IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court No. DA-24-0261

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CHRISTOPHER SHELTON, VICKY COSTA, AND TODD COSTA,

Appellants,

v.

STATE OF MONTANA, DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES, an agency of the State of Montana, SUSAN RIDGEWAY, AXILON LAW GROUP, PLLC, PAUL S. HENNING, AARON J. DAVIES and DOES 1-20,

Appellees.

ON APPEAL FROM THE MONTANA FIRST JUDICIAL DISTRICT COURT,
LEWIS AND CLARK COUNTY, CAUSE NO.: ADV-2018-830
THE HONORABLE MIKE MENAHAN

APPELLEE HENNING AND DAVIES' RESPONSE BRIEF

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STATEMENT OF THE ISSUE

Whether the district court correctly concluded summary judgment was proper based on collateral estoppel, the Full Faith and Credit Clause of the U.S. Constitution, and a lack of standing in a case where an adoption occurred in a different state, the parties took an active participation in that case, and the State's court rendered judgment against the party seeking damages in another forum.

STATEMENT OF THE CASE

This appeal stems from a completed, finalized private adoption which occurred in Utah with a child born in Montana. Within this adoption, the Utah court held that all requirements of the Interstate Compact on the Placement of Children were complied with, terminated Appellant Shelton's parental rights, and authorized the minor child's adoption by Appellees Paul Henning and Aaron Davies. The adoption was finalized on January 27, 2021.

Prior to the completion of the adoption, on August 8, 2018, Christopher Shelton, and his parents, Todd and Vicky Costa filed various claims against DPHHS, Susan Ridgeway, Axilon Law Group, PLLC, and Paul Henning and Aaron Davies, the adoptive parents. Count I sought a declaratory judgment from the court that DPHHS violated the ICPC. Count II alleged DPHHS had violated Appellants' substantive due process rights under the Montana Constitution. Count III alleged negligence against DPHHS. Count IV alleged negligence against Appellees jointly. Count V alleged gross negligence against Appellees jointly. Count VI alleged gross negligent infliction of emotional distress against the Appellees jointly. Finally, Count VII alleged negligent misrepresentation against DPHHS.

On October 5, 2018, Ridgeway and Axilon Law Group filed their *Motion to Dismiss* pursuant to Mont. R. Civ. P. 12(b)(6) due to a lack of duty to Appellants. An oral argument was held on January 3, 2019, and on January 30, 2019, the district court granted that motion.

On March 17, 2023, Paul Henning and Aaron Davies moved for an order dismissing the claims against them pursuant to Mont. R. Civ. P. 12(b)(6). As a result of this *Motion*, and on the same basis, DPHHS filed their *Motion for Summary Judgment* on Counts I, II, and IV-VII. On May 31, 2023, Henning and Davies filed a notice of joinder to DPHHS's motion. The court held oral argument on Henning and Davies *Motion to Dismiss* and DPHHS's *Motion for Summary Judgment* on November 20, 2023.

On February 29, 2024, the court granted DPHHS' *Motion* on all counts in favor of DPHHS, Henning and Davies. This appeal follows from that Order as well as the Order on Axilon and Ridgeway's *Motion to Dismiss*.

STATEMENT OF FACTS

Melissa Surbrugg and Christopher Shelton were married in 2008. *Compl*., ¶ 1. In 2015, Surbrugg learned she was pregnant, but at that time was unsure of the biological father's identity. *P.H. v. C.S.* (*In re Adoption of B.H.*), 2020 UT 64, ¶ 7, 474 P.3d 981. After finding out she was married, Surbrugg decided to facilitate a private adoption for the unborn child to Appellees' Paul Henning and Aaron Davies, who lived in in Utah. *Compl*., ¶ 14. Being that Henning and Davies lived in Utah, and that's where the child would reside, they filed their petition for adoption in Utah District Court on January 26, 2016. *P.H. v. C.S.*, ¶ 8.

