COURT OF APPEALS
DECISION
DATED AND FILED

October 31, 2017

Diane M. Fremgen
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. 2016AP2341 **Cir. Ct. No. 2013CV689**

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

KENNETH E. GARVES,

PLAINTIFF,

MARY WELLER AND STATE OF WISCONSIN DEPARTMENT OF REVENUE,

PLAINTIFFS-RESPONDENTS,
V.

EMPIRE FIRE AND MARINE INSURANCE CO.,

DEFENDANT-CO-APPELLANT,

LAURA A. RAPP,

DEFENDANT-THIRD-PARTY
PLAINTIFF-APPELLANT,
V.

THE ESTATE OF VICKI L. GARVES-BERG, DECEASED, BY AND THROUGH ITS PERSONAL REPRESENTATIVE, KENNETH E. GARVES,

THIRD-PARTY DEFENDANT.

APPEAL from a judgment of the circuit court for St. Croix County: SCOTT R. NEEDHAM, Judge. *Affirmed*.

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Laura Rapp and Empire Fire and Marine Insurance Company appeal a summary judgment requiring payment on a personal representative's bond based on Rapp's failure to fulfill her duties as personal representative of the Estate of Laurence Berg. We conclude the undisputed facts show that Rapp failed to comply with the probate court's orders and otherwise committed maladministration while acting as personal representative. We therefore affirm.

BACKGROUND

¶2 On January 30, 2009, Laurence Berg and his wife, Vicki Garves-Berg, were killed in a plane crash, along with their friend, Brett Weller. Laurence was the pilot at the time of the crash. Although no tort actions were filed following the accident, Brett Weller's wife, Mary Weller, asserted a $2 million claim against Laurence's estate based on her husband's wrongful death.[1] Kenneth Garves, Vicki Garves-Berg's father, asserted two wrongful death claims against Laurence's estate—a $500,000 claim on his own behalf, and a $500,000 claim on behalf of Garves-Berg's estate. It also became apparent following the accident

[1] We refer to Mary Weller by her last name throughout the remainder of this opinion.

that Laurence and Garves-Berg owed "significant" taxes to both the IRS and the Wisconsin Department of Revenue (DOR).

¶3 Laurence's father, James Berg, was initially appointed personal representative of Laurence's estate. However, James resigned in October 2009, and his daughter, Laura Rapp, was named successor personal representative. Empire issued Rapp a personal representative's bond in the amount of $150,000.

¶4 Following Laurence's death, the proceeds of certain life insurance policies and his 401(k) account were paid directly to James, the named beneficiary.[2] On April 12, 2010, Weller petitioned the probate court to make these nontestamentary assets available to Laurence's estate for the payment of its debts, asserting the estate's assets were insufficient to pay all valid claims. On January 7, 2011, the probate court determined it was "likely" Laurence's estate would "lack sufficient assets to cover its debts." The court therefore ordered James to "pay the amounts he received in life insurance proceeds and 401(k) proceeds into the Court."

¶5 James filed a notice of appeal from the probate court's January 7 order and also asked the probate court to stay that order pending appeal. The probate court granted James' motion for a stay, but it required as a condition that James deposit the life insurance and 401(k) proceeds he had received "in an interest bearing account in a bank located in the State of Wisconsin … and that said account shall be restricted such that no withdrawal, transfer, or disbursement

[2] Rapp asserts in her brief-in-chief that James received $199,000 in life insurance benefits and $36,690.32 from Laurence's 401(k). Although the record citation Rapp provides for these amounts does not support them, neither Weller nor the DOR disputes that Rapp has accurately stated the amounts James received.

from said account shall be permitted by anyone without express written Order" of the probate court. James complied with that condition and deposited approximately $235,000 in an account at a Wells Fargo Bank branch in Hudson, Wisconsin.

