COURT OF APPEALS
DECISION
DATED AND FILED

May 29, 2019

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2018AP442 **Cir. Ct. No. 2016CV3961**

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

IN RE THE AWARD OF SANCTIONS:

JACKSON FAIRBANKS VEIT,

PLAINTIFF-APPELLANT,

V.

ANGELA FRATER,

DEFENDANT-RESPONDENT.

APPEAL from orders of the circuit court for Milwaukee County: GLENN H. YAMAHIRO, Judge. *Affirmed*.

Before Kessler, P.J., Brennan and Kloppenburg, JJ.

¶1 BRENNAN, J. Attorney Leah Poulous Mueller appeals an order of the trial court imposing on her a monetary sanction of $5,923.50 for

"maintain[ing] frivolous proceedings for the improper purpose of harassing the defendants[.]"[1] She also appeals the trial court's order denying her reconsideration motion. Attorney Mueller served as plaintiff's counsel in this case, which sought damages on the grounds that plaintiff had been wrongfully deprived of his investment in InfoCorp, LLC ("InfoCorp") when it became insolvent and its assets were sold to a new company. This case was commenced in 2016, four years after the plaintiff's prior lawsuit in Washington County Circuit Court concerning the same asset sale was dismissed and was not appealed. Attorney Mueller was also plaintiff's counsel in the Washington County case. This case was dismissed on the grounds that it was barred by claim preclusion.[2] The trial court imposed sanctions on Attorney Mueller because it concluded that "[g]iven the law on claim preclusion, plaintiff's counsel [Mueller] should have known that [plaintiff's] claims in this case were without merit." Attorney Mueller asks this court to vacate the orders.

¶2 "We review the trial court's decision to impose sanctions and the appropriateness of the sanctions ordered under an erroneous exercise of discretion standard." ***Lee v. GEICO Indem. Co.***, 2009 WI App 168, ¶16, 321 Wis. 2d 698, 776 N.W.2d 622. "Accordingly, we will affirm the trial court's decision if it examined the relevant facts, applied a proper standard of law, and reached a reasonable conclusion." ***Id.*** (citation omitted). "The issue is not whether we, as

[1] The sanctions are authorized under WIS. STAT. §§ 802.05(2)(a) and 895.044 (2017-18). All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

[2] "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." ***Federal Nat'l Mortg. Ass'n v. Thompson***, 2018 WI 57, ¶30, 381 Wis. 2d 609, 912 N.W.2d 364 (quotation marks omitted).

an original matter, would have imposed the same sanction as the circuit court; it is whether the circuit court exceeded its discretion in imposing the sanction it did." ***Id.*** (citation omitted).

¶3 Attorney Mueller asserts that the sanctions were improperly imposed for the following reasons. First, she argues that the defendant's motion was defective because (1) it impermissibly sought both monetary and nonmonetary sanctions and thus should have been brought as separate motions; (2) it did not identify the specific conduct alleged to be frivolous; (3) it did not provide her the required twenty-one-day safe harbor notice; and (4) it was untimely.

¶4 Attorney Mueller also argues that the trial court erred in imposing the sanctions because (1) the elements for a claim of malicious prosecution were not present; (2) the underlying case did have a basis in law, and the trial court's conclusion to the contrary was "a manifest error"; and (3) she was wrongly sanctioned on the basis of her client's amended *pro se* complaint even though she had requested leave to amend the complaint again in order to cure the problems with it.

¶5 The record does not support Attorney Mueller's assertions of fact, and her legal arguments are contrary to well-settled law. We conclude that the trial court examined the relevant facts, applied a proper standard of law, and reached a reasonable conclusion when it ordered the sanctions against Attorney Mueller, and we therefore affirm.

BACKGROUND

¶6 This appeal relates solely to the imposition of sanctions on Attorney Mueller in Milwaukee County Circuit Court case No. 16CV3961. The

sanctions award is based, in part, on the court's conclusion that the claims in this case could have been brought in the 2012 Washington County case. In its ruling here, the trial court referenced several other InfoCorp-related cases in which Jackson Fairbanks Veit was plaintiff and Attorney Mueller was plaintiff's counsel. Veit has brought six such cases in total, four of which are germane to our analysis here.[3] Therefore, for ease of reference, we supply this list showing this case and the other relevant actions, Attorney Mueller's involvement, and each case's disposition.

Case	Date filed and disposition at circuit court	Disposition on appeal
1. ***Veit v. Anderson***, (***InfoCorp I***), No. 12CV296, unpublished order (Washington County Cir. Ct. Oct. 21, 2013).	Filed Mar. 15, 2012. Dismissed on the merits on Oct. 21, 2013. Atty. Mueller represented Veit.	Not appealed.
2. ***InfoCorp, LLC v. Anderson***, No. 16CV3960, unpublished order (Milwaukee County Cir. Ct. Apr. 22, 2019).	Filed May 24, 2016. Final judgment granting summary judgment and dismissing case entered Apr. 22, 2019. Atty. Mueller represented Veit.	Not appealed.
3. This case: ***Veit v. Anderson***, No. 16CV3961, unpublished order (Milwaukee County Cir. Ct. July 17, 2017) (dismissing case) and ***Veit v. Anderson***, No. 16CV3961, unpublished order (Milwaukee County Cir. Ct. July 17, 2017) (imposing sanctions on counsel).	Filed May 24, 2016. Dismissed on July 17, 2017. Atty. Mueller represented Veit.	***Veit v. Anderson***, No. 2017AP2494, unpublished slip op. (WI App Mar. 12, 2019) (dismissing appeal on its own motion as a sanction for Atty. Mueller's failure to follow appellate rules for briefs despite five extensions)
	The trial court also ordered monetary sanctions against Atty. Mueller on Nov. 30, 2017, and denied Atty. Mueller's motion for reconsideration of the sanctions on Feb. 8, 2018.	***In re The Award of Sanctions: Veit v. Frater,*** **No. 2018AP442, (this appeal) was taken from the order for monetary sanctions.**

[3] Veit is shown as a client and Attorney Mueller is shown as counsel of record in the electronic dockets for ***InfoCorp, LLC v. Speranza Inc.***, No. 13CV4872 (Milwaukee County Cir. Ct. Nov. 29, 2013), and ***InfoCorp, LLC v. Cheryl Anderson***, No. 17CV7116 (Milwaukee County Cir. Ct. Dec. 20, 2017), both of which were dismissed and not appealed.

