COURT OF APPEALS
DECISION
DATED AND FILED

March 27, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1525 **Cir. Ct. No. 2007CV95**

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

CHARLENE S. MERTZ AND BARRY H.R. MERTZ,

PLAINTIFFS-APPELLANTS-CROSS-RESPONDENTS,

MICHAEL O. LEAVITT, SECRETARY, HEALTH & HUMAN SERVICES AND DEPARTMENT OF HEALTH AND HUMAN SERVICES, MEDICARE PARTS A & B,

INVOLUNTARY-PLAINTIFFS,

V.

BARBARA WALDOCH AND DUANE S. WALDOCH,

DEFENDANTS-RESPONDENTS-CROSS-APPELLANTS.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Jefferson County: RANDY R. KOSCHNICK, Judge. *Reversed and cause remanded.*

Before Higginbotham, P.J., Dykman and Bridge, JJ.

¶1 PER CURIAM. Charlene and Barry Mertz appeal a judgment dismissing their complaint against Barbara and Duane Waldoch. The Waldochs cross-appeal. The Mertzes alleged a cause of action for intentional infliction of emotional distress. The trial court denied the Waldochs' motion to dismiss for failure to adequately state that claim. However, the trial court dismissed the complaint upon concluding that the doctrine of claim preclusion barred the action. On appeal the Mertzes challenge that ruling. The Waldochs cross-appeal the court's ruling that the complaint adequately stated a claim for intentional infliction of emotional distress.[1] We conclude that the doctrine of claim preclusion does not bar this action. We also conclude that the complaint adequately pleads the Mertzes' claim. We therefore reverse and remand.

¶2 The parties, longtime neighbors, disputed the Mertzes' claim to a right-of-way across the Waldochs' property. In November 2005, the Waldochs sued for a judgment declaring the parties' rights in the matter. The Mertzes' reply to the complaint included a counterclaim for intentional infliction of emotional distress. In February 2006, the Mertzes voluntarily withdrew the counterclaim, and the trial court dismissed it without prejudice. Trial on the Waldochs' complaint occurred in October 2006, and the trial court entered judgment in December 2006 in favor of the Mertzes.

¶3 In April 2007, the Mertzes commenced this action, again alleging that the Waldochs intentionally inflicted emotional distress on Charlene Mertz.

[1] It was unnecessary for the Waldochs to cross-appeal in order to argue alternative grounds to affirm dismissal of the Mertzes' complaint. *See* ***State v. Alles***, 106 Wis. 2d 368, 392, 316 N.W.2d 378 (1982) (respondent may argue that the trial court was right for reasons other than those the court relied on).

Their amended complaint identified many specific acts of intentional harassment or intimidation that the Waldochs allegedly committed between June 2004 and August 2006. The trial court applied the doctrine of claim preclusion to dismiss the amended complaint.

CLAIM PRECLUSION

¶4 Whether the doctrine of claim preclusion applies to a particular set of facts presents a question of law that we review independently. *See* ***Menard, Inc. v. Liteway Lighting Prods.***, 2005 WI 98, ¶23, 282 Wis. 2d 582, 698 N.W.2d 738. Generally under the doctrine, a final judgment precludes subsequent actions between the same parties or their privies as to all matters which were litigated or could have been litigated in the former proceedings. ***Northern States Power Co. v. Bugher***, 189 Wis. 2d 541, 550, 525 N.W.2d 723 (1995). However, the doctrine does not apply to permissive counterclaims. *See* ***Wickenhauser v. Lehtinen***, 2007 WI 82, ¶¶23-27, 32, 302 Wis. 2d 41, 734 N.W.2d 855. A counterclaim is compulsory if judgment on it in a subsequent action would nullify the judgment in the initial action or impair rights established in that action. ***Id.***, ¶25, citing ***Menard***, 282 Wis. 2d 582, ¶28. This compulsory counterclaim rule is a narrow exception to the general rule of permissive counterclaims. ***Wickenhauser***, 302 Wis. 2d 41, ¶26.

¶5 The Mertzes' cause of action for intentional infliction of emotional distress was a permissive counterclaim in the previous action, because a favorable ruling in this proceeding could have no conceivable effect on the judgment declaring property rights in that action. Consequently, under the permissive counterclaim rule explained and applied in ***Wickenhauser***, claim preclusion does not bar the action.

¶6 In briefing, the Waldochs ask this court to modify, clarify or overrule ***Wickenhauser***. That we cannot do. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997) (only the supreme court has authority to overrule, modify or withdraw language from a previous supreme court case).

SUFFICIENCY OF THE COMPLAINT

¶7 We review the sufficiency of a complaint de novo, as a question of law. ***Green v. Heritage Mut. Ins. Co***., 2002 WI App 297, ¶10, 258 Wis. 2d 843, 655 N.W.2d 147. Under the notice pleading rules set forth in WIS. STAT. § 802.02 (2005-06),[2] a party need only give the opposing party fair notice of what the claim is and the grounds upon which it is based. ***Hertlein v. Huchthausen***, 133 Wis. 2d 67, 72, 393 N.W.2d 299 (Ct. App. 1986). The test we apply to a complaint is whether it contains sufficient details to give the defendant and the court a fair idea of what the plaintiff is complaining about. ***Wolnak v. Cardiovascular & Thoracic Surgeons***, 2005 WI App 217, ¶48, 287 Wis. 2d 560, 706 N.W.2d 667. A complaint should be dismissed as legally insufficient only if it is quite clear that there are no circumstances under which the plaintiff can prevail. ***Grams v. Boss***, 97 Wis. 2d 332, 351-52, 294 N.W.2d 473 (1980)

¶8 The Mertzes' complaint meets the requirements of notice pleading. The elements of a claim for intentional infliction of emotional distress are: (1) the defendant intended to cause emotional distress by his or her conduct; (2) the conduct was extreme and outrageous; (3) the conduct was a cause-in-fact of the plaintiff's emotional distress; and (4) the plaintiff suffered an extreme disabling

[2] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

response to the defendant's conduct. ***Rabideau v. City of Racine***, 2001 WI 57, ¶33, 243 Wis. 2d 486, 627 N.W.2d 795. Here, the Mertzes' complaint alleged numerous acts of harassing, confrontational or threatening behavior the Waldochs directed at the Mertzes for more than two years. It identified the nature, date and place of each alleged incident. It alleged that the acts were extreme and outrageous, were done with knowledge that Charlene Mertz suffered pre-existing mental health problems, and were intended to cause her emotional distress. The complaint further alleged that the acts did in fact cause her extreme distress that resulted in extended hospital stays. In so doing, the complaint provided the Waldochs and the trial court a clear idea of the circumstances of the claim and the grounds for it. If anything, it substantially exceeded the requirements of notice pleading. *See* ***Grams***, 97 Wis. 2d at 352 (complaint may be "barebone" and "conclusory in part" and still satisfy the notice pleading rules).

By the Court.—Judgment reversed and cause remanded.

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