¶6 While James' appeal was pending, the probate court ordered "all parties, claimants, creditors, or anyone who may claim an interest in, or against," Laurence's estate to participate in mediation. Following a mediation session on January 9, 2012, Weller, Garves, Rapp, James, the DOR, and their respective attorneys executed a written settlement agreement. The agreement, which required court approval, stated James would pay $120,000 to Laurence's estate, which would then pay $80,000 to Weller and $40,000 to Garves. Upon approval of the agreement and payment of those amounts, Weller and Garves would "provide a complete release of all claims past, present and future against the Estate of Laurence A. Berg, Laura Rapp, personal representative, and Laura Rapp personally and against James Berg individually and as personal representative."

¶7 The settlement agreement further provided that the taxes due to the IRS and the DOR would be split between Laurence's and Garves-Berg's estates, with Laurence's estate paying $200,000 and Garves-Berg's estate paying $70,000. The DOR agreed to "accept $64,719 subject to final review and approval." The agreement "assume[d] all creditors not in attendance at the mediation," other than the IRS, would "be discharged." Following execution of the agreement, Laurence's estate paid the IRS $161,567.24, while Garves-Berg's estate paid the IRS $48,457.16 and paid the DOR $26,286.24. This left a balance of $38,432.76 owed to the DOR by Laurence's estate.

¶8 On January 18, 2012, nine days after the parties executed the settlement agreement, we reversed the probate court's January 7, 2011 order requiring James to pay the probate court the life insurance and 401(k) proceeds he had received as a result of Laurence's death. *See* ***Berg v. Weller***, No. 2011AP119, unpublished slip op. ¶1 (WI App Jan. 18, 2012) (***Berg I***). We concluded those funds were not "liable for the payment" of Laurence's estate's debts under WIS. STAT. § 859.40 (2009-10).[3] ***Berg I***, No. 2011AP119, unpublished slip op. ¶9.

¶9 Shortly after we issued our decision in ***Berg I***, Garves moved the probate court to approve the parties' settlement agreement. Rapp, through new counsel, opposed the motion on multiple grounds. James subsequently died on March 20, 2012. As of his death, James had not paid the $120,000 he agreed to pay Laurence's estate under the settlement agreement.

¶10 On May 11, 2012, the probate court issued a written decision and order approving the settlement agreement without modification. The court concluded the settlement agreement was enforceable under WIS. STAT. § 807.05 because it was in writing and was signed by all of the parties and their respective attorneys. The court rejected Rapp's argument that she was entitled to relief from the settlement agreement under WIS. STAT. § 806.07(1)(a) based on mistake or excusable neglect.

¶11 On May 30, 2012, Rapp moved for reconsideration of the order approving the settlement agreement. She subsequently moved the probate court to release the $235,000 that James had previously deposited in an account at Wells

[3] All subsequent references to the Wisconsin Statutes are to the 2015-16 version, unless otherwise noted.

Fargo Bank in compliance with the court's prior order. On June 19, 2012, while these motions were pending, Rapp was appointed personal representative of James' estate in Travis County, Texas. On August 13, 2012, the Wisconsin probate court entered an order denying Rapp's motion for reconsideration and again upholding the settlement agreement's enforceability. However, the court granted Rapp's motion for release of the funds James had deposited in the Wells Fargo account.

¶12 The probate court signed two additional orders on September 17, 2012. The first order required Laurence's estate to pay the DOR $38,432.76. The second order required Laurence's estate to "collect $120,000.00 from the Estate of James Berg, or from James Berg's Living Trust, or from any other asset that James Berg may have ever owned."

¶13 On September 24, 2012, Rapp wrote to the probate court objecting to the September 17 orders. Rapp also sought to resign as personal representative of Laurence's estate and be discharged on her personal representative's bond. At a subsequent hearing on October 1, 2012, Rapp asserted she could not comply with the court's order to collect $120,000 from James' estate because that order created a conflict of interest, given her dual roles as personal representative of both James' and Laurence's estates. The probate court denied Rapp's requests to resign and be discharged on her bond, stating that, at a minimum, Rapp needed to complete an accounting before the court would consider those requests.

