**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

February 23, 1999

**Marilyn L. Graves**
**Clerk, Court of Appeals**
**of Wisconsin**



**No. 98-0997**

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

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**WILLIAM J. EVERS AND ANITA E. EVERS,**

**PLAINTIFFS-APPELLANTS,**

**v.**

**ROBERT J. LERNER,**

**DEFENDANT-RESPONDENT.**

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APPEAL from a judgment of the circuit court for Brown County: TIM A. DUKET, Judge. *Affirmed.*

Before Cane, C.J., Myse, P.J., and Hoover, J.

PER CURIAM. William and Anita Evers, pro se, appeal a judgment dismissing their complaint against their former attorney, Robert Lerner, under the doctrine of claim preclusion. The Everses argue that the trial court relied solely on an Outagamie County case, ***Evers v. Lerner***, No. 96-2116 (Wis. Ct. App. June 10, 1997), when it concluded that the Everses previously had the opportunity

to litigate the claims it brought against Lerner. The Everses contend that in No. 96-2116, the Outagamie County trial court had relied on the judgment entered in the case before us. The Everses argue that a judgment dismissing one lawsuit cannot act as grounds for the dismissal of a previously filed lawsuit. In other words, both suits cannot rely on one another to bar the Everses' claims on the basis of claims preclusion.

The record does not support the Everses' premise. The trial court relied not only on No. 96-2116, but on three other cases brought against Lerner as well. Additionally, in No. 96-2116, the Outagamie County court relied not on the instant action, but on two other Brown County cases. Because the Everses' premise is wrong, we reject their arguments and affirm the judgment.[1]

In June 1994, the Everses commenced this action with a complaint against Lerner alleging, among other things, that Lerner was hired as an attorney to: (1) represent William in a "civil case for liable (sic) in Brown county" in 1986; (2) give them advice regarding a 1987 John Doe massage parlor investigation; and (3) in 1987 to represent the Everses on criminal charges. The complaint alleges that in 1988 Lerner entered into a conspiracy to deprive them of their constitutional rights defrauded them and caused Anita to convey real estate and enter a plea to untrue charges. The complaint also alleges that Lerner acted in unauthorized ways and violated his duty to represent them. The complaint further alleges that Lerner acted maliciously to injure their business, was negligent in his

[1] The Everses recast this argument in various ways, including that the trial court erroneously vacated the default judgment; that the Everses were denied due process when it held hearings without proper notice or opportunity to respond; that the court denied them equal protection and due process when it failed to hold an evidentiary hearing and that the court erroneously applied the doctrines of res judicata and claims preclusion. Because our decision disposes of these issues, we do not address them separately.

representation, and abused the confidential attorney-client relationship. Additionally, it alleges that Lerner unjustly enriched himself through their relationship and also caused intangible injuries of damage to reputation, humiliation, embarrassment, pain and suffering, emotional distress, headaches, depression, nightmares, fear and mistrust of authority. The complaint sought compensatory and punitive damages.

Lerner did not file a timely answer, and the trial court determined that Lerner should be denied additional time to answer. The court signed a document entitled "Judgment and Order" that ordered a jury trial on the issues of damages. Apparently, the parties interpret this order as a default judgment, but the document does not state that a default judgment was entered. In any event, the trial court later vacated the order and judgment and dismissed the Everses' complaint on grounds of claim preclusion. The Everses' appeal of the order of dismissal is now before us.

"The term claim preclusion replaces res judicata; the term issue preclusion replaces collateral estoppel." ***NSP v. Bugher***, 189 Wis.2d 541, 550, 525 N.W.2d 723, 727 (1995). As ***NSP*** explains, "a final judgment is conclusive in all subsequent actions between the same parties [or their privies] as to all matters which were litigated or which might have been litigated in the former proceedings." ***Id***.

> The present trend is to see claim in factual terms and to make it coterminus with the transaction regardless of the number of substantive theories, or variant forms of relief flowing from those theories, that may be available to the plaintiff; regardless of the number of primary rights that may have been invaded; and regardless of the variations in the evidence needed to support the theories or rights.

***Id***. at 554, 525 N.W.2d at 729.

The Everses argue that the court erred by ruling that claim preclusion barred their claims. They contend that the trial court stated that it was relying "solely on its interpretation of the Court of Appeals decision 96-2116, dated July 10, 1997 claiming that the issues in this lawsuit had been litigated on the merits in Outagamie County case 95-CV-270." The trial court's order provided, however, that dismissal was based on reasons "stated in my oral decision from the bench on October 8, 1997."