4. ***Veit v. Frater***, No. 16C621, 2017WL5891325 (E.D. Wis. Jan. 30, 2017).	Filed May 25, 2016. Magistrate judge dismissed all state claims as barred by claim preclusion. On remand after Veit's first *pro se* appeal, the magistrate judge dismissed remaining federal claim as barred by statute of limitations and imposed $15,000 in sanctions against Veit, $5,000 of which were imposed jointly and severally with Atty. Mueller, who represented Veit during the district court proceedings. *See* ***Veit v. Frater, et al.***, No. 18-2623, 2019WL1568077, at *2 (7th Cir. Apr. 11, 2019).	On Veit's first *pro se* appeal, the 7th Circuit Court of Appeals affirmed dismissal of his state claims and remanded for disposition of a single federal claim. *See* ***Veit v. Frater, et al.***, 715 Fed. App'x 524 (7th Cir. 2017). On Veit's second *pro se* appeal, the 7th Circuit affirmed the magistrate judge's sanctions and the dismissal, and imposed sanctions on Veit for his frivolous *pro se* appeal. *See* ***Veit v. Frater, et al.***, No. 18-2623, 2019WL1568077, at *2 (7th Cir. Apr. 11, 2019).

The 2010 asset sale.

¶7 Veit owned thirteen percent of InfoCorp, a company whose predecessor entity he had co-founded in the 1990s. Other members of InfoCorp were Cheryl I. Anderson, Allen H. Frater, Angela Frater, and the Hazel & Gordon 1975 Trust. InfoCorp's members approved its dissolution and the sale of its assets in May 2010. According to the Asset Purchase Agreement, InfoCorp had "exhausted its working capital, owe[d] approximately $708,000 to Park Bank, owe[d] $513,834 to its principal members, Allen Frater and Cheryl Anderson, and ha[d] outstanding trade payables of approximately $426,325." It was "insolvent and … no longer able to function as a going concern." Park Bank, which held a security interest in "substantially all of [InfoCorp's] assets" had demanded payment in full. Under the Asset Purchase Agreement, the buyer purchased "substantially all of [InfoCorp's] assets in exchange for assuming and satisfying [InfoCorp's] obligations to Park Bank.

The 2012 litigation ("*InfoCorp I*").

¶8 In March 2012, Veit filed suit in Washington County Circuit Court, case No. 12CV0296, asserting claims related to the InfoCorp asset sale transaction. Among those named as defendants were Speranza, Inc., and all of the other members of InfoCorp, LLC, except Angela Frater. Veit alleged direct and derivative claims. The amended complaint in that matter—signed by Veit's counsel, Attorney Mueller—alleged eleven contract, tort, and statutory claims. The complaint alleged that Veit had suffered damages when the defendants had "devised a scheme that would provide the appearance InfoCorp was insolvent, then transfer its assets, intellectual property, trade secrets, and opportunity to an entity they enjoyed exclusive control over."

¶9 That case was resolved on summary judgment in favor of defendants. The trial court first granted summary judgment to defendants on the derivative claims, concluding that Veit lacked standing under WIS. STAT. § 183.1101 to bring an action on behalf of InfoCorp. In trial court filings after that order, Veit "concede[d] that, as pled, he lack[ed] statutory authority to bring a derivative action on behalf of InfoCorp, LLC." The trial court then granted summary judgment to defendants on Veit's direct claims, concluding that the injuries Veit claimed—his lost investment in InfoCorp when the company was sold and his failure to receive "optimal member distributions"—did not satisfy the legal standard for him to bring such claims because they were injuries primarily to

the company and only secondarily to him.[4] *See* ***Rose v. Schantz***, 56 Wis. 2d 222, 229 n.9, 201 N.W.2d 593 (1972). Veit did not appeal the dismissal.

This case: Milwaukee County Circuit Court Case No. 16CV3961.

¶10 In May 2016, Veit, proceeding *pro se*, filed the complaint from which this appeal arises. On November 11, 2016, Attorney Mueller filed a notice of appearance for plaintiff "to maintain the action" Veit had initiated *pro se*.

The proceedings leading to the dismissal of the claims.

¶11 The complaint in this action named Anderson, Allen Frater, Angela Frater, Hazel & Gordon 1975 Trust, and Speranza, Inc. The complaint related the history of InfoCorp and the May 2010 asset sale. It then stated the following causes of action: civil conspiracy, fraudulent writings, theft, fraudulent transfer, "promissory estoppel," and possession of stolen property.

¶12 On September 23, 2016, defendants moved to dismiss on the basis of claim preclusion.

¶13 On October 13, 2016, Veit, still proceeding *pro se*, filed an amended complaint. The amended complaint was in all respects identical with the original

[4] As to Veit's claim that his investment had been lost due to the asset sale, the trial court noted, "While the sale of InfoCorp had the collateral effect of adversely affecting the plaintiff's investment, that alone is not sufficient to give rise to a direct action as pled here, even assuming wrongdoing by some of the defendants" because "the alleged actions of the defendants here resulted in an injury primarily to the LLC, assuming an injury occurred." For the same reason, it held that Veit could not pursue tort claims premised on the sale. As to his claim regarding member distributions, it failed because the record showed that all members received distributions proportional to their ownership in 2009 and no members received any distributions in 2008 and 2010. Finally, the trial court noted that Veit's breach of contract claim failed because "the record in this matter is bereft of any evidence of any contract between the parties."

complaint except: (1) three of the defendants had been dropped; (2) Speranza, Inc. had been denominated "New Company" in the caption and in the body of the complaint; and (3) "Alter Ego" had been substituted for "InfoCorp" throughout.

