

STATE OF MICHIGAN
COURT OF APPEALS

THOMAS RICHARDS, BRAD MANLEY, and
DEION WASHINGTON,

UNPUBLISHED
June 10, 2014

Plaintiffs-Appellants,

v

No. 311475
Wayne Circuit Court
LC No. 12-006801-CZ

WAYNE COUNTY AIRPORT AUTHORITY,
SUZANNE K. HALL, and WAYNE COUNTY
AIRPORT AUTHORITY BOARD,

Defendants-Appellees.

Before: WILDER, P.J., and SAAD and K. F. KELLY, JJ.

PER CURIAM.

Plaintiffs appeal as of right from an order awarding defendants attorney fees and costs following the dismissal of plaintiffs' complaint, which the trial court deemed frivolous. Finding no errors warranting reversal, we affirm.

I. BASIC FACTS

This case is one of several cases filed in Wayne Circuit Court by attorney Andrew Paterson that arose from the hiring of Turkia Mullin as the chief executive officer (CEO) of defendant Wayne County Airport Authority (WCAA). The first two lawsuits, referred to herein as *Davis I* and *Davis II*, were brought by plaintiff Robert Davis, whom Paterson represented. The suits alleged violations of the Open Meetings Act (OMA), MCL 15.261, *et seq.* In *Davis I*, the trial court found that the WCAA violated the OMA when it used an ad hoc committee, which did not meet in public, to conduct the CEO search and issued an injunction. *Davis II*, filed a few days later, sought to overturn the hiring of Mullin and alleged violations of the OMA. The trial court held that these claims were barred by res judicata and Davis lacked standing. The *Davis II* complaint also alleged three violations of the OMA unrelated to the CEO hiring process. The trial court found that, although the WCAA had violated certain provisions of the OMA, the violations had occurred before the injunction issued in *Davis I*. The trial court then refused to issue further injunctive relief since the WCAA had enacted safeguards to ensure future compliance with the OMA.

This instant case was filed by plaintiffs Thomas Richards, Brad Manley, and Deion Washington, who were also represented by attorney Paterson, and requested declaratory

judgment and injunctive relief based on a resolution that authorized Suzanne Hall, as a one-man committee, to finalize the terms of Mullin's employment contract. Plaintiffs alleged that defendants' one-person committee constituted a public body under the OMA, that any meetings held regarding Mullin's contract should have been noticed, and that meeting minutes should have been maintained. The trial court found that plaintiffs' action was barred by res judicata due to the previous cases of *Davis I* and *Davis II*. The trial court also found that plaintiffs' action was frivolous, since it was barred by res judicata, and ordered attorney Paterson to pay defendants their attorney fees and costs.¹

II. ANALYSIS

Plaintiffs argue that the trial court abused its discretion in awarding attorney fees and costs based on its finding that plaintiffs' action was frivolous and barred by res judicata. We disagree.

We review for an abuse of discretion a trial court's decision to award attorney fees. *Farmers Ins Exch v Kurzmann*, 257 Mich App 412, 422; 668 NW2d 199 (2003). "The court does not abuse its discretion when its decision is within the range of reasonable and principled outcomes." *In re Temple Marital Trust*, 278 Mich App 122, 128; 748 NW2d 265 (2008). However, we review for clear error a trial court's determination that an action is frivolous. *BJ's & Sons Constr Co, Inc v Van Sickle*, 266 Mich App 400, 405; 700 NW2d 432 (2005). "A decision is clearly erroneous when, although there may be evidence to support it, we are left with a definite and clear conviction that a mistake has been made." *Guerrero v Smith*, 280 Mich App 647, 677; 761 NW2d 723 (2008).

MCR 2.114(D) states that an attorney's or party's signature constitutes a certification that the document is well grounded in fact and not imposed for an improper purpose. If this rule is violated, the court, "on the motion of a party or its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay the other party or parties the amount of reasonable expenses incurred because of the filing of the document, including reasonable attorney's fees." MCR 2.114(E). MCR 2.625(A)(2) subjects a party filing a frivolous claim to costs. Further, MCL 600.2591 provides that sanctions, costs, and fees shall be awarded to a prevailing party in a frivolous action. An action is "frivolous" if it meets at least one of the following:

¹ Plaintiffs appealed the trial court's June 25, 2012 dismissal of their complaint and the trial court's July 2, 2012 award of attorney fees and costs against plaintiffs' counsel. On our own motion, we partially dismissed plaintiffs' claim of appeal for lack of jurisdiction as it related to the June 25, 2012 order of dismissal because the appeal of that order was untimely pursuant to MCR 7.204(A) and limited the appeal to the July 2, 2012 order that awarded attorney fees and costs. *Thomas Richards v Wayne County Airport Authority*, unpublished order of the Court of Appeals, issued September 26, 2012 (Docket No. 311475). Thus, the only issue on appeal for us to decide concerns the trial court's award of attorney fees and costs.

