

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

BRYAN P. WEILER,

Plaintiff,

v.

MEMORANDUM and ORDER
06-C-591-S

BOARD OF REGENTS OF THE UNIVERSITY
of WISCONSIN SYSTEM and TRULI
G. BERTRAM,

Defendants.

The above entitled case was removed from the Dane County Circuit Court on October 16, 2006. Plaintiff Bryan P. Weiler claims that the defendant Truli G. Bertram violated his Fourth Amendment rights.

On November 2, 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 Bryan P. Weiler is an adult resident of Illinois. Defendant Truli Bertram is a police officer for the University of Wisconsin. Defendant Board of Regents of the University of Wisconsin System is defendant Bertram's employer.

On May 15, 2005 at approximately 1:28 a.m. plaintiff was stopped by defendant Bertram on West Johnson Street. She issued

him a citation for deviation from lane of traffic and operating a motor vehicle while intoxicated. Officer Bertram took plaintiff to the University of Wisconsin Police Department in Madison, Wisconsin. Plaintiff refused to submit to an intoximeter test. Officer Bertram transported plaintiff to Dane County Jail where she issued him a Notice of Intent to Revoke Driving Privileges as result of his refusal to submit to a breath test. Plaintiff remained in jail until 2:00 p.m.

On December 21, 2005 plaintiff had a trial to the court, the Honorable Robert DeChambeau presiding, on the charges of deviating from the lane of traffic, operating a motor vehicle while intoxicated and refusal to submit to a breath test. The Court found plaintiff not guilty of deviating from the lane of traffic and operating a motor vehicle while intoxicated but found him guilty of refusing to submit to a breath test and ordered that his privilege to operate a motor vehicle be revoked.

Plaintiff appealed this determination. On July 7, 2006 the Wisconsin Court of Appeals ruled that Officer Bertram did not have reasonable suspicion to stop plaintiff and reversed the conviction for improperly refusing to submit to a breath test.

MEMORANDUM

Plaintiff moves for partial summary judgment on the ground of issue preclusion. This Court must determine the preclusive effect

of the prior state court action under Wisconsin Law. Simpson v. Nickel, 450 F.3d 393, 396-97 (7th Cir. 2006). Issue preclusion allows the Court to prohibit relitigation of an issue which was resolved in a prior proceeding Michelle T. V. Crozier, 173 Wis. 2d 681, 687, 495 N.W.2d 327 (1993). The Court must first consider whether the parties in the present action are the same as or in privity with the parties in the prior action. Paige K.B. v. Steven G. B., 226 Wis. 2d 210, 224, 594 N.W. 2d 370 (1990).

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 (2002). Privity exists where the parties are sufficiently similar in interests that preclusion can be applied without violating the current litigant's due process rights. Paige K.B., 226 Wis 2d at 227.

In the state court case plaintiff had a court trial and was acquitted of deviating from a lane of traffic and operating a motor vehicle but convicted of refusing to take a breath test. On appeal the Wisconsin Court of Appeals found that Officer Bertram did not have reasonable suspicion to stop plaintiff and reversed the conviction for improperly refusing to submit to a breath test.

In the case in state court, the State of Wisconsin legal interest was enforcement of the Wisconsin traffic code. The State

of Wisconsin was represented by the Dane County District Attorney's office. Officer Bertram was not a party to that action.

In this case plaintiff is suing Officer Bertram for a violation of his Fourth Amendment rights. The defendant's interests in defending this suit are not the same as the state's interest in prosecuting plaintiff for traffic code violations.

In Paige K.B., the Wisconsin Supreme Court addressed the issue of privity in considering whether the grandparents were precluded from litigating whether their son sexually assaulted their granddaughter based on the criminal conviction of their son. Paige K.B., 226 Wis. 2d at 215. The Court found that the grandparents were not in privity with the son because they did not have the opportunity to litigate the issue in the criminal prosecution or to join in the prior action. Further the Court found that the grandparents had no opportunity to examine or cross-examine witnesses in the prior proceeding.

Defendant Bertram, like the grandparents in Paige K.B. , did not have the opportunity to litigate the issue of her personal liability in the prior action or to examine or cross-examine witnesses. Officer Bertram did not have the same legal interests as the State in the prior action and is not in privity with it. Accordingly, the application of issue preclusion would violate defendant Bertram's due process rights.

Had the Court found that defendant Bertram was in privity of the state the Court would then have to determine whether fundamental unfairness prevents the application of the doctrine. Mrozek v. Intrafinancial 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.

Plaintiff had the opportunity in state court to fully litigate the charges against him. Defendant Bertram did not have the opportunity to fully litigate the issue of whether she violated plaintiff's Fourth Amendment rights. In addition she did not have the opportunity in that case as she will in this case to raise defenses for her action such as qualified immunity. It would be fundamentally unfair to apply issue preclusion in this case because defendant Bertram had an inadequate opportunity to obtain a full and fair adjudication of the issue in the initial litigation.

Issue preclusion cannot be applied against defendant in the instant action because she is not in privity with the State of Wisconsin in the prior action and because it would be fundamentally unfair. Accordingly, 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 4th day of December, 2006.

BY THE COURT:

S/

JOHN C. SHABAZ
District Judge