COURT OF APPEALS
DECISION
DATED AND FILED

November 13, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal Nos. 01-1694
01-3080

Cir. Ct. No. 00-CV-41

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

JEANETTE SCHWARZBACH AND STEVEN SCHWARZBACH,

PLAINTIFFS-APPELLANTS,

V.

STEVE THELEN, INDIVIDUALLY, AND THELEN SAND & GRAVEL, INC.,

DEFENDANTS-RESPONDENTS.

APPEAL from judgments of the circuit court for Kenosha County: LEO F. SCHLAEFER, Reserve Judge. *Affirmed and cause remanded with directions*.

Before Nettesheim, P.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. Jeanette and Steven Schwarzbach appeal from judgments dismissing their claim that Steve Thelen and Thelen Sand & Gravel,

Inc., tortiously interfered with their contract with Diane Reese to purchase an interest in a ski hill and awarding Thelen $25,000 for attorney's fees as a sanction under WIS. STAT. § 802.05(1) (1999-2000).[1] In ***Schwarzbach v. Reese***, No. 01-3081, unpublished slip op. at ¶7 (WI App Aug. 21, 2002), we determined that the Schwarzbachs lacked an enforceable contract with Reese because a condition precedent was never satisfied. Issue preclusion prevents the Schwarzbachs from relitigating the force of that contract in the action against Thelen. Therefore, we affirm the judgments and remand to the circuit court for a determination of reasonable attorney's fees and expenses for maintaining a frivolous appeal.

¶2 Reese held the controlling stockholder interest in Wilmot Mountain, Inc. (WMI), a family-held corporation which operated a ski hill on property owned by the Wilmot Ski Hills and the Hickory Hills partnerships. In November 1998, the Schwarzbachs entered into an agreement whereby Reese would sell 452 shares of WMI common stock to them and the Schwarzbachs would buy the minority partnership interests in Wilmot Ski Hills and Hickory Hills held by Michael Reese, soon to be Reese's ex-husband. The ski hill was in financial trouble and it was anticipated that with an ownership interest, the Schwarzbachs would bring in investors and capital to cover WMI's debt. The Schwarzbachs never acquired the ownership interests. They allege that in October 1999, Thelen stepped in with a better offer to purchase the ski hill and caused Reese to breach the buy/sell agreement.

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

¶3 On December 15, 1999, the Schwarzbachs commenced an action against Reese and sought injunctive relief to prevent the sale of the ski hill to any third party. ***Schwarzbach***, slip op. at ¶4. They also sought specific performance of the Stock Purchase Agreement. ***Id.*** The circuit court granted summary judgment concluding that the Stock Purchase Agreement was unenforceable and that only an unenforceable agreement to agree existed with respect to any obligation to employ alternative methods of conferring an ownership interest to the Schwarzbachs. ***Id.*** The circuit court's judgment was affirmed on appeal.

¶4 This action against Thelen was commenced on January 7, 2000. The circuit court concluded that Thelen had an absolute privilege to explore the purchase of the ski hill and did not tortiously interfere with any contractual relationship that may have existed between the Schwarzbachs and Reese. Judgment granting Thelen's motion for summary judgment and dismissing the action was entered on May 16, 2001. (The judgment predated the final judgment in the Reese litigation.) After an appeal was filed, the circuit court entered a judgment finding that the Schwarzbachs violated WIS. STAT. § 802.05(1), and awarding $25,000 in attorney's fees to Thelen.[2]

¶5 The doctrine of issue preclusion prevents the relitigation of issues that have been contested in a previous action between the same or different parties. ***Michelle T. v. Crozier***, 173 Wis. 2d 681, 687, 495 N.W.2d 327 (1993). The defensive use of issue preclusion prevents a plaintiff from relitigating an issue

[2] The Schwarzbachs did not timely appeal from the denial of their motion for reconsideration of summary judgment. An order of December 18, 2001, limited the second filed appeal to review of the addition of $64 costs assessed against the Schwarzbachs. The Schwarzbachs filed an amended notice of appeal after entry of the judgment awarding attorney's fees.

decided in a prior action. ***State v. Sorenson***, 2001 WI App 251, ¶11, 248 Wis. 2d 237, 635 N.W.2d 787, *aff'd as modified*, 2002 WI 78, 254 Wis. 2d 54, 646 N.W.2d 354. "[O]nce an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." ***Paige K.B. v. Steven G.B.***, 226 Wis. 2d 210, 219, 594 N.W.2d 370 (1999) (citation omitted).

