

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 19, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2006AP126

Cir. Ct. No. 2000CV94

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

EMILY S. BEAVER AND BARBARA BEAVER,

PLAINTIFFS,

ALBERT H. BEAVER,

PLAINTIFF-APPELLANT,

v.

**CYNTHIA ZELLNER-EHLERS, GRANT P. THOMAS, PAUL MICKELSON
AND CONNIE SCHUSTER,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Door County:
THOMAS S. WILLIAMS, Judge. *Affirmed and cause remanded with directions.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Albert Beaver appeals a judgment dismissing and finding frivolous his action against the Door County Developmental Disabilities Coordinator, the corporation counsel and two sheriff's deputies. The trial court, Reserve Judge Thomas S. Williams, concluded that the complaint failed to state a claim for which relief could be granted and the defendants were entitled to immunity for their roles in detaining and hospitalizing Beaver's developmentally disabled adult daughter, Emily. The court also concluded that Beaver, his wife Barbara, and their attorney Lynne Layber knew or should have known that the action was without any reasonable basis in law or equity and could not be supported by good faith argument for extension, modification or reversal of existing law.

¶2 Beaver argues: (1) the trial court erred when it would not allow him to represent Emily in this matter; (2) the court should have given precedential or preclusive effect to the stipulated judgment in Door County case No. 2000CV57, in which Emily, by her father and guardian, Beaver, sued Judge John Koehn, the judge who presided over Emily's commitment proceedings; (3) the court erred when it concluded that the final order terminating the proceedings against Emily in case No. 99ME26 did not make either party a winner or a loser because it was based on a stipulation after an unchallenged finding of probable cause; (4) the trial court erred when it determined that the defendants were entitled to qualified immunity and a presumption of good faith, rejecting Beaver's argument that those defenses were waived because they were not raised in Emily's lawsuit against Judge Koehn; (5) the trial judge erred by failing to disqualify himself on the ground of partiality; (6) regarding the frivolousness finding, the court should have

applied WIS. STAT. § 802.05,¹ as amended January 15, 2005, and should have detailed a specific duty requiring Beaver to conform to a certain standard of conduct before finding the action frivolous; and (7) the court improperly exercised its discretion when it entered a default judgment against Beaver on the question of frivolousness based on Beaver's violation of discovery orders. We reject these arguments and affirm the judgment, and remand the matter to amend the judgment by adding the reasonable attorney fees the respondents incurred in this appeal.

BACKGROUND

¶3 Emily was taken into custody by deputies Paul Mickelson and Connie Schuster after Emily's stepmother, Barbara, complained that Emily attacked her and bit her while she was driving her car and that Emily endangered herself and others by walking in traffic. They transported Emily to a hospital located in Brown County and the Door County Corporation Counsel, Grant Thomas, commenced WIS. STAT. ch. 51 proceedings against Emily. The next day, Beaver requested that the Door County Department of Community Programs research residential options for Emily because she could not come home due to conflicts with Barbara. On August 17, 1999, a Brown County judge dismissed the Door County commitment action, reciting that Emily had been discharged from the hospital. On August 18, 1999, the Door County court, Judge Koehn presiding, found probable cause for a WIS. STAT. ch. 55 protective placement and placed Emily at Cottonwood Center, an inpatient intermediate care facility. On August 20, 1999, Judge Dennis Luebke, acting as a Door County

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

judge, determined that the initial order dismissing the petition was invalid because the Brown County judge was not assigned to the case and the order was based on the false premise that Emily had been discharged. By stipulation of all of the parties on January 17, 2000, the protective placement petition was dismissed by Judge Koehn.

¶4 Emily, by Beaver, then sued Judge Koehn in case No. 2000CV57, alleging that the initial protective placement order was invalid because the stipulation was not signed by Emily's guardian, Beaver, and Judge Koehn violated WIS. STAT. §§ 940.285 (abuse of vulnerable adults) and 940.30 (false imprisonment). The complaint sought a declaration of Judge Koehn's misconduct, injunctive relief and referral to the Judicial Commission. Judge Koehn stipulated that he would not preside over any cases involving Emily or Albert Beaver in return for dismissal of the action. By order dated April 28, 2000, based on the stipulation, the court enjoined Judge Koehn from presiding over any judicial proceedings involving Emily or Albert Beaver and the action was dismissed on the merits with prejudice.

