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**DISTRICT I**

February 9, 2021

*To*:

Hon. Carl Ashley
Circuit Court Judge
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Robert J. Hutchinson
5611 Forkwood Dr., NW
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You are hereby notified that the Court has entered the following opinion and order:

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2019AP1130 Robert J. Hutchinson v. Kohner, Mann & Kailas, S.C.
(L.C. # 2018CV3389)

Before Brash, P.J., Blanchard and Donald, JJ.

**Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. Rule 809.23(3).**

Robert J. Hutchinson, *pro se*, appeals from an order of the circuit court that dismissed his amended complaint and imposed both monetary and non-monetary sanctions on Hutchinson for frivolous litigation. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2017-18).[1] Upon review, the order is summarily affirmed.

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

## BACKGROUND

*Waukesha County Circuit Court case No. 2012CV3673*

Hutchinson previously co-owned Metallurgical Associates, Inc. (MAI), with Thomas Tefelske. When Tefelske wanted to retire, he and Hutchinson worked out an arrangement for Hutchinson to purchase Tefelske's shares of the company. Shortly after execution of the agreement, Hutchinson decided that Tefelske had breached it, so Hutchinson stopped making payments to Tefelske. In December 2012, Tefelske filed suit against MAI, Hutchinson, and Hutchinson's wife. The Hutchinsons and MAI retained law firm Kohner, Mann & Kailas, S.C. (KMK) to represent them. This relationship eventually deteriorated to a point that KMK withdrew from representation in January 2015.

*Milwaukee County Circuit Court case No. 2015CV6012*

In July 2015, KMK commenced suit against the Hutchinsons and MAI for unpaid fees and expenses incurred in the Tefelske case. The Hutchinsons filed a counterclaim which alleged, as relevant here, that KMK: (1) "owed a legal duty to provide [the Hutchinsons with] the standard of care"; (2) failed to "ultimately furnish the complete file to successor counsel upon its withdrawal"; and (3) was "otherwise negligent."

KMK moved for summary judgment on its claim for unpaid sums and sought dismissal of the Hutchinsons' counterclaim. KMK argued that: (1) the specific itemized damages claimed by the Hutchinsons were derivative of any injury to MAI and, thus, the Hutchinsons lacked standing to pursue those particular damages; (2) the Hutchinsons in their individual capacities could not prove causation from KMK's alleged negligence; (3) MAI's losses arose from judicial rulings

made after KMK had withdrawn; and (4) the Hutchinsons lacked adequate expert testimony to support their claims.

In a brief opposing KMK's motion for summary judgment, the Hutchinsons argued that their successor counsel never received the entire file from KMK and that "[o]ne of the most significant withholdings" from the file "was information extracted from Tefelske's cell phone." The Hutchinsons also alleged that KMK had withheld this evidence from them and had denied it was in KMK's possession despite the firm having allegedly received it eight months prior. The brief and Hutchinson's affidavit in support extensively detail KMK's alleged "actions in withholding evidence."

Ultimately, the summary judgment court[2] granted KMK's motion for summary judgment and its motion to dismiss the counterclaim in orders dated January 10, 2017. The Hutchinsons attempted to appeal; however, their notice of appeal was untimely, and we dismissed the appeal on that ground.[3] The supreme court subsequently denied the Hutchinsons' petition for review.

On June 11, 2018, Hutchinson—now proceeding solely in his own capacity and on his own behalf—filed a motion for relief from judgment pursuant to WIS. STAT. § 806.07, again

[2] The Honorable Dennis P. Moroney presided over the summary judgment and dismissal motions and will be referred to as "the summary judgment court."

