

532 N.W.2d 202, 209 Mich.App. 551, Bullock as Next Friend of Bullock v. Huster,
(Mich.App. 1995)

*202 209 Mich.App. 551

Ronald L. BULLOCK, as Next Friend of Renee BULLOCK, a Minor,
Plaintiff-Appellee,

v.

Bette HUSTER, Defendant-Appellant,

Docket No. 165366.

Court of Appeals of Michigan.

Submitted Nov. 2, 1994, at Detroit.

Decided April 3, 1995, at 9:30 a.m.

Released for Publication May 24, 1995.

Father brought suit as next friend of daughter, claiming that guardian ad litem had been negligent in discharging her duties in custody litigation. The Circuit Court, Wayne County, Sharon Tevis Finch, J., denied guardian's motion for summary disposition and appeal was taken. The Court of Appeals, Michael J. Kelly, J., held that: (1) guardian did not have immunity from suit, and (2) earlier decisions regarding custody did not have collateral estoppel effect.

Affirmed.

Fitzgerald, P.J., concurred and filed opinion.

1. STATUTES k195

361 ----

361VI Construction and Operation

361VI(A) General Rules of Construction

361k187 Meaning of Language

361k195 Express mention and implied exclusion.

Mich.App. 1995.

When legislature undertakes broad reform of area covered by statute, expression of one thing in resulting statute may be deemed exclusion of another.

2. INFANTS k85

211 ----

211VII Actions

211k76 Guardian Ad Litem or Next Friend

211k85 Duties and liabilities.

Mich.App. 1995.

Guardians ad litem were not entitled to immunity for acts of negligence performed in connection with their duties; statute specifically identifying various officers having immunity did not make reference to guardians ad litem. M.C.L.A. Sec. 691.1407.

3. JUDGES k36

227 ----

227III Rights, Powers, Duties, and Liabilities

227k36 Liabilities for official acts.

Mich.App. 1995.

Statute conferring immunity on judges, for their actions conducted in course of their duties,

did not extend to appointees of judges in any capacity, including guardians ad litem.

M.C.L.A. Sec. 691.1407.

4. JUDGMENT k720

228 ----

228XIV Conclusiveness of Adjudication

228XIV(C) Matters Concluded

228k716 Matters in Issue

228k720 Matters actually litigated and determined.

[See headnote text below]

4. JUDGMENT k724

228 ----

228XIV Conclusiveness of Adjudication

228XIV(C) Matters Concluded

228k723 Essentials of Adjudication

228k724 In general.

Mich.App. 1995.

Collateral estoppel precludes relitigation of issue in subsequent, different cause of action between same parties, when prior proceeding culminated in valid final judgment and issue was actually and necessarily determined in prior proceeding.

5. JUDGMENT k724

228 ----

228XIV Conclusiveness of Adjudication

228XIV(C) Matters Concluded

228k723 Essentials of Adjudication

228k724 In general.

Mich.App. 1995.

Previous court decisions regarding child custody did not have collateral estoppel effect in suit brought by father against guardian ad litem, claiming negligence in discharge of her duties; ultimate issue in earlier cases had been whether best interest of child would be served under care of mother or father, while ultimate issue in present case was negligence in discharge of duties; issue of guardian's negligence was not essential to custody decision.

[209 Mich.App. 552] *203 Travis Ballard and Demosthenes Lorandos, Adrian, for plaintiff.

Paul H. Stevenson, Detroit, for defendant.

Before FITZGERALD, P.J., and MICHAEL J. KELLY and POST, (FN*) JJ.

MICHAEL J. KELLY, Judge.

Defendant Bette Huster appeals by leave granted an order of the circuit court denying her motion for a rehearing of her motion for summary disposition under MCR 2.116(C)(7).

The

circuit court ruled that defendant was not immune from liability for her actions as guardian ad litem for plaintiff Renee Bullock in an underlying child custody suit between Ronald Bullock, plaintiff's father, and Sharon Pope, her mother. We affirm.

I

Plaintiff Renee Bullock was born in May 1983. In March 1985, Ronald Bullock and Sharon Pope separated, and a bitter child custody battle over plaintiff ensued. Initially, Bullock was given custody [209 Mich.App. 553] of plaintiff. (FN1) In April 1988, defendant

Bette Huster accepted appointment as guardian ad litem for plaintiff. Pope subsequently alleged that Bullock had sexually abused plaintiff. In December 1988, Pope was awarded custody of plaintiff and began denying Bullock visitation. After being found in contempt of

court, Pope fled to Georgia with plaintiff, which led to a conviction of parental kidnapping and a sentence of ninety days' imprisonment and community service. Despite Pope's actions, defendant continued to recommend that Pope retain custody. Apparently, defendant conducted little investigation into the allegations of sexual abuse against Bullock

and displayed hostility toward him and those who rendered expert opinions in his favor.

In December 1992, plaintiff filed the instant lawsuit, alleging that defendant acted in a negligent and grossly negligent manner while performing her duties as guardian ad litem, that she breached an express or implied contract with plaintiff and implied warranties

incident to that contract, and that she intentionally inflicted emotional distress upon plaintiff. Plaintiff also claimed that defendant failed to conduct sufficient investigation and cited numerous instances when defendant was negligent or intentionally deceitful in her analysis of plaintiff's expert opinions. Bullock was appointed next friend under MCR 2.201(E)(1)(b).

Bullock had moved for the removal of defendant as guardian ad litem in the underlying action. This motion was denied in February 1993 on the basis of insufficient evidence.

