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2015 IL App (4th) 141073-U

NO. 4-14-1073

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

August 26, 2015

Carla Bender

4th District Appellate Court, IL

MANUEL REED,)	Appeal from
Plaintiff-Appellant,)	Circuit Court of
v.)	McLean County
BRO MENN PHYSICIANS MANAGEMENT)	No. 08L115
CORPORATION, an Illinois Corporation, d/b/a Health)	Honorable
Point,)	Rebecca Simmons Foley,
Defendant-Appellee.)	Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Justices Harris and Appleton concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court affirmed, concluding the trial court properly granted defendant's motion for summary judgment where plaintiff's negligence claim was barred by collateral estoppel.

¶ 2 In August 2006, while employed for the City of Bloomington (City) as a heavy-machine operator, plaintiff, Manuel Reed, backed his front-end loader into a parked van. As a result of the collision and pursuant to the City's collision policy, plaintiff submitted to breath-alcohol-concentration (BAC) testing at defendant's clinic, Bro Menn Physicians Management Corporation, an Illinois Corporation, d/b/a Health Point. The testing revealed plaintiff's BAC exceeded the limits permitted by the City. Later that month, the City terminated plaintiff's employment.

¶ 3 In July 2008, plaintiff filed a negligence action, alleging defendant's agents improperly administered plaintiff's BAC testing, which resulted in an inaccurate BAC reading

that subsequently caused the City to terminate his employment. In September 2014, defendant filed a motion for summary judgment, which the trial court granted in December 2014 after finding no issue of material fact existed and, as a matter of law, judgment for defendant was appropriate.

¶ 4 Plaintiff appeals, asserting the trial court erred in granting defendant's motion for summary judgment. For the following reasons, we affirm.

¶ 5 I. BACKGROUND

¶ 6 On August 2, 2006, while operating a front-end loader as part of his employment with the City, plaintiff collided with a parked van, causing the van to roll across the street and hit a utility pole. Plaintiff's collision triggered two of the City's disciplinary policies.

¶ 7 A. The City's Disciplinary Policies

¶ 8 First, plaintiff's collision triggered the City's drug-and-alcohol policy. Any employee who possessed a commercial driver's license, such as plaintiff, was prohibited from reporting to work while impaired by a drug or with a BAC of 0.02 or greater. City of Bloomington Policy Statement No. 1.3(II)(C) (eff. Jan. 1, 1995). In the event such an employee was involved in a collision, the employee was required to submit to postcollision drug and BAC testing as soon as possible after the collision. City of Bloomington Policy Statement No. 1.3(II)(G)(1), (3) (eff. Jan. 1, 1995). If an employee violated the drug-and-alcohol policy on a second occasion, the City retained the right to terminate the employee's employment. City of Bloomington Policy Statement No. 1.3(VII)(A)(2) (eff. Jan. 1, 1995).

¶ 9 Independent from the City's drug-and-alcohol policy, the City had a disciplinary policy regarding collisions. Under the City's August 2006 Progressive Discipline Guidelines, the City created disciplinary guidelines based on the severity of the offense. For example, the City

classified a preventable fleet crash as a "Severity Level 2" violation, for which a first offense typically warranted a written reprimand or brief suspension. However, a preventable fleet crash involving egregious circumstances was classified as "Severity Level 3," for which first offense discipline could range from a three-day suspension to termination.

¶ 10 B. Plaintiff's Termination

¶ 11 Following the collision and pursuant to the City's drug-and-alcohol policy, plaintiff submitted to BAC testing at defendant clinic. Two separate BAC tests were administered by defendant's agent, Marilyn Homerding. The first test revealed plaintiff had a BAC of 0.059. A subsequent test to confirm the initial reading revealed plaintiff had a BAC of 0.053.

¶ 12 Thereafter, in a letter dated August 7, 2006, the City terminated plaintiff's employment. The letter, issued by the City's Human Resources Director, Emily Bell, stated, in relevant part, as follows:

"On Wednesday, August 2, 2006, you were operating an endloader and backed into a parked vehicle, causing significant damage, which required the parked vehicle to be towed. You were also issued a citation for improper backing. These two factors triggered a post accident test *** to determine if there was a prohibited alcohol concentration."

Bell then noted the BAC testing reflected plaintiff's BAC level exceeded the 0.02 level permitted by the City's policy and federal law. Bell's letter went on to state, "[y]our actions endangered the safety and well being of yourself and others and is [*sic*] not acceptable. Therefore as a result of

your actions on Wednesday, August 2, 2006, your employment with [the City] is terminated."

The next paragraph stated:

"[The City] is committed to providing a drug and alcohol free workplace. As a result of your post accident test, you are also in violation of [the City's] Drug and Alcohol Testing Policy. This is your second violation of the Policy. Our records indicate you failed a random drug test on March 31, 1997. The City retains the right to terminate for a second offense and has an established practice. The second violation of the Policy would have also resulted in your termination."

¶ 13 C. Arbitration Proceedings

¶ 14 In April 2007, plaintiff's union, on his behalf, commenced arbitration proceedings against the City for wrongful termination. The following relevant information arose during the proceedings.

