COURT OF APPEALS
DECISION
DATED AND FILED

December 23, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP2766 **Cir. Ct. No. 2004CV2002**

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

THE ESTATE OF JOSEPH E. SABOL AND JOSEPH E. SABOL, JR., INDIVIDUALLY AND ACTING AS SPECIAL ADMINISTRATOR,

PLAINTIFFS-APPELLANTS,

V.

VILLAGE OF MT. PLEASANT BOARD OF REVIEW AND VILLAGE OF MT. PLEASANT,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Racine County: STEPHEN A. SIMANEK, Judge. *Affirmed and cause remanded for proceedings consistent with this opinion.*

Before Brown, C.J., Snyder and Neubauer, JJ.

¶1 PER CURIAM. The Estate of Joseph E. Sabol and Joseph E. Sabol, Jr., (collectively, Sabol) appeal from an order granting summary judgment and

dismissing the complaint on the basis of issue preclusion. On appeal, Sabol challenges that dismissal. The Village of Mount Pleasant asks the court to find the appeal to be frivolous. We affirm the judgment, find the appeal to be frivolous, and remand the matter to the circuit court for a determination of the appropriate amount of attorney's fees and costs.

¶2 Sabol challenges the 2004 tax assessment for a portion of his property that he claims should be classified as agricultural. This is the third time Sabol has brought this same issue before the court. The question was first brought to this court in ***Sabol v. Wis. DOR***, 2003AP3134, unpublished slip op. ¶1 (Wis. Ct. App. Mar. 9, 2005) (***Sabol I***).[1] In that case, Sabol challenged the tax assessment for 2002. We affirmed the assessment. In the second appeal, Sabol challenged the 2003 tax assessment for the same property. In that appeal, he claimed that "[t]he instant claim is entirely new and never could have been addressed before" because the assessed value of the property had changed from 2002 to 2003. We rejected that claim, and affirmed on the basis of issue preclusion. ***Estate of Joseph Sabol v. Village of Mount Pleasant***, 2006AP832 unpublished order (Wis. Ct. App. May 23, 2007) (***Sabol II***). The supreme court denied the petitions for review in both cases.

¶3 In this case, Sabol challenges the 2004 tax assessment for the same property on the same grounds as the previous two. The Village moved for summary judgment and the circuit court granted the Village's motion before Sabol had filed a brief in opposition. At the hearing, the court explained to Sabol that

[1] The appellant in the first appeal was Joseph Sabol. In the second appeal and in this one, the appellants are the Estate of Joseph Sabol and Joseph Sabol, Jr.

the same issue had been considered by the circuit court, the Court of Appeals, and the supreme court. The circuit court concluded that there was no issue of material fact that could survive a motion for summary judgment, and that there "was no reason to spend any more time on this." The court said: "Each time the Village has been sustained and you have failed to prevail. Nothing has changed." The court also said that it had considered finding the case to be frivolous, but decided not to do so. The court advised the plaintiff, however, that "if you continue with this course of conduct, there will [be] at some point in time a determination of frivolousness which will cost you significantly more than it has cost you to this point to relitigate, to rehash the same issue year after year after year after year."

¶4 In his appeal to this court, Sabol again challenges the determination that issue preclusion applies on the basis that neither of the previous two cases addressed the merits of the 2004 assessment. As in ***Sabol II***, we do not agree. The change in the year of the assessment does not support a change in the underlying classification—the same property is at issue in all three cases. Sabol does not argue that the property has changed in any way.

¶5 In ***Sabol II***, we explained why the circuit court properly applied the doctrine of issue preclusion.

> Issue preclusion addresses the effect of a prior judgment on the ability to relitigate an identical issue of law or fact in a subsequent action. ***Mrozek v. Intra Fin. Corp.***, 2005 WI 73, ¶17, 281 Wis. 2d 448, 699 N.W.2d 54. In order for issue preclusion to be a potential limit on subsequent litigation, the question of law or fact that is sought to be precluded actually must have been litigated in a previous action and be necessary to the judgment. ***Id.*** Here, both prongs of this test are met. The question of the agricultural classification that Sabol seeks for his property was litigated and was necessary to the judgment.

The same is true in this appeal. As the circuit court stated, nothing has changed.

¶6 For these same reasons, we find the appeal to be frivolous. WIS. STAT. RULE 809.25(3) (2005-06).[2] In order to impose sanctions under the WIS. STAT. RULE 809.25(3)(c)2., the court must find that the party "knew or should have known, that the appeal or cross-appeal was without any 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." This court will not assess costs and fees against a litigant unless the court finds the entire appeal to be frivolous. ***Baumeister v. Automated Products, Inc.***, 2004 WI 148, ¶26, 277 Wis. 2d 21, 690 N.W.2d 1. "A frivolous argument in a brief is not enough." ***Id.***

¶7 We conclude that this entire appeal was frivolous. Sabol has twice before raised the same underlying issues to this court. Further, in ***Sabol II*** we rejected the very same reason he offers here for distinguishing this action from the previous one. When the circuit court granted summary judgment to the Village, the court explained to Sabol that he could not continue to litigate the same issue, and warned him that he faced the possibility of a finding of frivolousness if he continued. That time has come.

¶8 For the reasons stated, we affirm the judgment of the circuit court. Further, we find that this appeal was brought without any 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. Consequently, the appeal is frivolous. We remand the matter to the circuit court for a determination of the appropriate amount of attorneys' fees and costs.

[2] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

By the Court.—Judgment affirmed and cause remanded.

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