¶14 On December 9, 2016, after Attorney Mueller had filed her November 11, 2016 notice of appearance in the case, Defendant Angela Frater served Veit and Attorney Mueller with a draft notice of motion and motion for sanctions. When the plaintiff's pleadings were not withdrawn, Angela Frater moved the trial court for sanctions on January 6, 2017. The motion alleged that Veit had "commenced additional litigation that is legally and factually unsupportable and has already been rejected" by the Washington County Circuit Court. The motion sought "an award of attorneys fees and litigation costs and expenses for violation of WIS. STAT. §§ 802.05 and 895.044 and non-monetary sanctions in the form of precluding plaintiff … from further pursuing litigation stemming from the asset purchase/sale between InfoCorp, LLC and Speranza, Inc. in 2010[.]"

¶15 On February 24, 2017 the trial court held a hearing on the defense motion to dismiss. Before the trial court reached the merits of the motion, however, Attorney Mueller asserted that Veit had been advised by a family member of the judge. The judge promptly informed the parties that he would be recusing himself in order to avoid "cloud[ing] the record." The case was then transferred.

¶16 At a hearing on July 17, 2017, the trial court dismissed the complaint after it concluded that the three elements of claim preclusion were met in this case: "(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." *See* ***Pasko v. City of Milwaukee***, 2002 WI 33, ¶14, 252 Wis. 2d 1, 643 N.W.2d 72 (citation omitted). The trial court addressed each element,[5] starting with the identity of the parties:

> [T]he [16CV3961] defendants are the same parties or privies of the same parties that appeared in ***InfoCorp I*** in Washington County. In that case, plaintiff brought direct claims against Anderson, Mr. Frater, the Trust, and the entity referred to as Speranza and others.
>
> The original complaint in 16CV3961 brought claims against Anderson, Mr. Frater, the Trust and Speranza. His original complaint in [16CV3961] also brought claims against Ms. Frater. And just as in the federal case, [in his amended complaint] plaintiff removed all defendants but Ms. Frater; and he added a defendant entitled New Company, presumably in an effort to avoid preclusion.
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> ….
>
> … [T]he attachments to Plaintiff's complaint unequivocally demonstrate that "New Company" is a substitute for the previously named "Speranza," and the entity referred to as "Alter Ego" is a substitute for the previously named InfoCorp.
>
> ….
>
> Because there is no inference that leads this Court to believe that New Company and Alter Ego are any other entity besides Speranza and InfoCorp, there is an identity of parties as to claims against New Company that warrants claim preclusion.
>
> ….
>
> … [As to Ms. Frater,] [t]he plaintiff's amended complaint makes allegations against Ms. Frater and

[5] Attorney Mueller argues on appeal that the trial court erroneously exercised its discretion because it based the sanctions on its conclusion that the claim was frivolous or brought for an improper purpose. She argues that the trial court dismissed not because claim preclusion barred the action but because it "rejected" the legal theories on which the claims were based. We therefore set forth the trial court's thorough claim preclusion analysis in full.

conspirators, or Mrs. Frater and New Company, which we now know to mean Speranza.

The inclusion of ["]and conspirators["] and Speranza implicitly means that Ms. Frater was not acting alone. Additionally, the documents attached to the amended complaint support an inference Ms. Frater acted in concert with her business associates -- namely her husband, Mr. Frater, and daughter, Ms. Anderson. Because the only inference raised by the pleading and its attachments is that Mrs. Frater was part of the management of InfoCorp, the Court finds that she does share the interest of other managers involved in ***InfoCorp I***.

¶17 The trial court then turned to the second element:

Claim preclusion unlike issue preclusion extends to any and all claims that either were or which could have been asserted in the previous litigation, under ***Lindas v. Cady***, 183 Wis. 2d 547.

Wisconsin has adopted the transactional approach to this analysis that means final judgment extinguishes all rights and remedies against the defendant with respect to all or any part of the transaction or series of connected transactions out of which the action arose. Under ***Kruckenberg v. Harvey***, 279 Wis. 2d 520.

Also under that case, quote, the goal in the transactional approach is to see a claim in factual terms and to make the claim coterminous with the transaction, regardless of the claimant's substantive theories or forms of relief, regardless of the primary rights invaded, and regardless of the evidence needed to support the theories or rights….

In [16CV3961], claims arise from a common nucleus of operative facts with those in ***InfoCorp I***. Just as in the federal case, plaintiff's claims closely match with only minor wording modifications those raised in ***InfoCorp I***.

The basic allegation is that the defendants fraudulently schemed to devalue plaintiff's investment or securities and then transferred his investment to a new company without providing compensation to him. The Washington County case, the federal case, and this case all stem from the same incident, event, transaction and circumstances -- primarily the 2010 members meeting. The

> mere fact that the plaintiff is now attempting to assert that he is claiming his victim rights due under the constitution does not revive his claims.
>
> … [A] plaintiff's different substantive theory of relief will not save his claims from the Court's determination of claim preclusion. Based on that, the Court finds a second requirement of claim preclusion to be met.

¶18 The trial court then addressed the third element, namely the existence of a final order:

> And finally, the defendants have presented the final order of the Washington County case; and in [the] decision, … Mr. Veit's individual claims against all defendants formally named in his original complaint in [16CV3961] were dismissed on summary judgment with prejudice. That Court's decision stated that the order disposed of the entire matter in litigation as to the defendants and is final for purposes of appeal. Plaintiff failed to take an appeal on that decision.

Having concluded that the defendants were entitled to the application of claim preclusion to bar Veit's claims in this case, the trial court granted the motion to dismiss.

The proceedings leading to the order imposing sanctions.

¶19 On July 31, 2017, Defendant Angela Frater brought a motion seeking monetary and non-monetary sanctions on the grounds that Veit and Attorney Mueller had failed to dismiss or correct frivolous pleadings after being properly served with a draft motion for sanctions on December 9, 2016, pursuant to the safe harbor provision of WIS. STAT. § 802.05(3)(a).

¶20 On October 31, 2017, Attorney Mueller filed a brief in opposition to the motion for sanctions. In the brief, she acknowledged, "Mrs. Frater served safe

harbor notice in accordance with WIS. STAT. § 802.05, and thereafter moved on January 6, 2017" for sanctions.