¶6 We conclude that application of the doctrine is appropriate here even though the circuit court and Thelen did not invoke the doctrine.[3] We may affirm on grounds different than those relied on by the circuit court. *See* ***Vanstone v. Town of Delafield***, 191 Wis. 2d 586, 595, 530 N.W.2d 16 (Ct. App. 1995); ***State v. Holt***, 128 Wis. 2d 110, 125, 382 N.W.2d 679 (Ct. App. 1985).

¶7 The application of issue preclusion involves a two-step analysis. ***Paige K.B.***, 226 Wis. 2d at 224. The first consideration is whether the litigant to be precluded has a "sufficient identity of interests to comport with due process." ***Id.*** That step is easily satisfied here since the Schwarzbachs were in the same party position in both this case and the Reese litigation.

¶8 The second step requires a fundamental fairness analysis—that is whether applying issue preclusion to the litigant comports with principles of fundamental fairness. ***Id.*** at 225. This involves a consideration of some, or all, of the following factors:

[3] As we have observed, the circuit court's judgment predated the final judgment in the Reese litigation. Our decision in ***Schwarzbach v. Reese***, No. 01-3081, unpublished slip op. (WI App Aug. 21, 2002), was entered after the briefs were filed in this appeal.

> (1) could the party against whom preclusion is sought, as a matter of law, have obtained review of the judgment; (2) is the question one of law that involves two distinct claims or intervening contextual shifts in the law; (3) do significant differences in the quality or extensiveness of proceedings between the two courts warrant relitigation of the issue; (4) have the burdens of persuasion shifted such that the party seeking preclusion had a lower burden of persuasion in the first trial than in the second; or (5) are matters of public policy and individual circumstances involved that would render the application of [issue preclusion] to be fundamentally unfair, including inadequate opportunity or incentive to obtain a full and fair adjudication in the initial action?

Michelle T., 173 Wis. 2d at 689.

¶9 Generally, the equitable determination of fairness by application of these factors is within the circuit court's discretion. However, certain of the ***Michelle T.*** factors present questions of law. ***Paige K.B.***, 226 Wis. 2d at 225. "Particularly, the first factor—whether, as a matter of law, the party against whom issue preclusion is sought could have obtained judicial review of the prior judgment—is a question of law." ***Id.*** Further, because the possible application of issue preclusion arises for the first time on appeal we may independently inquire whether issue preclusion applies. *See* ***Robinson v. City of West Allis***, 2000 WI 126, ¶39 n.8, 239 Wis. 2d 595, 619 N.W.2d 692. We are in as good a position as the circuit court to address issue preclusion because the case was decided on a "paper record." *See* ***Weinberger v. Bowen***, 2000 WI App 264, ¶7, 240 Wis. 2d 55, 622 N.W.2d 471.

¶10 Here the application of issue preclusion comports with fundamental fairness. The Schwarzbachs availed themselves of the opportunity to have the judgment in the Reese litigation reviewed on appeal. The ultimate question regarding the enforceability of the contract and the burden of persuasion is the

same in both cases. The issue was vigorously litigated in the Reese litigation. Finally, because issue preclusion wards off endless litigation, ensures the stability of judgments, and guards against inconsistent decisions on the same set of facts, ***Precision Erecting, Inc. v. M&I Marshall & Ilsley Bank***, 224 Wis. 2d 288, 301-02, 592 N.W.2d 5 (Ct. App. 1998), public policy considerations support its application here.