[3] *See* ***Kohner Mann & Kailas SC v. Metallurgical Assocs., Inc.***, No. 2017AP611, unpublished slip op. and order (WI App June 30, 2017).

arguing that KMK had "knowingly withheld" the cell phone evidence.[4] The postjudgment court[5] denied the motion for relief from judgment; it also granted KMK's request for sanctions against Hutchinson, finding he had advanced "non-meritorious arguments" and had "engaged in a troubling pattering of improper litigation," as demonstrated by various sanctions previously issued against him in three other related instances.[6] The postjudgment court imposed both a $5,000 monetary sanction as well as limits on Hutchinson's ability to file "any suit, action, proceeding or motion against KMK, its employees, or shareholders … without first obtaining leave of court." Hutchinson appealed from that decision; we affirmed. *See* ***Kohner Mann & Kailas SC v. Metallurgical Assocs., Inc.***, No. 2018AP1988, unpublished slip op. & order (WI App Dec. 27, 2019).

*The Underlying Case: Milwaukee County Circuit Court case No. 2018CV3389*

Meanwhile, in April 2018, just prior to filing the WIS. STAT. § 806.07 motion in KMK's case against him, Hutchinson commenced the underlying suit against KMK. He sought "[r]elief

[4] The WIS. STAT. § 806.07 motion for relief stated that Hutchinson was seeking relief from a May 9, 2018 amended judgment, not the January 10, 2017 orders granting summary judgment and dismissing the counterclaim. That amended judgment was entered pursuant to our mandate in ***Kohner Mann & Kailas v. Metallurgical Assocs.***, No 2017AP1071, unpublished slip op. and order (WI App May 3, 2018), and it modified the amount of taxable costs and disbursements KMK was entitled to recover. The claim for relief, however, necessarily encompasses the summary judgment court's reasoning from the original January 10, 2017 orders, because that was the decision which determined that KMK should recover costs and disbursements.

[5] The Honorable Ellen R. Brostrom presided over the WIS. STAT. § 806.07 motion and will be referred to as "the postjudgment court."

[6] These other instances were a discovery sanction in Milwaukee County Circuit Court case No. 2015CV6012, a finding of contempt in Waukesha County Circuit Court case No. 2012CV3673, and sanctions for a frivolous motion to reopen filed in Waukesha County Circuit Court case No. 2015CV2187.

from judgement [sic], ordered on May 23, 2017,[7] in Milwaukee County Circuit Court Case No. 2015-CV-6012, for KMK's breach of fiduciary duty" and compensation for the "loss of value of Hutchinson's interest in his corporation, loss of income, and other damages." Among other things, Hutchinson again alleged that KMK "intentionally concealed" the cell phone data from him.

KMK responded with a motion to dismiss, asserting that Hutchinson's case was barred by claim preclusion. Shortly thereafter, KMK also moved for sanctions. Hutchinson objected and filed an amended complaint, which KMK also moved to dismiss. After briefing and a hearing, the circuit court[8] granted KMK's motions. It dismissed Hutchinson's amended complaint as barred by claim preclusion, imposed a monetary sanction of $7,500, and imposed non-monetary sanctions[9] virtually identical to those imposed by the postjudgment court in case No. 2015CV6012. Hutchinson appeals.

[7] The May 23, 2017 judgment was the judgment we modified in appeal No. 2017AP1071, resulting in the May 9, 2018 amended judgment. *See supra* n.4.

[8] The Honorable Carl Ashley presided over these motions, which are the subject of this appeal, and will be referred to as "the circuit court."

[9] The circuit court ordered that Hutchinson:

> may not cause to be filed in any [c]ircuit [c]ourt in the State of Wisconsin any suit, action, proceeding, or motion against Kohner, Mann & Kailas, S.C., its employees, or its shareholders arising from its representation of Robert Hutchinson without first obtaining leave of the court in which he wishes to make such filing. Any such motion for leave of court to file any suit, action, proceeding, or motion shall include a copy of this Order.

## DISCUSSION

### *I. Scheduling Requirements*

One of Hutchinson's arguments is that the circuit court granted KMK's motions prematurely, without first holding a scheduling conference or issuing a scheduling order, addressing "the appropriateness and timing of summary judgment adjudication," and providing a "reasonable opportunity" for conducting depositions, interrogatories, and discovery. He contends that this violated WIS. STAT. §§ 802.06(2)(b), 802.06(3), and 802.08(2), and Milwaukee County Circuit Court Local Rule 3.8(A) and that these violations deprived him of "due process, legality and fair procedure."

