

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 23, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

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Appeal No. 2006AP2854

Cir. Ct. No. 2006CV906

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

ST. FRANCIS HOSPITAL,

PLAINTIFF-RESPONDENT,

V.

JAMES SZYMCZAK,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: MICHAEL J. DWYER, Judge. *Affirmed.*

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

¶1 CURLEY, P.J. James Szymczak appeals the judgment incorporating an order finding him in contempt for his refusal to pay an earlier assessment leveled against him for violating the pleading requirements of WIS.

STAT. § 802.05 (2005-06),¹ or, in the alternative, for his failure to appear in court to answer under oath all supplemental deposition questions.² The trial court found Szymczak in contempt pursuant to WIS. STAT. §§ 815.02 and 785.02, set the purge conditions that remain outstanding, and ordered him to pay \$8474.50 for St. Francis Hospital's (St. Francis) attorney fees generated in its attempt to execute on the earlier judgment. Because Szymczak failed both to pay the earlier attorney fees assessed against him after admitting he had the ability to do so, or to appear in court and answer under oath questions regarding his financial condition, the trial court properly exercised its discretion in finding him in contempt and ordering him to pay an additional attorney fee charge of \$8474.50. Consequently, we affirm.

I. BACKGROUND.

¶2 This matter has its genesis in a guardianship proceeding filed in 2003 by St. Francis, seeking to have Szymczak's mother protectively placed in its

¹ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

² The order of contempt provided, in pertinent part, that the purge conditions could be satisfied by one of the following methods:

a) James Szymczak pays in full the "Judgment Against James Szymczak" of \$8,409.00, previously entered against him and in favor of St. Francis Hospital relating to this litigation, plus all accrued statutory 12% post-judgment interest (i.e. interest of \$2.76 per day from January 13, 2006 up to the date of payment);
or

b) James Szymczak appears in court before the Honorable Michael J. Dwyer at a time acceptable to the Court and counsel for St. Francis Hospital to answer fully and under oath all supplemental deposition questions propounded to him by counsel for St. Francis Hospital[.]

Szymczak did neither.

affiliated nursing home, The Terrace at St. Francis (the Terrace). Szymczak's mother was a patient in the hospital. Szymczak attempted, without success, to intervene. Eventually, the guardianship was dismissed, but Szymczak persisted in his contention that his mother had been unlawfully admitted to the Terrace. The reason for his belief was that the hospital's petition, filed with the court, listed "WE FOUR," a corporate guardian, as the proposed temporary guardian. Szymczak's mother was admitted to the Terrace one day before the date stamped on the court order approving her placement. Thus, the record reveals that "WE FOUR" authorized Szymczak's mother's admission to the Terrace before it had legal authority to do so. Szymczak has continued to litigate his claim against the hospital, and his belief that the hospital violated WIS. STAT. § 50.06 (2001-02) by moving his mother to the Terrace prior to having any authority to do so.³ In his bid to prove that the hospital acted improperly, Szymczak sought to obtain a copy of his mother's medical records by taking a release of medical records form, signed by his mother, to the Terrace. The Terrace refused to honor the release. Szymczak then sued the Terrace. The trial court agreed with the Terrace, and the first of four related state appeals in this matter was started.⁴ This court reversed the trial court. *Szymczak v. Terrace at St. Francis*, 2006 WI App 3, 289 Wis. 2d 110, 709 N.W.2d 103.

³ The lawyers for St. Francis claim that the date stamp is incorrect and that the order was delivered to the court one day before the time stamped date. They contend that their office records show a messenger took the documents to the court the day before the time stamped date. However, nothing in the record supports that contention.

⁴ One of Szymczak's appeals was dismissed after this court made a finding that it was moot.