(i) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass or injure the prevailing party.

(ii) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.

(iii) The party's legal position was devoid of arguable legal merit. [MCL 600.2591(3).]

Ultimately, the award of sanctions is left to the sound discretion of the trial court. *John J Fannon Co v Fannon Prods, LLC*, 269 Mich App 162, 173; 712 NW2d 731 (2005).

Here, the trial court found plaintiffs' complaint to be frivolous because it determined that the complaint's primary purpose was to harass, embarrass, and injure defendants. The court further found that plaintiffs' counsel wasted the court's and defendants' time and resources by filing this action despite being aware that the trial court's rulings in the prior actions rendered this action essentially moot. Plaintiffs argue, however, that the trial court erred in finding that the action was barred by res judicata. Plaintiffs argue that their case arose from the creation and use of a one-man committee to negotiate Mullin's employment contract in violation of the OMA and that these allegations were not raised or litigated in either *Davis I* or *Davis II*. Plaintiffs further claim that, at the time that *Davis I* and *Davis II* were filed, neither Davis nor his counsel were aware of the one-man negotiation committee and thus could not have included those claims in those actions.

Res judicata bars a subsequent action where a prior action was decided on the merits, both actions involve the same parties or their privies, and the matter in the subsequent case was, or could have been, resolved in the first case. *Adair v State of Michigan*, 470 Mich 105, 121; 680 NW2d 386 (2004). Under the broad interpretation of res judicata utilized by Michigan courts, res judicata bars claims actually litigated as well as claims arising from the same transaction that the parties, with reasonable diligence, could have raised but did not. *Id.*

The first requirement for res judicata to apply was met here since final orders disposing of the cases in *Davis I* and *Davis II* were entered. The second requirement has also been met. Although this case involved different plaintiffs than the plaintiff in *Davis I* and *Davis II*, the plaintiffs in the three cases are in privity.

To be in privity is to be so identified in interest with another party that the first litigant represents the same legal right that the later litigant is trying to assert. The outer limit of the doctrine traditionally requires both a "substantial identity of interests" and a "working functional relationship" in which the interests of the nonparty are presented and protected by the party in the litigation. [*Adair*, 470 Mich at 122 (citations omitted).]

Plaintiffs and the *Davis I* and *Davis II* plaintiff share the same interest in ensuring that the WCAA conduct its meetings in accordance with the OMA. Privity exists here because the plaintiffs here were represented by the same attorney as Davis and sought the same injunctive relief, attorney fees, and costs that were sought by Davis. Finally, as noted by the trial court, "[i]t's very clear that [plaintiffs] are just standing in the shoes of Robert Davis because Robert

Davis filed an affidavit in this case[.]” Further, the three cases also all share the two primary defendants, WCAA and the WCAA Board.

Lastly, the third requirement was met since both claims arose out of the same transaction under Michigan’s transaction test. “Whether a factual grouping constitutes a transaction for purposes of res judicata is to be determined pragmatically, by considering whether the facts are related in *time, space, origin or motivation*, [and] whether they form a convenient trial unit[.]” *Adair*, 470 Mich at 125 (internal quotation marks omitted; emphasis in original). This case, *Davis I*, and *Davis II* all arose from claims regarding the selection and hiring of Mullin as WCAA’s CEO and thus all are related in time, space, and origin. Further, all three cases share the same motivating factors — to enforce the OMA and ensure the public transparency of the WCAA Board.

Although plaintiffs assert that new facts were discovered after the decisions in *Davis I* and *Davis II*, there is no support for their assertions. On the contrary, the evidence indicates plaintiffs’ counsel was aware of the facts alleged in this complaint at the time the *Davis* complaints were filed. In the *Davis II* complaint, filed months before this action was filed, plaintiffs’ counsel alleged that defendant Hall and Mullin negotiated additional terms of Mullin’s employment contract that were not approved by the WCAA Board, which is one of the same allegations contained in the complaint here. Further, the meeting minutes for defendant Hall’s appointment to negotiate Mullin’s employment agreement were attached as exhibit C to the *Davis I* complaint so clearly plaintiffs’ counsel was aware of this fact at the time *Davis I* and *Davis II* were filed.

The trial court did not err in finding that plaintiffs’ action was frivolous, nor did the trial court abuse its discretion when it awarded attorney fees and costs against plaintiffs’ counsel. The WCAA should not have had to appear and defend against this third action against it involving parties in privity with the plaintiff in the prior actions and based upon the same selection process and hiring of Mullin as WCAA’s CEO. Plaintiffs could have and should have brought their claims regarding the one-man negotiation committee and alleged OMA violations in either *Davis I* or *Davis II*.

Affirmed. As the prevailing party, defendants may tax costs. MCR 7.219.

/s/ Kurtis T. Wilder
/s/ Henry William Saad
/s/ Kirsten Frank Kelly