We reject these arguments. The record includes a January 20, 2019 letter *from Hutchinson* to the circuit court, informing the court that his limited-appearance attorneys were not available "to attend the Monday, February 4, 2019 *scheduling conference*." (Emphasis added.) Electronic circuit court docket entries[10] reflect that the hearing proceeded, although the circuit court declined to enter a scheduling order at that time because it preferred to first dispose of four pending motions. A transcript of that hearing is not in the record; therefore, we presume it supports the circuit court's decision. *See* ***Austin v. Ford Motor Co.***, 86 Wis. 2d 628, 641, 273 N.W.2d 233 (1979); ***Fiumefreddo v. McLean***, 174 Wis. 2d 10, 26-27, 496 N.W.2d 226 (Ct. App. 1993). In any event, "the circuit court *may* enter a scheduling order" on its own motion or a party motion, but it is not required to do so. *See* WIS. STAT. § 802.10(3) (emphasis added).

[10] We may take judicial notice of such entries. *See* ***Kirk v. Credit Acceptance Corp.***, 2013 WI App 32, ¶5 n.1, 346 Wis. 2d 635, 829 N.W.2d 522.

Hutchinson's reference to depositions, interrogatories, and discovery stems from the circuit court's treatment of KMK's motion to dismiss as a motion for summary judgment and from Hutchinson's belief that "the pleadings must be complete" before the circuit court is allowed to proceed to review a summary judgment motion. *See* ***Alliance Laundry Systems LLC v. Stroh Die Casting Co., Inc.***, 2008 WI App 180, ¶12, 315 Wis. 2d 143, 763 N.W.2d 167.

A defense of claim preclusion may be raised by motion prior to the filing of an answer. *See* WIS. STAT. § 802.06(2)(a)8.;[11] *see also* ***Alliance Laundry***, 315 Wis. 2d 143, ¶13. If, on such a motion, the circuit court considers matters outside of the pleadings, the motion is to be treated as one for summary judgment under WIS. STAT. § 802.08, and the parties shall be given a "reasonable opportunity" to present all material pertinent to such a motion. *See* § 802.06(2)(b). ***Alliance Laundry*** did, in fact, state that, "[t]o proceed through [the summary judgment] process, the pleadings must be complete; otherwise, the court cannot review a motion for summary judgment." *See* ***id.***, 315 Wis. 2d 143, ¶12. However, ***Alliance Laundry*** goes on to state that "[WIS. STAT.] § 802.06(2)(b) *creates an exception* to the general rule that pleadings must be complete before a court can rule on a summary judgment motion." ***Id.***, 315 Wis. 2d 143, ¶18 (emphasis added).

Further, while parties must be given reasonable notice before a motion to dismiss is converted to a motion for summary judgment under WIS. STAT. § 802.06(2), what constitutes reasonable notice will vary from case to case. *See* ***CTI of NE Wis., LLC v. Herrell***, 2003 WI

[11] WISCONSIN STAT. § 802.06(2)(a)8. uses the term "res judicata," an older name for the doctrine of claim preclusion. *See* ***Northern States Power Co. v. Bugher***, 189 Wis. 2d 541, 550, 525 N.W.2d 723 (1995).

App 19, ¶¶6, 10, 259 Wis. 2d 756, 656 N.W.2d 794 (2002). Hutchinson's arguments regarding notice are undeveloped and, thus, we could decline to address them. *See* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988). Nevertheless, we observe that Hutchinson filed at least one brief in response to KMK's motion to dismiss, and that a hearing date on KMK's motion to dismiss Hutchinson's suit was set at the February 2019 scheduling hearing. In addition, when the circuit court offered Hutchinson the opportunity at the motion hearing to make additional argument before the court to supplement his brief, he declined. For these reasons, we are not persuaded that Hutchinson lacked sufficient notice relative to the motion to dismiss or that there were procedural anomalies violating due process.

