

No. 1-12-1676

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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MICHAEL MANN and	)	Appeal from the
LININA CHERNYAVSKA	)	Circuit Court of
	)	Cook County.
Plaintiffs-Appellants and,	)	
Cross-Appellees,	)	No. 11 L 13462
	)	
v.	)	Honorable
	)	Ronald Bartkowicz,
BMO HARRIS BANKCORP, INC. and,	)	Judge Presiding.
CHRISTOPHER ROBERT McCLEAR,	)	
	)	
Defendants-Appellees and	)	
Cross-Appellants.	)	

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JUSTICE HYMAN delivered the judgment of the court.  
Justices Pierce and Mason concurred in the judgment.

ORDER

- ¶ 1 *Held:* Case is reversed and remanded where trial court erred by dismissing plaintiffs' breach of fiduciary duty claims under the doctrine of *res judicata* and plaintiffs' claims of intentional infliction of emotional distress and loss of consortium for failing to state a claim upon which relief could be granted. Also, trial court's order denying defendants' motion for sanctions under Illinois Supreme Court Rule 137 is vacated.
- ¶ 2 Plaintiffs, Michael Mann and his wife, Linina Chernyavska, appeal from an order of the

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circuit court dismissing their complaint with prejudice under sections 2-619 and 2-615 of the Code of Civil Procedure (735 ILCS 6/2-619, 2-615 (Code) (West 2010)). Mann contends the trial court erred in finding his breach of fiduciary duty claims against defendants, BMO Harris Bank, N.A. (Harris) and Christopher Robert McClear (for simplicity, collectively, "Harris"), barred by the doctrine of *res judicata* and in finding that plaintiffs failed to state a claim for intentional infliction of emotional distress and loss of consortium. On cross-appeal, Harris argues the trial court erred in denying its motion for sanctions under Illinois Supreme Court Rule 137 (eff. Feb. 1, 1994).

¶ 3 We reverse the trial court's dismissal of plaintiffs' breach of fiduciary duty claims and their claims for intentional infliction of emotional distress and loss of consortium. We also vacate the trial court's order denying Harris's motion for Rule 137 sanctions and remand for further proceedings consistent with this order.

¶ 4 Background

¶ 5 Michael Mann suffered life-long debilitating injuries in a car accident when he was 3-years old and is confined to a wheelchair. On September 19, 1991, when he was 18-years-old, using the proceeds of his settlement from the accident, Mann created two trusts: a revocable trust called the Michael Mann Trust ("revocable trust") and an irrevocable trust called the Michael Mann Health Care Trust ("health care trust"). In 2006, Harris was appointed co-trustee, along with Mann, of the two trusts. Later, Harris became sole trustee of the health care trust. An officer at Harris, defendant Christopher McClear, administrated the trusts.

¶ 6 Under the revocable trust, all of the net income of the trust had to be distributed to Mann

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at least annually. In addition, Mann could request a distribution from the principal of the trust not to exceed \$25,000 per year. Otherwise, Harris had discretion to manage the trust and distribute as much of the principal as it deems in its discretion to be in Mann's best interest. The trust expressly provides that it is in Mann's best interest to have a new and reliable motor vehicle every few years. The trust permits the trustee to resign by giving 30 days written notice to the co-trustee and to all current income beneficiaries. The trustee is entitled to a judicial approval of accounts from time to time and an account is binding on beneficiaries, unless an objection is received within six months of the trustee furnishing the account.

¶ 7 Under the health care trust, Harris could distribute the trust's net income and principal for Mann's health care if other resources were insufficient and use any part or all of the net income and principal to pay for Mann's state and federal income taxes as well as expenses caused by illness, accident, or other emergency. At age 45, Mann may withdraw all of the assets of the health care trust.

