

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

CHRISTOPHER J. MCMAHON,
Plaintiff,

v.

MEMORANDUM and ORDER
06-C-285-S

JOHN KINDLARKSI, JOHN NIEBUHR,
RONALD DeBRUYNE, SR., JUDITH DeBRUYNE
and KRISTEN DeBRUYNE,

Defendants.

Plaintiff Christopher J. McMahon commenced this civil action against defendants John Kindlarski, John Niebuhr, Ronald DeBruyne, Sr., Judith DeBruyne and Kristen DeBruyne alleging that they conspired to violate his equal protection and due process rights and his rights under state law.

On October 16, 2006 plaintiff moved for partial summary judgment on the basis of issue preclusion pursuant to Rule 56, Federal Rules of Civil Procedure, submitting proposed findings of facts, conclusions of law, affidavits and a brief in support thereof. This motion has been fully briefed and is ready for decision.

On a motion for summary judgment the question is whether any genuine issue of material fact remains following the submission by both parties of affidavits and other supporting materials and, if not, whether the moving party is entitled to judgment as a matter

of law. Rule 56, Federal Rules of Civil Procedure. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matters stated therein. An adverse party may not rest upon the mere allegations or denials of the pleading but the response must set forth specific facts showing there is a genuine issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

There is no issue for trial unless there is sufficient evidence favoring the non-moving party that a jury could return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

FACTS

For purposes of deciding the motions for summary judgment the Court finds that there is no genuine dispute as to the following material facts.

Plaintiff Christopher J. McMahon is an adult resident of Wisconsin Rapids, Wisconsin. Defendant Kristen DeBruyne is an adult resident of Arbor Vitae, Wisconsin. Defendants Judith DeBruyne and Ronald DeBruyne, the parents of Kristen, are also adult residents of Arbor Vitae, Wisconsin. Defendant Ronald DeBruyne has been a member of the Vilas County Board of

Supervisors. J.A. is the daughter of the plaintiff and defendant Kristen DeBruyne and was born on January 10, 2002.

Defendant John Niebuhr is the Sheriff of Vilas County. Defendant John Kindlarski is a Detective Sergeant of the Vilas County Sheriff's Department.

On June 27, 2003 plaintiff was adjudicated to be the father of J.A. On June 15, 2004 the Oneida County Circuit Court heard testimony from plaintiff and the DeBruyne family concerning the paternity of J.A. Defendant Kindlarski testified at this hearing. The Court continued the proceedings until July 22, 2004 and heard more testimony. On September 16, 2004 the Court ordered joint legal custody of J.A., that she reside between Kristen and plaintiff with periods of physical placement granted to Ron and Judy concurrent with those enjoyed by Kristen.

In October 2004 defendants Ronald and Judith De Bruyne moved reconsideration of the September 16, 2004 order. On October 26, 2005 plaintiff moved for sole custody of J.A. The paternity case was tried before the Honorable Mark A. Mangerson commencing on December 5, 2005 and ending on December 9, 2005. The Court awarded sole legal custody and primary placement of J.A. to plaintiff granting the DeBruynes visitation rights every other weekend from Friday until Sunday. The Court made detailed findings including the following:

#13. The Court now explicitly finds that the minor child was not conceived as the result of a forced sexual assault.

#14. The Court now finds that the minor child was conceived as the result of a sexual encounter between the petitioner, Christopher McMahon and the respondent, Kristen De Bruyne.

#40. The Court finds that there was a relationship between Kristen and Mr. McMahon and that relationship was consensual.

#32. The Court finds that plaintiff was flat-out lying when she testified that there was no relationship between herself and Mr. McMahon.

#41. The Court finds that Kristen has a manner of relating events which in and of itself depreciates the credibility of her answers. Kristen often begins answers with "actually" or "basically." "Actually" means everything I just said was not true and "basically" means that everything I just said was not accurate.

#42. The Court finds that Kristen makes things up as she goes along which are dependent on the circumstances that she finds herself in at the time.

#45. The Court finds that, even worse, Ron and Judith De Bruyne have held on to the false rape allegation despite all the strong evidence that there was no forced sexual contact between Kristen and Mr. McMahon.

#46. The Court finds that Kristen as well as Ron and Judith DeBruyne continuing to hold on to this false rape allegation has been a major detriment to the minor child.

53. The Court in making these findings is not minimizing Mr. McMahon's conduct. However, Mr. McMahon has been making good faith efforts throughout these proceedings despite the fact that he was instantly labeled a rapist upon his filing of this paternity action and

despite the fact that he continued to be called a rapist by the DeBruynes.

#59. There have been assertions that the child has said to Judith DeBruyne and Joyce Downs things such as "daddy touches me" or "my daddy touches me there."

