
> 18. That defendants Gerald G. Wood, Jr., and Debra L. Wood have controlled *plaintiff's stock ownership and ownership interest in Wood and Sons Trucking, Inc.* ….
>
> 19. That defendants Gerald G. Wood, Jr., and Debra L. Wood, have converted all of the cash and property belonging to Wood and Sons Trucking, Inc., to their and for their personal use and gain, including but not limited to transferring Wood and Son[s] Trucking, Inc., assets out of the corporation for no, or inadequate, consideration; all wrongfully exercising dominion and control over *plaintiff's stock ownership and ownership in Wood and Sons Trucking, Inc.*, without plaintiff's consent.

(Emphasis added.)

¶8 As relief, Ilse requests judgment against Gerald Jr. and Debra to include "an amount to be proven at trial for the property belonging to Wood and Sons Trucking, Inc., wrongfully taken or converted by the defendants while they controlled plaintiff's stock ownership and ownership of Wood and Sons Trucking, Inc."

¶9 Looking at the elements of conversion, along with the factual allegations and request for relief in Ilse's complaint, we conclude that, in order for Ilse to be successful in her conversion claim against Gerald Jr. and Debra, Ilse must have had, *at the time of Gerald Sr.'s death*, an ownership interest in Wood and Sons Trucking. If she did not, then Gerald Jr. and Debra could not have interfered with Ilse's ownership interest after Gerald Sr.'s death, as alleged in the complaint. Conversely, there is no apparent reason to believe that Ilse has a viable claim of conversion if, prior to his death, Gerald Sr. validly transferred the stock in Wood and Sons Trucking to his grandsons. It follows that, in order to succeed on her conversion claim, Ilse must show that the alleged stock transfer to the grandsons never occurred or that it was invalid. At the same time, we know that the grandsons have asserted, in deposition testimony, that they currently own Wood and Sons Trucking because they purchased all of the stock in the company from Gerald Sr.

¶10 The "interest" test involves a "pragmatic approach" that is "primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." ***Dairyland***, 258 Wis. 2d 210, ¶15 (citing ***Armada Broad., Inc. v. Stirn***, 183 Wis. 2d 463, 472, 516 N.W.2d 357 (1994) (internal quotations omitted)). With this test in mind, we conclude that the grandsons are so situated that the disposition of Ilse's action in their absence may impair or impede their ability to protect their claimed interest in the stock of Wood and Sons Trucking. *See* WIS. STAT. § 803.03(1)(b)1. As we have suggested, if Ilse's conversion action proceeds to trial, a verdict in her favor will necessarily involve a factual finding or a legal conclusion that there was no valid transfer from Gerald Sr. to his grandsons prior to Gerald Sr.'s death. Upon such a finding or conclusion, issue preclusion may

well prevent the grandsons from asserting the validity of their ownership in Wood and Sons Trucking in future litigation, particularly in light of the fact that they have been participating in this litigation, albeit as non-parties, through their own separate attorney.[3]

¶11 One factor in an issue preclusion analysis is whether a party had an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action. *See* ***Town of Delafield v. Winkelman***, 2004 WI 17, ¶34 & n.6, 269 Wis. 2d 109, 675 N.W.2d 470. Because nothing prevents the grandsons from participating fully in this action, we see no reason why issue preclusion would not apply to, for example, a future claim by Ilse that the grandsons are currently

[3] In determining whether issue preclusion applies, courts conduct a "fundamental fairness" analysis in which they consider several factors, including:

> (1) Could the party against whom preclusion is sought, as a matter of law, have obtained 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?

Town of Delafield v. Winkelman, 2004 WI 17, ¶34 & n.6, 269 Wis. 2d 109, 675 N.W.2d 470.

interfering with her ownership of the company, or to some other claim between Gerald Jr. and Debra and the grandsons.[4]

¶12 Indeed, Gerald Jr. and Debra agree that the grandsons are necessary parties under WIS. STAT. § 803.03. However, in their view, Ilse's action must be dismissed precisely because the grandsons are necessary and because they cannot be joined under § 803.03. We disagree that the grandsons cannot be joined.

¶13 Gerald Jr. and Debra argue that the grandsons cannot be joined because statutes of limitations have run for the claims Ilse might have brought against the grandsons. However, Gerald Jr. and Debra do not explain why a timely claim against the grandsons is a prerequisite to naming the grandsons as parties.

¶14 We find nothing in the language of WIS. STAT. § 803.03 requiring that there be a viable claim against a person before that person can be joined as a party under the statute. Rather, § 803.03(1) states that a necessary party "who is subject to service of process shall be joined as a party."[5] As previously noted, the grandsons have been deposed in this litigation and have participated via their own attorney. We determine that they are, therefore, subject to service of process.