¶21 On November 30, 2017, the trial court held a hearing on the sanctions motion and on Veit's motion for reconsideration and motion to stay the proceedings.[6] The trial court began with a lengthy review of the procedural history of the case.

¶22 The trial court denied the motion for reconsideration, concluding that Veit had "fail[ed] to satisfy the burden on the motion to reconsider." It noted that "[t]o prevail on a motion for reconsideration, a movant must [either] present … newly discovered evidence, or establish a manifest error of law or fact." *See* ***Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd.***, 2004 WI App 129, ¶44, 275 Wis. 2d 397, 685 N.W.2d 853. It noted that this case, involving a motion to dismiss, "by its very nature cannot involve new evidence" because "[i]t's based on the four corners of the complaint." The trial court individually addressed each of the "manifest error[s]" Veit argued and concluded that they were unsupported by legal authority and consisted of "reassert[ing] allegations articulated in their complaint and … response brief."

[6] Veit, through Attorney Mueller, filed a motion for reconsideration of the dismissal on August 23, 2017. On August 21, 2017, Veit, through Attorney Mueller moved to stay the proceedings until the resolution of the federal case, which was then pending. Prior to the case's dismissal, Veit, through Attorney Mueller had requested, without a written motion, leave to file a second amended complaint. Attorney Mueller withdrew her request on the record on May 19, 2017. At the hearing on the motion to dismiss, on July 17, 2017, Attorney Mueller reversed course and again requested leave to amend. After the case was dismissed, Attorney Mueller continued to file post-judgment motions seeking leave to amend. The trial court denied the motions.

¶23 The trial court also denied the motion to stay the proceedings pending the outcome of Veit's case pending in federal district court. It concluded that the federal proceedings had no legal impact on its findings with regard to the doctrine of claim preclusion. The trial court agreed that it "took judicial notice of [the federal magistrate's] decision and ultimately found it to be of assistance" but stated, "[T]his case was decided based upon the plaintiff's amended complaint, the proceedings of the 2012 Washington County case and Wisconsin law regarding claim preclusion." It further noted, "Plaintiff has failed to persuasively indicate how the 7th Circuit's interpretation of federal law would impact this Court's interpretation of state law. Federal law is persuasive, but it is not binding authority on this Court."

¶24 The trial court then addressed the motion for sanctions:

> As to the motion for sanctions, the Court ordered plaintiff to respond to defendant's …sanctions motion by September 20, 2017. Plaintiff's objection was not filed until October 31 of this year. Defendant has moved to strike the plaintiff's response [as] untimely filed. Even though it was untimely filed … I am going to accept that filing.
>
> Defendant's motion for sanctions requests sanctions including an award of attorneys' fees and litigation costs for violations of [WIS. STAT. §§] 802.05 and 895.044.
>
> Defense also sought non-monetary sanction consisting of an order barring the plaintiff from bringing future direct state law claims arising out of the 2010 sale of securities.…
>
> Defendants provided plaintiff with a draft Notice of Motion and Motion for Sanctions on December 9, 2016, and although plaintiff indicated to Judge Sosnay that she intended to withdraw her client's amended complaint during the motion hearing on February 24, 2017, she's not done so.
>
> Defendants filed their motion for sanctions on July 31, 2017. Defendants move for sanctions pursuant to

[WIS. STAT. §] 802.05, which is applicable to both attorneys and *pro se* parties.…

The factors that the Court may consider in imposing sanctions include the following: (1) whether the alleged frivolous conduct was part of a pattern of activity or isolated event; (2) whether the conduct infected the entire pleading or was an isolated claim or defense; and (3) whether the attorney or party has engaged in similar conduct in other litigation.

Sanctions authorized under this section and under (3) may include an award of actual fees and costs to the party victimized by the frivolous conduct which is set forth in the comment under [WIS. STAT. §] 802.05(3). Whether a violation of that statute has occurred and what sanctions, if any, to impose for the violations are matters committed to the discretion of the Court.

The Court finds the claims in 16CV3961 are frivolous. For a claim to be frivolous, a party or attorney knew or should have known that the claim was without any reasonable basis in law or equity, [pursuant] to ***Howell v. Denomie***, 282 Wis.2d 130. Plaintiff's claims in 16CV3961 had no basis in law, and based on the history of this case, were bought for an improper purpose.

Plaintiff's direct claims were litigated in the 2012 Washington County case before Judge Gonring. Judge Gonring dismissed all of the direct claims with prejudice. Neither the plaintiff or his counsel appealed that ruling.

This is not the first case which plaintiff has attempted to relitigate his direct claims. If the 2012 Washington County case can be called ***InfoCorp I***, then ***InfoCorp II***, Milwaukee County Case 13CV4872, which was filed but never commenced, a third action which we'll call ***InfoCorp III*** was filed by the plaintiff individually against Angela Frater and New Company in the Eastern District of Wisconsin 16CV621, filed on May 25, 2016, and dismissed with prejudice on January 30, 2017.

The two cases pending before this Court were filed the day before the federal case. The motion to dismiss hearing in this case did not occur until after the federal court issued its decision regarding whether claim preclusion barred plaintiff's claims.

The timeline of cases indicates a pattern of activity wherein the plaintiff has attempted to haul the defendants

into court to defend their claims—to defend against claims which were decided in 2012.

The federal court through Magistrate Jones told the plaintiff that his claims were precluded yet he continued to argue them in this case. And while counsel did not draft the complaints, she has maintained the action despite the fact that she knew or should have known that the plaintiff's direct claims are barred by claim preclusion.

Plaintiff and counsel's conduct infects the entire pleading in 16CV3961. Plaintiff attempts to get around claim preclusion by slightly altering his complaint, as an example, by replacing InfoCorp with, quote, Alter Ego and Speranza, Inc. with, quote, New Company.