¶ 8 The parties agree that the relationship between Mann and Harris began to deteriorate in 2009. Harris acknowledges its trust administrator, McClear, declined to fulfill all of Mann's requests for money, however, it asserts that plaintiff's complaint makes several false allegations regarding McClear's distribution of funds. For instance, Mann claimed McClear denied his request for money to pay for his wedding, while Harris contends McClear authorized a \$20,000 disbursement for Mann's wedding budget. Mann also alleged Harris would not authorize disbursements to purchase healthy groceries, doctor-recommended massages, exercise and sauna sessions, a new wheelchair to replace a six-year-old wheelchair, a new shower to replace a worn-

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out shower, auto and homeowner's insurance, stem-cell therapy, a new van, and an overdue water bill. Harris denied all of these allegations and asserted that it authorized disbursement to cover all of these expenses except the stem cell treatment, which Harris asserts was not approved because Mann refused to provide the physician approval and back-up documentation.

¶ 9 On September 16, 2010, Harris filed a petition in the Chancery Division of the circuit court against Mann (*Harris, N.A., not individually but as co-trustee of the Revocable Trust and as Trustee of the Health Care Trust v. Michael Mann*, 10 CH 40273 (*Mann I*)) seeking: (1) under the terms of the trusts, both trust accounts approved for the period it served as trustee or co-trustee and dismissal as trustee; (2) appointment of a successor trustee; and (3) a civil restraining order against Mann. Harris alleged it had discretion under the trust accounts, that Harris and Mann encountered difficulty regarding trust distributions, and because of that difficulty, coupled with Mann's behavior toward Harris employees, Harris sought to resign and have the trust accounts approved. The petition described Mann's conduct, stating that throughout the spring and summer of 2010, Mann made numerous verbal threats against McClear and Kathryn Vander Zanden, a senior managing director at Harris. Then, in August 2010, Mann left numerous, lewd, obscene, threatening and harassing voice mail messages with McClear, making specific death treats to him and other threats against him and Vander Zanden. Harris reported the threats to the Hinsdale police department and were advised that Mann's acts were potentially criminal. Mann consented to the entry of two orders that fully disposed of the case. On October 1, 2010, Judge Billik entered an order approving both trust accounts for the period of July 1, 2006 to August 31, 2010, and discharging and releasing Harris as co-trustee of both trusts. Judge Billik also entered

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a restraining order preventing Mann from visiting Harris facilities and from communicating with McClear, Vander Zanden, and other Harris personnel or their family members. No notice of appeal was filed as to either order.

¶ 10 Fourteen months later, on December 14, 2011, Mann and his wife, Linina Chernyavaska, filed a four-count complaint (*Mann II*), alleging against Harris and McClear breaches of fiduciary duty as trustee of the health care trust (count I) and of the revocable trust (count II), and intentional infliction of emotional distress (count III). Chernyavaska asserted a claim for loss of consortium (count IV). Harris filed a counterclaim seeking reimbursement for all expenses, including attorneys fees incurred in defending itself in the lawsuit.

¶ 11 Harris filed a motion to dismiss under section 2-619 of the Code (735 ILCS 5/2-619 (West 2010)) and a motion for sanctions against plaintiffs under Supreme Court Rule 137. Harris's motion to dismiss asserted that Mann's claims were barred by the doctrine of *res judicata*, as incorporated into section 2-619(a)(4) of the Code, which allows a trial court to dismiss a cause of action on the grounds that it is barred by a prior judgment. 735 ILCS 5/2-619(a)(4) (West 2010). Specifically, Harris asserted plaintiffs' complaint seeks to relitigate issues already decided by Judge Billik when he entered an order in October 2010, approving its actions as trustee. Harris asserted that an order in plaintiffs' favor would directly contradict Judge Billik's orders.

¶ 12 Oral argument on both motions was held on May 21, 2012. Afterward, the trial court announced its decision to grant, with prejudice, Harris's motion to dismiss counts I and II of the complaint, alleging breach of fiduciary duties, on *res judicata* grounds. The court stated, "Mr.