¶14 Rapp moved for reconsideration of the probate court's September 17 orders. She submitted an interim accounting on October 31, 2012, and the following month she again moved the probate court to accept her resignation as personal representative and discharge her on her bond. Following two hearings,

the probate court entered a written order on October 7, 2013, denying Rapp's motion to reconsider the September 17 orders. The court also held there was "no conflict of interest … that would prevent [Rapp] from complying with the Court's order to collect $120,000.00 in accordance with the Settlement Agreement." The court therefore indicated it was exercising its discretion to deny Rapp's request to withdraw as personal representative of Laurence's estate.

¶15 Rapp appealed from the probate court's October 7, 2013 order, arguing the court erred by denying her request to withdraw as personal representative. *See* ***Rapp v. Weller***, No. 2013AP2822, unpublished slip op. ¶1 (WI App Apr. 28, 2015) (***Berg II***). We concluded Rapp had a conflict of interest stemming from her "fiduciary duties" as personal representative of both James' and Laurence's estates, as well as her "personal interest as an heir of [James'] estate." ***Id.***, ¶12. We further concluded Rapp's conflict of interest "caused undue delay and costs because of her unwillingness or inability to act upon the settlement agreement and the [probate] court's orders." ***Id.***, ¶13. Under these circumstances, we determined the probate court erroneously exercised its discretion by denying Rapp's motion to withdraw as personal representative. ***Id.***, ¶16. We therefore reversed in part and remanded for the court to remove Rapp as personal representative. ***Id.***, ¶1. We specifically noted, however, that allowing Rapp's removal as personal representative would not absolve her of liability for her past conduct. ***Id.***, ¶15.

¶16 We also observed in ***Berg II*** that Rapp had raised "additional issues" regarding the probate court's September 17 orders that "partially overlap[ped] with her arguments in favor of removal." ***Id.***, ¶17. We declined to address these additional issues, concluding Rapp had forfeited her right to raise them by failing to timely appeal the September 17 orders. ***Id.***, ¶¶17-19.

¶17 On November 13, 2013, while ***Berg II*** was pending, Garves, Weller, and the DOR filed the instant lawsuit against Rapp and Empire, seeking to recover under Rapp's personal representative's bond. The parties ultimately filed opposing summary judgment motions in September 2015. The circuit court denied Rapp's and Empire's motions and granted summary judgment in favor of Garves, Weller, and the DOR. The court concluded the undisputed facts showed that Garves, Weller, and the DOR were entitled to bring an action on Rapp's bond under WIS. STAT. § 878.07(1)(a) and (c). The court further concluded that, based on the undisputed facts, Garves, Weller, and the DOR were entitled to recover on the bond.

¶18 Garves passed away in 2016, and the circuit court subsequently dismissed him as a party. On October 28, 2016, the court entered a judgment requiring Empire to pay Laurence's estate $118,432.76—that is, the $80,000 owed to Weller under the settlement agreement plus the $38,432.76 owed to the DOR—plus prejudgment interest. Rapp and Empire now appeal.[4]

DISCUSSION

¶19 We independently review a grant of summary judgment, using the same methodology as the circuit court. ***Hardy v. Hoefferle***, 2007 WI App 264, ¶6, 306 Wis. 2d 513, 743 N.W.2d 843. Summary judgment is appropriate where "the

[4] Judgment was entered against Empire alone. However, it is undisputed Rapp is an aggrieved party, and therefore has standing to appeal, because Rapp's bond contract contains an indemnity clause and Empire has asserted a cross-claim against Rapp for indemnification. *See* ***Ford Motor Credit Co. v. Mills***, 142 Wis. 2d 215, 217-18, 418 N.W.2d 14 (Ct. App. 1987) (explaining a person is "aggrieved," and therefore has standing to appeal, if the judgment in question "bears directly and injuriously upon his or her interests," such that the judgment "adversely affect[s]" the person "in some appreciable manner").

pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." WIS. STAT. § 802.08(2).

