IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2001 Term

FILED
November 30, 2001
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 29327

RELEASED
December 3, 2001
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

GERALDINE WILLARD AND DENZIL RHODES,
CO-EXECUTORS OF THE ESTATE OF ALMA WHITED, DECEASED,
Plaintiffs Below, Appellants

v.

GARY EUGENE WHITED,
EXECUTOR OF THE ESTATE OF DELBERT R. WHITED, DECEASED,
Defendant Below, Appellee

Appeal from the Circuit Court of Jackson County
Honorable Charles E. McCarty, Judge
Civil Action No. 99-C-110

AFFIRMED

Submitted: November 7, 2001
Filed: November 30, 2001

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The Opinion of the Court was delivered PER CURIAM.
CHIEF JUSTICE MCGRAW and JUSTICE ALBRIGHT dissent and reserve the right to file dissenting opinions.
JUSTICE STARCHER concurs and reserves the right to file a concurring opinion.

SYLLABUS BY THE COURT

1. "Before the prosecution of a lawsuit may be barred on the basis of *res judicata*, three elements must be satisfied. First, there must have been a final adjudication on the merits in the prior action by a court having jurisdiction of the proceedings. Second, the two actions must involve either the same parties or persons in privity with those same parties. Third, the cause of action identified for resolution in the subsequent proceeding either must be identical to the cause of action determined in the prior action or must be such that it could have been resolved, had it been presented, in the prior action." Syllabus Point 4, *Blake v. Charleston Area Medical Center, Inc.*, 201 W.Va. 469, 498 S.E.2d 41 (1997).

2. "'An adjudication by a court having jurisdiction of the subject-matter and the parties is final and conclusive, not only as to the matters actually determined, but as to every other matter which the parties might have litigated as incident thereto and coming within the legitimate purview of the subject-matter of the action. It is not essential that the matter should have been formally put in issue in a former suit, but it is sufficient that the *status* of the suit was such that the parties might have had the matter disposed of on its merits. An erroneous ruling of the court will not prevent the matter from being *res judicata*.' Syllabus Point 1, *Sayre's Adm'r v. Harpold*, 33 W.Va. 553, 11 S.E. 16 (1890)." Syllabus Point 1, *State ex rel. Shrewsbury v. Hrko*, 206 W.Va. 646, 527 S.E.2d 508 (1999).

3. "A declaratory judgment action can not be used as a substitute for a direct appeal." Syllabus Point 3, *Hustead on Behalf of Adkins v. Ashland Oil, Inc.*, 197 W.Va. 55, 475 S.E.2d 55 (1996).

Per Curiam:

This case is before this Court upon appeal of a final order of the Circuit Court of Jackson County entered on June 29, 2000. In that order, the circuit court granted a motion to dismiss filed by the appellee and defendant below, Gary Eugene Whited, Executor of the Estate of Delbert R. Whited, deceased, in this action filed by the appellants and plaintiffs below, Geraldine Willard and Denzil Rhodes, Co-executors of the Estate of Alma Whited, deceased, seeking declaratory judgment to settle the estate of Alma Whited. In this appeal, the appellants contend that the circuit court erred by dismissing the case.

This Court has before it, the petition for appeal, the entire record, and the briefs and argument of counsel. For the reasons set forth below, the final order of the circuit court is affirmed.

I.

Delbert and Alma Whited were married on April 18, 1982. This was the second marriage for both of them and each had previously acquired numerous assets. During their marriage, Delbert and Alma Whited continued to maintain the majority of their assets separately although they did establish some joint banking accounts. On December 8, 1994, Alma Whited died at the age of 81.

Before her death, Alma Whited executed a will which bequeathed $500 to her husband and the rest and residue of her estate to her brothers and sisters. After his wife's death, Delbert Whited

sought his elective share of her estate rather than taking the bequest made to him in her will. Accordingly, he brought an action in the Circuit Court of Jackson County, *Whited v. Willard, et al., Civil Action No. 96-C-49,* to determine his elective share of his wife's estate pursuant to W.Va. Code § 42-3-1 (1995). The matter was referred to a special commissioner who determined that Delbert Whited's statutory share was 38% of the augmented estate. *See* W.Va. Code § 42-3-1 (1995). The augmented estate included Alma Whited's net probate estate totaling $117,801.00 and her reclaimable estate totaling $84,923.00. Using the elective share formula, Delbert Whited's elective share was calculated to be $77,035.00.

