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NO. COA02-286

NORTH CAROLINA COURT OF APPEALS

Filed: 31 December 2002

BILLY W. WRIGHT, and wife,  
GLORIA WRIGHT,  
Plaintiffs

v.

Henderson County  
No. 92 CVD 881

JULIE ANN WRIGHT (SMITH),  
Defendant

Appeal by defendant from judgment entered 9 August 2001 by Judge Laura J. Bridges in Henderson County District Court. Heard in the Court of Appeals 31 October 2002.

*Donald H. Barton for plaintiffs-appellees.*

*Pisgah Legal Services, by Becki L. Truscott; and Bazzle & Carr, P.A., by Eugene M. Carr, III, for defendant-appellant.*

WALKER, Judge.

On 9 February 2000, plaintiffs filed a motion in the cause to enforce a 1996 consent order granting them visitation with their grandchild, Noah Smith. Defendant filed a motion seeking to terminate plaintiffs' visitation on 14 March 2001. Both motions were heard, and on 9 August 2001, Judge Laura J. Bridges granted plaintiffs' motion for visitation and denied defendant's motions to dismiss and to terminate visitation.

Prior to the institution of the present action, the Buncombe County Department of Social Services filed a juvenile petition

alleging that Billy Wright had sexually abused his grandchildren.

On 21 October 1998, the trial court found:

[B]y clear, cogent, and convincing evidence that all of the minor children are neglected children pursuant to N.C.G.S. § 7A-517(21) in that they lived in an environment where a sibling was sexually abused and in an environment injurious to their welfare due to the fact that Gloria Wright was aware that Bill Wright bathed Noah and Christopher when they visited their home, that she does not believe the allegations made by Noah and Christopher, and that she allowed the activity to continue. That Noah and Christopher Smith are sexually abused children pursuant to N.C.G.S. § 7A-517(1) in that their maternal grandfather, Bill Wright, touched them in an inappropriate manner while bathing them.

However, in the present action, the trial court found in part:

5. That Noah told his mother about the alleged abusive conduct before he said anything to the school. That she didn't put any credence in it and the Court finds that she did not believe there was any kind of sexual abuse although she knew about what happened.

. . . .

10. As to the behavior that was alleged to have been abusive, the Court cannot determine that it was in fact abusive. Because of the lack of social development, children like Noah sometimes require special assistance with hygiene and keeping themselves clean, such as washing them if they do not wash themselves. That children of this nature can fail to adequately clean themselves after using the bathroom. In addition, there is a lack of inhibitions that may cause behavior outside the bounds of what is considered socially normal, such as removing one's clothes inappropriately.

The trial court then concluded that "it is [in] the best interest of Noah that he have visitation with his grandparents, the

Plaintiffs, and that they are fit and proper persons to have visitation with the minor child."

Defendant alleges, in part, that the trial court failed to find that Billy Wright had sexually abused his grandson. Defendant contends the trial court was collaterally estopped by the 21 October 1998 order from re-litigating whether Billy Wright had sexually abused Noah.

Under the doctrine of collateral estoppel, a party is precluded from retrying a previously litigated issue that was decided prior to the instant action and that was necessary to the prior action. *King v. Grindstaff*, 284 N.C. 348, 356, 200 S.E.2d 799, 805 (1973). In determining whether collateral estoppel is applicable, certain requirements must be met:

- (1) The issues to be concluded must be the same as those involved in the prior action;
- (2) in the prior action, the issues must have been raised and actually litigated; (3) the issues must have been material and relevant to the disposition of the prior action; and (4) the determination made of those issues in the prior action must have been necessary and essential to the resulting judgment.

*Id.* at 358, 200 S.E.2d at 806; see *Thomas M. McInnis & Assoc., Inc. v. Hall*, 318 N.C. 421, 349 S.E.2d 552 (1986).

A defendant is allowed to:

[A]ssert collateral estoppel as a defense against a party who has previously had a full and fair opportunity to litigate a matter [in a previous action which resulted in a final judgment on the merits] and now seeks to reopen the identical issues [actually litigated in the prior action] with a new adversary.

*Miller Bldg. Corp. v. NBBJ North Carolina, Inc.*, 129 N.C. App. 97, 100, 497 S.E.2d 433, 435 (1998), quoting *Thomas M. McInnis & Assoc., Inc.*, 318 N.C. at 428 and 434, 349 S.E.2d at 557 and 560. Furthermore, the party asserting collateral estoppel need not have been a party to the prior action, *Miller*, 129 N.C. App. at 100, 497 S.E.2d at 435, and once the elements of collateral estoppel have been established, the burden is on the opposing party "to show that there was no full and fair opportunity to litigate the issues in the first case," *Bradley v. Hidden Valley Transp., Inc.*, 148 N.C. App. 163, 167, 557 S.E.2d 610, 613 (2001), quoting *Miller*, 129 N.C. App. at 100, 497 S.E.2d at 435.

In the prior action, the issue before the trial court was whether Noah had been abused. Specifically, the trial court "conclude[d] as a matter of law" that Billy Wright sexually abused Noah and that Gloria Wright knowingly allowed the abuse to continue. Here, the trial court, when faced with the prior court's conclusion, found instead that it could not "determine that [Billy Wright's past behavior with Noah] was in fact abusive."

Furthermore, even though plaintiffs denied the allegations made in the prior action, they did not contest the findings and conclusions in that action. See *Fink v. Fink*, 120 N.C. App. 412, 426-27, 462 S.E.2d 844, 855 (1995); *NationsBank of North Carolina v. American Doubloon Corp.*, 125 N.C. App. 494, 503-04, 481 S.E.2d 387, 392-93 (1997). Therefore, defendant has established the elements necessary for collateral estoppel, and the burden is on plaintiffs to show they did not have a full and fair opportunity to

litigate the contested issue in the prior action. *See Bradley*, 148 N.C. App. at 167, 557 S.E.2d at 613.

Although plaintiffs were not named parties to the prior action, they were both present and represented by counsel. Furthermore, they actively participated in that action and denied the allegations in the petition. Plaintiffs have failed to meet their burden.

The trial court improperly allowed the plaintiffs to contest an issue previously determined. Rather than re-litigating the issue of whether Noah was abused, the trial court should have determined whether, taking into account the prior court's determination, there had been a substantial change of circumstances affecting the welfare of Noah and whether it was in his best interest to have visitation with the plaintiffs.

Because defendant is entitled to a new hearing, we decline to address the additional assignments of error as they may not appear on rehearing.

Reversed and remanded.

Judges McCULLOUGH and CAMPBELL concur.

Report per Rule 30(e).