¶3 In the guardianship proceeding, Szymczak, despite the fact the guardianship had been dismissed and the original judge had ordered him to desist from filing any additional motions in the matter, filed motions approximately one-and-a-half years after the dismissal, seeking relief from the judgment and seeking a declaratory judgment. The trial court denied his motions, and, in doing so, found that Szymczak had violated the pleading provisions set forth in WIS. STAT. § 802.05 (2005-06), because in the words of the judge:

I make a finding that there is an order in this case by Judge Brennan that's well over a year old that precludes that which was filed in this court. I reject as legitimate the explanation as to why Mr. Szymczak did not feel that this motion was a violation of that order, that reason being that he was ordered by Judge Brennan to further participate in the guardianship, which somehow overruled that order precluding filings. And in fact Mr. Szymczak honored the order, as he explained to the Court of Appeals, which is why he made his motions there rather than in the trial court.

And I conclude that it is a reasonable finding of fact that the reason that Mr. Szymczak felt free to bring this motion before this Court was that he saw a chance to get another kick at the cat, and that there was a degree of forum shopping going on, and that Mr. Szymczak knew or should have known that [] forum shopping is improper.

¶4 The trial court then proceeded to assess attorney fees against Szymczak of \$8409. However, the trial court stayed the order if Szymczak would refrain from filing an appeal. Undaunted, Szymczak appealed, and we recently affirmed the trial court.

¶5 After the trial court awarded St. Francis its attorney fees, St. Francis began proceedings to execute on the judgment. Szymczak failed to appear at the first scheduled supplementary deposition. At the second deposition, he refused to answer some questions, argued with the court commissioner, acted bizarrely, and eventually left before the deposition was concluded. When Szymczak said the

reason he was leaving was to go to the bank to get the money, the court commissioner tried to accompany him. During the elevator ride, the court commissioner claimed he was pushed by Szymczak. St. Francis then brought a motion seeking to have the trial court find Szymczak in contempt.

¶6 A hearing on the contempt motion was held on July 21, 2006. Szymczak did not appear, but did contact the court and attempt to “waive” his appearance. The trial court found him in contempt of court and ordered a bench warrant for his arrest. Following the contempt hearing, Szymczak filed motions seeking to have one of St. Francis’s attorneys sanctioned and objecting to the contempt order, along with supporting briefs. In October 2006, the trial court held another hearing to address the motions filed by Szymczak, as well as to review the contempt of court order. Again, Szymczak failed to appear. At this hearing, the trial court determined that the remedial contempt could be purged by Szymczak by either paying the earlier assessed attorney fees plus interest, or appearing before the court at a designated time and answering all supplementary deposition questions propounded by counsel for St. Francis Hospital. In addition, the trial court denied and struck Szymczak’s motion seeking to sanction one of the attorneys and refused to calendar any additional motions sought by Szymczak until he purged the contempt. The trial court also awarded St. Francis Hospital attorney fees of \$8474.50 for the fees paid in attempting to execute the judgment. Szymczak did not comply with either of the trial court’s purge conditions. This appeal follows.

II. ANALYSIS.

¶7 Szymczak’s brief touches on a great many irrelevant matters.⁵ His challenge to the contempt finding is twofold. First, he argues that because he was denied a hearing when the trial court entered the order requiring him to pay \$8409 in attorney fees, he was denied due process. Second, he argues that the court commissioner who ordered him to appear for the supplementary deposition was acting as a “private collection agent,” in violation of WIS. STAT. § 946.16, and that the commissioner committed perjury.

¶8 Because Szymczak is judicially estopped from raising the due process issue in this appeal, and nothing in the record supports Szymczak’s claim that the court commissioner was a private collection agent or that he violated WIS. STAT. § 946.31, we affirm the contempt finding and the attorney fee award.

¶9 This court’s standard of review involving contempt orders is limited. Whether a defendant’s act is a contempt of court is a discretionary determination because the question “is one which the trial court has far better opportunity to determine than a reviewing court.” *Currie v. Schwalbach*, 132 Wis. 2d 29, 36, 390 N.W.2d 575 (Ct. App. 1986), *aff’d*, 139 Wis. 2d 544, 407 N.W.2d 862 (1987). A reviewing court will not reverse a trial court’s determination “except in a plain instance of mistake” or erroneous exercise of discretion. *Id.* Further, findings of

⁵ Szymczak claims that: the trial court erred for failing to refer one of St. Francis’s attorneys to the district attorney’s office; one of the attorneys gave false information to the trial court in a hearing that predated the contempt hearing; his motion for relief from the judgment and order should have been granted because St. Francis filed a false exhibit in an earlier oral argument before this court; and St. Francis has “unclean hands.” All of these issues have either been previously litigated, should have been previously litigated, or are irrelevant to the question of the validity of the contempt order.

fact made by the trial court will be accepted unless they are clearly erroneous. *See* WIS. STAT. § 805.17(2).