*II. Claim Preclusion*

Hutchinson next argues that the circuit court erred in concluding that claim preclusion applied. "[C]laim preclusion exists to prevent endless litigation." ***Wisconsin Pub. Serv. Corp. v. Arby Constr., Inc.***, 2012 WI 87, ¶33, 342 Wis. 2d 544, 818 N.W.2d 863. Under the doctrine of claim preclusion, 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. ***Menard, Inc. v. Liteway Lighting Prods.***, 2005 WI 98, ¶26, 282 Wis. 2d 582, 698 N.W.2d 738. "Claim preclusion is designed to draw a line between the meritorious claim on the one hand and the vexatious, repetitious and needless claim on the other hand." ***Id.*** (citations and internal quotation marks omitted).

Claim preclusion has three elements: "(1) An identity between the parties or their privies in the prior and present suits; (2) an identity between the causes of action in the two suits; and, (3) a final judgment on the merits in a court of competent jurisdiction." ***Northern States Power***

***Co. v. Bugher***, 189 Wis. 2d 541, 551, 525 N.W.2d 723 (1995). Hutchinson concedes that there is identity between the parties, but contends that the other two factors are not met. He argues that there is no identity between causes of action because his original counterclaim in Milwaukee County Circuit Court case No. 2015CV6012 was for negligence, not concealment of evidence, breach of fiduciary duty, or fraud, and he asserts that simply raising an issue is insufficient to apply claim preclusion. Hutchinson also contends that there was "no final judgment on the merits" because the summary judgment court dismissed his negligence counterclaim as a derivative action that Hutchinson lacked standing to bring.

Wisconsin follows a transactional analysis approach to claim preclusion. *See* ***Parks v. City of Madison***, 171 Wis. 2d 730, 735, 492 N.W.2d 365 (1992). "Under this analysis, all claims arising out of one transaction or factual situation are treated as being part of a single cause of action, and they are required to be litigated together." ***Id.*** "Application of the rule of [claim preclusion] does not depend on actual litigation of an issue." *See* ***id.*** (citation omitted). The earlier judgment is conclusive as to all matters which were, *or which might have been*, litigated. *See* ***id.*** "Under the transactional analysis, it is irrelevant that 'the legal theories, remedies sought, and evidence used may be different between the first and second actions. The concept of a transaction connotes a common nucleus of operative facts.'" ***Menard***, 282 Wis. 2d 582, ¶32 (citation omitted).

Whether claim preclusion applies is a question of law we review *de novo*. *See* ***Wisconsin Pub. Serv. Corp.***, 342 Wis. 2d 544, ¶30. Here, we agree with the circuit court's well-reasoned analysis.

> Hutchinson argues that his primary complaint here—KMK's concealment of the data on the cell phone—was not the basis of his

> claim in the last case. This argument fails on two levels, first, he did raise the cell phone issue in the earlier case; and, second, transactional causes of action arise out of Mr. Hutchinson's dissatisfaction regarding KMK's legal [re]presentation …. Despite Mr. Hutchinson's argument that these new causes of action constitute something separate from the counterclaims in the Milwaukee case 15-CV-6012, each action arises from a common nucleus of operative facts—KMK's representation of Mr. Hutchinson in the underlying Waukesha case….
>
> … [The summary judgment court] granted KMK's summary judgment on its claim in the Milwaukee case, and [it] dismissed Mr. Hutchinson's counterclaim with prejudice, on the merits, in [its] decision on January 10th, 2017. Hutchinson's argument that no final judgment was made because he raised different causes of action fails because claim preclusion does not require identical causes of action.
>
> [The summary judgment court] dismissed Mr. Hutchinson's counterclaim in the Milwaukee case because Mr. Hutchinson and his wife were barred from testifying … because of discovery violations …. Without Mr. Hutchinson's testimony, the counterclaim could not be proven. When a cause of action cannot be proven, dismissal is merited. The dismissal of the counterclaim was therefore made on the merits[.]

