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DISTRICT II

March 27, 2013

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

2012AP442 Margaret Bach v. Richard Linhart (L.C. #2009CV16167)

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

Margaret Bach appeals from an order dismissing her claims against Richard Linhart, her incompetent son Aaron's general guardian, and ANEW Health Care Services. Based on our

review of the briefs and the record, we conclude that summary disposition is appropriate. *See* WIS. STAT. RULE 809.21 (2011-12).[1] We affirm the order.

Margaret alleged that Linhart denied Aaron prompt and adequate treatment. At a hearing on April 13, 2010, Judge Mel Flanagan determined that Linhart performed his guardianship duties in good faith, in Aaron's best interests, and with diligence and prudence, such that Linhart was entitled to immunity from civil liability. *See* WIS. STAT. § 54.18(4). When Margaret again alleged that Linhart negligently acted or failed to act, Judge Dennis Dugan dismissed claims related to Linhart's pre-April 13, 2010 actions on the basis of issue preclusion.

Issue preclusion prevents "relitigation in a subsequent action of an issue of law or fact that has been actually litigated and decided in a prior action and reduced to judgment." ***Jensen v. Milwaukee Mut. Ins. Co.***, 204 Wis. 2d 231, 235, 554 N.W.2d 232 (Ct. App. 1996). Here the same issues and facts already were litigated. Moreover, applying issue preclusion was fundamentally fair because: (1) Margaret was able to, and did, appeal Judge Flanagan's ruling and Aaron's GAL could have but did not; (2) the claims against Linhart were identical; (3) evidence of the adequacy of Linhart's guardianship services is substantially the same as in prior proceedings; (4) the burden of proof did not shift; and (5) matters of public policy or individual circumstances do not militate for a finding that Margaret would be denied a full and fair adjudication of her claims. *See* ***Aldrich v. LIRC***, 2012 WI 53, ¶110, 341 Wis. 2d 36, 814 N.W.2d 433. Her desire to repeatedly litigate the issues does not outweigh the competing goals

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

of judicial efficiency, finality and protection against harassing litigation. *See* ***Estate of Rille v. Physicians Ins. Co.***, 2007 WI 36, ¶94, 300 Wis. 2d 1, 728 N.W.2d 693.

Judge Dominic Amato, who inherited the case on judicial rotation, denied Margaret's motion to reconsider Judge Dugan's issue-preclusion decision. The decision on a motion for reconsideration is reviewed under the erroneous exercise of discretion standard. ***Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd.***, 2004 WI App 129, ¶6, 275 Wis. 2d 397, 685 N.W.2d 853. Essentially a request for a "do-over," Margaret neither presented newly discovered evidence nor established a manifest error of law or fact. The court thus properly denied her motion. *See* ***id.***, ¶44.

Margaret also argues that Judge Amato was without jurisdiction to make a ruling because he initially recused himself but then sat on the case when the chief judge refused to accept the recusal. Margaret earlier had named Judge Flanagan and another judge as parties in the case. Judge Amato thought having a judge from another county hear the case might avoid the appearance of impropriety. He never said he could not act impartially. When his recusal was denied, Judge Amato stated on the record that he could judge the case fairly and without bias. Disqualification is required only when the judge makes a determination that, in fact or appearance, he or she cannot act in impartially. WIS. STAT. § 757.19(2)(g).

When Margaret did not comply in any respect with the circuit court's scheduling order, Linhart moved pursuant to WIS. STAT. § 805.03 for summary judgment on the claims pertaining to his post-April 13, 2010 actions. The circuit court dismissed the claims. This is the only issue Margaret raises that relates to her claim against ANEW. Margaret argues that dismissal for simply "missing a deadline" was error. On these facts, we disagree.

A circuit court has broad discretion to sanction a party for the failure to comply with a court order, including a scheduling order. ***Hefty v. Strickhouser***, 2008 WI 96, ¶76, 312 Wis. 2d 530, 752 N.W.2d 820. Sanctions for noncompliance must be "just," which means that the noncomplying party must have acted egregiously or in bad faith. ***Industrial Roofing Servs., Inc. v. Marquardt***, 2007 WI 19, ¶43, 299 Wis. 2d 81, 726 N.W.2d 898. Failure to obey a scheduling order without a clear and justifiable excuse can be egregious. ***Id.***

Margaret explains that she "did not see a need" to name an expert witness because (1) she could not afford one; (2) she thought an expert unnecessary, as "[a]nyone can be a guardian"; and (3) she believed the scheduling order was stayed based on information allegedly obtained from Judge Amato's clerk and despite a court order to the contrary. These are not a "clear and justifiable excuse" to flout a court order. Furthermore, she asked the court to dismiss her case so that she might pursue it in federal court. We see no error.

Margaret next complains that Aaron's guardian ad litem (GAL) is incompetent, that the GAL "abandoned" Aaron and was not at the hearing before Judge Amato and that she should be able to represent Aaron herself. These claims are baseless. Margaret terms "incompetent" the professional decisions she disagrees with and she herself asked Judge Amato to proceed without the GAL. Also, we already have rejected her argument that she should represent Aaron and will not revisit it. *See* ***Bach v. Milwaukee Cnty.***, No. 2011AP2369, unpublished slip op., pp.4-5 & n. 7 (WI App Nov. 9, 2011), and ***Bach v. Linhart***, No. 2012AP442, unpublished slip op., pp.1-2 (WI App March 15, 2012).

Finally, the trial court properly exercised its discretion when it refused to consolidate this case with the action against Milwaukee county and various other entities and with her pending

foreclosure action. *See* ***Fire Ins. Exch. v. Basten***, 202 Wis. 2d 74, 95, 549 N.W.2d 690 (1996). The court explained that the matters were not closely related, did not involve common parties or common obligations, would be unnecessarily confusing and would cause unneeded litigation. The discretionary decision was based on an appropriate view of the facts and law.

Upon the foregoing reasons,

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

Diane M. Fremgen
Clerk of Court of Appeals