¶20 Actions to recover on personal representatives' bonds are governed by WIS. STAT. § 878.07. As relevant to this appeal, such an action may be brought by: (1) a "creditor when the amount due the creditor has been ascertained and ordered paid by the court, if the personal representative … neglects to pay the same when demanded," *see* § 878.07(1)(a); or (2) a "creditor, distributee, or other person aggrieved by any maladministration, when it appears that the personal representative … has failed to perform his or her duty in any other particular," *see* § 878.07(1)(c). The statute further provides:

> Whenever a personal representative … refuses or neglects to perform any order or judgment for rendering an account, or upon a final settlement, or for the payment of debts or distributive shares, the judge shall cause the bond of the personal representative … to be prosecuted for the benefit of all concerned, and the money collected shall be applied in satisfaction of the order or judgment in the same manner as the property ought to have been applied by the personal representative ….

Sec. 878.07(2). In addition, case law indicates an aggrieved party may enforce a personal representative's bond "[t]o recover the loss and damages sustained by reason of … maladministration." *See* ***Cannon v. Berens***, 244 Wis. 271, 278, 12 N.W.2d 53 (1943).

I. Summary judgment in favor of the DOR

¶21 Applying the standards set forth above, we agree with the circuit court that the undisputed facts demonstrate the DOR was entitled to summary

judgment. It is undisputed the DOR is a "creditor" of Laurence's estate, for purposes of WIS. STAT. § 878.07(1)(a). The undisputed facts further demonstrate the probate court "ascertained" that Laurence's estate owed the DOR $38,432.76, and, on September 17, 2012, it ordered the estate to pay the DOR that amount. *See* ***id.*** Rapp, acting as personal representative of Laurence's estate, "refuse[d] or neglect[ed]" to pay the DOR. *See* § 878.07(2). The DOR is therefore entitled to recover on Rapp's personal representative's bond, under the plain language of § 878.07(1)(a) and (2).[5]

¶22 Rapp argues the circuit court erred by granting the DOR summary judgment because, as of September 17, 2012, the estate had insufficient funds to pay the DOR. This argument is unavailing. In ***Roberts v. Weadock***, 98 Wis. 400, 74 N.W. 93 (1898), the probate court ordered the executor of an estate to pay a claim, but the executor failed to comply with that order. ***Id.*** at 401. In a subsequent action to recover on the executor's bond, the sureties asserted as a defense that the estate contained insufficient assets to pay the claim. ***Id.*** at 404-05. Our supreme court rejected that argument, reasoning the probate court's order to pay the debt was "conclusive" unless "reversed on appeal or set aside." ***Id.*** at 405. The court noted the personal representative had the right to appeal from the probate court's order but failed to do so. ***Id.*** at 406.

[5] Rapp argues in her reply brief that WIS. STAT. § 878.07 "sets forth the requirements for *standing* to bring an action against the bond, not the elements of a claim." We disagree. Although § 878.07(1) addresses the individuals who are permitted to bring an action on a personal representative's bond, § 878.07(2) requires a circuit court to "cause the bond … to be prosecuted for the benefit of all concerned" when the personal representative "refuses or neglects to perform any order or judgment … for the payment of debts." That is precisely the situation presented by this case.

¶23 Similarly, in this case, Rapp could have appealed the probate court's September 17, 2012 order requiring Laurence's estate to pay the DOR $38,432.76. However, she did not timely appeal that order and therefore forfeited her right to challenge it. *See* ***Berg II***, No. 2013AP2822, unpublished slip op. ¶¶17-19. Consequently, Berg cannot now argue her failure to comply with the order was justified because the estate did not have sufficient assets to pay the DOR's claim.

¶24 Rapp also argues she was not required to comply with the September 17, 2012 order to pay the DOR because "she was wrongfully denied resignation" as personal representative of Laurence's estate. Rapp notes that, in ***Berg II***, this court concluded the probate court erroneously exercised its discretion by denying Rapp's request to resign. *See* ***id.***, ¶16. Rapp asserts that, because the probate court erred by denying her motion to resign, she "should never have been put in the position of having to comply with" the order to pay the DOR.

