

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 31, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 97-2947

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

PATRICIA A. VRIEZE,

PLAINTIFF-APPELLANT,

V.

JOHN H. VRIEZE,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for St. Croix County:
ERIC J. LUNDELL, Judge. *Affirmed.*

Before Cane, P.J., Myse and Hoover, JJ.

CANE, P.J. Patricia Vrieze appeals a judgment dismissing a misrepresentation suit she filed against her former husband. Patricia and John Vrieze were divorced in November 1993. Patricia had previously filed a motion to reopen the divorce judgment, alleging that John had misrepresented the value of marital assets; that she had relied on the values of assets he had represented to her

and to the court; and that she would not have entered into the marital settlement agreement absent his misrepresentations. Her allegations were based on an October 1994 interim company financial statement showing Vrieze Farms valued at \$358,304, which differed significantly from the negative \$36,516 value John gave on his financial statement in November 1993 in the divorce proceeding. Patricia claims the 1994 valuation was circumstantial evidence of John's misrepresentations in the divorce proceeding. Patricia also alleged that John misrepresented the value of other property that he claimed was a transfer of real estate to Roger and Barbara Thompson. In February 1996, the court denied Patricia's motion to reopen the divorce proceedings.

Approximately two months later, Patricia filed the underlying action in this case, a suit against John alleging fraudulent and negligent misrepresentation and strict responsibility misrepresentation, seeking compensatory and punitive damages. The trial court¹ granted John's motion for summary judgment, holding that the doctrines of issue and claim preclusion barred Patricia's suit. Patricia now appeals.

Patricia claims the trial court erred when it granted summary judgment in John's favor based on its conclusion that the doctrine of issue preclusion barred her misrepresentation suit against John. She argues that the trial

¹ The motion for summary judgment was decided by the Honorable Eric J. Lundell. The divorce proceedings, including the motion to reopen, were held before the Honorable C.A. Richards.

court's application of issue preclusion is fundamentally unfair and inequitable. She also claims the trial court erred by applying the doctrine of claim preclusion.²

Our review of a trial court's grant of summary judgment is de novo. *Green Spring Farms v. Kersten*, 136 Wis.2d 304, 315-16, 401 N.W.2d 816, 820 (1987). We apply the same methodology as the trial court. *Id.* That methodology has been described in many cases and need not be repeated again here. See *Grams v. Boss*, 97 Wis.2d 332, 338, 294 N.W.2d 473, 476-77 (1980).

Whether the doctrine of issue or claim preclusion bars an action is a question of law. *DePratt v. West Bend Mut. Ins. Co.*, 113 Wis.2d 306, 310, 334 N.W.2d 883, 885 (1983); *Landess v. Schmidt*, 115 Wis.2d 186, 191, 340 N.W.2d 213, 216 (Ct. App. 1983). We review a question of law de novo, without deference to the trial court's determinations. *DePratt*, 113 Wis.2d at 310, 334 N.W.2d at 885.

ISSUE PRECLUSION

Patricia contends her misrepresentation suit against John is not barred by the doctrine of issue preclusion. She argues that application of the issue preclusion doctrine is fundamentally unfair and inequitable because she did not obtain a full and fair adjudication of the misrepresentation issue in the divorce proceedings, which included her motion to reopen. In addition, she argues there

² In *Northern States Power Co. v. Bugher*, 189 Wis.2d 541, 549-50, 525 N.W.2d 723, 727 (1995), the supreme court adopted the phrases "issue preclusion" and "claim preclusion" in place of "collateral estoppel" and "res judicata" respectively.

was a significant difference in the quality and extensiveness of the divorce proceedings and her subsequent suit for misrepresentation.³ We are not persuaded.

Issue preclusion applies where the matter raised in the second suit is identical in all respects to that decided in the first proceeding and where the controlling facts and applicable legal rules remain unchanged. *Moore v. LIRC*, 175 Wis.2d 561, 567, 499 N.W.2d 288, 290 (Ct. App. 1993). Issue preclusion is a doctrine designed to limit the relitigation of issues that have been contested in a previous action between the same parties. *Michelle T. v. Crozier*, 173 Wis.2d 681, 687, 495 N.W.2d 327, 329 (1993). It is well accepted that the doctrine of issue preclusion may be used defensively to prevent a plaintiff from relitigating an issue decided in a prior litigation. *Id.* at 698, 495 N.W.2d at 335. "[W]hether the use of a prior adjudication is appropriate to preclude an issue for determination in a second forum is dependent upon conformance with principles of fundamental fairness." *Id.*

When determining whether to apply the doctrine of issue preclusion, the court may consider some or all of the following factors to protect the rights of all parties to a full and fair adjudication of all issues involved in the action: (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

³ Patricia also argues that the trial court's basis for denying the motion is unclear because the trial court did not make findings of fact as to whether John did misrepresent the value of assets required to be disclosed. We decline to address this argument because it is not developed. No citations to the record or to case law are provided to this court. See *State v. Pettit*, 171 Wis.2d 627, 646-47, 492 N.W.2d 633, 642 (Ct. App. 1992).