That

same month, defendant moved for summary disposition in the instant action on the basis that she was immune [209 Mich.App. 554] from liability as guardian ad litem and that plaintiff was collaterally estopped from relitigating the issue of defendant's negligence in view of the determinations made in the underlying action. In April 1993, the circuit court denied the motion. Defendant filed a motion for reconsideration and for a stay of proceedings pending appeal. In May 1993, the circuit court denied these motions. In August 1993, this Court granted defendant's application for leave to appeal.

II

Defendant first argues that she is entitled to immunity as guardian ad litem. We disagree.

At issue is the scope of the governmental immunity act of 1986, M.C.L. Sec. 691.1407; M.S.A. Sec. 3.996(107). Just before the act was proposed, the Supreme Court decided nine

consolidated governmental immunity cases, commonly referred to as *Ross v. Consumers Power Co.*, 420 Mich. 567, 363 N.W.2d 641 (1984). The response of the Legislature was swift and comprehensive. The Legislature took an immunity provision that previously had applied only to governmental agencies (subsection 1 of M.C.L. Sec. 691.1407; M.S.A. *204 Sec. 3.996[107] and added several other provisions defining the extent of immunity available to officers, employees, members, and volunteers of government agencies (subsections 2 and 3); public hospitals and medical care facilities (subsection 4); and judges, legislators, and the elective or highest appointive executive officials of all levels of government (subsection 5). See House Legislative Analysis, HB 5163, January 16, 1986. This was all accomplished in conjunction with the extensive tort reform act of 1986, 1986 P.A. 175. While the Legislature left intact a provision in subsection 1 that affirmed common-law rules regarding the immunity of government agencies as [209 Mich.App. 555]

the rules existed before July 1, 1965 (the effective date of the original governmental immunity act), the Legislature did not provide for the preservation of any common-law rules

with respect to the government officials covered in the other subsections of the 1986 act.

[1][2][3] Clearly, the 1986 act represents a comprehensive review of governmental immunity. Yet, the Legislature failed to include guardians ad litem within the class of persons entitled to immunity. Where the Legislature undertakes such broad reform, the expression of one thing in the resulting statute may be deemed the exclusion of another. See *Jennings v. Southwood*, 446 Mich. 125, 142, 521 N.W.2d 230 (1994). While subsection

5 grants immunity to "judges," there is no indication that this term should be construed beyond its plain meaning to include persons appointed by judges in any capacity. The Legislature drafted subsection 5 to apply only to those persons who are the ultimate decision makers in their respective branches of government--for example, "legislators" and "elective or highest appointive executive officials." Subsections 2 and 3, regarding employees of government agencies, are inapplicable to guardians ad litem. No other provisions in the act apply to guardians ad litem. Under these circumstances, we hold that the intent of the Legislature was to exclude guardians ad litem from the scope of governmental immunity. The wisdom of this exclusion is not a matter for our review. *Id.*, citing *City of Lansing v. Lansing Twp.*, 356 Mich. 641, 648, 97 N.W.2d 804 (1959). The circuit court's denial of defendant's motion for summary disposition on immunity grounds was proper.

III

Defendant also asserts that plaintiff is collaterally [209 Mich.App. 556] estopped from relitigating the propriety of the circuit court orders in the underlying child custody case.

[4] Collateral estoppel precludes relitigation of an issue in a subsequent, different cause of action between the same parties when the prior proceeding culminated in a valid final judgment and the issue was actually and necessarily determined in the prior proceeding. *Schlumm v. Terrence J. O'Hagan, P.C.*, 173 Mich.App. 345, 354, 433 N.W.2d 839 (1988).

The ultimate issue in the second action must be the same as that in the first. *Detroit v. Qualls*, 434 Mich. 340, 357, 454 N.W.2d 374 (1990). The issue must have been necessarily determined--that is, essential to the resulting judgment--in the first action. *Id.* It also must have been actually litigated--that is, put into issue by the pleadings, submitted to the trier of fact, and determined by the trier of fact. *VanDeventer v. Michigan Nat'l Bank*, 172 Mich.App. 456, 463, 432 N.W.2d 338 (1988). The parties must have had a full and fair opportunity to litigate the issue in the first action. *Kowatch v. Kowatch*, 179 Mich.App. 163, 168, 445 N.W.2d 808 (1989).

[5] The ultimate issue in the custody action was whether plaintiff's best interests would be served under Bullock's care or by remaining with Pope. The ultimate issue in this case is defendant's negligence or misconduct as guardian ad litem. The issue of defendant's negligence was not essential to the custody decision. The circuit court's denial of defendant's motion for summary disposition on collateral estoppel grounds was proper.

Affirmed.

POST, J., concurs.

FITZGERALD, Presiding Judge, concurring.

I concur with the [209 Mich.App. 557] majority's conclusion that the intent of the Legislature was to *205. exclude guardians ad litem from the scope of governmental immunity. I write separately, however, to express my concern that disgruntled parents who are dissatisfied with a custody decision may retaliate by suing the guardian ad litem, ostensibly on behalf of the child. I am concerned that guardians ad litem, whose services are consistently used in cases involving the termination of parental rights and child neglect and used with increasing frequency in custody cases to protect the interests of children, may be reluctant to serve as guardians ad litem if they are forced to defend their actions because of the anger of a parent who is not awarded custody. Hence, I would invite the Legislature to revisit the decision to exclude guardians ad litem from the scope of governmental immunity.

FN* Edward R. Post, 20th Judicial Circuit Judge, sitting on Court of Appeals by assignment

pursuant to Const. 1963, Art. 6, Sec. 23, as amended 1968.

FN1. Throughout this opinion, we will use "Bullock" to refer to Ronald Bullock. Renee Bullock will be referred to simply as "plaintiff."