Additionally, instead of including Ms. Anderson, Mr. Frater and the Trust in his amended complaint, even though these individuals are named in the attachments to the amended complaint, plaintiff says that Ms. Frater and ["]controlled others" … or "conspirators" defrauded him. In his filings, plaintiff recognized that claim preclusion bars claims arising from the same common nucleus of operative facts but [was] persistent in arguing that this different theory of liability entitles him to relief. The complaint in 16CV3961 is frivolous because the action was disposed of in the 2012 Washington County case.

Given the law on claim preclusion, plaintiff's counsel should have known that Mr. Veit's claims in this case were without merit.

It appears plaintiff, counsel for the plaintiff may have engaged in this behavior before. I believe that they have maintained frivolous proceedings for the improper purpose of harassing the defendants in violation of [WIS. STAT. §] 802.05(2)(a).

¶25 The trial court ordered monetary sanctions against Attorney Mueller in the amount of $5,923.50 to be paid to Defendant Angela Frater.[7] The trial court denied Attorney Mueller's motion to reconsider the monetary sanctions. This appeal follows.[8]

DISCUSSION

I. Standard of review and relevant law.

¶26 "[A]n attorney who is sanctioned by the circuit court for misconduct in a client's case must file his or her own notice of appeal in order to challenge the sanction." ***Ziebell v. Ziebell***, 2003 WI App 127, ¶1, 265 Wis. 2d 664, 666 N.W.2d 107.

[7] On November 7, 2017, prior to the hearing, defendants Speranza, Inc., Cheryl Anderson, Allen Frater, and the Hazel & Gordon 1975 Trust withdrew their request for sanctions based on their failure to provide plaintiff with the safe harbor notice. Although the trial court initially granted sanctions to those defendants because it did not realize the request had been withdrawn, it later vacated its order as to those defendants, noting that it had not intended to grant unrequested sanctions.

[8] The trial court's order resulted in two separate appeals. As Veit's counsel, Attorney Mueller appealed the dismissal of his claims. This court dismissed that appeal as a sanction for repeated failure to follow appellate rules after multiple extensions. Attorney Mueller also appealed the imposition of sanctions on her personally, which we address here. As a sanction in this appeal of the order for sanctions, this court declined to accept Attorney Mueller's reply brief due to her non-compliance with several rules of appellate procedure. We gave her leave to refile the reply brief initially after she claimed she had "erroneously filed the wrong draft." However her re-filing consisted of twenty-four pages, containing eighty-four footnotes, which greatly exceeded the word limit. The reply brief also contained images of documents without indication of whether they were contained in the record. The reply brief did not contain the required signature. We noted in our order refusing to accept the filing that "although Attorney Mueller certifies that she mailed her briefs by first-class mail on February 15, 2019, the postmark information indicates that the briefs were sent by priority mail on February 19, 2019." ***Veit v. Frater***, No. 2018AP442, unpublished order (WI App Feb. 22, 2019).

¶27 In this case, the sanctions were imposed on the grounds that Attorney Mueller continued to litigate a claim after she should have known that it was frivolous because it was barred by claim preclusion. A claim is frivolous if there is no reasonable basis in law or equity or if it is commenced solely for the purposes of harassing or maliciously injuring another. WIS. STAT. § 814.025(3). A determination that a claim was frivolous presents a mixed question of fact and law. ***Stern v. Thompson & Coates, Ltd.***, 185 Wis. 2d 220, 236, 517 N.W.2d 658 (1994). We will review the trial court's factual findings regarding what occurred under the clearly erroneous standard but will independently consider whether those facts fulfill the legal standard. ***Id.***

¶28 As noted above, we review the trial court's decision to impose sanctions and the appropriateness of the sanctions ordered under an erroneous exercise of discretion standard, *see* ***Lee***, 321 Wis. 2d 698, ¶16, and will affirm the trial court's decision "if it examined the relevant facts, applied a proper standard of law, and reached a reasonable conclusion." *See* ***id.*** (citation omitted). "The issue is not whether we, as an original matter, would have imposed the same sanction as the circuit court; it is whether the circuit court exceeded its discretion in imposing the sanction it did." ***Id.*** (citation omitted).

¶29 WISCONSIN STAT. § 802.05(2) states the responsibilities of counsel and *pro se* litigants when making representations to the court:

> (2) Representations to Court. By presenting to the court, whether by signing, filing, submitting, or later advocating a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, all of the following:

> (a) The paper is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.
>
> (b) The claims, defenses, and other legal contentions stated in the paper are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.

¶30 WISCONSIN STAT. § 802.05(3)(a) provides for sanctions where the above subsection is violated, but it creates a "safe harbor" for a party whose filings are challenged, requiring a twenty-one-day grace period during which the party can withdraw or correct filings in order to avoid sanctions:

> A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate sub. (2). The motion shall be served as provided in s. 801.14, but shall not be filed with or presented to the court unless, within 21 days after service of the motion or such other period as the court may prescribe, the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion reasonable expenses and attorney fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

¶31 WISCONSIN STAT. § 895.044(1) sets forth the standards for sanctions where a party has pursued an action that is "solely for purposes of harassing" or "without any reasonable basis in law or equity":

> (1) A party or a party's attorney may be liable for costs and fees under this section for commencing, using, or continuing an action, special proceeding, counterclaim, defense, cross complaint, or appeal to which any of the following applies:
>
> (a) The action, special proceeding, counterclaim, defense, cross complaint, or appeal was commenced, used, or continued in bad faith, solely for purposes of harassing or maliciously injuring another.

> (b) The party or the party's attorney knew, or should have known, that the action, special proceeding, counterclaim, defense, cross complaint, or 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.

II. The trial court considered the relevant facts and applied the correct standard of law when it concluded that the motion for sanctions complied with WIS. STAT. § 802.05.

¶32 Attorney Mueller argues that the order for sanctions must be vacated because neither the January 2017 sanctions motion nor the July 2017 sanctions motion satisfied requirements of WIS. STAT. § 802.05 and therefore "neither could support an imposition of sanctions." As noted above, she argues that (1) the sanctions motion impermissibly sought both monetary and nonmonetary sanctions and thus should have been brought as separate motions, (2) the sanctions motion did not state the specific conduct alleged to violate the statute, (3) she did not receive the required twenty-one-day safe harbor notice, and (4) the motion was untimely.

