

Cite as 2024 Ark. App. 246
ARKANSAS COURT OF APPEALS
DIVISION II
No. CV-23-212

JIM R. NASH

APPELLANT

V.

JOHN NASH, JR. AND PAM NASH
GLOVER, PERSONAL
REPRESENTATIVES OF THE
ESTATE OF NORMA NASH,
DECEASED

APPELLEES

Opinion Delivered April 17, 2024

APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT,
THIRD DIVISION
[NO. 60PR-17-1141]

HONORABLE CASEY R. TUCKER,
JUDGE

AFFIRMED

BRANDON J. HARRISON, Chief Judge

This is the third appeal in a long-running attempt by appellant Jim Nash, a member of our bar, to collect for decades of legal work he claims to have provided (on the loosest payment terms) to John and Norma Nash. John, Jim’s brother, died in April 2012. Norma, John’s wife, died in February 2016, some ten months into defending Jim’s lawsuit for breach of contract. The ensuing procedural mess is detailed in *Nash v. Nash*, our opinion affirming the judgment on a defense jury verdict. 2019 Ark. App. 173, 574 S.W.3d 171 (*Nash I*). This is an appeal from a probate order denying Jim’s claim against Norma’s estate for the same legal fees he sought—and the jury refused to award—in that case.

The background, briefly, is this. After John’s death, Jim alleged, Norma began moving the couple’s probate assets into the Norma F. Nash Living Trust to avoid paying

his legal fee. Norma was the first trustee. In April 2015, Jim filed suit against her, individually and as trustee, for breach of contract for legal services. Norma died in February 2016. The record in the first appeal begins with an amended complaint that recites the proceedings on Jim's motion to revive the action and substitute parties to defend it. No probate estate for Norma had yet been opened. Jim moved in the civil case to appoint John Jr. and Pam as special administrators of Norma's estate and successor trustees of the trust. We held in *Nash I* that appointing a special administrator was the right course. *Id.* at 8, 574 S.W.3d at 177. But Jim did not petition the probate division to appoint one, and the court did not appoint one in the civil case. Instead, it entered an order that found:

That [Jim] shall be and is allowed to file an amended complaint herein which shall include the proper parties to substitute for [Norma], now deceased, and any other proper parties to this action, and said amended complaint will be considered by this Court as satisfying the requirements of Rule 25 of the Rules of Civil Procedure and all other requirements as to revivor and substitution of parties, and this action shall continue accordingly.

Jim filed an amended complaint that incorporated his previous complaints and sued all the parties who might have been proper—and some others besides. Importantly, Norma Nash was named as a party defendant.¹ Jim alleged that she broke a long-term contract to pay him when a liquor store and warehouse she and John had owned was sold. John Jr. and Pam were sued individually, “for Norma Nash, deceased,” as co-trustees of the Norma F. Nash Living Trust, and as co-administrators of Norma's still unopened estate. John and Norma's other children were sued individually, and “for Norma Nash, deceased,” Jim

¹As we noted in *Nash I*, the claims against Norma individually had been dismissed in an earlier order for want of substitution within ninety days, but were nonetheless tried to a jury in June 2017. 2019 Ark. App. 173, at 10, 574 S.W.3d at 178.

included an alternative claim for equitable or constructive trust to prevent unjust enrichment through Norma's breach of the agreement, and a claim against her children (in various capacities) for tortiously interfering with that agreement.

The civil case went forward. The breach-of-contract and unjust-enrichment claims were tried to a jury that was given this instruction, AMI Civ. 2401, at Jim's request:

Jim Nash claims that Norma Nash breached a contract and has the burden of proving each of four essential propositions:

First, that Jim Nash and Norma and John Nash, Senior entered into a contract;

Second, that the contract required Norma Nash to perform or not to perform a certain act;

Third, that Jim Nash did what the contract required of *him*; and

Fourth, that Norma Nash did not do what the contract required of *her*.

If you find that Jim Nash has proved each of these propositions, then your verdict should be for him and *against Norma Nash and her substitutes and heirs*. If, however, he has failed to prove any one or more of these propositions, then your verdict should be *for Norma Nash and her substitutes and heirs*.