After the child's birth, Surbrugg completed relinquishment counseling, and with help of counsel, executed an affidavit relinquishing her parental rights to the minor child on February 4, 2016. *Compl*., ¶ 20. Due to the nature of the adoption, Surbrugg signed an Interstate Compact on the Placement of Child ("ICPC") form 100A, requesting the child be placed with Henning and Davies in Utah. *Compl*., ¶ 21. Within this form, Surbrugg indicated that Donnel Gleed was the minor child's father, and the packet included a relinquishment by Mr. Gleed. *Compl*., ¶ 21. A cover letter attached to the ICPC packet indicated that Surbrugg was legally married to

Shelton, but did not believe him to be the father. *Def.'s Henning and Davies Mot. to Dismiss*, Mar. 17, 2023, Ex. 2; *In the Matter of the Adoption of Baby H.*, Findings of Fact and Conclusions of Law on Remand, ¶¶ 4, 17, Cause No. 162900039 (Utah Third District Court, January, 27, 2021). The forms were approved by the State of Montana, forwarded to the State of Utah, and approved by Utah, the following day. *Compl*., ¶ 27.

After the beginning of the adoption proceedings in Utah, Shelton filed for dissolution from Surbrugg and requested a paternity test of the minor child, which confirmed Shelton was the biological father. *P.H. v. C.S.*, ¶ 12. Subsequently, Henning and Davies petitioned to terminate Shelton's parental rights within the Utah adoption proceeding. *Id*., ¶ 13. A hearing was held, and both Appellants, Shelton and Vicky Costa, testified*. Def.'s Henning and Davies Mot. to Dismiss*, Ex. 1; *In the Matter of the Adoption of Baby H.*, Memorandum Decision and Order Terminating Parental Rights, Case No. 162900039, September 15, 2017, p. 12. On September 15, 2017, the court terminated the parental rights of Shelton on the basis that his addictions were his priority, not his children, and that he was an unfit parent to his habitual use of alcohol, controlled substances, and dangerous drugs, and his several stints in prison. *Id*., pp. 13-17.

Shelton appealed the district court's ruling to the Utah Court of Appeals, arguing the Court did not have subject matter jurisdiction, and asserting the ICPC was not complied with. *P.H. v. C.S. (In re B.H.),* 2019 UT App 103, ¶¶ 8-9, 447 P.3d 110. The Court rejected Shelton's arguments, and remanded for proceeding regarding whether the ICPC had been complied with. *Id*., ¶¶ 15, 24, 28. Shelton petitioned for certiorari to the Utah Supreme Court, which was granted. *P.H. v. C.S.,* 2020 UT 64, ¶ 21. The Utah Supreme Court affirmed the Court of Appeals' ruling, and also remanded to the district court for further proceedings to determine ICPC compliance. *Id*., ¶ 65.

Upon remand, the district court held an evidentiary hearing regarding ICPC compliance, and ultimately held, "All terms and conditions of the Interstate Compact on the Placement of Children ("ICPC") from the state of Montana were complied with." *Def.'s Henning and Davies Mot. to Dismiss*, Ex. 2; *In the Matter of the Adoption of Baby H*., Findings of Fact and Conclusions of Law on Remand, Cause No. 162900039. This decision finalized the adoption of the minor child, the decision was not appealed by Appellants, and the judgment is final. *Def.'s Henning and Davies Mot. to Dismiss*.

On August 8, 2018, Appellants filed the *Complaint* in this matter. R. at 1. On March 23, 2023, Appellee Henning and Davies filed their *Motion to Dismiss*. R. at 50. While Henning and Davies initially filed a lawsuit against DPHHS, Axilon and Ridgeway on January 14, 2019, they voluntarily dismissed their Complaint via a *Notice of Dismissal* on April 18, 2019. No factual determinations were made by the court in that suit prior to its dismissal.