¶5 Beaver then commenced this action in Emily's name against Cynthia Zellner-Ehlers, the developmental disabilities coordinator, and Thomas, for their roles in Emily's detention and commitment. The complaint alleged maltreatment, false imprisonment, malicious prosecution, abuse of process and malice, and sought five million dollars compensatory damages and ten million dollars punitive damages. The trial court determined that Beaver, a suspended attorney, could not represent Emily in this matter. Beaver then retained attorney Lynn Layber to represent Emily. Layber filed amended complaints adding Albert and Barbara Beaver as plaintiffs and deputies Mickelson and Schuster as defendants. In addition to the grounds listed in the initial complaint, the Beavers

alleged negligent and intentional infliction of emotional distress and violation of Emily's civil rights.

¶6 The trial court determined that the defendants were entitled to public employee immunity for discretionary acts under WIS. STAT. § 893.80(4), quasi-judicial immunity for acting on facially valid court orders, *see Henry v. Farmers City State Bank*, 808 F.2d 1228, 1238-39 (7th Cir. 1986), and statutory immunity under WIS. STAT. § 51.15(11) based on their presumed good faith efforts to act in Emily's best interest. The court also went through each of the allegations as to each of the defendants and concluded there was no factual or legal basis to support the claims. Beaver failed in his attempt to establish wrongdoing based on the orders dismissing the petition against Emily and the stipulated resolution of her action against Judge Koehn.

¶7 The court also found that the action was frivolous under WIS. STAT. § 814.025 (2003-04), because the Beavers and Layber knew or should have known it was meritless. The court scheduled further discovery to determine the relative roles of Beaver and Layber and allocate responsibility between them. After Beaver's repeated failure to comply with discovery orders, the court entered a default judgment against him, finding egregious misconduct. Beaver requested reconsideration, producing a letter from a doctor stating "some individuals do suffer a temporary decrease in short-term memory" following medical procedures Beaver had undergone and suggesting that missing filing dates is consistent with memory deficits after surgery. The court rejected that excuse and ultimately granted judgment against Beaver for \$142,586.40 and against Layber for \$11,572.27.

ANALYSIS

¶8 Beaver's notice of appeal purports to appeal on behalf of himself and Layber. By this court's order of June 21, 2006, the appeal as to Layber was dismissed because Beaver cannot represent anyone other than himself. The notice of appeal does not purport to appeal on behalf of Emily or Barbara. Several of Beaver's arguments on appeal appear to attempt to vindicate Emily's rights, and Beaver's personal stake in the issue is not self-evident. To the extent the issues raised on appeal seek vindication of any person's rights other than Beaver's, they will not be considered.

BEAVER'S RIGHT TO REPRESENT EMILY

¶9 The trial court properly compelled Beaver to retain counsel for Emily. As a suspended attorney, Beaver is precluded from commencing a civil action on behalf of anyone other than himself. *See Jadair, Inc. v. United States Fire Ins. Co.*, 209 Wis. 2d 187, 202-03, 562 N.W.2d 401 (1997). Beaver argues that his right to speak for Emily was necessarily determined by his action against Judge Koehn. Beaver's authority to file pleadings on Emily's behalf was not litigated in the earlier case. In any event, Koehn's failure to object to Beaver's representation of Emily does not bar enforcement of the law in this action.

¶10 Beaver also argues that *Gonzales v. Reno*, 86 F. Supp. 2d 1167 (S.D. Fla. 2000), authorizes him to commence an action for an incompetent person. *Gonzales* determined that the child's uncle had standing to apply for asylum on the child's behalf, was a real party in interest and had capacity to sue. *Id.* at 1180-83. The court did not allow the uncle to perform the functions of an attorney. In fact, the plaintiffs were represented by numerous attorneys. *Id.* at 1170. Authorization to commence an action does not mean authority to perform the

functions of an attorney. A guardian is authorized to retain counsel to represent his ward.