At the October 8 hearing, the trial court explained its reasons for dismissing the complaint. Although the court referred to the Outagamie County case, ***Evers***, No. 96-2116, the court did not limit its reasons to the claims brought solely in that case. The court observed that the Outagamie County case was just one in a series of numerous cases filed by Evers against Lerner. The court noted the following: (1) ***Evers v. Lerner***, No. 92-2998 (Wis. Ct. App. May 11, 1993), involving punitive and compensatory damages; (2) ***Evers v. Outagamie County***, No. 95-0597 (Wis. Ct. App. Oct. 5, 1997), involving claims against Lerner and others of conspiracy to deprive Evers of property rights and constitutional rights; and (3) ***Evers v. Lerner***, No. 95-1354 (Wis. Ct. App. Nov. 28, 1995). This case involved claims of legal malpractice, negligence, breach of contract, theft, fraud, and conversion of proceeds of the sale of a car.[2]

Additionally, in ***Evers***, No. 96-2116, the Outagamie County trial court's written opinion relied upon two Brown County cases, Nos. 92 CV 811 and

[2] Also, at the hearing, Lerner pointed out that there was another case in Brown County, No. 95 CV 1636, dated September 11, 1996, as well as one in the Eastern District of Wisconsin, both arising out of his legal representation of the Everses.

93 CV 1296. The court acknowledged Lerner's observation that the instant case, No. 94 CV 819, was pending, but did not rely on the instant case in resolving the Everses' claims. Instead, the Outagamie County court relied on No. 93 CV 1296, and concluded "that there is an identity of claims between the causes of action in 93 CV 1296 and this action."

Here, the trial court held that a transactional view of claim preclusion bars actions arising out of the same factual underpinnings from future consideration, regardless of the number of alternative legal theories presented. The trial court was correct. Based upon our review of the record, together with our previous decisions, we are satisfied that the allegations in several earlier suits and the instant one arise from essentially the same series of incidents, facts and transactions with Lerner as the Everses' attorney.[3] They merely seek relief under alternative legal theories for alleged wrongs brought in previous actions. Thus, the trial court could correctly conclude that the Everses' claims were litigated or "might have been litigated" in former proceedings.[4] *See* ***NSP***, 189 Wis.2d at 550, 525 N.W.2d at 727.

This is the fifth appeal to this court arising out of the Everses dissatisfaction with Lerner's legal representation.[5] The Everses have not

[3] Evers and Lerner do not provide us with a comparative analytical review of each of the pleadings and judgments filed in previous actions, and therefore we do not undertake such a review here.

[4] The Everses assert that Anita was not a party in any previous action against Lerner. This assertion is both inaccurate and inadequate to argue that the identity of parties requirement has not been met. *See* ***NSP v. Bugher,*** 189 Wis.2d 541, 551, 525 N.W.2d 723, 728 (1995). We do not address an issue that "has not been adequately briefed, and the facts have not been adequately developed to allow us to make a reasoned determination." ***Shannon v. Shannon***, 150 Wis.2d 434, 446, 442 N.W.2d 25 (1989).

[5] The previous appeals are numbered 92-2998; 95-0597; 95-1354; and 96-2116.

demonstrated that they bring any claims that could not have been brought before. The Everses are not strangers to the appellate process, having filed numerous matters in our court. Their signatures on their brief constitutes a certificate that to the best of their knowledge, the argument is well grounded or warranted by good faith argument. Sections 802.05(1)(a) and § 809.84, STATS. If a party fails to make this determination, the court may, on its own initiative, impose an appropriate sanction. Section 802.05, STATS. Here, any reasonable inquiry would have shown that a continued attempt to relitigate is unwarranted by the facts or any good faith legal argument. As a result, we deem it appropriate to sanction the Everses $150.

The Everses' arguments are so misleading and patently frivolous in context of the circumstances presented that there would be no purpose in remanding for further fact finding. The clerk of court of the court of appeals is directed not to accept any papers that William or Anita Evers attempts to file in any civil action naming Robert Lerner as a party unless the order for sanctions is satisfied.[6]

*By the Court.*—Order affirmed.

[6] The Everses requested that we strike Lerner's appellate brief for failure to contain record citations. We deny their request because large portions of the Everses' appellate brief also fail to contain the appropriate record citation. However, we admonish both parties that failure to contain proper record citation is grounds for sanctions. *See* RULE 809.19, STATS.; RULE 809.83(2), STATS.

This opinion will not be published. RULE 809.23(1)(b)5, STATS.