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Mann's filing of this case here in the law division is nothing more than just a continuation of an issue which could have been resolved in the first instance before Judge Billik by an appropriate pleading. And I don't believe \*\*\* it would be appropriate for Mr. Mann's action to continue to proceed in this courtroom." The court also announced its decision to dismiss, with prejudice and on its own motion, counts III and IV of the complaint for failure to state a claim. The court stated that the allegations in plaintiffs' complaint do not "rise up to the type of conduct \*\*\* to go forward on intentional infliction of emotional distress; namely that the conduct has to be so obnoxious, so offensive to the general public to rise above just mere slights and ill-feelings because of the conduct." The trial court also dismissed the loss of consortium claim, finding it fails since the plaintiffs failed to state a claim for intentional infliction of emotional distress. The trial judge also denied Harris's request for Rule 137 sanctions against plaintiffs, stating that he could not "say that there was not a good-faith basis" for plaintiffs' complaint.

¶ 13 The trial court memorialized its decisions in a final order entered on June 1, 2012. Since the order did not address Harris's counterclaim for attorney fees, it was not appealable under Rule 301, but the court stated, under Supreme Court Rule 304, there was no just reason to delay enforcement or appeal of the order. Plaintiffs filed a notice of appeal, asking this court to reverse and vacate the trial court's order granting Harris's motion to dismiss. Harris then filed a notice of appeal to that part of the court's order denying their motion for Rule 137 sanctions.

¶ 14 Analysis

¶ 15 *Res Judicata*

¶ 16 A motion to dismiss under section 2-619 of the Code "admits the legal sufficiency of the

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complaint but asserts affirmative matter to avoid or defeat the claim.” *Giannini v. Kuhmo Tire U.S.A., Inc.*, 38 Ill. App. 3d 1013, 1015 (2008). “One defense that a defendant may raise in a section 2-619 motion is that a prior judgment bars the plaintiff’s cause of action, *i.e.*, that the prior judgment has *res judicata* effect in the subsequent lawsuit.” *Kasney v. Connen & Roth, Ltd.*, 395 Ill. App. 3d 870, 873 (2009). This court reviews *de novo* the dismissal of a complaint under section 2-619 of the Code. *DeLuna v. Burciaga*, 223 Ill. 2d 49, 59 (2006).

¶ 17 Mann first contends the trial court erred in finding his two breach of fiduciary duty claims were barred by *res judicata*. The doctrine of *res judicata* provides that “a final judgment on the merits rendered by a court of competent jurisdiction bars any subsequent actions between the same parties or their privies on the same cause of action.” *Lane v. Kalcheim*, 394 Ill. App. 3d 324, 329 (2009). *Res judicata* applies when: (1) a final judgment on the merits was rendered by a court of competent jurisdiction; (2) there is an identity of causes of action; and (3) there is an identity of parties or their privies. *Id.* at 329-30. “*Res judicata* is an equitable doctrine designed to prevent the multiplicity of lawsuits between the same parties and involving the same facts and the same issues.” *Murneigh v. Gainer*, 177 Ill. 2287, 299 (1997). The bar extends to all matters that were offered to sustain or defeat a claim in the first action, as well as to all matters that could have been offered. *Avria v. Madigan*, 209 Ill. 2d 520, 533 (2004).

¶ 18 The parties do not dispute that the earlier litigation ended in a final judgment on the merits rendered by a court of competent jurisdiction. Nor do they dispute that the parties in *Mann I* are the same as the parties in *Mann II*. The only issue is whether there is an identity of causes of action between the two cases. To answer that question, Illinois courts apply a

