COURT OF APPEALS
DECISION
DATED AND FILED

July 31, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 01-0087

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

LIDUVINA STENSLAND,

PLAINTIFF-APPELLANT,

V.

WARSHAFSKY, ROTTER, TARNOFF, REINHARDT AND BLOCH, S.C.,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Milwaukee County: MICHAEL P. SULLIVAN, Judge. *Affirmed*.

Before Wedemeyer, P.J., Schudson and Curley, JJ.

¶1 PER CURIAM. Liduvina Stensland appeals from the trial court's summary judgment dismissing her legal malpractice action against Warshafsky, Rotter, Tarnoff, Reinhardt and Bloch, S.C. She claims that the court erred in concluding that issue preclusion barred her claim. Liduvina raises two issues: (1) whether judicial estoppel is applicable; and (2) whether issue preclusion was

proper. Because judicial estoppel is inapplicable and issue preclusion was properly applied, we affirm.

I. BACKGROUND

¶2 This case involves Liduvina suing her former attorneys regarding the legal representation provided to her in a case arising from an automobile accident that occurred on December 11, 1993. Liduvina and her then roommate, now her husband, Steven Stensland, were injured when the car in which they were passengers struck a car that had stalled on the freeway. The stalled car was being driven by Amanda Davis, was owned by Carl Brown, and was insured by Safeway Insurance Company. Brown was a passenger in the car at the time it stalled. Safeway provided a $20,000 policy for the stalled car, and another $20,000 policy for a second car owned by Brown.

¶3 Four personal injury lawsuits arose from the accident. Steven was represented by Attorney S.A. Shapiro; Liduvina was represented by Attorney Robert Goldstein of the Warshafsky firm. Safeway Insurance defended both cases. On September 28, 1994, Liduvina settled with Safeway for $20,000. Steven's case proceeded, and two issues were resolved in the pretrial phase: (1) whether stacking was available under the Safeway policies; and (2) whether coverage was available based on a principal/agent relationship between Brown and Davis. The court concluded that stacking was not available, and that additional coverage could only be available upon a showing that Brown was actively negligent.

¶4 Steven's case proceeded to trial. Following extensive testimony, the trial court granted Safeway's motion for a directed verdict on the issue of whether Brown was actively negligent. The trial court found that no evidence had been

introduced to show that Brown was actively negligent. Ultimately, Safeway settled with Steven for $40,000 despite the favorable ruling.

¶5 On February 24, 2000, Liduvina sued the Warshafsky law firm, alleging legal malpractice. She claimed the firm was negligent for failing to: conduct discovery; pursue a theory that Brown was actively negligent; seek stacking of Safeway's policies; pursue an agency theory; assign an experienced attorney to handle her case; and provide her with informed consent before settling the matter.

¶6 While the case was pending, Liduvina also brought a declaratory judgment action seeking to ward off the application of issue preclusion to her case. The trial court decided that issue preclusion did apply because the stacking and agency issues had already been decided in Steven's case. Summary judgment was granted in favor of the Warshafsky firm. Liduvina now appeals.

II. DISCUSSION

¶7 In reviewing an order granting summary judgment, we are dealing with issues that are legal in nature; therefore, we review the trial court's decision independently. ***Alberte v. Anew Health Care Servs., Inc.***, 2000 WI 7, ¶6, 232 Wis. 2d 587, 605 N.W.2d 515.

A. Judicial Estoppel

¶8 Liduvina first claims that the trial court should have applied the doctrine of judicial estoppel, thus preventing the Warshafsky law firm from raising issue preclusion as a defense. She argues that the Warshafsky firm took inconsistent positions and, therefore, should be judicially estopped from arguing issue preclusion on appeal. We disagree.

¶9 In ***State v. Petty***, 201 Wis. 2d 337, 548 N.W.2d 817 (1996), the supreme court adopted three elements for invoking judicial estoppel:

> First, the later position must be clearly inconsistent with the earlier position; second, the facts at issue should be the same in both cases; and finally, the party to be estopped must have convinced the first court to adopt its position—a litigant is not forever bound to a losing argument.