¶25 This argument is flawed, for the reasons given below at ¶¶35-36 in our discussion of the circuit court's decision to grant summary judgment in favor of Weller. For purposes of Rapp's argument regarding the DOR, however, it is sufficient to note that Rapp ignores the basis for our decision in ***Berg II***. We concluded in ***Berg II*** that Rapp should have been permitted to resign as personal representative of Laurence's estate due to a conflict of interest stemming from her conflicting fiduciary duties as personal representative of both James' and Laurence's estates, along with her personal interest as an heir of James' estate. *See* ***id.***, ¶12. The existence of that conflict was relevant to Rapp's refusal to collect $120,000 from James' estate, as required by the settlement agreement and the probate court's subsequent orders. The conflict had no effect, however, on Rapp's willingness or ability to pay the DOR $38,432.76, as required by the

probate court's September 17, 2012 order. Thus, contrary to Rapp's assertion, the existence of the conflict did not absolve her of her responsibility to pay the DOR.

¶26 Rapp lastly argues summary judgment for the DOR was inappropriate because Rapp "did not cause [Laurence's estate's] insolvency by improperly contesting the [settlement] agreement." This argument is a red herring. Our decision that the circuit court properly granted the DOR summary judgment is in no way based on a conclusion that Rapp caused Laurence's estate to become insolvent. Rather, we conclude the DOR was entitled to summary judgment because the undisputed facts show that Rapp failed to pay the DOR's claim when the probate court ordered her to do so. Under these circumstances, the DOR was entitled to recover on Rapp's personal representative's bond, based on the plain language of WIS. STAT. § 878.07(2).

II. Summary judgment in favor of Weller

¶27 The circuit court concluded Weller was entitled to recover on Rapp's bond because Weller had been "aggrieved" by Rapp's maladministration of Laurence's estate. *See* WIS. STAT. § 878.07(1)(c); ***Cannon***, 244 Wis. at 278. We agree that the undisputed facts show Rapp committed maladministration in three primary ways.

¶28 First, under WIS. STAT. § 857.03(1), Rapp had a duty to "collect, inventory and possess all the decedent's estate … [and] pay and discharge out of the estate all … claims allowed by the court, or such payment on claims as directed by the court." The January 2012 settlement agreement required James to pay Laurence's estate $120,000, and it then required the estate to pay $80,000 of that money to Weller and $40,000 to Garves. The probate court entered a written order approving the settlement agreement on May 11, 2012. Rapp moved for

reconsideration of that order, which the probate court denied on August 13, 2012. The court subsequently entered an order requiring Rapp to collect $120,000 from James' estate. It is undisputed that Rapp never filed a claim against James' estate to collect the $120,000 it owed under the settlement agreement, nor did she distribute any portion of that money to Weller, as the agreement required her to do. James' estate clearly had funds available to pay claims, as on Rapp's motion the probate court had released approximately $235,000 to James' estate in August 2012. By failing to comply with her statutory obligations to collect Laurence's estate's assets and pay claims as directed by the court, Rapp committed maladministration.

¶29 Second, the undisputed facts show that Rapp committed maladministration by breaching her fiduciary duties as personal representative. A personal representative "owes fiduciary duties to the creditors as well as to the beneficiaries of the estate." ***Lecic v. Lane Co.***, 104 Wis. 2d 592, 611-12, 312 N.W.2d 773 (1981). He or she must use such care and skill in dealing with the estate's property as a person of ordinary prudence would use in dealing with his or her own property. ***Van Epps v. City Bank of Portage***, 40 Wis. 2d 139, 147, 161 N.W.2d 278 (1968). Here, Rapp had a fiduciary duty to Weller, a creditor of Laurence's estate, to take action to ensure that Weller received the amount she was due under the settlement agreement. Again, the probate court approved the settlement agreement on May 11, 2012. Although Rapp asserts the agreement's validity "remained uncertain" until the probate court denied her motion for reconsideration on August 13, 2012, she could have filed a claim against James' estate in the interim, in order to protect both herself and Laurence's estate while still contesting the agreement's validity.