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transactional test, which was adopted by our Supreme Court in *River Park, Inc. v. City of Highland Park*, 184 Ill. 2d 290, 310 (1998). The essential showing for purposes of *res judicata* under the transactional test is that the claims arise from a common core of operative facts. *Id.* Using the transactional test, claims may be considered part of the same cause of action even if there is no substantial overlap in the evidence. *Id.* Separate claims will be considered the same cause of action under the transactional test if they arise from a single group of operative facts, regardless of whether different theories of relief are asserted. *Lane*, 394 Ill. App. 3d at 392. What constitutes a single transaction should be determined pragmatically, and courts should consider whether the facts are related in time, space, origin, or motivation. *River Park, Inc.*, 184 Ill. 2d at 312. Courts should also consider whether the facts form a convenient trial unit and whether treating them as a one unit conforms with the parties expectations. *Id.*

¶ 19 Mann argues that although he could have brought his claims in the earlier lawsuit, he was not required to do so because counterclaims are not compulsory in Illinois. It is true that, “in Illinois, counterclaims are generally permissive rather than mandatory.” *Fuller Family Holdings, LLC v. Northern Trust Co.*, 371 Ill. App. 3d 605, 617 (2007). Thus, “a defendant [in the original action] generally may raise his or her claim against the plaintiff [in the original action] by way of a counterclaim or by way of a separate action.” *Id.* But, if the defendant's claim involves the same operative facts as the plaintiff's claim, *res judicata* may bar the defendant from raising his or her claim in a subsequent action. *Id.* Specifically, *res judicata* bars a subsequent action if successful prosecution of that action would, in effect, nullify the judgment entered in the initial action. *Id.*



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¶ 20 Harris argues that *res judicata* applies to bar plaintiffs' breach of fiduciary duty claims because in *Mann I*, Harris alleged it had discretion to make distributions under the trust accounts, that Harris and Mann had disagreements over trust distributions, and that Harris sought to be discharged as trustee and a restraining order against Mann after he threatened and intimidated McClear and other Harris personnel because he was unhappy about the decisions Harris made as trustee. Harris asserts the allegations in *Mann II* similarly concern Harris's exercise of its discretion as trustee and its refusal to approve certain distributions of trust assets. Therefore, Harris contends, the claims in both cases arise out of the same conduct involving the same trust accounts during the same period of time.

¶ 21 Harris also asserts that a successful prosecution of plaintiffs' claims would nullify Judge Billik's orders. For support, Harris relies on *Corcoran-Hakala v. Dowd*, 362 Ill. App. 3d 523 (2005). In *Dowd*, an attorney filed a fee petition in a wrongful death action to recover a referral fee from a client. The trial court granted the fee petition and ordered the client to pay the lawyer \$140,000. The client then filed a complaint against the lawyer alleging, in part, that the referral was obtained through fraud and that if she and the attorney had an attorney-client relationship, the attorney committed malpractice by failing to properly advise her before she signed a contingency agreement. The trial court dismissed the complaint on *res judicata* grounds, and plaintiff appealed arguing that counterclaims are not mandatory in Illinois and she should not be precluded from filing her lawsuit to raise those claims. *Id.* at 530. The appellate court affirmed the trial court, stating that "plaintiff's current claims involve the same operative facts as the earlier litigation" and that "successful prosecution of plaintiff's current suit would in effect nullify

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the prior judgment." Therefore, "plaintiff could have—and should have—raised those claims in that proceeding." *Id.* at 531.

¶ 22 Harris urges this court to follow *Dowd* and find that plaintiffs' breach of fiduciary duty claims are barred by *res judicata* because a judgment in plaintiffs' favor would nullify Judge Billik's prior judgment. *Dowd*, however, is distinguishable. In that case, the lawyer brought an action to recover a referral fee under the terms of a contingency agreement signed by the client. After the trial court upheld the agreement and ordered the client to pay the attorney, the client brought an action claiming the contingency agreement was invalid because it was procured through fraud and seeking to recover the amount she had been ordered to pay under the agreement. Not only do those claims arise out of the same operative facts, the execution of the contingency agreement, but an order finding that the contingency agreement was obtained through fraud would nullify the trial court's order that agreement was valid and that the client owed the attorney \$140,000.

