STATE OF MICHIGAN

COURT OF APPEALS

CYNTHIA HAYNES and the
FAMILY INDEPENDENCE AGENCY,

Plaintiffs-Appellants,

v

LAWRENCE MOON,

Defendant-Appellee.

UNPUBLISHED
February 23, 1999

No. 206216
Genesee Circuit Court
LC No. 94-033526 DP

Before: Jansen, P.J., and Sawyer and Markman, JJ.

PER CURIAM.

Plaintiffs appeal from the trial court's order granting defendant summary disposition in a paternity action, pursuant to MCR 2.116(C)(7), because the action was barred by a prior adjudication. After being denied leave to bring a delayed appeal in this Court,[1] a delayed application for leave to appeal in the Supreme Court resulted in a remand to this Court for consideration as on leave granted.[2] Upon full consideration, we affirm the trial court, but note that a future paternity action by the Family Independence Agency brought on behalf of Haynes' minor child is not precluded by prior adjudication.

This is an appeal from the dismissal of the second of two paternity suits involving the same parties and operative facts. The first suit was filed by Cynthia Haynes in May 1994 and was dismissed with prejudice as a discovery sanction in December 1994. Defendant had served Haynes with a brief set of relevant interrogatories and despite the issuance of an order compelling a response, Haynes never provided the requested information. Sixteen days after the first suit was dismissed with prejudice, Haynes filed a second suit, this time represented by the Genesee County prosecutor's office. The case was assigned to the same trial court and defendant moved the court for summary disposition pursuant to MCR 2.116(C)(7) based on the prior adjudication as enforced by the principles of res judicata and collateral estoppel. On the day before the hearing on defendant's motion, the Department of Social Services, now known as the Family Independence Agency, filed a motion seeking to be added as a party-plaintiff. At the subsequent hearing, the court dismissed the case, without addressing the FIA's motion to be added as a party, because the claim was a refiling of the earlier case which had been dismissed with prejudice.

We first address the extent of the preclusive effect of the dismissal of Haynes' paternity action. The application of res judicata and collateral estoppel present questions of law which we review de novo. *Phinisee v Rogers*, 229 Mich App 547, 551; 582 NW2d 852 (1998) (res judicata); *McMichael v McMichael*, 217 Mich App 723, 727; 552 NW2d 688 (1996) (collateral estoppel). The principle of res judicata, also known as claim preclusion, is a doctrine which prevents claims from being relitigated. In order for it to apply, a party must establish that: "(1) the former suit was decided on the merits, (2) the issues in the second action were or could have been resolved in the former action, and (3) both actions involved the same parties or their privies." *Phinisee, supra* at 551; *Limbach v Oakland Bd of Rd Comm'rs*, 226 Mich App 389, 395; 573 NW2d 336 (1997). By comparison, the principle of collateral estoppel, also known as issue preclusion, is a doctrine which prevents issues from being relitigated. In order for it to apply, a party must show that: (1) the issue was actually litigated in a prior proceeding, (2) a determination of the issue was necessary to the outcome of the proceeding, and (3) the parties in the prior proceeding are the same as in the present proceeding. *McMichael, supra* at 727; *Porter v Royal Oak*, 214 Mich App 478, 485; 542 NW2d 905 (1995).

Standing to pursue relief under the Paternity Act is conferred upon (1) the mother of a child born out of wedlock, (2) the father of a child born out of wedlock, and (3) the Family Independence Agency on behalf of a child born out of wedlock who is being supported in whole or in part by public assistance. MCL 722.714(1), (8); MSA 25.494(1), (8). Regardless of the party bringing suit, the court may enter an order of filiation which may be enforced in the same manner as if the action were brought by the mother. MCL 722.714(10); MSA 25.494(10). Although the interests of a mother and her out-of-wedlock child in obtaining an order of filiation may be similar, they are not identical and one does not derive from the other. This Court has recently made it clear that a mother and child are not in privity for purposes of a paternity action. *Phinisee, supra* at 551-554. Hence, a claim under the Paternity Act brought by the FIA on behalf of a child, would not be precluded, under the doctrine of res judicata, by the prior adjudication of a claim brought by the mother.

The application of collateral estoppel needs even less analysis. The issue whether defendant was the child's father was never actually and necessarily litigated. Moreover, the child's non-party/non-privy status with regard to that prior adjudication would prevent collateral estoppel from precluding the relitigation of determinative issues even if they had already been litigated.