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 issue preclusion to be fundamentally unfair, including an inadequate opportunity or incentive to obtain a full and fair adjudication in the initial action? *Id.* at 688-89, 495 N.W.2d at 330.

The trial court determined that Patricia failed to present evidence sufficient to grant her motion to reopen the divorce judgment under either § 806.07, STATS., or under § 767.27(5), STATS. Section 806.07 allows a party to be relieved from a judgment, order or stipulation on the grounds of mistake, inadvertence, surprise or excusable neglect, or based on the fraud, misrepresentation, or other misconduct of an adverse party. *See* §§ 806.07(1)(a) and (c), STATS. A motion for such relief, however, must be brought not more than one year after the judgment was entered or the order or stipulation was made. *See* § 806.07(2), STATS. The trial court found that Patricia's choice in the course of the divorce proceedings and negotiations not to check on the status and value of certain assets was, at most, mistake or excusable neglect under § 806.07(1) but, nevertheless, was not timely under § 806.07(2).

The trial court also considered whether Patricia had a viable misrepresentation claim under § 767.27(5), STATS. That section allows a party to petition the trial court for the creation of a constructive trust if the adverse party has deliberately or negligently failed to disclose an asset required to be disclosed under § 767.27(1) and, as a consequence of the failure to disclose, an asset with a fair market value of more than \$500 has been omitted from the final distribution of property. *See* § 767.27(5), STATS. Such a petition may be brought at any time. *Id.* The trial court found Patricia had failed to submit any evidence substantiating

her claims that John made misrepresentations of value of assets during the divorce proceedings and therefore concluded she was not entitled to relief under § 767.27(5).

Issue preclusion is applicable here because the issue of whether John made misrepresentations was contested in the divorce proceedings, and Patricia's claims in the misrepresentation suit are identical to the claims she set forth in her motion to reopen.⁴ Furthermore, the other facts we may consider also support application of issue preclusion in this case.

First, Patricia could have obtained review of the trial court's denial of her motion to reopen in the divorce proceedings.⁵ Second, there is not a significant difference between the quality and extensiveness of her motion to reopen and her misrepresentation suit to warrant relitigation of the asset values. Patricia claims the trial court's denial of her motion to reopen prevented her from continuing to the discovery stage of proceedings that would allow her to more fully develop the facts she needed to show the extent of John's misrepresentations. She argues she should not now be prevented from pursuing her misrepresentation claims on the basis of the trial court's decision. Patricia fails to appreciate that the trial court determined her assertions of misrepresentations in the motion to reopen were insufficient to allow her to proceed to the discovery stage. During the divorce proceedings, both parties had ample opportunity to conduct discovery regarding marital assets before deciding to enter into a marital settlement agreement. The

⁴ We do note that Patricia's misrepresentation suit against John includes an additional claim of strict responsibility misrepresentation that was not set forth in the motion to reopen in the divorce proceeding.

⁵ We note that Patricia did not seek review of the trial court's denial of her motion to reopen the divorce judgment.

evidence at the default divorce hearing was that John's net worth was anywhere between zero and \$531,000, that Patricia was aware of the discrepancies at that time, and voluntarily decided to enter into the marital settlement agreement. Her later attempt to resurrect the issue of the valuation of assets in her motion to reopen the divorce judgment based on John's alleged misrepresentations of value was considered and rejected by the trial court as being without merit.

Last, Patricia argues that application of issue preclusion is fundamentally unfair because of the public policy that parties should not be allowed to make misrepresentations with impunity, and because of her individual circumstances included the fact that she did not have an adequate opportunity to obtain a full and fair adjudication in the divorce action. We are not persuaded. Patricia did have a complete opportunity to pursue discovery of John's financial status during the divorce proceedings. She chose to enter into a marital settlement agreement rather than litigate the matter to the court, knowing that John's financial status had not been determined with certainty. She also attempted to reopen the divorce proceedings based on allegations that John misrepresented the value of marital assets, and the trial court determined she had submitted no evidence substantiating her claims.

An examination of the factors under a fairness analysis convinces us that Patricia's attempt to revisit the valuations of Vrieze Farms and the Thompson property in her misrepresentation suit against John is the kind of case that is meant to be prevented by the doctrine of issue preclusion. The question of whether John misrepresented the extent and value of assets during the divorce proceedings was contested in Patricia's motion to reopen and decided in John's favor; the doctrine of issue preclusion, therefore, bars the relitigation of that issue. We therefore

affirm the court's grant of summary judgment on the ground the suit is barred by the doctrine of issue preclusion.