On May 26, 2023, Appellee State of Montana, Department of Health and Human Services filed their *Motion for Summary Judgment*. R. at 58. On May 31, 2023, Appellees Henning and Davies filed their *Notice of Joinder to DPHHS' Motion for Summary Judgment*. R. at 60. The district court held oral argument on the motions on November 20, 2023. The district court issued its *Order – State's Motion for Summary Judgment* on February 29, 2024 wherein it granted the State's *Motion*. R. at 71. The district court filed its *Order Dismissing Defendants Paul S. Henning and Aaron J. Davies* on March 12, 2024. R. at 75. This appeal follows from the order granting summary judgment.

STANDARD OF REVIEW

The Montana Supreme Court reviews a case de novo based on the same criteria applied by the district court for appeals from summary judgment. See *Stutzman v. Safeco Insurance Co.* (1997), 284 Mont. 372, 376, 945 P.2d 32, 34 (citing *Treichel v. State Farm Mut. Auto. Ins. Co.* (1997), 280 Mont. 443, 446, 930 P.2d 661, 663). Thus,

> [t]he movant must demonstrate that no genuine issues of material fact exist. Once this has been accomplished, the burden then shifts to the non-moving party to prove by more than mere denial and speculation that a genuine issue does exist. Having determined that genuine issues of material fact do not exist, the court must then determine whether the moving party is entitled to judgment as a matter of law. [This Court] reviews the legal determination made by a district court as to whether the court erred.

Stutzman, 284 Mont. at 376, 945 P.2d at 34 (*quoting Bruner v. Yellowstone County* (1995), 272 Mont. 261, 264–65, 900 P.2d 901, 903). If this Court agrees with the conclusions of the district court, this Court can affirm the district court's decision, if correct, regardless of its reasons. See *Norman v. City of Whitefish* (1993), 258 Mont. 26, 30, 852 P.2d 533, 535; *Musselshell*, 245 Mont. at 527, 802 P.2d at 1253; *Jerome v. Pardis* (1989), 240 Mont. 187, 192, 783 P.2d 919, 922.

SUMMARY OF THE ARGUMENT

The district court appropriately held that summary judgment was proper in this case because there existed no issues of material fact, and Appellees Henning, Davies and Montana DPHHS were entitled to judgment as a matter of law. Appellants' claims are barred by the Full Faith and Credit Clause of the U.S. Constitution, and the doctrine of collateral estoppel.

Full Faith and Credit must be given to judicial proceedings of sister states. Here, a district court in Utah held that all terms and conditions of the Interstate Compact on the Placement of Children ("ICPC") had been satisfied. Appellants allege that violations of the ICPC gave rise to liability for Appellees in the State of Montana, which would undermine and gut the judicial determination of the State of Utah's district court.

Additionally, Appellants arguments are barred by the doctrine of collateral estoppel because 1) the identical issue of whether the ICPC had been complied with was previously raised and decided in the Utah adoption proceeding; 2) a final judgment on the merits was issued in the Utah adoption proceedings; 3) Shelton was a named party in the prior proceeding, and the Costas stand in privity with him with regards to the

prior proceeding; and 4) Appellants were afforded a full and fair opportunity to litigate the issues in the prior proceeding.

ARGUMENT

I. The District Court Appropriately Rendered Summary Judgment Against Appellants in this Matter.

As a preliminary matter, Appellees Henning and Davies will only be responding to argument I included in Appellants' *Opening Brief*, as it is the sole issue which involves their interests. The Lewis and Clark District Court also issued its Order dismissing Appellees Henning and Davies on March 12, 2024. Based on Appellants' Opening Brief, it does not appear that Order is being appealed as it is not included within their statement of issues, nor the Notice of Appeal. So, regardless of this Court's decision regarding the Summary Judgment Order, Appellees Henning and Davies have been properly dismissed from the case.

Summary judgment is appropriate when summary judgment is proper only when there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Mont. R. Civ. P. 56(c)(3). While the initial burden of proof attaches to the moving party, the burden shifts where the record discloses no genuine issue of material fact. The party opposing the motion then bears the burden of properly raising an issue of fact. *Dooling v. Perry*, 183 Mont. 451, 456, 600 P.2d 799, 801 (1979).

a. There Are No Issues of Material Fact Which Would Prevent Summary Judgment.