Id. at 348 (citation omitted). This court agrees with the Warshafsky law firm's reasoning that Liduvina failed to satisfy any of the elements. Liduvina mischaracterizes the Warshafsky law firm's arguments. First, the arguments made were not inconsistent. The arguments simply stated that: (1) issue preclusion does apply; and (2) if issue preclusion does not apply, Liduvina loses on the merits of the issues. These are not inconsistent arguments, but rather, alternative arguments common under the circumstances. Second, under Liduvina's rationale, any party raising the defense of issue preclusion would be estopped from defending on the merits of the claim. Such a conclusion cannot be accepted. Therefore, the doctrine of judicial estoppel is inapplicable.

B. Issue Preclusion

¶10 Liduvina next claims that issue preclusion should not have been applied because: (1) there are issues of material fact; (2) the agency theory was not addressed in the earlier litigation; (3) other jurisdictions do not apply issue preclusion in legal malpractice actions; (4) there is no privity or identity of interest between Liduvina and Steven; and (5) applying issue preclusion here violates her equal protection rights. We disagree.

¶11 Under ***Paige K.B. ex rel. Peterson v. Steven G.B.,*** 226 Wis. 2d 210, 226, 594 N.W.2d 370 (1999), the supreme court adopted a two-step test for

determining whether issue preclusion should be applied. The first step requires the court "to determine whether the litigant against whom issue preclusion is asserted was in privity or had sufficient identity of interest with a party to the prior proceedings to comport with due process." ***Id.*** "To be in privity the parties must be so closely aligned that they represent the same legal interest." ***Id.*** (quotations and citations omitted). The facts in the present case support a finding that the parties were in privity or had sufficient identity. Both Liduvina and Steven were passengers in the same vehicle and had no adverse interests. Furthermore, Liduvina and Steven lived together at the time of the accident and were married the month following the accident, before either filed suit. Upon these facts, the first step of the analysis is satisfied.

¶12 The second step requires the court to determine whether the application of issue preclusion comports with fundamental fairness. ***Id.*** at 225. In determining fundamental fairness, the court identifies five factors that may be used in the analysis. ***Id.*** at 220-21. The standard of review is a mixed question of law and fact. ***Id.*** at 225. The five factors are as follows:

> (1) [C]ould 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?

Id. at 220-21 (citation omitted). Liduvina has shown no change in the law or any difference in the factual circumstances to support her position under the five-factor analysis. Additionally, there were no significant differences between the two proceedings. Nor was there a difference in the burdens of proof. The stacking and agency questions Liduvina sought to relitigate were identical to those in Steven's trial. There was no showing that would render issue preclusion fundamentally unfair. As the trial court adeptly recognized in its decision, the five-factor analysis "strongly favors applying issue preclusion to this case. In fact, as the defendants [Warshafsky law firm] point out in their brief, all of the factors save one (the right to appeal the earlier case) suggest that it would not be fundamentally unfair to apply issue preclusion to this case." Accordingly, the circuit court correctly ruled that issue preclusion applies.

¶13 This court is not persuaded by Liduvina's contention that we should not apply issue preclusion because other states treat issue preclusion in malpractice cases differently. We are not bound by foreign case law, and must apply the law of this state. No Wisconsin cases have been presented that prevent the application of issue preclusion here.

¶14 Regardless of issue preclusion, the court would have been correct in ruling upon the merits that summary judgment was warranted. Liduvina claims that she is entitled to $40,000 because the Safeway policies should be stacked either because Brown was actively negligent, or because Davis was acting as Brown's agent. Even if issue preclusion did not apply, Liduvina failed to provide evidence or law to support these claims. On the principal/agency issue, Liduvina failed to provide sufficient proof admissible in a summary judgment proceeding. Rather, she submitted inadmissible hearsay. Thus, summary judgment was proper.

By the Court.—Judgment affirmed.

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