In short, Hutchinson is attempting, for at least the third time, to obtain relief based on what he says is KMK's withholding of cell phone data during the course of its representation of

him in the Tefelske case. This attempt is barred by claim preclusion. *See* ***id.***; ***Menard***, 282 Wis. 2d 582, ¶26; ***Parks***, 171 Wis. 2d at 735.[12]

*III. Sanctions*

Finally, Hutchinson argues that the sanction order restricting his "access to law is unprecedented in Wisconsin Jurisprudence." He also argues that the "imposition of [monetary] sanctions is duplicative of the court's order … requiring Hutchinson to seek court approval before filing any action against KMK[.]"

Whether to impose sanctions, and what sanctions to impose, are matters for the circuit court's discretion, *see* ***Bettendorf v. Microsoft Corp.***, 2010 WI App 13, ¶15, 323 Wis. 2d 137, 779 N.W.2d 34, and, contrary to Hutchinson's assertion, a circuit court's authority to impose filing restrictions as a type of sanction is well-established in Wisconsin jurisprudence. The purpose of frivolous claims statutes is to deter litigants from commencing or continuing frivolous actions and to punish those who do. *See* ***Minniecheske v. Griesbach***, 161 Wis. 2d 743, 748, 468

[12] In his amended complaint, Hutchinson alleged that "KMK's concealment of the cell phone evidence from Hutchinson, denial of possession of that evidence, and continued [billing of] Hutchinson for over one (1) year while KMK concealed that evidence from Hutchinson, constitutes fraud in the inducement upon Hutchinson as set forth herein." On appeal, Hutchinson contends that the circuit court "failed to address or resolve Hutchinson's fraud in the inducement cause of action." Hutchinson is incorrect.

KMK's motion to dismiss asserted that "Hutchinson's Amended Complaint is barred by the claim preclusion doctrine…. Hutchinson seems to argue that the elements of claim preclusion are not satisfied in this case because … he did not assert a cause of action titled 'breach of fiduciary duty' or 'fraud in the inducement' in the amended counterclaim[.]" The circuit court expressly stated in its order that "the elements of claim preclusion are satisfied *in this case*" (emphasis added) and granted KMK's motion to dismiss accordingly. That ruling encompassed the fraud in the inducement claim; as noted above, "[u]nder the transactional analysis, it is irrelevant that 'the legal theories, remedies sought, and evidence used may be different between the first and second actions.'" ***Menard, Inc. v. Liteway Lighting Prods.***, 2005 WI 98, ¶32, 282 Wis. 2d 582, 698 N.W.2d 738 (citation omitted).

N.W.2d 760 (Ct. App. 1991). "Without an order prohibiting future filings related to the same issues, these statutes would be virtually useless against a *pro se* party who cannot pay." ***Id.*** "A court faced with a litigant engaged in a pattern of frivolous litigation has the authority to implement a remedy that may include restrictions on that litigant's access to the court." ***Id.*** (quoting ***Lysiak v. Commissioner***, 816 F.2d 311, 312-13 (7th Cir. 1987)).

Here, the circuit court explained that a "frivolous action is filed when a plaintiff does not make a reasonable inquiry into the law prior to filing its action." It determined that Hutchinson "did not understand claim preclusion or its potential dismissal of this claim. He failed to address or alleviate any potential concerns regarding claim preclusion in his initial or amended complaint. His failure to make a reasonable inquiry into the law supports the finding" of frivolousness. The circuit court further noted that "it is also clear by the records" that Hutchinson had been "sanctioned by the courts on multiple occasions" and as such, sanctions would also be appropriate here. It ordered Hutchinson to pay $7,500 and ordered that he cannot file any further litigation against KMK without leave of the court.

The filing restrictions imposed upon Hutchinson do not preclude or even unduly hinder him in submitting any new, nonfrivolous complaints or nonfrivolous filings. The restrictions simply require that his future actions be consistent with the claim preclusion doctrine and that his filings be nonfrivolous. *See* ***In re Davis***, 878 F.2d 211, 213 (7th Cir. 1989). An order allowing for "threshold review of a litigant's documents to ensure that those documents are neither duplicative nor frivolous … is a sensible and constitutional means of dealing with a litigant intent upon pressing frivolous litigation." ***Id.*** at 212-13 (7th Cir. 1989); *see also* ***State v. Casteel***, 2001 WI App 188, ¶26, 247 Wis. 2d 451, 634 N.W.2d 338. There is "no flaw in such an approach." *See* ***Davis***, 878 F.2d at 213.