Here, the district court rendered its *Order – State's Motion for Summary Judgment* on February 29, 2024. Within this *Order*, the court rendered summary judgment against Appellants in favor of Henning, Davies and Montana DPHHS, finding that there were no issues of material fact, and Appellees were entitled to judgment as a matter of law. Within their *Opening Brief* Appellants do not allege that there are issues of material fact which made the district court's *Order* improper. As a result, the first hurdle of the summary judgment analysis is satisfied, as no issues of material fact exist. With this preliminary query satisfied, the issue shifts to whether Appellees were entitled to judgment as a matter of law.

b. Appellees Henning, Davies, and the Montana DPHHS are Entitled to Judgment as a Matter of Law.

With regards to this issue, Montana case law is clear. Montana courts are obligated to give effect to the sister state's judgment, "even assuming the law underlying the judgment **contravenes the public policy of Montana** [emphasis added]." *Carr v. Bett*, 1998 MT 266, ¶ 45, 291 Mont. 326, 340, 970 P.2d 1017, 1025. Appellants wish to relitigate a case which has already been finalized in Montana because they are unhappy with the

result in Utah. This relitigation would violate not only established Montana case law, but also the United States Constitution.

The doctrines of collateral estoppel and the Full, Faith and Credit Clause of the U.S. Constitution bar Appellants' recovery in this matter. The U.S. Constitution is clear; "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state." U.S. Const. art. IV, § 1. It is well established that, "a valid judgment rendered in one state must be recognized in a sister state." *Thoring v. LaCounte*, 225 Mont. 77, 80, 733 P.2d 340, 342 (1987) (citing Restatement (Second) of Conflict of Laws Section 93 (1971)). The obligation owed to a final judgment under the Full Faith and Credit Clause is "exacting" and that the judgment "should have the same credit, validity, and effect, in every court of the United States, which it had in the state where it was pronounced." *Carr v. Bett*, 1998 MT 266, ¶ 39, 291 Mont. 326, 338, 970 P.2d 1017, 1024 (citing *Underwriters National Assur. Co.*, 455 U.S. 691, 704, 102 S.Ct. 1357, 1365, 71 L.Ed.2d 558 (1982)). This requirement has been codified in Montana, where it states that "[t]he effect of a judicial record of a sister state is the same in this state as in the state where it was made.... " Mont. Code Ann. § 26-3-203.

It is important for this Court to understand that every one of Appellants' theories of liability flow directly from Appellees' alleged violation of the Interstate Compact on the Placement of Children ("ICPC"). If Appellees did not violate the ICPC, then no liability can exist for Appellants' causes of action. Appellants' appeal attempts to distinguish the act that causes liability, from the theory of liability itself. This does not make sense, as the finding that the ICPC was not violated prevents them from proving liability in this case. Unfortunately for Appellants, this issue has been thoroughly, and completely, litigated in another forum. The issue of whether the ICPC was violated has been litigated, and a judgment on its merits has been entered. The court in Utah was clear, and made the following factual determinations, which should be given Full Faith and Credit before this Court as a judicial record of a sister state under Mont. Code Ann. § 26-3-203:

> 3. All terms and conditions of the Interstate Compact on the Placement of Children ("ICPC") from the state of Montana were complied with.
>
> 4. The Court noted that the ICPC 100A Form listed Donald Gleed as the name of the father. However, the Court also finds that a cover letter dated February 6, 2016 re ICPC approval to Montana DPHHS indicated that the birthmother was married to a Christopher Shelton at the time of the child's birth, and identified him as a legal father.

5. Adoptive Father, Paul Henning, testified that he hand-delivered the entire packet including cover letter, and 15 attachments including a home study, legal risk affidavits, and more.

6. Compliance with ICPC is evidenced in this matter by the DPHHS-CFS-019C ICPC 100A Form signed by the Sending State (Montana) Compact Administrator on February 8, 2016, and by the Receiving State Compact Administrator on February 9, 2016. The Court notes that ICPC approval was granted by both states' Administrators subsequent to the delivery of the ICPC Form and cover letter identifying both alleged fathers.

