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DISTRICT II

April 14, 2021

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You are hereby notified that the Court has entered the following opinion and order:

2019AP2029 Bryan McDermott v. Waukesha County (L.C. #2018CV1194)

Before Neubauer, C.J., Reilly, P.J., and Davis, J.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Bryan McDermott appeals from an order granting summary judgment against him. He contends that the circuit court erred in determining that issue preclusion barred his claim. Based

upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2019-20).[1] We affirm.

In the early morning hours of April 6, 2015, McDermott called 911 for assistance. He said that he was having a reaction to medication and wanted to know how to "deactivate" it. McDermott spoke loudly, used profanity, and appeared to be in great distress. He requested medical attention but simultaneously expressed fear that an ambulance would take him to prison.

Four Waukesha County Sheriff Department deputies were dispatched to McDermott's residence. Paramedics were also dispatched but told to stay away until the scene was secured. At the scene, McDermott behaved erratically, ignored commands, and reached for a black bag—the contents of which were unknown to the deputies. The deputies subsequently tased and handcuffed McDermott. Paramedics then took him to the hospital for further evaluation.

On November 10, 2015, McDermott filed a lawsuit in federal court against Waukesha County, its insurer, its sheriff, and the four deputies involved in the incident. He asserted several causes of action under 42 U.S.C. § 1983 along with a state law claim of assault and battery against the deputies. After nearly two years, the defendants moved for summary judgment. In response to the motion, McDermott withdrew his claims against the individual defendants, including the state law claim.[2] Ultimately, the district court granted the defendants' motion and dismissed the case.

[1] All references to the Wisconsin Statutes are to the 2019-20 version.

[2] McDermott conceded that he could not maintain his claims against the individual defendants; thus, he decided to limit his case to claims against Waukesha County and its insurer.

Shortly after the district court's dismissal, McDermott filed a new lawsuit in state court against Waukesha County, its insurer, and the four deputies involved in the April 6, 2015 incident. Again, he asserted a claim of assault and battery against the deputies. Again, the defendants moved for summary judgment. The circuit court granted the defendants' motion, determining that (1) the matter had been previously litigated and (2) fundamental fairness weighed in favor of applying issue preclusion. Accordingly, it dismissed the case. This appeal follows.

Issue preclusion "is a doctrine designed to limit the relitigation of issues that have been contested in a previous action between the same or different parties." ***Michelle T. by Sumpter v. Crozier***, 173 Wis. 2d 681, 687, 495 N.W.2d 327 (1993). Determining whether to preclude an issue is a two-step process.

"In the first step, a circuit court must determine whether the issue or fact was actually litigated and determined in the prior proceeding by a valid judgment in a previous action and whether the determination was essential to the judgment." ***Estate of Rille v. Physicians Ins. Co.***, 2007 WI 36, ¶37, 300 Wis. 2d 1, 728 N.W.2d 693. This presents a question of law that we review de novo. *See* ***id.***

"In the second step, a circuit court must determine whether applying issue preclusion comports with principles of fundamental fairness." ***Id.***, ¶38. The case law sets forth several nonexclusive factors to aid in this determination. ***Id.***[3] We review a circuit court's decision on the question of fundamental fairness for an erroneous exercise of discretion. ***Id.***

[3] The nonexclusive factors that a circuit court may consider are:

Here, we agree with the circuit court that McDermott's claim of assault and battery had been previously litigated. As noted, McDermott raised the same claim in the federal action against the same parties. The fact that he chose to withdraw the claim years into that action does not mean that it was not actually litigated. It was litigated and ultimately dismissed on summary judgment along with the rest of the action.

Likewise, we are satisfied that the circuit court properly exercised its discretion in applying issue preclusion to bar McDermott's claim. The court carefully examined the nonexclusive factors, noting (1) McDermott's ability to obtain review of the district court's decision, (2) the similarity of the claims, (3) the lack of appreciable differences in proceedings between the courts, (4) the fact that the burdens of persuasion had not shifted, and (5) McDermott's opportunity to

1) Could the party against whom preclusion is sought have obtained review of the judgment as a matter of law;

2) Is the question one of law that involves two distinct claims or intervening contextual shifts in the law;

3) Do significant differences in the quality or extensiveness of proceedings between the two courts warrant relitigation of the issue;

4) Have the burdens of persuasion shifted such that the party seeking preclusion had a lower burden of persuasion in the first trial than in the second; and

5) Are matters of public policy and individual circumstances involved that would render the application of collateral estoppel to be fundamentally unfair, including inadequate opportunity or incentive to obtain a full and fair adjudication in the initial action?

Estate of Rille v. Physicians Ins. Co., 2007 WI 36, ¶61, 300 Wis. 2d 1, 728 N.W.2d 693.

fully litigate his claim. In the end, the court believed that it would be unfair to the defendants not to apply issue preclusion. On this record, we perceive no error.[4]

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals

[4] To the extent we have not addressed any other argument raised by McDermott on appeal, the argument is deemed rejected. *See* ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978).