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

October 13, 1998

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



**No. 97-1857**

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

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**DIANE ANTCZAK,**

**PLAINTIFF-APPELLANT,**

**V.**

**RIVER HILLS SOUTH INVESTORS, L.P., D/B/A RIVER HILLS SOUTH AND JOHN FLYNN, IN HIS INDIVIDUAL AND OFFICIAL CAPACITIES,**

**DEFENDANTS-RESPONDENTS.**

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APPEAL from orders of the circuit court for Milwaukee County: JOHN F. FOLEY, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

PER CURIAM. Diane Antczak appeals from the trial court order dismissing her action against River Hills South Investors, L.P., d/b/a River Hills South, and John Flynn (collectively, "River Hills"), and from the trial court order

granting River Hills's motion for sanctions. Antczak argues that the trial court erred in concluding that her action was barred under the doctrine of claim preclusion, and in concluding that her action was frivolous. We conclude that Antczak's action was barred by claim preclusion, but we also conclude that the trial court's findings do not support its order for sanctions. Accordingly, we affirm, in part, and reverse, in part.

Antczak's mother, Bernice Reed, was a resident of River Hills South Health Care Center, a nursing home where John Flynn was the administrator. Ms. Reed lived at River Hills South from May 21, 1993 until her February 19, 1995 admission to a hospital where she died on February 25, 1995.

Antczak sued River Hills alleging that the nursing home's neglect of her mother's care caused her death. Antczak also took certain actions, including picketing River Hills South, expressing her beliefs about River Hills. As a result, River Hills sued Antczak alleging libel and invasion of privacy.

In response to River Hills's suit, Antczak filed an eight count counterclaim. Four counts of the counterclaim, filed on Antczak's mother's behalf, were dismissed without prejudice upon the discovery that Antczak was not the representative of her mother's estate. The other four counts of the counterclaim – alleging breach of contract, negligence, breach of fiduciary duty, and *negligent* infliction of emotional distress – filed on Antczak's behalf, also were dismissed. River Hills's libel and invasion of privacy claims also were dismissed. Neither Antczak nor River Hills challenges the dismissal of any of these claims or counterclaims.

Following the dismissal of her counterclaims, Antczak sued River Hills for *intentional* infliction of emotional distress, as well as negligent infliction

of emotional distress.[1] She alleged, among other things, that River Hills's legal action against her had caused "severe psychological and corresponding physical harm" resulting in depression and requiring psychiatric treatment. The trial court dismissed her action, however, concluding that "certainly [Antzcak] is precluded from maintaining her current action [for intentional infliction of emotional distress] even though [she] failed to even pose it … in the counterclaim in the previous action."

The standards for reviewing the sufficiency of a claim are familiar to the parties and need not be repeated here. *See* § 802.06(2)(a), STATS.; ***Evans v. Cameron***, 121 Wis.2d 421, 426, 360 N.W.2d 25, 28 (1985). Under the doctrine of claim preclusion, a final judgment "is conclusive in all subsequent actions between the same parties as to all matters which were litigated or which might have been litigated in the former proceedings." ***DePratt v. West Bend Mut. Ins. Co.***, 113 Wis.2d 306, 310, 334 N.W.2d 883, 885 (1983). Whether claim preclusion applies to a given set of facts presents a question of law we review *de novo*. *See* ***id.***

Antczak argues that the trial court misconstrued the nature of her claim. She contends that although her *negligent* infliction counterclaim in the preceding action and her *intentional* infliction claim in the instant action derive from the same underlying events, they are significantly different. She maintains that "the first case was about [River Hills's] treatment of Diane Antczak's mother, whereas the second case is about how [River Hills] treated Ms. Antczak, herself."

[1] Counsel for Antczak subsequently agreed to the dismissal of the claim for negligent infliction of emotional distress realizing that, because the identical counterclaim had been dismissed in the previous action, "said claim had been brought in error in the instant suit."

Although, to some extent, that may be so, the difference in what the two cases were "about" does not lead to the conclusion Antczak desires.

A comparison of Antczak's negligent infliction counterclaim to her intentional infliction claim does not support Antczak's argument. While the preceding case may have been "about" River Hills's treatment of her mother, Antczak's negligent infliction counterclaim explicitly addressed the "emotional distress upon Counterclaimant as a consequence of [River Hills's] actions," and the damages she (Antczak) suffered.

Moreover, the distinction Antczak now attempts to draw is one she neglected to draw when litigating her counterclaims. In her trial court brief responding to River Hills's motion to dismiss her counterclaims, Antczak argued, in the section dealing with her counterclaim for *negligent* infliction of emotional distress, that she (Antczak) "has suffered emotional distress as a result of River Hills campaign of harassment, including this lawsuit." Thus, her litigation of the counterclaims did indeed entail River Hills's alleged *intentional* conduct and causation of her emotional distress. *See* ***Heideman v. American Family Ins. Group***, 163 Wis.2d 847, 861, 473 N.W.2d 14, 20 (Ct. App. 1991) ("'One who by extreme and outrageous conduct intentionally causes severe emotional distress to another is subject to liability for such [intentional infliction of] emotional distress and for bodily harm resulting from it.'"). Therefore, were there any doubt about the "coterminous" nature of Antczak's counterclaim and subsequent claim, *see* ***DePratt***, 113 Wis.2d at 311, 334 N.W.2d at 886 ("'present trend is to see claim in factual terms and to make it coterminous with the transaction regardless of the number of substantive theories'"), her litigation of her counterclaim confirmed that the intentional infliction of emotional distress claim was one that "might have

been litigated" in the course of those earlier proceedings. Accordingly, the trial court correctly dismissed her subsequent action.[2]

Antczak next argues that the trial court erred in granting River Hills's motion for sanctions under §§ 802.05(1)(a) and 814.025(3)(b), STATS.[3] She contends that the trial court failed to make any findings to support sanctions and "[t]o the contrary, … specifically found that the plaintiff did not act, 'with any

[2] Resolving this issue on this basis obviates the need to address River Hills's additional argument that Antczak's complaint fails to state a cause of action for intentional infliction of emotional distress because "no Wisconsin court has ever held that filing suit against another is extreme or outrageous conduct, and "it is the policy of the State of Wisconsin for courts not to interpret the commencement and ultimate dismissal of a lawsuit as 'designed to inflict emotional harm.'"