CLAIM PRECLUSION

We also agree with the trial court's conclusion that Patricia's misrepresentation suit against John is barred by the doctrine of claim preclusion.⁶ Claim preclusion provides that a "final judgment is conclusive in all subsequent actions between the same parties ... as to all matters which were litigated or which might have been litigated in the former proceedings." *Davis v. American Family Mut. Ins. Co.*, 212 Wis.2d 382, 388, 569 N.W.2d 64, 66 (Ct. App. 1997) Three requirements must be met in order for claim preclusion to apply. *Id.* There must be: (1) an identity between the parties or their privies in the prior and present lawsuits; (2) an identity between the causes of action in the lawsuits; and (3) a final judgment on the merits in a court of competent jurisdiction. *Id.* The first requirement is met because Patricia and John were the only parties in both matters. Patricia argues the second and third requirements have not been met. We disagree.

Wisconsin has adopted a transactional approach to determining whether there is identity between the two causes of action. *Northern States Power Co. v. Bugher*, 189 Wis.2d 541, 553, 525 N.W.2d 723, 728 (1995). The court in *DePratt* explained:

The present trend is to see claim in factual terms and to make it coterminous with the transaction regardless of the number of substantive theories, or variant forms of relief flowing from those theories, that may be available to the plaintiff; regardless of the number of primary rights that

⁶ See *supra*, note 2.

may have been invaded; and regardless of the variations in the evidence need to support the theories or rights. The *transaction* is the basis of the litigative unit or entity which may not be split.

Id. at 311, 334 N.W.2d at 886 (citing RESTATEMENT (SECOND) OF JUDGMENTS § 24, cmt. a (1982)) (emphasis added). Thus, "if both suits arise from the same transaction, incident or factual situation, [claim preclusion] generally will bar the second suit." *Northern States Power Co.*, 189 Wis.2d at 554, 525 N.W.2d at 729. Whether a group of facts constitutes a "transaction" is to be "determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations." *Id.*

Applying the transactional approach to the facts before us, we conclude that there is identity of claims between Patricia's misrepresentation lawsuit and the divorce judgment where the property values were initially disputed.⁷ Patricia's misrepresentation suit is rooted on the same factual dispute of valuation of property present in the divorce proceedings. In the divorce action, Patricia could have, but elected not to, challenge the property values. Her misrepresentation lawsuit is essentially an attempt to revisit the issue on property values which could have been litigated in the divorce action. Thus, the divorce judgment where property values was an issue, and was finally determined by stipulation, became conclusive in all subsequent actions, including the

⁷ We reject Patricia's argument that applying claim preclusion violates Patricia's right to bring a separate intentional tort case where the intentional tort arose during the marriage. See *Stuart v. Stuart*, 140 Wis.2d 455, 410 N.W.2d 632 (Ct. App. 1987), *aff'd*, 143 Wis.2d 347, 421 N.W.2d 505 (1988). *Stuart* is neither analogous nor controlling on the issue of whether there is an identity of causes of action in this case.

misrepresentation lawsuit. Because the claims set forth in the misrepresentation suit arise from the factual underpinnings present in the divorce proceedings, we conclude the element of identity between causes of action is present here.

We also reject Patricia's contention that there is no final judgment on the merits. A judgment is a final determination of the rights of the parties. *Great Lakes Trucking Co. v. Black*, 165 Wis.2d 162, 168, 477 N.W.2d 65, 67 (Ct. App. 1991). The parties' stipulation may act as a final judgment. *Id.* Here, the court entered judgment consistent with the parties' marital settlement agreement, and the court found Patricia's allegations of misrepresentation insufficient to reopen the case. Patricia erroneously assumes that only if the court had allowed her to reopen the divorce judgment, conduct discovery, and present testimony on her misrepresentation claims would there be a final judgment on the merits.

In summary, we conclude all three requirements for applying claim preclusion as a bar to Patricia's misrepresentation suit are met. The judgment in the divorce proceedings is conclusive in the subsequent misrepresentation suit because Patricia had the opportunity to litigate, and in fact did litigate, the matter of John's valuations of marital assets. Furthermore, application of claim preclusion here serves the important policies of fairness to defendants, finality of judgments, and conservation of judicial resources. *Id.* at 171-72, 477 N.W.2d at 69. Therefore, we also affirm the court's grant of summary judgment based on the doctrine of claim preclusion.⁸

⁸ Because we affirm the trial court's grant of summary judgment based on issue and claim preclusion, we do not address John's alternative arguments for affirming the court's grant of summary judgment. See *Sweet v. Berge*, 113 Wis.2d 61, 67, 334 N.W.2d 559, 562 (Ct. App. 1983).

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