Hutchinson's argument that the imposition of a monetary sanction is duplicative is undeveloped. In any event, we are not persuaded that the circuit court erroneously exercised its discretion by imposing two kinds of sanctions.[13]

*IV. Sanctions on Appeal*

Finally, KMK seeks sanctions against Hutchinson for a frivolous appeal.[14] KMK asserts that Hutchinson is "pursu[ing] this frivolous appeal … for the sole purpose of harassing and maligning KMK when he knows or should know that his appeal is without a reasonable basis in law and equity." *See* WIS. STAT. RULE 809.25(3)(c)2.

Hutchinson has not filed a response to this motion for sanctions, nor has he addressed this motion in his reply brief. We conclude that Hutchinson's appeal is frivolous because we agree that he knew, or should have known, that the appeal 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. *See* ***id.*** There was no reasonable basis for Hutchinson to appeal dismissal of his case, particularly after the circuit court explained claim preclusion's application in this matter and why this suit was frivolous. Because we conclude that Hutchinson's entire

[13] Hutchinson also asserts that the trial court acted with bias and discrimination against him because of his *pro se* status. There is a rebuttable presumption that a judge acted fairly and impartially in discharging his or her duties. ***State v. Gudgeon***, 2006 WI App 143, ¶20, 295 Wis. 2d 189, 720 N.W.2d 114. Hutchinson cites no particular evidence of animus. Instead, he merely cites adverse decisions he disagrees with, and "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion." ***Liteky v. United States***, 510 U.S. 540, 555 (1994).

[14] On November 8, 2019, KMK filed a motion for sanctions, pursuant to WIS. STAT. RULE 809.25, in which it asked us to strike Hutchinson's appellant's brief, dismiss the appeal, and prohibit future filings "in any Wisconsin Court" involving KMK. In an order dated November 21, 2019, we denied the requests to strike the brief and dismiss the appeal, and ordered that "the motion for sanctions shall be decided by that panel that resolves the merits of the appeal."

appeal is frivolous, we grant KMK's motion for costs and reasonable attorney fees incurred in this appeal, and we remand this case to the trial court to determine the proper amount thereof.

KMK also asks us to impose filing restrictions on Hutchinson in this court; however, we decline to do so at this time. It appears that this is Hutchinson's last open appeal, and we anticipate that the filing restrictions imposed by the postjudgment court and the circuit court will suffice to curtail further frivolous appellate filings. However, we now caution Hutchinson that continued frivolous litigation in this court will likely subject him to filing restrictions similar to those imposed in ***Casteel***. *See* ***id.***, 247 Wis. 2d 451, ¶¶25-27.[15]

Upon the foregoing, therefore,

IT IS ORDERED that the order is summarily affirmed. *See* WIS. STAT. RULE 809.21(1).

IT IS FURTHER ORDERED that respondent's WIS. STAT. RULE 809.25(3) motion for costs and reasonable attorney fees incurred in this appeal is granted, and we remand this matter to the circuit court to determine the proper amount thereof.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

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*Sheila T. Reiff*
*Clerk of Court of Appeals*

[15] If we conclude a litigant is "abusing the appellate process by repetitively litigating the same matters," a sanction order might direct that no further filings will be accepted from the litigant unless accompanied by an affidavit containing: (1) A copy of the circuit court's written decision and order sought to be appealed; (2) a statement setting forth the specific grounds upon which this court can grant relief; (3) a statement showing how the issues sought to be raised differ from issues raised and previously adjudicated, and (4) statement of why any new claims so raised are acceptable under applicable preclusion doctrines. *See* ***State v. Casteel***, 2001 WI App 188, ¶25, 247 Wis. 2d 451, 634 N.W.2d 338.