¶10 Contempt of court is, among other things, the intentional “[d]isobedience, resistance or obstruction of the authority, process or order of a court,” WIS. STAT. § 785.01(1)(b); intentional “[r]efusal as a witness to appear, be sworn or answer a question,” § 785.01(1)(c); or intentional “[r]efusal to produce a record, document or other object,” § 785.01(d). A court may impose punitive or remedial sanctions on contemnors. WIS. STAT. § 785.02. “Remedial contempt is imposed to ensure compliance with court orders.” *Diane K.J. v. James L.J.*, 196 Wis. 2d 964, 968, 539 N.W.2d 703 (Ct. App. 1995); *see also* § 785.01(3). It “must be purgeable through compliance with the original court order” or alternative purge conditions. *Diane K.J.*, 196 Wis. 2d at 969. This contempt power serves to enforce the rights of an aggrieved litigant. *Id.* Here the trial court imposed a remedial sanction.

¶11 Remedial sanction is available under certain circumstances. WISCONSIN STAT. § 785.03(1) provides that:

Procedure. (1) NONSUMMARY PROCEDURE. (a) *Remedial sanction.* A person aggrieved by a contempt of court may seek imposition of a remedial sanction for the contempt by filing a motion for that purpose in the proceeding to which the contempt is related. The court, after notice and hearing, may impose a remedial sanction authorized by this chapter.

WISCONSIN STAT. § 785.04(1)(a) through (e) set forth the sanctions:

Sanctions authorized. (1) REMEDIAL SANCTION. A court may impose one or more of the following remedial sanctions:

(a) Payment of a sum of money sufficient to compensate a party for a loss or injury suffered by the party as the result of a contempt of court.

(b) Imprisonment if the contempt of court is of a type included in s. 785.01 (1) (b), (bm), (c) or (d). The imprisonment may extend only so long as the person is committing the contempt of court or 6 months, whichever is the shorter period.

(c) A forfeiture not to exceed \$2,000 for each day the contempt of court continues.

(d) An order designed to ensure compliance with a prior order of the court.

(e) A sanction other than the sanctions specified in pars. (a) to (d) if it expressly finds that those sanctions would be ineffectual to terminate a continuing contempt of court.

¶12 After a judgment has been entered, a party seeking to execute on a judgment can request the trial court to find the judgment debtor in contempt after meeting certain conditions. WISCONSIN STAT. § 815.02 provides:

Judgments, enforced by execution. A judgment which requires the payment of money or the delivery of property may be enforced in those respects by execution. Where it requires the performance of any other act a certified copy of the judgment may be served upon the party, person or officer who is required to obey the same, and if he or she refuse he or she may be punished for contempt, and his or her obedience enforced.

¶13 In *St. Francis Hospital v. Szymczak*, No. 2006AP44, unpublished slip op. (WI App Aug. 21, 2007), this court determined that the trial court's assessment of \$8409 against Szymczak for attorney fees for violating the pleading requirements of WIS. STAT. § 802.05 (2005-06) was proper. Szymczak never challenged the assessment alleging a failure of the trial court to provide him with a hearing. Consequently, he is estopped from raising it now. Under the doctrine of claim preclusion, formerly called *res judicata*, a final judgment is conclusive in all subsequent proceedings on all matters that were litigated or that might have been litigated between the parties or their privies in the former proceeding. *Northern*

States Power Co. v. Bugher, 189 Wis. 2d 541, 550, 525 N.W.2d 723 (1995). Szymczak's opportunity to raise this issue has come and gone. He should have raised it in his earlier appeal. Moreover, the record belies Szymczak's contention. The findings of fact and conclusions of law setting forth the trial court's orders authorizing a judgment of \$8409 contain the following statements:

The above matter came before Michael J. Dwyer, Circuit Court Judge, on August 12, 2005 on James Szymczak's motions for Relief from Final Stipulation and for Declaratory Relief, among others. The Petitioner appeared by counsel, Grant Kiloran and Jacqueline Champaign, and James Szymczak, an objector to the petition appeared without counsel. After consideration of the statements, briefs and arguments of the parties and upon all the files and pleadings had herein, the court makes the following [findings of fact and conclusions of law and orders]

(Underlining added.)