¶30 Moreover, it is difficult to see how Rapp's protracted challenge to the settlement agreement benefited either Laurence's estate or its creditors. Under the settlement agreement, James was required to pay Laurence's estate $120,000, which the estate would then use to pay Weller and Garves in exchange for a complete release of their claims against the estate. Rather than accepting this agreement, which would have brought money into the estate and allowed it to be released from Weller's and Garves' claims, Rapp repeatedly challenged the agreement's validity and the court's orders approving it, expending significant attorney fees in the process.[6]

¶31 Third, the undisputed facts show that Rapp committed maladministration by agreeing to serve as personal representative of James' estate. In ***Berg II***, we concluded Rapp's acceptance of that appointment, while serving as personal representative of Laurence's estate, created an unmanageable conflict of interest. ***Berg II***, No. 2013AP2822, unpublished slip op. ¶12. We further concluded Rapp's conflict of interest "caused undue delay and costs because of her unwillingness or inability to act upon the settlement agreement and the

[6] We further note the record shows that, on January 17, 2012—eight days after the settlement agreement was executed—Laurence's estate had $51,602.63 in cash. Rather than using that money to pay the estate's $38,432.76 debt to the DOR, Rapp expended at least $49,260.59 of the estate's funds on attorney fees over the next eleven months. Again, it is difficult to see how this expenditure benefited Laurence's estate or its creditors.

The circuit court stated in its summary judgment decision that Rapp "was required to place the interests of the Laurence Estate above her own personal interest, however she did not do so." Rapp argues on appeal that the court improperly made a factual finding regarding her motivation for challenging the settlement agreement. Our decision in this appeal does not rely on any finding that Rapp's protracted challenges to the settlement agreement were motivated by her own self-interest. However, we do observe it is undisputed that Rapp is the sole beneficiary of James' estate. Thus, Rapp's failure, as personal representative of Laurence's estate, to make a claim against James' estate for the money due under the settlement agreement did, as a practical matter, result in a personal benefit to Rapp.

[probate] court's orders." ***Id.***, ¶13. A fiduciary has a duty "to avoid conflicts of interest with the estate." ***In re Estate of Neuman***, 819 N.W.2d 211, 217 (Minn. Ct. App. 2012). Rapp was already serving as personal representative of Laurence's estate when she accepted the additional appointment as personal representative of James' estate. At the time Rapp accepted the additional appointment, James' estate was a debtor to Laurence's estate under the settlement agreement, and Rapp was the sole beneficiary of James' estate. Neither Rapp nor Empire cites any authority indicating Rapp was required to accept the second appointment as personal representative of James' estate. By doing so, Rapp created a conflict of interest and thereby committed maladministration.[7]

¶32 Empire and Rapp argue Rapp did not commit maladministration because she had "legitimate reasons" for failing to collect the money James' estate owed under the settlement agreement prior to entry of the probate court's September 17, 2012 order. For instance, Rapp asserts that following execution of the settlement agreement, it became apparent Laurence's estate did not have sufficient funds to pay all of its creditors. Rapp further notes the settlement agreement "made no provision for an allocation of funds in the event of a deficiency." Rapp and Empire therefore argue the agreement "was in direct

[7] The conflict of interest was foreseeable at the time Rapp accepted the appointment as personal representative of James' estate. By that time, the probate court had entered an order approving the settlement agreement, which required James to pay Laurence's estate $120,000.

Empire argues our holding in ***Berg II*** indicates that, as soon as Rapp accepted the appointment as personal representative of James' estate, the probate court should have removed her as personal representative of Laurence's estate based on her conflict of interest. *See* ***Rapp v. Weller***, No. 2013AP2822, unpublished slip op. (WI App Apr. 28, 2015) (***Berg II***). Empire misstates ***Berg II***'s holding. ***Berg II*** held that the probate court erroneously exercised its discretion by denying Rapp's request to resign as personal representative. *See* ***id.***, ¶16. It did not hold the court should have sua sponte removed Rapp once she was appointed personal representative of James' estate.

conflict" with statutes addressing the order in which an estate's expenses are paid, which require debts owed to the government to be paid before other claims. *See* WIS. STAT. § 859.25; 31 U.S.C. § 3713. Rapp also asserts the settlement agreement was deficient because it "made no provision for Rapp's fees, expenses, or the anticipated cost of final administration."