¶ 23 Here, a successful prosecution of plaintiffs' claims for breach of fiduciary duty would not similarly nullify Judge Billik's orders in *Mann I*. First, the order approving the trustee's accounts and discharging Harris as trustee only showed that Harris kept accurate records of the transactions it made as trustee of the trusts. As Harris notes in its brief, "court orders approving accounts \*\*\* cover all matters related to *transactions in the Trust Accounts*." (Emphasis added). In *Mann II*, plaintiffs do not question the accuracy of Harris's records but instead ask the trial court to determine whether Harris breached its fiduciary duties by failing to approve specific disbursements of trust assets for Mann's health and well-being. And, Mann seeks damages from

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defendants personally rather than assets or distributions from either trust. A judgment in plaintiffs' favor on those claims would not nullify the previous order approving the accounts. Further, a ruling in plaintiffs' favor on counts I and II of their complaint would not negate the civil restraining order Judge Billik imposed on Mann. Mann's threatening and harassing conduct toward McClear and other Harris employees was improper regardless of whether defendants breached their fiduciary duties, and the restraining order would remain in place regardless of the outcome of this case.

¶ 24 That Illinois does not have mandatory counterclaims, and Mann was not required to bring that claim in *Mann I*, does not resolve the case before us. Critical to the analysis is to determine whether the breach of fiduciary duties claims should have been raised in connection with the issues Harris raised in *Mann I*. Although the claims in both cases may generally arise out of the trustee's handling of the trusts, the earlier case involved specific distributions made by Harris and the accuracy of its trust accounts. *Mann II*, on the other hand, involves Mann's requests for distributions that Harris allegedly did not make, and does not affect the accuracy of the trust accounts. Like the proverbial two ships passing in the night, the facts of each constitute its own trial unit and nothing in the record indicates any expectations of the parties to treat the facts as one unit. Therefore, we reverse the trial court's dismissal of counts I and II of plaintiffs' complaint on *res judicata* grounds and remand for further proceedings.

¶ 25 Intentional Infliction of Emotional Distress and Loss of Consortium

¶ 26 Next, plaintiffs argue the trial court erred in dismissing counts III and IV of their complaint under section 2-615 of the Code (735 ILCS 5/2-615 (West 2010)), for failing to state a

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claim for intentional infliction of emotional distress and loss of consortium. Plaintiffs first contend that because Harris did not explicitly seek dismissal of count III or IV on that basis, the trial court should not have dismissed either claim *sua sponte*. A trial court, however, has authority to dismiss claims that do not state a cause of action. *Crissman v. Strickland*, 43 Ill. App. 3d 496, 498 (1976). And, this authority is an essential ingredient to the power and ability of courts to expeditiously and cost-effectively manage their cases. Therefore, the trial judge had authority to dismiss counts III and IV of plaintiffs' complaint under section 2-615 of the Code. 735 ILCS 5/2-615 (West 2010).

¶ 27 A section 2–615 motion to dismiss challenges the legal sufficiency of a complaint based on defects apparent on its face. *Beacham v. Walker*, 231 Ill. 2d 51, 57 (2008). When the legal sufficiency of a complaint is challenged by a motion to dismiss under section 2–615, all well-pleaded facts in the complaint are taken as true and a reviewing court must determine whether the allegations of the complaint, construed in a light most favorable to the plaintiff, are sufficient to establish a cause of action upon which relief may be granted. *Lozman v. Putnam*, 379 Ill. App. 3d 807, 821 (2008). A trial court should dismiss a complaint with prejudice under section 2–615 of the Code only if it is clearly apparent that the plaintiffs can prove no set of facts that will entitle them to recover. *In re County Collector of Lake County*, 343 Ill. App. 3d 363, 370 (2003). The decision to deny leave to amend is within the sound discretion of the trial court. *Id.* But, the trial court should exercise its discretion liberally in favor of allowing amendments if doing so will further the ends of justice, and it should resolve any doubts in favor of allowing amendments. *Id.* Generally, the trial court should give a plaintiff at least one opportunity to cure

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the defects in his or her complaint. *Id.*

¶ 28 In count III of the complaint, Mann alleged that Harris's refusal to disburse trust funds to pay for certain medical and living expenses caused him severe physical and emotional distress, including an inability to breath properly, severe headaches, constant back pain, and stomach ulcers. Mann asserted he was unable to sleep or eat, cried frequently, and contemplated suicide. In count IV claiming loss of consortium, Mann's wife, Chernyavska, alleged she was deprived of her husband's love, companionship, affection, society, moral support, and solace due to his deteriorated physical and psychological condition.