On June 9, 1998, the special commissioner issued a written report which stated, in pertinent part:

> That judgment by award of the elective share should be rendered as follows:
>
> Based on the numbers provided at the hearing and in all other forms offered by respective counsel, and upon calculation through the elective share formula, the amount should be $77,035.00, as of the date of the hearing.
>
> In calculating the final amount due and owing, counsel must exchange proof of all interest earned on the accounts held by the estate in order that 38% percent [sic] of that income will also be paid as part of the elective share due Plaintiff.

On August 6, 1998, the circuit court entered a final order in the action approving the June 9, 1998 report of the special commissioner and directing the parties to carry out and implement its provisions. Subsequently, Delbert Whited died.

On August 27, 1999, Geraldine Willard, et al., the appellants herein,[1] filed a motion requesting the court to "fix and determine" certain matters pertaining to the special commissioner's report. The circuit court determined that it no longer had jurisdiction as the judgment had been in effect for over a year and the motion for relief from judgment was not timely within the meaning of Rule 60 of the West Virginia Rules of Civil Procedure. Thus, the motion was denied.

Thereafter, the appellants filed the complaint in the case *sub judice*. The complaint was brought pursuant to the Uniform Declaratory Judgments Act, W.Va. Code §§ 55-13-1 to -16 (1941), and alleged that the appellants were entitled to credits or offsets on the elective share amount of $77,035.00 for those assets over which they had no control or access, namely the joint banking accounts of Alma and Delbert Whited. In other words, the appellants claimed that Delbert Whited maintained control over certain bank accounts he held jointly with his wife and that these accounts were never a part of Alma Whited's estate. Nonetheless, these accounts were included in the special commissioner's calculations to determine the amount of Delbert Whited's elective share. The appellants asserted that because they never had control of these assets as the executors of Alma Whited's estate, the total amount of these assets should be offset or credited against Delbert Whited's elective share.

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[1]It appears that Geraldine Willard, Denzil Rhodes, and other brothers and sisters of Alma Whited were parties in the first action. However, the complaint in this case was only filed by Geraldine Willard and Denzil Rhodes as the co-executors of Alma Whited's estate.

On January 7, 2000, the appellee filed a motion to dismiss asserting that the case should be dismissed under the theory of *res judicata.* The circuit court determined that the case had in fact already been adjudicated and granted the motion to dismiss. This appeal followed.

II.

The appellants contend that they were entitled to bring this action pursuant to the Uniform Declaratory Judgments Act, W.Va. Code § 55-13-1 to -16 (1941). In particular, the appellants rely upon W.Va. Code § 55-13-2 which provides:

> Any person interested under a deed, will, written contract, or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

The appellants maintain that this statute was designed to settle controversies like the one in the case at bar where counsel for the respective parties have been unable to carry out the terms of a court order which presumed that the parties would be able to resolve the matter.

In response, the appellee asserts that the Uniform Declaratory Judgments Act cannot be used to reopen matters that have already been concluded. We agree. The order of the circuit court entered on August 6, 1999 in the prior civil action constituted a final adjudication on the merits with regard to Delbert Whited's elective share. Any attempt to collaterally challenge the amount owed to Delbert Whited's estate is barred by the principles of *res judicata*. "'Under the doctrine of res judicata, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action.'" *Porter v. McPherson*, 198 W.Va. 158, 166, 479 S.E.2d 668, 676 (1996), *quoting Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n. 5, 99 S.Ct. 645, 649 n. 5, 58 L.Ed.2d 552, 559 n. 5 (1979) (footnote omitted).

In Syllabus Point 4 of *Blake v. Charleston Area Medical Center, Inc.*, 201 W.Va. 469, 498 S.E.2d 41 (1997), this Court held that:

> Before the prosecution of a lawsuit may be barred on the basis of *res judicata*, three elements must be satisfied. First, there must have been a final adjudication on the merits in the prior action by a court having jurisdiction of the proceedings. Second, the two actions must involve either the same parties or persons in privity with those same parties. Third, the cause of action identified for resolution in the subsequent proceeding either must be identical to the cause of action determined in the prior action or must be such that it could have been resolved, had it been presented, in the prior action.