[4] While it appears that Gerald Jr. and Debra have been taking a position in this litigation consistent with the grandsons' interests, we can imagine scenarios in which allegiances or interests could shift, depending on whether Ilse receives a determination that the stock transfer to the grandsons was invalid. It is sufficient to say that we believe a determination that the stock transfer to the grandsons was invalid has the potential to lead to additional claims either by or against the grandsons.

[5] Because we determine that the grandsons are necessary parties and can be joined, there is no reason to address the second part of the "indispensable" party analysis, that is, whether "in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable." WIS. STAT. § 803.03(3).

Accordingly, the grandsons are necessary parties, and nothing prevents them from being named as parties.

¶15 WISCONSIN STAT. § 803.03(3) explains: if a necessary party that can be joined "has not been so joined, the judge to whom the case has been assigned shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff." Consequently, on remand, the circuit court must grant a motion by Ilse to join the grandsons. If Ilse does not move to join the grandsons, the court must nonetheless order them joined if this litigation proceeds. *See* ***Dickinson v. Indiana State Election Bd.***, 933 F.2d 497, 500-02 (7th Cir. 1991) (applying analogous federal rule and holding that, when district court believed party was necessary, proper course was to require joinder rather than dismiss). Of course, Ilse is free to move to dismiss the action, as are the parties free to agree to dismissal. *See* WIS. STAT. § 805.04(1). If, on remand, the grandsons are joined, it will be up to them to decide whether they will actively participate in an effort to protect their asserted ownership interest in Wood and Sons Trucking.

Whether Gerald Jr. and Debra Were Entitled to Summary Judgment on Other Grounds

¶16 Gerald Jr. and Debra offer additional reasons why this court should affirm dismissal of Ilse's suit. Each of these reasons involves the alleged stock transfer. They argue: (1) that Ilse has no evidence that Gerald Jr. and Debra played a role in the stock transfer from Gerald Sr. to the grandsons; (2) that even if the grandsons failed to pay the $10,000 purchase price for the stock, as Ilse argues, Ilse's remedy is for breach of contract damages against the grandsons, not a conversion action against Gerald Jr. and Debra; and (3) that Gerald Sr. was free to

convey the stock under marital property law, and Ilse's remedy to recoup the value of her interest in the stock was a marital property action against Gerald Sr. None of these arguments provide grounds on this record to grant summary judgment in favor of Gerald Jr. and Debra.

¶17 We perform summary judgment analysis *de novo,* applying the same methodology employed by circuit courts. *See* ***Brownelli v. McCaughtry***, 182 Wis. 2d 367, 372, 514 N.W.2d 48 (Ct. App. 1994). That methodology is well established and need not be repeated in its entirety. *See*, *e.g.*, ***Lambrecht v. Estate of Kaczmarczyk***, 2001 WI 25, ¶¶20-24, 241 Wis. 2d 804, 623 N.W.2d 751. Here, our focus is on the following aspects of summary judgment methodology:

> If the defendant is the moving party the defendant must establish a defense that defeats the plaintiff's cause of action….
>
> The inferences to be drawn from the underlying facts contained in the moving party's material should be viewed in the light most favorable to the party opposing the motion, and doubts as to the existence of a genuine issue of material fact are resolved against the moving party.

Id., ¶¶22-23 (footnotes omitted).

¶18 The flaw in all three arguments that Gerald Jr. and Debra offer is that each argument assumes it is undisputed that Gerald Sr. validly transferred the stock to his grandsons prior to his death. Gerald Jr. and Debra rely on the February 28, 1994 stock transfer certificate and purchase agreement as conclusive evidence that a valid transfer took place. Their corresponding defense to Ilse's conversion claim is that they did not convert any Wood and Sons Trucking property owned by Ilse because the grandsons, not Gerald Sr., owned the company at the time of the alleged conversion. However, whether a valid stock transfer occurred is a disputed issue.

¶19 One of Ilse's arguments in support of her conversion claim is that a valid stock transfer never occurred. Ilse's deposition testimony, which was part of Gerald Jr.'s and Debra's submissions to the circuit court, places the validity of the alleged transfer in dispute. Ilse testified that it was not Gerald Sr.'s signature on the stock certificate, a signature that must be the signature of Gerald Sr. for the stock transfer to be valid. The stock certificate indicates that the stock is transferable only "upon surrender of the Certificate properly endorsed." Gerald Jr. and Debra do not contend that the transfer could be valid without Gerald Sr.'s signature on the certificate.

¶20 Assuming, as we must for purposes of summary judgment analysis, that Ilse's testimony is true, a reasonable inference is that the stock was never validly transferred to the grandsons. *See* ***Ricco v. Riva***, 2003 WI App 182, ¶15, 266 Wis. 2d 696, 669 N.W.2d 193 ("[S]ummary judgment is generally not a proper forum for weighing the credibility of a witness."). Consequently, Gerald Jr. and Debra are not entitled to summary judgment on this record.

Conclusion

¶21 We reverse the circuit court's order dismissing Ilse's action and remand for further proceedings consistent with this decision.

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

Not recommended for publication in the official reports.