¶ 29 Harris's motion to dismiss argued plaintiffs' entire complaint should be dismissed under section 2-619 of the Code (735 ILCS 5/2-619 (West 2010)), on *res judicata* grounds. Harris did not assert that plaintiffs' complaint failed to state a cause of action under section 2-615. (735 ILCS 5/2-619 (West 2010)). The plaintiffs were first made aware that their complaint could be dismissed due to defects in their pleadings when, during arguments on Harris's 2-619 motion, the trial court decided to address counts III and IV under section 2-615 of the Code. As noted above, the trial court has discretion to dismiss a complaint, on its own motion, under section 2-615, if a complaint fails to state a cause of action. Under the circumstances, we agree with the trial court's dismissal of counts III and IV of plaintiffs' complaint for failing to state a cause of action. But, the court should have given plaintiffs at least one opportunity to amend their complaint, particularly since they did not have reason to think they needed to amend their pleadings before the trial court held arguments on Harris's motion to dismiss under section 2-619 of the Code. Therefore, we reverse the trial court's dismissal of counts III and IV with prejudice and remand

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for further proceedings.

¶ 30

#### Rule 137 Sanctions

¶ 31 Lastly, on cross-appeal, Harris claims the trial court erred in denying their motion for sanctions under Illinois Supreme Court Rule 137 (eff. Feb. 1, 1994). Under Rule 137, the signature of an attorney or party on a pleading constitutes a certification “that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.” The availability of sanctions for the filing of frivolous or harassing or vexatious or groundless claims in fact or law stands as an efficient tool to deter the abuse of the legal process.

¶ 32 "Using an objective standard, the trial court must determine whether a party made a reasonable inquiry into the facts and law supporting their allegations to meet the burden of Rule 137." *Dismuke v. Rand Cook Auto Sales, Inc.*, 378 Ill. App. 3d 214, 217 (2007). The decision of whether to impose sanctions under Rule 137 is committed to the sound discretion of the circuit court and will not be disturbed on appeal unless it represents an abuse of that discretion. *Dowd & Dowd*, 181 Ill. 2d at 487.

¶ 33 Harris contends sanctions were appropriate because plaintiffs' complaint is founded solely on false allegations, which plaintiffs must know to be false, and the complaint is not warranted by existing law. In denying Harris's motion, the trial court focused on the latter factor only,

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stating, "I cannot \*\*\* say that there was not a good-faith basis and one that brings a very interesting issue to this court." In reversing the trial court's dismissal of counts I and II of plaintiffs' complaint on *res judicata* grounds and remanding for further proceedings, we agree with the trial court that there is, at least, a good faith argument that plaintiffs' claims are supported by existing law. But, a litigant could plead a cause of action comprised of specious, untrue, or spurious material facts. Because we are reversing the trial court's dismissal of plaintiff's complaint with prejudice, and remanding to permit plaintiffs an opportunity to replead, we also vacate the court's order denying Harris's request for Rule 137 sanctions. If Harris asks the trial court to revisit the sanctions issue based on plaintiffs' amended complaint, the court should make specific findings of fact or law supporting its decision to grant or deny the request.

¶ 34

#### Conclusion

¶ 35 We reverse the trial court's dismissal of plaintiffs' complaint and vacate its order denying Harris's motion for Rule 137 sanctions and remand for further proceedings consistent with this order.

¶ 36 Reversed and remanded.