¶11 Beaver also argues that the anti-retaliation provisions of the Americans with Disabilities Act authorizes him to practice law on Emily's behalf. *See* 42 U.S.C. § 12203 (1990). The Act prohibits discrimination, interference, coercion or intimidation against an individual who assists or encourages another individual to exercise his or her rights protected by the Act. Enforcement of state laws prohibiting a suspended attorney from practicing law cannot be construed as retaliation, interference, coercion or intimidation.

¶12 Finally, Emily's claims were decided on the merits. Beaver does not identify any issue on which Emily would have prevailed if Beaver had been allowed to represent her.²

THE PRECEDENTIAL OR PRECLUSIVE EFFECT OF PRIOR LITIGATION

¶13 Beaver next argues that the principles of *stare decisis* should have prevented the trial court from determining that his complaint failed to state a claim for which relief could be granted. He contends that the stipulated order entered in

² In a motion for summary disposition and supporting briefs, Beaver also notes that he has been allowed to file a petition for a writ of habeas corpus in the federal court on Emily's behalf. A nonlawyer has authority under 28 U.S. Code, WIS. STAT. § 2242 (2000) to bring a habeas petition. The federal court dismissed all other aspects of Beaver's petition. Nothing in that order authorized Beaver to bring a civil action as if he were an attorney.

Beaver also cites *Winkleman v. Parma City School District*, ___ U.S. ___ (slip op. May 21, 2007), for the proposition that a parent can bring an action on behalf of a developmentally disabled child without retaining an attorney. *Winkleman* is based on the specific language of 20 USC § 1400 *et seq.*, the Disabilities Education Act, that creates rights and duties for parents. Beaver cites no comparable provision of the Americans With Disabilities Act that would give him authority to act as an attorney on his daughter's behalf. Beaver's motion for summary disposition is denied.

Door County case No.2000CV57, Emily’s action against Judge Koehn, should have been given precedential or preclusive effect regarding Emily’s capacity to stipulate to her protective placement and Judge Koehn’s lack of authority to commit her. Beaver cites pleadings and memoranda, but no findings of fact or conclusions of law. The principles of *stare decisis* do not apply. Those principles relate to an appellate court’s fidelity to precedent.

¶14 To the extent Beaver intended to invoke issue or claim preclusion, the stipulated judgment terminating Emily’s action against Judge Koehn has no preclusive effect. Issue preclusion only applies to issues actually litigated. *See Lindas v. Cady*, 183 Wis. 2d 547, 558, 575 N.W.2d 458 (1994). Claim preclusion only applies when there is identity between the parties or their privies, the litigation resulted in a final judgment on the merits and there is identity of the causes of action in the two lawsuits. *See Kruckenberg v. Harvey*, 2005 WI 43, ¶21, 279 Wis. 2d 520, 594 N.W.2d 879. The stipulated agreement that Judge Koehn would not hear future cases involving Emily or Albert Beaver and dismissal of the remaining claims on the merits with prejudice is wholly consistent with the trial court’s ruling in this case that Beaver failed to state a claim.

¶15 Likewise, Judge Koehn’s ultimate dismissal of the protective placement action does not provide evidence to support Beaver’s malicious prosecution or abuse of process claims. After Judge Koehn found probable cause to place Emily in a treatment facility, Beaver took her from the facility for a “home visit” approximately ten days later and did not return her to the facility. The corporation counsel decided not to contest the *de facto* transfer of Emily to Beaver’s home. Pursuant to a stipulation signed by Emily’s guardian ad litem, Beaver’s counsel and the corporation counsel, the court dismissed the protective placement action against Emily. Nothing in this decision establishes abuse of

process or malicious prosecution, or rebuts the presumption of good faith or compromise the defendants' claims of immunity.³ The trial court also correctly concluded that Judge Koehn's failure to raise immunity and the presumption of good faith did not waive those defenses as to the defendants in this action because these issues were not actually litigated and there is no identity of the parties or claims.