Confusion regarding the preclusive effect of the trial court's orders of dismissal may stem primarily from the FIA's pretense that it was a party in the trial court to the action presently on appeal. Had the FIA filed a paternity action on behalf of the child and the trial court had dismissed it on res judicata grounds, that dismissal would have been error. *Phinisee, supra* at 554. However, that is not what happened. Haynes' second action was dismissed before the FIA was ever joined and rather than filing a separate action on behalf of the child, the FIA has joined Haynes in the present appeal. The net result is that the FIA was not and is not precluded from bringing a suit under the Paternity Act on behalf of the child and no modification of the order being appealed is necessary to effectuate that result.

We next address the propriety of the trial court's granting summary disposition pursuant to MCR 2.116(C)(7) despite plaintiffs' collateral attack on the dismissal in the earlier case. We review

summary disposition under MCR 2.116(C)(7) de novo. *Limbach*, *supra* at 395. Summary disposition pursuant to MCR 2.116(C)(7) is proper when a prior adjudication bars the claim. *Id.*

at 395-396. The dismissal presently being appealed was granted because Haynes had earlier filed an identical claim which was dismissed with prejudice. An involuntary dismissal with prejudice is an adjudication on the merits. MCR 2.205(B)(3); *ABB Paint Finishing, Inc v Nat'l Union Fire Ins Co of Pittsburgh, PA*, 223 Mich App 559, 562-563; 567 NW2d 456 (1997). On its face, Haynes' second claim clearly falls within the category of cases properly dismissed under MCR 2.116(C)(7) based on res judicata.

However, plaintiffs argue that the dismissal in the first case was an abuse of discretion and it violated the Equal Protection Clause with regard to the minor child whose rights were summarily terminated. Plaintiffs argue that because of this, the original dismissal was a nullity so the dismissal presently on appeal was erroneous. Given our above analysis that the rights of the minor child were unaffected by the dismissal, plaintiffs' arguments which invoke prejudice to the minor child are without merit. As for the prior dismissal being an abuse of discretion, where a court has jurisdiction over the parties and the subject matter, irregularities which may render a judgment erroneous do not render the judgment void. *Altman v Nelson*, 197 Mich App 467, 472-475; 495 NW2d 826 (1992). "[U]ntil the judgment is set aside [in a proper proceeding for that purpose] it is valid and binding for all purposes and cannot be collaterally attacked." *Id.* at 475. Hence, the only proper course of action for the trial court to have taken in the instant case was to grant defendant's motion to dismiss under MCR 2.116(C)(7) because of the prior adjudication.

Lastly, we address plaintiffs' contention that the trial court abused its discretion by granting summary disposition before ruling on the FIA's motion to be joined as a party-plaintiff. Defendant correctly points out that the FIA's motion was never properly noticed pursuant to MCR 2.119(C)(1). Moreover, the FIA raised no objection to the trial court's failure to rule on its insufficiently noticed motion, nor did it bring a motion under MCR 2.119(F) for reconsideration of the summary disposition in conjunction with a hearing on its motion to be added. The decision whether to hear a motion without sufficient notice to the other party is within the discretion of the trial court. *Michigan Nat'l Bank v Mudgett*, 178 Mich App 677, 681; 444 NW2d 534 (1989). However, because the trial court was not afforded the opportunity to rule on this issue, we review it only for manifest injustice. *Herald Co v Kalamazoo*, 229 Mich App 376, 390; 581 NW2d 295 (1998); *Miller v Inglis*, 223 Mich App 159, 168; 567 NW2d 253 (1997). The rights of the child as represented by the FIA were not detrimentally affected by the court's declination to hear the FIA's motion before ruling on defendant's motion. Adding the FIA as a party to an action from which Haynes was necessarily barred, at a time when direct appeal from the prior adjudication was still available, would have detrimentally affected Haynes' position. Therefore, we find no manifest injustice resulted.

Affirmed.

/s/ Kathleen Jansen
/s/ David H. Sawyer
/s/ Stephen J. Markman

[1] *Haynes v Moon*, unpublished order of the Court of Appeals, entered September 12, 1996 (Docket No. 195216).

[2] *Haynes v Moon*, 456 Mich 867; 569 NW2d 160 (1997).