As noted above, there was a final adjudication on the merits in the previous action. In addition, this case involves the same parties who participated in the first action. Finally, the issue presented in this case could have been resolved had it been presented in the prior action.

While the appellants claim that the issue sought to be resolved in this declaratory judgment action did not arise until the previous case had been concluded, it is clear that the appellants could have litigated this matter in the prior suit. The appellants obviously knew before the final order was entered in the previous case that the joint banking accounts of Alma and Delbert Whited were never going to be made a part of Alma Whited's estate. As this Court observed in Syllabus Point 1 of *State ex rel. Shrewsbury v. Hrko*, 206 W.Va. 646, 527 S.E.2d 508 (1999):

> "An adjudication by a court having jurisdiction of the subject-matter and the parties is final and conclusive, not only as to the matters actually determined, but as to every other matter which the parties might have litigated as incident thereto and coming within the legitimate purview of the subject-matter of the action. It is not essential that the matter should have been formally put in issue in a former suit, but it is sufficient that the *status* of the suit was such that the parties might have had the matter disposed of on its merits. An erroneous ruling of the court will not prevent the matter from being *res judicata*." Syllabus Point 1, *Sayre's Adm'r v. Harpold*, 33 W.Va. 553, 11 S.E. 16 (1890).

Moreover, this Court has previously determined that a collateral attack on a final judgment in a civil action through a declaratory judgment action after the doctrine of *res judicata* has attached is not permissible. In *Hustead on Behalf of Adkins v. Ashland Oil, Inc.*, 197 W.Va. 55, 475 S.E.2d 55 (1996), the guardian ad litem of infant plaintiffs in an air pollution lawsuit brought a declaratory judgment action to have a court-approved settlement agreement invalidated. The final order approving the settlement in the previous action had been entered ten months earlier and the guardian admittedly chose not to file a direct appeal from the circuit court's final order. Having determined that the guardian was attempting to use the declaratory judgment action as a substitute for a direct appeal, this Court stated:

> There is, however, no law in West Virginia that permits a declaratory judgment action to be used as a collateral attack on a final civil judgment. Moreover, we agree with other jurisdictions that have expressly ruled that "[a]bsent special circumstances, an action for a declaratory judgment cannot be used as a substitute for a timely appeal...." *School Comm.*, 482 N.E.2d at 801; *accord Alabama Public Serv. Comm'n v. AAA Motor Lines, Inc.*, 272 Ala. 362, 131 So.2d 172, 177, *cert. denied* 368 U.S. 896, 82 S.Ct. 173, 7 L.Ed.2d 93 (1961) (stating that "declaratory judgment cannot be made a substitute for appeal"); *see Hospital Underwriting Group, Inc. v. Summit Health Ltd.*, 63 F.3d 486, 495 (6th Cir.1995)(citing *Shattuck v. Shattuck*, 67 Ariz. 122, 192 P.2d 229, 235-36 (1948)) (stating that under Arizona law, "judgments are not set aside by collateral declaratory judgment actions"); *Tri-State Generation and Transmission Co. v. City of Thornton*, 647 P.2d 670, 676-77 n. 7 (Colo.1982)(stating that "a party may not seek to accomplish by a declaratory judgment what it can no longer accomplish directly...."); *Fertitta v. Brown*, 252 Md. 594, 251 A.2d 212, 215 (1969)(stating that "[d]eclaratory proceedings were not intended to and should not serve as a substitute for appellate review or as a belated appeal").

Hustead, 197 W.Va. at 61, 475 S.E.2d at 61. Thus, we held in Syllabus Point 3 of *Hustead* that "[a] declaratory judgment action can not be used as a substitute for a direct appeal."[2]

While there may be other ways that the appellants can dispute the specific amount owed, and by whom, to Delbert Whited's estate to satisfy his elective share, a declaratory judgment action is not a viable option. Thus, for the reasons set forth above, we find that the circuit court properly dismissed this case. Accordingly, the final order of the Circuit Court of Jackson County entered on June 29, 2000 is affirmed.

Affirmed.

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[2]We note that we are disappointed that neither party cited the *Hustead* case in their briefs or during oral argument.