¶33 First, Attorney Mueller argues that the sanctions motion filed in January 2017 was invalid—despite the fact that it was filed after being properly served on her more than twenty-one days earlier—because it included requests for both monetary and non-monetary sanctions and the statute requires that "[a] motion for sanctions under this rule shall be made separately from other motions or requests." She argues that the statute's language—"A motion for sanctions under this rule shall be made separately from other motions or requests"—means that defendant Angela Frater was not permitted to combine her request for monetary sanctions and her request for nonmonetary sanctions in the same motion.

¶34 This argument requires examination of the statute. Statutory interpretation presents a question of law. ***MercyCare Ins. Co. v. Wisconsin Comm'r of Ins.***, 2010 WI 87, ¶27, 328 Wis. 2d 110, 786 N.W.2d 785. "[S]tatutory interpretation 'begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry.'" ***State ex rel. Kalal v. Circuit Court for Dane Cty.***, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110 (citation omitted). "Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning." ***Id.***

¶35 The statute requires that motions for sanctions be made "separately from *other motions* or requests." *See* WIS. STAT. § 802.05(3)(a)1. (emphasis added). The meaning of this language is plain. Sanctions motions cannot be brought *with other motions*. That language does not require that "a motion for sanctions" be divided up into *separate motions for sanctions*. It is evident from the context of the statute that a trial court may consider various types of sanctions and has discretion to decide what form of sanction is needed:

> Subject to the limitations in subds. 1. and 2., the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorney fees and other expenses incurred as a direct result of the violation[.]

Sec. 802.05(3)(b). No language in the statute prohibits the filing of a motion seeking sanctions in various forms. Therefore, the January 2017 filing, which was preceded by serving the motion on Attorney Mueller on December 9, 2016, complied with the statute.

¶36 Second, Attorney Mueller argues that the motion failed to satisfy the statute because it "fail[ed] to specifically identify the conduct warranting sanctions" under WIS. STAT. § 802.05. She characterizes the motion's language as vague. We cannot agree. The January 2017 motion stated directly that the specific conduct alleged to violate the statute was the fact that Veit and Attorney Mueller had "maintain[ed] this individual action against defendants":

> Mr. Veit and Attorney Poulos Mueller were well aware that Mr. Veit *could not maintain this individual action against defendants* based on the ***InfoCorp I*** decisions. This litigation is an attempt to evade the ***InfoCorp I*** court's decisions and to improperly harass defendants through the imposition of unnecessary litigation expense. Mr. Veit's attempt to use this Court for such purpose constitutes an improper purpose for initiating litigation.
>
> The Washington County Circuit Court has already issued a decision involving many of the same parties, allegations and arguments as this case (***InfoCorp I*** Decisions). This is nothing more than an attempt by Mr. Veit to improperly relitigate the case that was dismissed by the Washington County Court more than three years ago.
>
> ….
>
> Pursuant to the safe harbor provisions in WIS. STAT. §§ 802.05(3)(a) and 895.044(2), Mr. Veit and Attorney Poulos Mueller were put on notice for the frivolous nature of Mr. Veit's lawsuit. Mr. Veit could have voluntarily cured this issue *by withdrawing the offending complaint within the twenty-one-day safe harbor period*. Mr. Veit chose not to do so, and, as such, defendants are entitled to an award of the fees and costs they have incurred defending against the frivolous lawsuit including, but not limited to, the fees and costs incurred in filing this motion for sanctions as well as an order prohibiting Mr. Veit from initiating future litigation against defendants. Mr. Veit's latest causes of action are frivolous attempts to harass defendants and increase the cost of litigation.

(Emphasis added.)

¶37 The specific conduct identified was maintaining the claim, which was without legal basis because it was barred by claim preclusion. Attorney Mueller's argument that the motion failed to state the specific conduct is therefore without merit.

¶38 Third, Attorney Mueller argues that the July 2017 post-judgment motion "quite literally made it impossible for Appellant to comply with the statutory safe harbor twenty-one-day advance notice provisions" because the complaint had already been dismissed, so she could not withdraw or amend it. She adds that "[a]t no time in the underlying action did any party serve Appellant twenty-one-day notice."

¶39 This argument is predicated on the argument that the December 2016 service and the January 2017 filing were not compliant with the statute. We have concluded that they were. Attorney Mueller was therefore served with the motion in December 2016, and no sanctions were sought until after twenty-one days had passed, during which she did not withdraw the frivolous complaint. Once that period of time had passed, the statute's notice requirement is satisfied, the movants are fully authorized by statute to proceed with requests to the trial court for sanctions, and the matter of imposing sanctions becomes a matter left to the trial court's discretion.

¶40 Fourth, Attorney Mueller argues that because the July 2017 sanctions motion was brought after judgment, it cannot be the basis for sanctions, and she cites to cases involving post-judgment sanctions claims. *See* ***Trinity Petroleum, Inc. v. Scott Oil Co., Inc.***, 2007 WI 88, ¶3, 302 Wis. 2d 299, 735 N.W.2d 1, and ***Ten Mile Invs., LLC v. Sherman***, 2007 WI App 253, ¶3, 306 Wis. 2d 799, 743 N.W.2d 442. Those cases are readily distinguishable. First, and

most significantly, in neither case was the non-movant served with safe harbor notice prior to the judgment, as she acknowledged in her brief to the trial court that she was ("Mrs. Frater served safe harbor notice in accordance with WIS. STAT. § 802.05, and thereafter moved on January 6, 2017" for sanctions.). Second, the question presented in those cases concerned the retroactive applicability of the new version of § 802.05 including the safe harbor provision because the prior version of the frivolous action sanctions rule had been repealed and replaced while the actions were pending.[9] There is no question of the applicability of the new version of § 802.05 in this case. Third, in both ***Trinity Petroleum*** and ***Ten Mile Investments***, the movant had argued that informal warnings, rather than formal motions, sufficed to put the opposing party on notice that sanctions would be pursued. *See* ***Trinity Petroleum,*** 302 Wis. 2d 299, ¶86, and ***Ten Mile Invs.***, 306 Wis. 2d 799, ¶17. That is not an issue in this case because the required formal sanctions motion was undisputedly served in December 2016 and filed in January 2017.