[3] Section 802.05(1)(a), STATS., provides, in part:

> Every pleading … of a party represented by an attorney … shall be subscribed with the handwritten signature of at least one attorney of record in the individual's name.… The signature of an attorney … constitutes a certificate that the attorney … has read the pleading …; that to the best of the attorney's … knowledge, information and belief, formed after reasonable inquiry, the pleading … is well-grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law; and that the pleading … is not used for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.… If the court determines that an attorney … failed to read or make the determinations required under this subsection before signing any petition, motion or other paper, the court may, upon motion or upon its own initiative, impose an appropriate sanction on the person who signed the pleading …. The sanction may include an order to pay to the other party the amount of reasonable expenses incurred by that party because of the filing of the pleading … including reasonable attorney fees.

Section 814.025(3)(b), STATS., provides, in part:

> In order to find an action … to be frivolous …, the court must find … [t]he party or the party's attorney knew, or should have known, that the action … 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.

maliciousness or harassment.' Indeed the trial court went on to say that plaintiff's actions, for which she was sanctioned were, 'no big deal.'" Antczak is correct.

To prevail on a motion for sanctions for filing a frivolous action, a defendant must overcome the presumption that the plaintiff's filing of a lawsuit was not frivolous. *See* ***Kelly v. Clark***, 192 Wis.2d 633, 659, 531 N.W.2d 455, 464 (Ct. App. 1995). To find an action frivolous, a trial court must find that "the attorney knew the action was without any reasonable basis in law *and* could not be supported by a good faith argument for an extension, modification or reversal of existing law." ***Radlein v. Industrial Fire & Cas. Ins. Co.***, 117 Wis.2d 605, 612, 345 N.W.2d 874, 878 (1984); *see* § 814.025(3), STATS. What a reasonable party knew or should have known presents a question of fact, and we will not overturn a trial court's factual finding unless it is clearly erroneous. *See* ***Beaupre v. Airriess***, 208 Wis.2d 238, 249, 560 N.W.2d 285, 290 (Ct. App. 1997). "Whether knowledge of the facts would then lead a reasonable party to conclude that an action is frivolous is a question of law" and, therefore, we review the trial court's legal conclusion *de novo*. ***Id.*** Here, the trial court's findings do not support its order for sanctions.

Evaluating River Hills's motion for sanctions, the trial court commented at length on Antczak's attorney's conduct. Although mildly critical of her performance in some respects, the trial court did not make any findings to support an order for sanctions. The trial court stated, "I don't find and will not find – that Mrs. Antczak and/or her attorney commenced either cause of action of her law suit against defendants solely for harassment or malice." The trial court then went on to say:

> However, a claim can be frivolous if it is continued in bad faith to harass or maliciously injure defendants.

> Now, counsel, I'm not saying … that you intended to harass or injure the defendants in any way but when you recognized that the complaint was defective [with respect to the four counterclaims on Antczak's mother's behalf] and you called and you had intentions probably at that time to dismiss but counsel for [River Hills] indicated she wanted everything dismissed [including the four counterclaims on Antczak's behalf] and you didn't want to, that was your prerogative and that was your decision to make and nothing was done and as a result the opposing counsels did have to come to court to execute papers, to move for dismissal.
>
> Now, this is what this whole thing boils down to, attorneys fees, to this extent and *I'm finding that you didn't maliciously do any of these things* but nevertheless you have failed to do something and *it's not to reflect on your abilities as a lawyer in any way whatsoever. I want that understood and I want the record to so indicate that the Court is not so finding that way*.
>
> You're a good lawyer and *if I were in your shoes, I might have done the same thing* but then if I did the same thing, I have got to suffer the consequences too *and it's no big deal that – I say no big deal*. I don't want to belittle the situation in any way but *you didn't dismiss which I can understand* and the statute requires – a case requires – I think it's [***Robertson-Ryan & Assocs. v. Pohlhammer***,] 112 Wis.2d 583[, 334 N.W.2d 246 (1983)] that there's got to be an explanation as to why you didn't do these things.
>
> *You have given an adequate explanation here. In my opinion it may be sufficient under the law but* (sic) *I feel that I'm going to accept your explanation as a true and voluntary explanation of what your intentions were.* However, the attorney was caused to expend some time in this matter to get the matter dismissed and I'm going to award costs in this matter if they can show me what those costs are.[4]

[4] Counsel did not object to the *amount* of the court-ordered sanctions, but did object to sanctions. The trial court and counsel had the following exchange:

> THE COURT: … Let me ask you this, would you be willing to pay the $500?
> [Counsel for Antczak]: Your Honor, I just said that I would not object to that order and obviously if I don't object to the order, I'm bound by it and I will pay it. I want to make it clear I'm not agreeing with the Court's decision.

(Emphasis and footnote added.) Thus, the trial court made no findings to support its order for sanctions and, in fact, made several findings that effectively precluded any conclusion that Antczak's action was frivolous.

Accordingly, this court affirms the trial court order dismissing Antczak's action against River Hills, but reverses the trial court's order for sanctions and remands the case to the trial court for the vacating of the order for sanctions.

*By the Court.*—Orders affirmed in part; reversed in part and cause remanded with directions.

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