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WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT IV

March 25, 2021

To:

Hon. Daniel T. Dillon
Circuit Court Judge
Rock County Courthouse
51 S. Main St.
Janesville, WI 53545

Jacki Gackstatter
Clerk of Circuit Court
Rock County Courthouse
51 S. Main St.
Janesville, WI 53545

Kyle W. Engelke
Stafford Rosenbaum LLP
P.O. Box 1784
Madison, WI 53701

Ronald McCray
2405 Sunshine Lane
Beloit, WI 53511

You are hereby notified that the Court has entered the following opinion and order:

2019AP1993 Ronald McCray v. Lori S. Curtis Luther (L.C. # 2019CV386)

Before Fitzpatrick, P.J., Blanchard, and Graham, 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).

Ronald McCray, pro se, appeals a circuit court order that dismissed his claims against City of Beloit officials and employees. The circuit court concluded that the claims were barred by issue preclusion and claim preclusion. Based upon our review of the briefs and the record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(1) (2019-20).[1] We affirm. Additionally, we grant the respondents' motion for

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

sanctions for a frivolous appeal, and we remand to the circuit court to determine the sanctions amount.

Relevant background is set forth in this court's summary opinion disposing of McCray's previous appeal, ***McCray v. City of Beloit***, No. 2018AP1648, unpublished op. and order (WI App July 26, 2019, amended Aug. 30, 2019). In August 2017, McCray filed a complaint (the "first action") against the City of Beloit. ***Id.*** at 2. The case stemmed from a call about McCray that the Beloit Police Department received on February 23, 2017. ***Id.*** McCray argued that the police investigation was false and misdirected. ***Id.*** The circuit court dismissed the first action without prejudice, determining that McCray failed to comply with WIS. STAT. § 893.80, a notice of claim statute. ***Id.*** at 3.

McCray did not appeal that dismissal order but instead filed a new complaint (the "second action") against the City of Beloit and police officers. ***Id.*** The circuit court dismissed the second action with prejudice. ***Id.*** McCray appealed and, in July 2019, this court issued its summary opinion affirming the circuit court. ***Id.*** at 1, 4.

The appeal now before us arises out of a third action that McCray filed. In this action, McCray filed claims against various City of Beloit officials and employees. As noted above, the circuit court dismissed McCray's claims based on issue preclusion and claim preclusion.

McCray argues that the circuit court erred in dismissing his current action because his complaint includes federal claims that cannot be barred by a state law notice of claim statute. This argument fails to address the basis for the circuit court's decision. The court did not

conclude that the notice of claim statute barred federal claims. Rather, as we have said, the court dismissed McCray's claims as barred by issue preclusion and claim preclusion.[2] The circuit court determined that one of the grounds for the dismissal of McCray's second action was that McCray could not prevail on the merits of the lawsuit, even if some claims were not barred by the notice of claim statute. Additionally, the court determined that the circumstances that gave rise to McCray's previous claims and current claims "are identical." Finally, the court also determined that, if McCray believed that he had previously sued the wrong defendants, he should have sought to amend the complaint in his second action, rather than filing a third complaint. Summarizing its reasoning, the court determined that "the allegations in this third complaint are inextricably tied by claim and issue preclusion to the prior decisions made by this Court … and the Court of Appeals decision."

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[2] Issue preclusion "is designed to limit the relitigation of issues that have been actually litigated in a previous action." ***Lindas v. Cady***, 183 Wis. 2d 547, 558, 515 N.W.2d 458 (1994). To determine whether issue preclusion applies, the court conducts a "fundamental fairness" analysis, considering a variety of factors. ***Id.*** at 559. The factors include: (1) whether the party against whom preclusion is sought could, as a matter of law, have obtained judicial review of the judgment; (2) whether the question is one of law that involves two distinct claims or intervening contextual shifts in the law; (3) whether significant differences in the quality or extensiveness of proceedings between the two courts warrant relitigation of the issue; (4) whether the burdens of persuasion have shifted such that the party seeking preclusion had a lower burden of persuasion in the first trial than in the second; or (5) whether matters of public policy and individual circumstances are involved that would render the application of collateral estoppel to be fundamentally unfair, including inadequate opportunity or incentive to obtain a full and fair adjudication in the initial action. ***Id.*** at 561 (citing the RESTATEMENT (SECOND) OF JUDGMENTS § 28 (1982)).

Claim preclusion has three elements: "(1) an identity between the parties or their privies in the prior and present lawsuits; (2) an identity of the causes of action in the two lawsuits; and (3) a final judgment on the merits in a court of competent jurisdiction." ***Teske v. Wilson Mut. Ins. Co.***, 2019 WI 62, ¶25, 387 Wis. 2d 213, 928 N.W.2d 555. As to the identity of parties, courts have concluded that this element may be satisfied when a claimant sued a government agency or employer and then later sued its officials or employees. *See* ***Northern States Power Co. v. Bugher***, 189 Wis. 2d 541, 551-53, 525 N.W.2d 723 (1995); ***Landess v. Schmidt***, 115 Wis. 2d 186, 196-97, 340 N.W.2d 213 (Ct. App. 1983). As to the identity of causes of action, the claims need not be the same. Rather, "'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.'" ***Teske***, 387 Wis. 2d 213, ¶31 (citation omitted).

With one exception, McCray makes no coherent argument that squarely addresses issue preclusion or claim preclusion. The exception is McCray's argument that the circuit court's decision improperly relied on our unpublished summary opinion disposing of McCray's previous appeal. This argument is meritless. The applicable rule expressly allows citation of this court's unpublished summary opinions "to support a claim of claim preclusion, issue preclusion, or the law of the case." *See* WIS. STAT. RULE 809.23(3)(a).

We turn to the respondents' motion for sanctions for a frivolous appeal. An appeal is frivolous if either of the following two standards is satisfied:

> 1. The appeal … was filed, used or continued in bad faith, solely for purposes of harassing or maliciously injuring another[] [or]
>
> 2. The party or the party's attorney 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.

WIS. STAT. RULE 809.25(3)(c).

The respondents rely primarily on the second standard. They argue that McCray knew or should have known that this appeal 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. We agree. More specifically, we conclude that McCray's appeal is frivolous because McCray has failed to make any coherent, non-frivolous argument that addresses issue preclusion or claim preclusion, the basis for the circuit court's decision. Accordingly, we grant the respondents' motion for sanctions. We remand to the circuit court to determine the appropriate amount of "costs, fees, and reasonable attorney fees." *See* WIS. STAT. RULE 809.25(3)(a).

Therefore,

IT IS ORDERED that the circuit court's order is summarily affirmed pursuant to WIS. STAT. RULE 809.21(1).

IT IS FURTHER ORDERED that the motion for sanctions is granted, and that the cause is remanded for the circuit court to determine costs, fees, and reasonable attorney fees.

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

Sheila T. Reiff
Clerk of Court of Appeals