In the Matter of the Adoption of Baby H., Findings of Fact and Conclusions of Law on Remand*,* ¶¶ 3-6. Each of these factual findings by the Utah court cannot be relitigated in this matter, and since this is the basis for Appellants' alleged liability, liability cannot exist.

Further, the district court appropriately held that Appellants' claims are barred by the doctrine of collateral estoppel. Collateral Estoppel, or issue preclusion, is a form of res judicata, and bars the reopening of issues which have been litigated and resolved in a prior suit. *Baltrusch v. Baltrusch*, 2006 MT 51, ¶¶ 15-18, 331 Mont. 281, 130 P.3d 1267. It requires a showing that: (1) the identical issue raised was previously decided in a prior adjudication; (2) a final judgment on the merits was issued in the prior adjudication; (3) the party against whom the plea is now asserted was a party or in privity with a party to the prior adjudication; and (4) the party against whom preclusion is now asserted was afforded a full

and fair opportunity to litigate the issue. *McDaniel v. State*, 2009 MT 159, ¶ 28, 350 Mont. 422, 208 P.3d 817.

Appellants acknowledge that element 2 of the analysis is satisfied but claim the district court erred in holding that the remaining elements were also met. Appellants are incorrect in their analysis.

First, the identical issue which has been raised in this case, was previously decided in a prior adjudication. As outlined above, liability can only exist in this matter if the Court determines that the ICPC has been violated. The parties litigated the identical issue of whether the ICPC was violated in the Utah adoption proceeding. Appellants would have this Court believe that the Utah Supreme Court only addressed "jurisdiction and not liability under Montana Law." What Appellants completely fail to acknowledge is that after the Utah Supreme Court remanded the case, the district court held an evidentiary hearing on the specific issue of whether the ICPC was complied with. Each of the Appellants were present at this hearing and provided testimony during it. It was after this specific hearing that the district court held that the ICPC had been complied with. This Order was never appealed by Appellants and is binding and final.

Appellants cite to *Thoring v. La Count* to substantiate their incorrect analysis but ignore that this Court's ruling in *Thoring* is wholly

distinguishable from the facts of this matter. As outlined within Plaintiff's brief, the rationale Montana gave for allowing the suit to continue is that the Court in North Dakota did not rule on liability under Montana law. *Thoring v. La Counte*, 225 Mont. 77, 81, 73 P.2d 340, 342-343. By contrast, the Court here in Utah did. The Utah court made the specific factual finding that "All terms and conditions of the Interstate Compact on the Placement of Children ("ICPC") from the state of Montana were complied with." In *Thoring*, the North Dakota court left the Montana court leeway to analyze the issues under Montana law, by contrast, the Utah court here, did not. The holding of *Thoring* is not applicable to these facts.

Appellants further argue that the Utah court's findings only focused on whether the birth mother violated the ICPC, and did not determine whether DPHHS had. As is outlined above, this distinguishment is not made in the *Findings of Fact and Conclusions of Law on Remand*, the Utah court said conclusively, "All terms and conditions of the Interstate Compact on the Placement of Children ("ICPC") from the state of Montana were complied with." The Utah court further outlined in paragraph 6 how it believed that DPHHS had complied with the ICPC as well. Appellants' rationale just blatantly ignores the plain language of the findings and conclusions issues by the Utah court.

The case before this Court really does boil down to one issue, whether the ICPC was complied with. The district court in Utah, after a hearing wherein Appellants were present and provided testimony, held conclusively that the ICPC was complied with. This issue is identical in each of the two matters, and as such, element one of collateral estoppel is satisfied.

Element three is also satisfied. The parties against whom the plea is now asserted was a party or in privity with a party to the prior adjudication. Appellant attempts to rely on non-controlling case law as a basis for their contentions that the Costas are not in privity with Shelton. Montana law disagrees.