¶33 We agree with Weller that these arguments constitute an improper attempt to collaterally attack the probate court's orders approving the settlement agreement. A collateral attack is "an attempt to avoid, evade, or deny the force and effect of a judgment in an indirect manner and not in a direct proceeding prescribed by law and instituted for the purpose of vacating, reviewing, or annulling it." ***Zrimsek v. American Auto. Ins. Co.***, 8 Wis. 2d 1, 3, 98 N.W.2d 383 (1959). Collateral attacks are generally prohibited, *see* ***State v. Hershberger***, 2014 WI App 86, ¶13, 356 Wis. 2d 220, 853 N.W.2d 586, because they "disrupt the finality of prior judgments and thereby tend to undermine confidence in the integrity of our procedures and inevitably delay and impair the orderly administration of justice." ***Oneida Cty. DSS v. Nicole W.***, 2007 WI 30, ¶28, 299 Wis. 2d 637, 728 N.W.2d 652 (quoting ***State v. Gudgeon***, 2006 WI App 143, ¶6, 295 Wis. 2d 189, 720 N.W.2d 114). It is well established that the general rule prohibiting collateral attacks applies to probate orders. *See, e.g.*, ***Hendrickson v. Watson***, 260 Wis. 291, 295, 50 N.W.2d 448 (1951); ***Roberts***, 98 Wis. at 405.

¶34 The settlement agreement in this case required James to pay Laurence's estate $120,000. The probate court approved the settlement agreement on May 11, 2012, and it denied Rapp's motion for reconsideration of that decision on August 13, 2012. Although Rapp did not appeal either of those orders, Rapp and Empire now argue Rapp was not required to comply with them, due to various

deficiencies in the settlement agreement. We reject this improper attempt to collaterally attack the probate court's orders approving the settlement agreement.[8]

¶35 Rapp and Empire also argue Rapp did not commit maladministration by failing to comply with the probate court's September 17, 2012 order to collect $120,000 from James' estate. They assert our decision in ***Berg II*** "absolved Rapp of liability" for failing to comply with that order. Their argument is, in essence, that: (1) we concluded in ***Berg II*** that Rapp had a conflict of interest stemming from her dual role as personal representative of both James' and Laurence's estates; (2) we also concluded in ***Berg II*** that, because of that conflict of interest, the probate court erroneously exercised its discretion by denying Rapp's motion to resign; and (3) because Rapp's request to resign was improperly denied, Rapp was not required to comply with the September 17, 2012 collection order.

¶36 Rapp and Empire read ***Berg II*** too broadly. Although we concluded in ***Berg II*** that Rapp had a conflict of interest, and the probate court therefore erroneously exercised its discretion by denying Rapp's request to resign, we did not hold, or even suggest, that Rapp's conflict of interest relieved her of her duty to comply with the probate court's orders. *See* ***Berg II***, No. 2013AP2822, unpublished slip op. ¶¶12-16. In fact, we declined to address Rapp's arguments challenging the September 17, 2012 orders, concluding Berg had forfeited her

[8] As noted above, Rapp contends the settlement agreement was deficient because Laurence's estate did not have sufficient funds to make the required payments, and the agreement did not address how funds would be allocated in the event of a deficiency. However, entering into the settlement agreement without properly determining the amount of assets available to pay claims was arguably maladministration in and of itself. Furthermore, although Rapp asserts she did not collect from James' estate due to her concerns about conflicts with the priority statutes, she does not explain what prevented her from filing a claim against his estate and then seeking guidance from the probate court about how to deal with any priority issues.