¶11 The Schwarzbachs' claim against Thelen is dependent on the existence of an enforceable contract with Reese. It has been determined that the Stock Purchase Agreement was unenforceable and, at best, the Schwarzbachs and Reese had an unenforceable agreement to agree to convey an ownership interest in the ski hill. ***Schwarzbach***, slip op. at ¶10. The Schwarzbachs cannot recover for tortious interference with a contract. Therefore, dismissal of the action was proper.

¶12 The award to Thelen of $25,000 for attorney's fees was made under WIS. STAT. § 802.05.[4] The circuit court determined that several factual allegations in the Schwarzbachs' complaint were not grounded in facts and that appropriate and reasonable investigation was not made by the Schwarzbachs before making

[4] WISCONSIN STAT. § 802.05(1)(a) provides that a litigant's signature on a pleading

> constitutes a certificate that the attorney or party has read the pleading, motion or other paper; that to the best of the attorney's or party's knowledge, information and belief, formed after reasonable inquiry, the pleading, motion or other paper 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, motion or other paper is not used for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

the averments. We review the circuit court's determination with deference. ***Belich v. Szymaszek***, 224 Wis. 2d 419, 429, 592 N.W.2d 254 (Ct. App. 1999).

¶13 The Schwarzbachs argue that the circuit court's determination was premised merely on their failure to prove their claim. *See* ***Jandrt v. Jerome Foods, Inc.***, 227 Wis. 2d 531, 551, 597 N.W.2d 744 (1999) (claim is not frivolous merely because there was a failure of proof). They also suggest that the circuit court failed to explain what pre-filing investigation was required. The sanction is not simply about the failure to conduct adequate pre-filing investigation. Rather, the circuit court found that the Schwarzbachs knowingly made false statements in the complaint. The Schwarzbachs do not challenge those findings. As direct participants, the Schwarzbachs had personal knowledge of the matters alleged in the complaint. The circuit court's findings that they knew certain allegations to be false are not clearly erroneous and support the sanction for a direct violation of WIS. STAT. § 802.05 by statements that were not grounded in fact.

¶14 ***Belich*** teaches that an attorney cannot simply rely on his or her client's word as to the factual underpinning of an action and that the story must pass the "smell test." ***Belich***, 224 Wis. 2d at 430-31. Here Steven Schwarzbach, a licensed attorney in the State of Illinois, acted as the attorney for himself and his wife. In doing so he demonstrated the validity of the old adage "a lawyer who represents himself has a fool for a client." The Schwarzbachs' complaint rested solely on their myopic view of the contract with Reese and the viability of the deal. They failed to step back from their intimate involvement and assess the truth of their averments.

¶15 The Schwarzbachs argue that there was insufficient proof of the amount of attorney's fees incurred because portions of some entries on invoices

for attorney's fees were redacted. Thelen's attorney testified that some entries on the invoices were redacted to protect the attorney-client privilege and work product. Attorney billing records are protected by the lawyer-client privilege when descriptions of the nature of the legal services rendered would reveal the substance of lawyer-client communications. ***Lane v. Sharp Packaging Sys.***, 2002 WI 28, ¶41, 251 Wis. 2d 68, 640 N.W.2d 788. Even if redacted portions of the invoices were not sufficient evidence of work performed, there were other sufficient invoiced amounts to support the award of $25,000 for attorney's fees. Indeed, the invoices reflected attorney's fees and costs over $100,000. The circuit court's award of only a fraction of that amount was a proper exercise of discretion.

¶16 Thelen seeks an award of attorney's fees and costs incurred in responding to a frivolous appeal. *See* WIS. STAT. RULE 809.25(3)(c). Our conclusion that the circuit court correctly determined that the action was commenced without a basis in fact and with false averments renders the appeal frivolous per se. *See* ***Belich***, 224 Wis. 2d at 435. We award reasonable attorney's fees and expenses for this appeal and remand to the circuit court for a determination on this issue.

By the Court.—Judgments affirmed and cause remanded with directions.

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