¶14 As to Szymczak's second argument, nothing in this record supports Szymczak's bald assertion that the court commissioner who conducted the supplemental deposition was a private collection agent and that, as a result, the court commissioner violated WIS. STAT. § 946.16 prohibiting judicial officers from collecting claims or that the commissioner committed perjury. While the court commissioner's offer to accompany Szymczak to his bank in order to pay the judgment appears to be a bit unusual, the suggestion that he accompany Szymczak was done after Szymczak said that he would pay the underlying judgment:

[SZYMCZAK]: Fine. Fine. Fine. I can pay the judgment.

COURT COMMISSIONER: If you'd like to be on the inside –

[SZYMCZAK]: I can pay it today.

COURT COMMISSIONER: Okay. What time can you bring the check back here then? I mean, if you're a man of your word –

[SZYMCZAK]: I don't owe the judgment to you.

COURT COMMISSIONER: No. I know. But just bring it to – Whoever you owe it to, and I'll deliver it.

[SZYMCZAK]: I'll bring it back. I'll bring the judgment back, sir.

COURT COMMISSIONER: Okay. When will you do that, sir?

[SZYMCZAK]: Tomorrow.

COURT COMMISSIONER: Well, no, no. You'll bring it back today.

[SZYMCZAK]: I can't get it today.

COURT COMMISSIONER: I've got a good idea.

[SZYMCZAK]: Okay.

COURT COMMISSIONER: He says he banks at any US Bank branch. I'll walk with him to the bank, all right, so he can get his money out and then just bring it back.

[SZYMCZAK]: Okay. All ready. Ready? Let's go.

COURT COMMISSIONER: Hang on. Don't leave yet. I'm going to walk with you.

[SZYMCZAK]: Well, I don't have my wallet with me.

COURT COMMISSIONER: You don't have to. Just have your ID.

[SZYMCZAK]: Okay.

COURT COMMISSIONER: They know who you are. Right?

[SZYMCZAK]: I don't have my ID with me.

[SZYMCZAK]: Wait, wait, wait, sir. Hold on. Hold on. I'll walk with you to the US Bank. Ready?

(Recess taken.)

COURT COMMISSIONER: The record should reflect that Mr. Szymczak left the office, he indicated that he was going to go to the bank and pay a judgment. I told him that I'd escort him to the bank. He then got into a little pushing situation with me, and I just had security tell him to get out, and he did voluntarily leave. But Mr. Szymczak should be – I find that he is in contempt, that he didn't produce the documents that he was ordered to produce, and I guess I would just certify it to the assigned judge

¶15 Further, had the court commissioner actually accompanied Szymczak to the bank and obtained the check for the underlying judgment, this would not have constituted a violation of WIS. STAT. § 946.16. Section 946.16 prohibits a judicial officer from bringing an action in a matter in which he or she is an agent or attorney for the party seeking to collect a debt before them in their official capacity. Section 946.16 reads: “Any judicial officer who causes to be brought in a court over which the officer presides any action or proceeding upon a claim placed with the officer as agent or attorney for collection is guilty of a Class B misdemeanor.” So, too, his claim that the court commissioner committed perjury is baseless. There is nothing in the record to contradict the court commissioner's version of the events that followed the deposition. Szymczak failed to appear at the hearing when the commissioner testified.

¶16 For the reasons stated, the trial court did not erroneously exercise its discretion. Szymczak's actions were contumacious. The sanctions and the attorney fee award were authorized by statute. As a result, the underlying contempt order and attorney fee award are affirmed.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