(Emphasis added.) The jury was instructed on unjust enrichment, AMI Civ. 2445, as follows:

In the alternative to the claim for breach of contract, Plaintiff Jim Nash claims Norma Nash and her substitutes and heirs have been unjustly enriched to his detriment and he has the burden of proving four essential elements:

First, that he provided services and goods, to Norma and John Nash, Senior, who received the benefit of such services and goods;

Second, that the circumstances were such that he reasonably expected to be paid the value of such services and goods by Norma and John Nash, Senior;

Third, that Norma and John Nash, Senior were aware that Jim Nash was providing such services and goods with the expectation of being paid and accepted the services and goods; and

Fourth, the reasonable value of such services and goods received by Norma and John Nash, Senior.

If you find that Jim Nash has proved each of these propositions, then your verdict should be for Jim Nash. If, however, he has failed to prove any one or more of these propositions, then your verdict should be for the defendants.

The jury returned defense verdicts on both counts on these verdict forms:

VERDICT FORM

On the issue of breach of contract, we the jury find in favor of:

<u> </u>	Plaintiff, Jim Nash
<u> X </u>	Defendants, Norma Nash and her substitutes and heirs

VERDICT FORM

In the alternative to the claim for breach of contract, and on the issue of unjust enrichment, we the jury find in favor of:

<u> </u>	Plaintiff, Jim Nash
<u> X </u>	Defendants, Norma Nash and her substitutes and heirs

The following day, John Jr. and Pam petitioned in the probate division to admit Norma's will to probate and to be appointed co-personal representatives of her estate. Jim filed a creditor's claim against the estate for the same legal services he had sued for in the civil case.

There were appeals, but we don't need to describe them. By the time Jim presented his probate claim, the ashes of the civil case were cold and the defense verdict stood. The estate denied the claim as precluded by the civil judgment. The circuit court found in November 2019 that the mandate in *Nash I* resolved Jim's claim as res judicata. After an appeal and remand in *Nash v. Nash*, 2021 Ark. App. 188, 626 S.W.3d 106 (*Nash II*), the circuit court denied the claim again (after a hearing) on the same grounds.

The case returns on this issue: Norma Nash died during the civil case, and no representative was substituted for her before the jury found for "Norma Nash and her substitutes and heirs." Did this rob the civil judgment of preclusive force in the probate case? Jim argues it does, either because the court lacked jurisdiction to enter judgment for Norma, or because his claims were not litigated with her estate (or those in privity with it) as the claim preclusion aspect of res judicata requires.

We affirm under another aspect of res judicata: issue preclusion. When issue preclusion applies, a final determination in one action of an issue of law, fact, or both can preclude a party from relitigating the issue in a later action—even if the party who invokes issue preclusion was a stranger to the earlier litigation. *Winrock Grass Farm, Inc. v. Affiliated Real Estate Appraisers of Ark., Inc.*, 2010 Ark. App. 279, at 10, 373 S.W.3d 907, 913–14. The issue (1) must be the same as the issue involved in the past litigation; (2) must have been actually litigated; and (3) must have been determined by a valid and final judgment; further, (4) that determination must have been essential to the judgment. *Vibo Corp. v. State ex rel. McDaniel*, 2011 Ark. 124, at 25, 380 S.W.3d 411, 427.

In one sense, the years of proceedings since the jury trial vindicate Jim's argument that the circuit court in the civil case should have appointed a substitute for Norma: if it had done so, *Nash I* might have been *Nash* only. Arguably, the substitution issues positioned *both sides* to argue that Norma's estate was bound, or was not bound, depending on the outcome of the trial. We held in *Nash I* that Jim waived any error in the substitution rulings, and that any error was harmless besides. 2019 Ark. App. 173, at 9-10, 574 S.W.3d at 178. If he had won at trial, and the defendants had appealed, we might have been asked to apply a similar waiver principle in his favor.

But he lost. Jim submitted Norma's individual liability for breach of contract and unjust enrichment to the jury. The jury found there was none. We affirmed the defense verdict because there was substantial evidence that Jim had in fact been paid for his legal work. *Id.* at 15-16, 574 S.W.3d at 181. It doesn't matter whether we consider Norma and her estate parties, nonparties, or something else in *Nash I*. *Jim* was a party. The jury finally and necessarily determined whether Norma's conduct resulted in a liability to him, as the court instructed them to do. The errors and irregularities Jim complains of, although undoubtedly frustrating, do not demonstrate that the trial was less than a "full and fair opportunity to litigate" that issue. The only difference between the civil and probate claims is that John Jr. and Pam have been granted the capacity to represent Norma's estate.

Affirmed.

GLADWIN and THYER, JJ., agree.

Jim R. Nash, for appellant.

Ed Daniel IV Attorney at Law, PLLC, by: *Ed Daniel*, for appellees.