right to appeal them. ***Id.***, ¶¶17-19. Moreover, we expressly noted that allowing Rapp to resign as personal representative would not absolve her of liability for her prior conduct. ***Id.***, ¶15. ***Berg II*** simply does not support an argument that, due to her conflict of interest, Rapp was not required to comply with the probate court's September 17, 2012 orders.[9]

¶37 Rapp additionally argues Weller was not entitled to summary judgment because Weller failed to show that Rapp caused her damages. We disagree. The undisputed facts show that Weller and Rapp were parties to a settlement agreement, under which James was required to pay Laurence's estate $120,000. Laurence's estate was then required to remit $80,000 of that money to Weller. The probate court approved the settlement agreement, denied Rapp's motion for reconsideration, and subsequently ordered Rapp to collect $120,000 from James' estate. Rapp committed maladministration by failing to collect $120,000 from James' estate and make the required payment to Weller. She therefore caused Weller's damages, in that her actions prevented Weller from receiving the funds to which she was entitled under the settlement agreement. Rapp's assertion on appeal that Weller would not have received $80,000 even if Rapp had collected $120,000 from James' estate is purely speculative.

¶38 In the alternative, Rapp argues Weller failed to mitigate her damages. *See* ***Kuhlman, Inc. v. G. Heileman Brewing Co.***, 83 Wis. 2d 749, 752,

[9] Rapp alternatively argues she was not required to comply with the September 17, 2012 order to collect $120,000 from James' estate because it would have been impossible to do so within five days, as required by the order. However, we concluded in ***Berg II*** that Rapp forfeited her right to appeal the probate court's September 17, 2012 orders. ***Berg II***, No. 2013AP2822, unpublished slip op. ¶¶17-19. Rapp cannot collaterally attack the September 17, 2012 collection order in this appeal on the grounds that compliance with that order would have been impossible. *See supra* ¶33.

266 N.W.2d 382 (1978) (explaining an injured party "has a duty to mitigate damages, that is, to use reasonable means under the circumstances to avoid or minimize the damages," and he or she "cannot recover any item of damage which could have been avoided"). Specifically, Rapp contends Weller should have mitigated her damages by filing a direct claim against James' estate.

¶39 The doctrine of judicial estoppel bars Rapp's mitigation-of-damages argument. Judicial estoppel is an equitable doctrine intended to protect against litigants playing "fast and loose" with courts by asserting inconsistent positions. ***Feerick v. Matrix Moving Sys., Inc.***, 2007 WI App 143, ¶16, 302 Wis. 2d 464, 736 N.W.2d 172 (quoting ***State v. Petty***, 201 Wis. 2d 337, 347, 548 N.W.2d 817 (1996)). For judicial estoppel to apply, the following three elements must be met: (1) the later position must be clearly inconsistent with the earlier position; (2) the facts at issue must be the same in both instances; and (3) the party to be estopped must have convinced the first court to adopt its position. ***Id.***, ¶17.

¶40 Each of these elements is met in the instant case. The undisputed facts show that, on August 16, 2012, Weller moved the probate court to docket a judgment in her favor against James' estate in the amount of $80,000 and issue a writ of execution. In response, Rapp argued the settlement agreement required James to pay Laurence's estate rather than paying Weller directly. That position is clearly inconsistent with Rapp's position on appeal—that is, that Weller should have filed a direct claim against James' estate. The circuit court adopted Rapp's position; rather than docketing a judgment against James' estate in Weller's favor, it issued an order requiring Rapp to collect $120,000 from James' estate. Under these circumstances, judicial estoppel bars Rapp's new argument that Weller was

not entitled to summary judgment because she failed to mitigate her damages by filing a claim against James' estate.[10]

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

[10] In addition, we observe that an appellant generally may not raise new arguments on appeal that were not first raised in the circuit court. *See* ***Greene v. Hahn***, 2004 WI App 214, ¶21, 277 Wis. 2d 473, 689 N.W.2d 657. Rapp does not direct us to any portion of the record indicating she raised her mitigation-of-damages argument in the circuit court.