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[9] *See* ***Trinity Petroleum, Inc. v. Scott Oil Co., Inc.***, 2007 WI 88, ¶3, 302 Wis. 2d 299, 735 N.W.2d 1:

> This court adopted new WIS. STAT. § (Rule) 802.05 (2005-06), pursuant to its rule-making authority under WIS. STAT. § 751.12 (2005-06), by Supreme Court Order 03-06 on March 31, 2005. Supreme Court Order 03-06 repealed both WIS. STAT. §§ 802.05 and 814.025 (2003-04), and recreated WIS. STAT. § (Rule) 802.05 (2005-06). The effective date of the new rule was July 1, 2005. On the effective date of the new rule the defendant's motion for summary judgment had not yet been decided by the circuit court.

(Footnotes omitted.)

III. The trial court applied the proper standard of law when it determined that the action had been maintained to harass defendants.

¶41 Finally, Attorney Mueller argues that the sanctions are invalid because the statute permits sanctions only where there has been "malicious prosecution," and she argues that the elements of a claim for malicious prosecution have not been satisfied. *See*, e.g., ***Strid v. Converse***, 111 Wis. 2d 418, 423, 331 N.W.2d 350 (1983) (stating the six elements for a civil claim of malicious prosecution).

¶42 This case does not involve a civil claim of malicious prosecution by a party; it involves a discretionary imposition of statutory sanctions by a court. Attorney Mueller is mistaken about what the statute requires. WISCONSIN STAT. § 895.044(1)(a) creates liability for a party's attorney "for … continuing an action … solely for purposes of harassing *or* maliciously injuring another" (emphasis added). The statute's plain language, using the disjunctive "or," authorizes sanctions for "harassing" another. Attorney Mueller's assertion that the statute "permits imposition of sanctions only after a determination that each of the essential six elements [of malicious prosecution] are present" is not supported by the statute's plain language.

¶43 Attorney Mueller's argument is limited to disputing the existence of "malicious prosecution." She asserts that "[t]he circuit court lacked statutory authority to impose sanctions for malicious prosecution and thus its imposition of sanctions was manifest error." The elements of a malicious prosecution claim are irrelevant; Attorney Mueller was not sued for malicious prosecution.

¶44 The trial court properly cited the comment to WIS. STAT. § 802.05 that lists the relevant factors a court may consider when imposing sanctions:

> Factors that the court may consider in imposing sanctions include the following: (1) Whether the alleged frivolous conduct was part of a pattern of activity or an isolated event; (2) Whether the conduct infected the entire pleading or was an isolated claim or defense; and (3) Whether the attorney or party has engaged in similar conduct in other litigation.

Supreme Court Note, 2003, WIS. STAT. RULE 802.05(3). The trial court found that in this case there was a pattern of activity of "haul[ing] the defendants into court to … defend against claims which were decided in 2012." The trial court found that the conduct did infect the entire pleading because the entire pleading was barred by claim preclusion. It found that counsel for the plaintiff had engaged in this behavior before and that "this is not the first case where plaintiff and counsel have presented claims arising from the 2012 sale … which were barred as a matter of law." The trial court thus concluded that Attorney Mueller and her client had "maintained frivolous proceedings for the improper purpose of harassing the defendants in violation of [§] 802.05(2)(a)." Attorney Mueller has not come near showing that the trial court's imposition of sanctions was an erroneous exercise of its discretion.

IV. The trial court did not erroneously exercise its discretion when it determined that Attorney Mueller had maintained a frivolous action in violation of WIS. STAT. §§ 895.044 and 802.05.

¶45 Attorney Mueller argues that the sanction is improper because she did not maintain a frivolous action, and the trial court erred in determining that this case lacked a basis in law. Attorney Mueller seems to be referring to the trial court's conclusion that the claims here were barred by the doctrine of claim preclusion although she does not use that term nor does she address the elements of claim preclusion as set forth in ***Pasko***: (1) identity of parties; (2) identity of causes of action, and (3) final judgment on the merits. *See* ***id.***, 252 Wis. 2d 1, ¶14.

We conclude those elements were met here and properly addressed by the trial court as noted above, and we adopt and incorporate its findings and conclusions. We decide cases on the narrowest grounds argued by the parties. We will not develop parties' arguments for them. *See* ***State v. Waste Mgmt., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978) ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.").

¶46 Attorney Mueller argues that Veit's claim is authorized by WIS. STAT. § 895.446, which creates a cause of action for crime victims to recover damages for loss due to criminal conduct. Similarly, she argues that a claim of fraudulent concealment "should frustrate a defense of res judicata[.]" She cites no legal authority for either proposition.

¶47 To the extent that Attorney Mueller is arguing claim preclusion cannot bar her from bringing a crime victim compensation twist to her earlier arguments, we disagree. First, Attorney Mueller has cited no law that exempts this cause of action from application of the doctrine of claim preclusion.

¶48 Secondly, case law explicitly prohibits a subsequent action between the same parties or their privies on matters 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. As the trial court correctly noted, "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" (emphasis added). It added, "Article I Section 9 of the Wisconsin Constitution existed when the plaintiff brought his first action to Washington County. WISCONSIN STAT. § 895.446 also existed when plaintiff brought his first action in Washington

County." Again, we agree with the trial court and adopt and incorporate its findings and conclusions. Because Veit and Attorney Mueller could have brought this § 895.446 claim in the Washington County action, it is precluded here. *See* ***Menard***, 282 Wis. 2d 582, ¶26**.**

¶49 Attorney Mueller argues that claim preclusion can be disregarded on equitable principles, but she has not cited any authority for doing so. The trial court correctly rejected that argument, citing to our supreme court precedent:

> Plaintiff's attempts to introduce a fairness test into the claim preclusion analysis was rejected by the Court in ***Kruckenberg***, wherein they stated claim preclusion is strictly applied, at Paragraph 53. The Supreme Court has made it clear that an ad hoc exception to the doctrine of claim preclusion cannot be justified simply by concluding that it is too harsh to deny an apparently valid claim, at Paragraph 55.
>
> Further, the Court stated that, quote, case-by-case exceptions to the application of the doctrine of claim preclusion based on fairness weaken the repose and reliance values of claim preclusion in all cases. Based upon that, the argument that the Court committed error by not considering fairness as an exception to claim preclusion is without merit.

