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DISTRICT IV

June 3, 2019

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You are hereby notified that the Court has entered the following opinion and order:

2018AP1691

Jerold A. Oscarson v. Gary L. Ramey, The Gary L. Ramey
Revocable Trust and Blackhawk Community Credit Union
Gary L. Ramey v. Jerry A. Oscarson
(L.C. Nos. 2016CV705 and 2018CV221)

Before Lundsten, P.J., Sherman and Fitzpatrick, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Gary Ramey appeals a circuit court order dismissing his case with prejudice on the basis of claim preclusion. After reviewing the briefs and record, we conclude at conference that this

case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2017-18).¹ We summarily affirm.

Respondent Jerold Oscarson filed a complaint against Ramey in Rock County Circuit Court Case No. 2016CV705, seeking partition of real estate and personal property co-owned by the parties. Ramey raised counterclaims, alleging facts regarding the relationship of the parties and promises made between them. Pursuant to a stipulation, the circuit court dismissed Ramey's counterclaims with prejudice. Oscarson's partition action then proceeded to a court trial on February 22, 2018.

Also on February 22, 2018, Ramey filed a complaint against Oscarson in a second action, Case No. 2018CV221, alleging facts nearly identical to the facts alleged in his dismissed counterclaims in Case No. 2016CV705. The circuit court entered an order consolidating the two cases. Oscarson moved to dismiss the second action on the basis of claim preclusion. After briefing by the parties, the circuit court granted Oscarson's motion to dismiss, and Ramey now appeals.

The doctrine of claim preclusion bars a party from bringing any claim that was the subject of a prior action when there is: "(1) an identity between the parties or their privies in the prior and present suits; (2) an identity between the causes of action in the two suits; and (3) a final judgment on the merits in a court of competent jurisdiction." *Wickenhauser v. Lehtinen*, 2007 WI 82, ¶22, 302 Wis. 2d 41, 734 N.W.2d 855. In his appellant's brief, Ramey does not dispute that these three elements of claim preclusion are present to bar his claims. Rather,

¹ All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

Ramey argues that, when the circuit court consolidated the two cases, they became a single case and that, therefore, claim preclusion cannot possibly apply. However, Ramey fails to provide any legal support for the proposition that a claim already adjudicated between identical parties in one case can be revived in a second case simply by consolidation of the two cases.

In the reply brief, Ramey finally addresses the three elements necessary for the application of claim preclusion. Ramey states, “Setting aside here Ramey’s previous argument that a consolidation order judicially negates claim preclusion, Ramey will show here that claim preclusion does not bar his common law causes of action that he pled in 2018CV221.” However, because this argument is made for the first time in Ramey’s reply brief, we will not consider it. *See Schaeffer v. State Pers. Comm’n, Dep’t of Military Aff.*, 150 Wis. 2d 132, 144, 441 N.W.2d 292 (Ct. App. 1989) (“We will not, as a general rule, consider arguments raised for the first time in a reply brief.”). The only argument on which Ramey relies in his brief-in-chief is his theory that a consolidation order somehow makes the application of claim preclusion an impossibility. Because Ramey’s theory is not developed logically or supported legally, we affirm the order of the circuit court.

Oscarson filed a motion requesting that this court find the appeal frivolous and award him his attorney fees and costs pursuant to WIS. STAT. RULE 809.25(3). Based on our discussion above, Ramey and/or his appellate counsel knew or should have known that his arguments regarding claim preclusion and consolidation lacked a reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law. *See* WIS. STAT. RULE 809.25(3)(c)2. Therefore, we conclude the entire appeal is frivolous. We grant Oscarson’s motion for costs and reasonable attorney fees and remand this matter to the circuit court with direction to determine the proper amount. We leave it to the

circuit court to allocate the assessment of costs and reasonable attorney fees against Ramey, his appellate counsel, or in part against each.

IT IS ORDERED that the order is summarily affirmed under WIS. STAT. RULE 809.21(1) and the cause is remanded to the circuit court for determination of costs and attorney fees to be awarded to the respondent.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals