

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 2, 2006

Cornelia G. Clark
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2005AP2351-FT

Cir. Ct. No. 2005CV152

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

VIRGINIA LEET AND DOREN C. CROOK,

PLAINTIFFS-APPELLANTS,

V.

MICHAEL J. GUY,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Monroe County:
MICHAEL J. McALPINE, Judge. *Affirmed.*

Before Dykman, Vergeront and Higginbotham, JJ.

¶1 PER CURIAM. Virginia Leet and Doren Crook appeal from an order dismissing their complaint on claim preclusion grounds. We affirm on the ground of issue preclusion.

¶2 The facts and procedures of the earlier litigation were stated in our opinion in that case, and we do not repeat them here. See *Leet v. Guy*, No. 2003AP3553, unpublished slip op. (WI App, Jan. 13, 2005). After that opinion, Leet and Crook filed a new complaint against defendant Michael Guy. They alleged that they have title to the 1.5 rod strip, and that Guy also claims ownership of that strip. They sought an order and judgment vesting ownership of the strip in the plaintiffs and declaring that no other person, including neighboring owners, have any right to use of the strip. Guy moved to dismiss on grounds of claim preclusion and issue preclusion. The circuit court granted the motion on claim preclusion grounds and did not address issue preclusion.

¶3 The contorted procedural history of this case makes it difficult to analyze either claim preclusion or issue preclusion easily. The circuit court relied on claim preclusion, but we conclude that issue preclusion is a closer fit to this case. “Issue preclusion” refers to the effect of a judgment in foreclosing relitigation in a subsequent action of an issue of law or fact that has been actually litigated and decided in a prior action. *Wittig v. Hoffart*, 2005 WI App 198, ¶11, 704 N.W.2d 415. Whether issue preclusion applies is a question of law subject to our de novo review. *Id.*, ¶10. The parties appear to agree as to what are the necessary elements of issue preclusion. Leet and Crook focus their arguments on whether ownership of the land was “actually litigated” in the prior action and on the fundamental fairness element described in *Michelle T. v. Crozier*, 173 Wis. 2d 681, 688-89, 495 N.W.2d 327 (1993).

¶4 We first address whether the issue was actually litigated. Leet and Crook argue that ownership of the land, as between themselves and Guy, was not determined in the prescriptive easement trial. We disagree. It is apparent from the court’s findings and conclusions on the easement issue, and on Guy’s

counterclaim for trespass, that the court implicitly decided Guy was the owner of the property. This is hardly surprising, in light of the fact that Leet and Crook's own complaint affirmatively alleged that they did not have title to the 1.5 rods. So far as we know, Leet and Crook never attempted to amend that allegation. Instead, they went to trial on their pleaded theory, that they had a prescriptive easement. It is a necessary component of that theory that Leet and Crook not be the owners of the land because the entire purpose of an easement, by definition, is to obtain a right to use land that belongs to someone else. Furthermore, Guy's counterclaim expressly pled that *he* owned the 1.5 rods.

¶5 Leet and Crook also address some of the fundamental fairness factors. On the first one, whether they had an opportunity to obtain review of the prior judgment, they argue that they could not have obtained review of the third-party summary judgment between Guy and the Schlaver heirs. This argument misses the point, because Leet and Crook *could* have obtained review of the court's judgment on the prescriptive easement trial, which is the one we are concerned with. They also address the third factor, whether significant differences in the quality or extensiveness of the proceedings between the two courts warrant relitigation of the issue. They argue that the significant difference was that the earlier court did not consider ownership, an argument we have already rejected above.

By the Court.—Order affirmed.

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