#60. From what the Court has heard regrading the minor child the Court finds that the child could not put sentences together like the aforesaid statements that were attempted to be attributed to her.

#61. That fact leads the Court to believe that this situation may have evolved into a conspiracy of sorts against Mr. McMahon.

#76. Officer Newcomb testified that child pornographers do not have twelve images of child pornography on their computer which have been downloaded over a period of ten minutes. He testified that if you catch a person with child pornography that person usually has hundreds to thousand of images. The Court finds this compelling and adopts it in the Court findings.

MEMORANDUM

Plaintiff moves for partial summary judgment on the ground of issue preclusion. An authenticated copy of the state court judge's findings that document is in the record. Initially the plaintiff moved the Court to give preclusive effect to the above findings of Judge Mangerson. In his reply brief he argues that defendants should be prohibited from relitigating only that JA's conception was the result of a consensual, sexual relationship between Kristen DeBruyne and Christopher McMahon (#'s 13, 14 and 40); that McMahon

did not physically or sexually abuse Jade (#'s 59 and 60) and that McMahon is not a child pornographer (#76).

This Court must determine the preclusive effect of the prior state court action under Wisconsin Law. Simpson v. Nickel, 450 F.3d 393, 306-07 (7th Cir. 2006). In Wisconsin issue preclusion is available so long as the issue of law or fact for which preclusive effect is sought has been actually litigated and decided in a prior action and reduced to judgment. Jensen v. Milwaukee Mu. Ins. Co., 203 Wis. 2d 231, 235 554 N.W. 2d 232, 234 (Ct. App. 1996).

Defendants Kindlarski and Niebuhr argue that issue preclusion cannot be used against them because they were not parties in the prior paternity action. In order to be in privity with a party to the judgment, a non party must have such absolute identity of interest that the party to the earlier action represented the same legal interest as the non party to that first action. Pasko v. City of Milwaukee, 252 Wis.2d 1, 33, 643 N.W.2d 72. Neither Kindlarski nor Niebuhr had the same interests as the parties in the prior state court action. Accordingly, issue preclusion cannot be used against them.

Defendants Kristin, Judith and Ron DeBruyne were parties in the prior state court paternity action. Some of the findings found by the state court judge were speculative, particularly his finding concerning a conspiracy of sorts.

Defendants Kristen, Judith and Ron DeBruyne contend that issue preclusion cannot be used against them because it would be fundamentally unfair. In Wisconsin, if a court determines that the prerequisite test for applying issue preclusion has been met, the court must still determine whether fundamental unfairness prevents the application of the doctrine. Mrozek v. Intrafinacial Corp., 281 Wis. 2d 448, 464, 699 N.W.2d 54 (Wis. 2005). The five areas of inquiry are provided by the Court:

(1) whether the party against whom preclusion is sought could have obtained review of the judgment; (2) whether the question is one of law that involves two distinct claims or intervening contextual shift in the law; (3) whether there are apt to be significant differences in the quality of the two proceedings such that relitigation of the issue is warranted; (4) whether the burden of persuasion has shifted such that the party seeking preclusion had a lower burden of persuasion in the first trial than in the second and (5) whether matters of public policy or individual circumstance would render the application of issue preclusion fundamentally unfair, including whether the party against whom preclusion is sought had an inadequate opportunity or incentive to obtain a full and fair adjudication of the issue in the initial litigation.

In this case, defendants Kristin, Judith and Ron DeBruyne could have obtained review of the judgment of Judge Mangerson. The issue in the child custody proceeding was distinct from the claim in this case. In the prior state court proceeding the Court determined which custodial placement was in the best interests of the child. In making this determination, the Court found that the

child was conceived in a consensual sexual relationship, that plaintiff did not abuse JA and that plaintiff was not a child pornographer. In this case the plaintiff has the burden to prove that defendants denied him his equal protection and due process rights and violated his rights under state law, claims that are distinct from whether he is a fit custodial parent.

Fundamental fairness requires that defendants should be able to relitigate the issues where they have any relevance or materiality to plaintiff's constitutional and state law claims. Specifically, the burden has shifted to plaintiff to prove that defendants made untrue statements against him and defendants should not be precluded from re-litigating the truth of these statements. It would also be unfair for this Court to preclude the relitigation of some findings of the state court and to allow relitigation of others.

Because the state court proceeding was distinctly different from this one, the Court finds that issue preclusion does not require the Court to adopt any findings of the state court judge. Plaintiff's motion for partial summary judgment will be denied.

ORDER

IT IS ORDERED that plaintiff's motion for partial summary judgment is DENIED.

Entered this 20th day of November, 2006.

BY THE COURT:

S/

JOHN C. SHABAZ
District Judge