Privity exists where "two parties are so closely aligned in interest that one is the virtual representative of the other." *Denturist Ass'n of Mont. v. State*, 2016 MT 119, ¶ 14, 383 Mont. 391, 372 P.3d 466. This is the circumstance here. The Costas' privileges as grandparents undoubtedly flow directly from their parental relationship with Appellant Shelton. Without Shelton's relationship to the minor child, the Costas in turn would have no relationship to the minor child. This is obvious from Mont. Code Ann. § 40-9-102, which deals with "Grandparent-grandchild contact." Subsection 8 specifies that the section does not apply in circumstances where "the child

has been adopted by a person other than a stepparent or a grandparent. Grandparent-grandchild contact granted under this section terminates upon the adoption of the child by a person other than a stepparent or a grandparent." The termination of the child's parent-child relationship also terminates the grandparent-child relationship which ultimately aligns the parties' rights.

But even if this was not the case, the Costas themselves acknowledge they were intimately involved in the Utah proceeding. Within their *Complaint*, and upon their own allegation, "Chris **and his parents, Vicky and Todd**, have spent a considerable amount of time and resources contesting Aaron's and Paul's adoption of L.S. in the State of Utah through the Utah Court system [emphasis added]. *Complaint*, ¶ 38. While they were not named parties in the prior case, they make clear they were active participants in its litigation and were there to support Shelton's claims. This shows that their interests were so aligned in the prior matter that they were the virtual representative of one another. The Costas undoubtedly were in privity with Shelton in the underlying Utah adoption proceeding. Element three of the analysis is satisfied.

Finally, Appellants were given a full and fair opportunity to litigate the issue in the Utah proceeding. The adoption of the minor child spanned

multiple years, included an appeal to the highest court in Utah, and an evidentiary hearing after remand. Appellants would have this Court believe that the Utah Supreme Court's Order was the end of that case, but it was not. Subsequent to the Utah Supreme Court's decision, and after remand, the Utah district court held an evidentiary hearing for the specific purpose of determining whether the ICPC had been complied with. Appellants continue to ignore this point. After hours of testimony, put on by all parties, including Costas and Shelton, the Utah district court held conclusively that the requirements had been met. Now, because they disagree with the Utah court's decision, they have decided to forum shop, in the hopes that they will receive a more favorable ruling elsewhere. This is the exact situation the Full Faith and Credit Clause of the U.S. Constitution and the doctrine of collateral estoppel intend to prevent. Element four of the analysis is also satisfied.

The district court correctly concluded that judgment as a matter of law was appropriate because Appellants claims were barred by the Full Faith and Credit Clause of the U.S. Constitution and the doctrine of collateral estoppel. Summary Judgment was appropriately rendered in this matter.

CONCLUSION

The district court did not err in entering summary judgment in favor of DPHHS, Henning and Davies as no issues of material fact existed and they were entitled to judgment as a matter of law. Due to the factual findings and holdings made by the Utah court in the underlying adoption, Appellants' claims were barred by the Full Faith and Credit Clause of the U.S. Constitution and the doctrine of collateral estoppel because 1) the identical issue of whether the ICPC had been complied with was previously raised and decided in the Utah adoption proceeding; 2) a final judgment on the merits was issued in the Utah adoption proceedings; 3) Shelton was a named party in the prior proceeding, and the Costas stand in privity with him with regards to the prior proceeding; and 4) Appellants were afforded a full and fair opportunity to litigate the issues in the prior proceeding.

DATED this 7th day of October, 2024.

ST. PETER O'BRIEN LAW OFFICES, P.C.

By /s/ Logan Nutzman
Logan Nutzman

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11, Montana Rules of Appellate Procedure, I certify that this Brief is printed with a proportionately spaced Arial text, typeface of 14 points, is double spaced, and the word count does not exceed 10,000 words, excluding Certificate of Service and the Certificate of Compliance.

Dated this 7th day of October, 2024.

ST. PETER O'BRIEN LAW OFFICES, P.C.

By /s/ Logan Nutzman
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CERTIFICATE OF SERVICE

I, Logan Alan Nutzman, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 10-07-2024:

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