FILED
MAY 20 1977
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

WESLEY DREESZEN,
ELVIE DREESZEN,
KENNETH BRUENE,
MERLINE BRUENE,
INA DREESZEN VOLKERT,
VELMA DREESZEN GOETTSCH,
RUTH BRUENE GOODBURN,
GLADYS BRUENE STRACKBEIN,
and EMMETT DREESZEN,

Appellants.

v.

ARNOLD PUTENSEN,

Appellee.

Filed May 20, 1977

126
2-58827

Appeal from Ida District Court - George F. Davis, Judge.

Appeal from judgment sustaining defense of res judicata in suit against executor of decedent's estate for breach of fiduciary obligation. Reversed and remanded.

Morris C. Hurd, of Ida Grove, for appellants.

Richard F. Branco of Branco & Boerner, of Holstein, for appellee.

Heard by Allbee, C.J., and Donielson, Oxberger and Carter, JJ. Snell, J., takes no part.

PER CURIAM

This is an action at law for damages against the executor of an estate based upon allegations that he sold estate assets to his nephew for less than the fair market value. The plaintiffs are distributees under decedent's will. The trial court dismissed the action based upon defendant's pleaded affirmative defense of res judicata.

I. Procedurally the trial court held an evidentiary hearing on the defense of prior adjudication. Although the issue had also been raised by a motion under rule 105, Rules of Civil Procedure, what in fact occurred was a separate trial of this issue followed by findings of fact and conclusions of law. Although appellants complain of this procedure we believe separate trial of this issue was within the trial court's discretion. *See* rule 186, R.C.P.

II. With respect to the merits of the trial court's findings and judgment appellants assert that there has in fact been no prior adjudication of the issues presented in this action. We agree.

The finding of res judicata was based upon a judgment in the probate proceeding denying a request by those distributees who are the plaintiffs in this action that the executor be enjoined from proceeding with the sale of real estate to his nephew and that any instruments consumating said sale be rescinded and cancelled. We deem it obvious that this action for damages does not present the same claim or cause of action that was involved in the probate proceeding. Moreover, our examination of the record in the prior proceedings leads us to the conclusion that the issues sought to be tried in the present proceeding were neither necessary to the decision in the prior proceeding nor actually litigated therein. The trial court in the probate

proceedings carefully avoided passing upon the right, if any, of the plaintiffs herein to seek money damages from the executor. The denial of injunctive relief and rescission was based upon grounds not involving approval of the executor's conduct. Under such circumstances the defendant's claim of res judicata or issue preclusion was not established. *See* Bertran v. Glens Falls Ins. Co., 232 N.W.2d 527 (Iowa 1975); Bickford v. American Interinsurance Exchange, 224 N.W.2d 450 (Iowa 1974); Schneberger v. U. S. Fidelity & Guaranty Co., 213 N.W.2d 913 (Iowa 1973). The trial court erred in dismissing the petition on the basis of res judicata or issue preclusion.

III. It is also argued by appellee that the petition fails to state a claim upon which relief can be granted. The parties are in disagreement as to whether the executor is held to the standard of section 633.160, The Code, or whether the will is sufficiently exculpatory to relieve him of this obligation. *See and compare* In re Estate of Rude, 233 Iowa 792, 10 N.W.2d 536 (1943); In re Estate of Scheibe, 140 N.W.2d 196 (Wis. 1966). Determination of the standard of care by which the executor's conduct must by measured for purposes of this action is not before on this appeal. We do conclude, however, that at the very least the executor must act in good faith. In re Estate of Rude, supra. Plaintiff's allegations of fact are sufficient to raise a justiciable issue under even a minimal standard of care. The judgment is reversed and the action remanded for trial on the merits.