RECUSAL OF JUDGE WILLIAMS

¶16 Beaver has provided no support for his argument that Judge Williams should have recused himself in the present case. Rejecting Beaver's claims and appropriately finding them frivolous does not constitute evidence of judicial bias. Judge Williams' signing of the stipulated order terminating Emily's action against Judge Koehn provides no basis for recusal in this case.

THE FINDING OF FRIVOLOUSNESS

¶17 Beaver next argues that the trial court erred by applying the definition of frivolousness contained in WIS. STAT. § 814.025 (2003-04), to this case and by failing to detail the specific duty or standard that Beaver failed to conform to. The court correctly applied § 814.025. The effective date of the new law on frivolousness, WIS. STAT. § 802.05, was July 1, 2005, long after this action was filed. S. CT. ORDER 03-06, 2005 WI 38, 278 Wis. 2d xiii (eff. July 1, 2005).

³ Aspects of Beaver's argument appear to suggest that the Brown County judge's initial order dismissing the petition constitutes grounds for malicious prosecution or abuse of process claims. Because that order was found to be entered by mistake by a judge who lacked authority to act in this matter, the trial court correctly concluded that the August 17, 1999 order could not serve as the basis for Beaver's current complaint.

Moreover, Beaver's second argument equates a finding of frivolousness with legal malpractice.

¶18 Regardless of which law applies, Beaver failed to withdraw his frivolous pleadings after he received notice that the defendants claimed the action was frivolous. On May 15, 2002, three months before the trial court's decision on the defendant's motion to dismiss and thirteen months before the trial court's decision on frivolousness, Beaver executed a hold harmless agreement with Layber, in which he agreed to hold Layber harmless for any costs and attorney fees assessed due to a finding of frivolousness in this action. The record supports the trial court's finding that Beaver knew or should have known that this action was frivolous.

¶19 Beaver argues that a letter from his cardiac surgeon established good cause for his repeated failure to comply with discovery requirements and the court improperly exercised its discretion by entering a default judgment based on discovery abuse. Beaver had surgery on October 30, 2003. The surgeon's letter dated May 11, 2004, states:

Even after successful surgery of this kind, we find that some individuals do suffer a temporary decrease in short term memory, which can take as much as 12 months to resolve. It has come to our attention that Mr. Beaver had missed a filing date regarding a case you are chairing. This type of lapse on his part is consistent with memory deficits after surgery. At present, there [sic] has had some improvement in this regard. Please allow him an extension of time to comply with your orders.

¶20 The record supports the trial court's decision to impose sanctions against Beaver for his egregious misconduct despite the doctor's letter. The letter indicated that Beaver might have suffered short term memory loss and that it could last up to twelve months and could explain the missed filing dates. The pattern of

Beaver's extensive and egregious misconduct, the tentative nature of the doctor's comments and Beaver's failure to timely bring his medical condition to the court's attention support the decision. The nature of the discovery requests did not require Beaver to rely on his memory. To constitute a reasonable excuse for his noncompliance, Beaver would have to establish constant memory lapses over a period of months. The doctor's letter speculating about short term, intermittent memory lapse is not sufficient to justify Beaver's repeated violations of discovery orders over several months.

¶21 Finally, the respondents filed a motion in this court to find the appeal frivolous. Beaver has not filed a response to that motion. When a claim was correctly adjudged to be frivolous in the trial court, it is frivolous per se on appeal. *See Riley v. Isaacson*, 156 Wis. 2d 249, 262, 456 N.W.2d 619 (Ct. App. 1990). To be made whole, the respondents are entitled to the reasonable attorney fees they incurred in this appeal. Therefore, we affirm the judgment and remand the matter with directions to amend the judgment to include the respondent's reasonable attorney fees.

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

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