¶50 Finally, to the extent that Attorney Mueller is arguing that her claims were not part of a pattern of harassment, we reject that argument as well. Attorney Mueller had warnings and adjournments far beyond what is reasonable and made no attempt to withdraw these claims. We cannot fail to observe that the record in this case is replete with admonitions from multiple courts concerning the conduct of the plaintiff and plaintiff's counsel beginning in 2012. The two orders of the Washington County Circuit Court disposing of the original case both referenced the troubling and unprofessional conduct of counsel as reflected in the filed documents and deposition transcripts. That pattern continued. Transcripts of

hearings in this case before multiple judges show repeated admonitions by the trial court for "preposterous accusations and errors" in court filings, "deviousness … not only by [Veit] but by [Attorney Mueller]," and an "offensive allegation" against the trial court. One judge on this case stated on the record, "[Q]uite frankly, I think that the defendant should pursue sanctions here based upon the record."

¶51 The decisions by the magistrate judge and the Seventh Circuit Court of Appeals likewise contain unusually strong censure of the plaintiff and plaintiff's counsel. Although the rulings of the federal courts are not precedent for this case, we take judicial notice of the multiple decisions by the federal magistrate and the Seventh Circuit Court of Appeals in Veit's case. The federal magistrate dismissed all of Veit's claims, both state and federal, on grounds that they were barred by claim preclusion based on the 2012 state court judgment. The Seventh Circuit affirmed except with regard to Veit's federal securities claim, which can be brought only in federal court, so it remanded for consideration of that claim. In its order, the Seventh Circuit noted that the magistrate judge should address the question of sanctions against the plaintiff for abuse of process. On remand, the district court dismissed the federal securities claim on several grounds, including statute of limitations, and imposed sanctions on Veit for "intransigence in pursuing time-barred and already adjudicated claims" and "vexatious litigation." Parts of the sanctions were imposed jointly and severally on Attorney Mueller. Veit appealed again, *pro se*, and the Seventh Circuit affirmed, noting that Veit had counsel during the proceedings before the magistrate judge, and imposed further sanctions for frivolous appeal.

V. The trial court did not erroneously exercise its discretion when it imposed sanctions because Attorney Mueller failed to withdraw the frivolous action within twenty-one days of being served with notice of the motion.

¶52 Attorney Mueller argues that she on multiple occasions sought leave to amend the complaint that Veit had filed and amended while proceeding *pro se*. She argues that she was therefore sanctioned for a pleading she did not file and that she was not permitted to rectify.

¶53 Prior to the case's dismissal, Attorney Mueller had requested, without a written motion, leave to file a second amended complaint, but she withdrew that request on the record on May 19, 2017, a fact she neglects to mention. At the hearing on the motion to dismiss, on July 17, 2017, Attorney Mueller reversed course and again requested leave to amend. After the case was dismissed, Attorney Mueller continued to file post-judgment motions seeking leave to amend. The trial court denied the motions.

¶54 Attorney Mueller has not shown that the trial court erred. First, she does not assert that she attempted to withdraw the frivolous filing within twenty-one days of being served with the motion for sanctions in December 2016.

¶55 Second, Attorney Mueller's argument that she sought to amend is disingenuous and is refuted by the findings of the trial court:

> In most cases motions are handled in the order they are filed and noticed for a hearing. Defendants filed their motion to dismiss in lieu of answer and a motion to transfer venue on September 23, 2016. Plaintiff filed his first amended complaint on October 13, 2016. Defendants notified the court that their motion to dismiss was equally applicable to the amended complaint, and during the status conference on November 14, 2016, Judge Dugan stated that the motion to transfer venue would be decided before any response to the amended complaint was due. That is language from the November 29, 2016 order.

> Judge Sosnay who later heard the case indicated the defendant's legal arguments would be applied to the amended complaint. Counsel's request to file a second amended complaint--and this is where the record becomes unclear, but I believe the first time that such request identifiable on the record was during the July 17, 2017, motion hearing. Counsel claimed she requested leave to amend the complaint before Judge Dugan. *This request is not memorialized by a motion or in any orders issued by Judge Dugan.*
>
> Additionally, Judge Sosnay addressed this issue during the February 24, 2017 motion at Page 8, Lines 8 through 17, wherein he indicated to counsel he did not believe that she had made a request for leave to amend. Notwithstanding that, counsel's again argued in her brief that she actually did request leave in front of Judge Dugan. *This would have been easily remedied by the filing of a written motion which never occurred.*
>
> And as far as I'm concerned, based upon the record, July 17, 2017 is the first recognizable request that's been made by counsel. The transcript of the proceeding before Judge Sosnay does not indicate that Judge Sosnay was presented for a motion for leave to file a second amended complaint. Instead it appears that Judge Sosnay was scolding counsel for [implying] that she had previously asked for leave when the record demonstrated that she had not.

(Emphasis added.)

¶56 Third, the corrective action that was required of Attorney Mueller if she wished to avoid the risk of sanctions was withdrawal of the patently frivolous filing within the time allotted by the statute after she was undisputedly served with a motion that put her on notice of the insurmountable legal bar to the claims presented in this case within a month of her notice of appearance in it.

¶57 For these reasons,[10] we conclude that the trial court considered the relevant facts, applied the correct standard of law, and reached a reasonable conclusion when it imposed sanctions on Attorney Mueller. We therefore affirm.

By the Court.—Orders affirmed.

Not recommended for publication in the official reports.

[10] To the extent that we have not addressed an argument Attorney Mueller raised on appeal, the argument is deemed rejected. *See* ***State v. Waste Mgmt., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1977) ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.").