¶ 15 1. *Plaintiff*

¶ 16 Plaintiff conceded, on August 2, 2006, between 8:00 and 8:30 a.m., while operating a front-end loader for the City, he backed into a parked van, which resulted in the van rolling across the street and into a utility pole. Following the collision, plaintiff went to defendant clinic for mandatory drug-and-alcohol testing pursuant to the City's postcollision policy. While in the waiting room prior to the testing, plaintiff consumed a diet soda and a candy bar from the vending machine. At one point, he attempted to leave the building to make a personal phone call, but the receptionist stopped him and told him he could not leave the facility prior to testing. Homerding eventually administered his BAC testing.

¶ 17 According to plaintiff, after his first BAC test yielded a positive result, he asked Homerding whether his use of breath spray would impact the testing results. Plaintiff said Homerding told him the breath spray could have skewed the results. He testified he used the breath spray approximately eight times between 6:00 a.m. and taking the first test. One of those occasions included his use of the breath spray after consuming the candy bar and drinking the diet soda while in the waiting room.

¶ 18 During the waiting period between the two BAC tests, plaintiff testified he used the breath spray three times. He then said he used the mist three to four times. On cross-examination, he indicated he used the spray more than five times prior to taking the second test. During that time, he said no staff member stopped him from using the spray.

¶ 19 *2. Homerding*

¶ 20 Homerding testified she was a certified BAC technician and, on August 2, 2006, she administered plaintiff's BAC testing at defendant clinic. Prior to administering the first BAC test, Homerding asked whether plaintiff had anything in his mouth, to which plaintiff replied he did not. While preparing to administer plaintiff's initial BAC test, the first machine Homerding chose, No. 1899, had a low battery, so she did not use it. She then chose a second machine, No. 1900, and took an "air blank"—a preliminary test to determine the machine correctly read a BAC in the air of 0.00. At 10:31 a.m., immediately after testing the machine, she tested plaintiff's BAC, which measured at 0.059. Homerding said she then told plaintiff he would have another chance to take the BAC test after a 15-minute waiting period. She could not recall whether she cautioned him against eating or drinking during that period of time. However, no vending machines or water fountains were accessible from the area in which plaintiff waited.

¶ 21 For plaintiff's second test to confirm the initial test results, Homerding used a third machine, No. 1901, because the second machine failed to print the necessary receipts for a confirmation test. Prior to administering plaintiff's second test, Homerding again took an "air blank" to ensure the machine's accuracy. The confirmation test recorded plaintiff's BAC as 0.053. For each test, plaintiff used a new mouthpiece.

¶ 22 Following plaintiff's second BAC test, Homerding asked him whether he had been drinking, to which he replied he had not. Plaintiff then asked whether the mouthwash he used before work would have skewed the test results, and she replied it would not have impacted the test due to the amount of time that had lapsed since he used it. According to Homerding, plaintiff did not ask about the effect of breath spray on the testing.

¶ 23 After plaintiff left the facility, Homerding noticed the third machine used for the confirmation test inaccurately reflected the second test was administered at 9:54 a.m. because the time had not been changed to reflect daylight saving time. In actuality, plaintiff's test occurred at 10:54 a.m.; thus, she amended her copy of the machine's receipt.

¶ 24 *3. Julie Van Dolah*

¶ 25 Julie Van Dolah testified she supervised Homerding on August 2, 2006. She confirmed the BAC machines were appropriately tested for accuracy prior to testing plaintiff by shooting "air blanks," recording the last calibration date, and checking to ensure the gas in the BAC machine had not expired.

¶ 26 *4. April Brucker*

¶ 27 April Brucker, an employee at defendant clinic, testified she is a certified drug and alcohol trainer and collector, a certified medical review officer assistant, and is certified by Lifeloc to perform BAC testing with the Lifeloc machines utilized by defendant clinic. Though

she was not present at defendant clinic when plaintiff was tested on August 2, 2006, she testified regarding the nature of her employment. Pursuant to federal regulations, Brucker ensured the Lifeloc BAC machines were properly calibrated and verified pursuant to Lifeloc's quality-assurance plan. The BAC machines used in plaintiff's testing had last been calibrated on July 7, 2006. She also ensured the staff at defendant clinic was trained in BAC- and urine-testing procedures. She stated the staff members were trained to tell patients not to consume any food or drink prior to testing.

¶ 28 When asked about her records with respect to the BAC machines, Brucker indicated she kept a spreadsheet for easy access of information, but any official documentation was kept in patient files. She acknowledged her spreadsheet contained discrepancies and that test numbers were not recorded in sequential order.

¶ 29 *5. Dr. Ronald Henson*

¶ 30 Dr. Ronald Henson, an expert on drug and alcohol testing, testified regarding the effect of breath spray on a BAC test. According to Dr. Henson, the use of breath spray would skew the BAC results as much as 0.20. The spray would then remain detectable by the testing machine for as long as 16 minutes. Additionally, drinking or belching could impact the results.

¶ 31 Dr. Henson also testified the two hours that lapsed between the collision and plaintiff's first test was not a reasonable amount of time as contemplated by the City's drug-and-alcohol policy. According to Dr. Henson, plaintiff should have been given the first test immediately upon arrival at defendant clinic. Regardless, during plaintiff's initial waiting period, Dr. Henson stated plaintiff should have been observed and advised against eating or drinking. He also criticized defendant's record-keeping, as Brucker's records contained numerous errors and the machines' malfunctioning rendered the test results suspect.

¶ 32

6. Arbitrator's Award

¶ 33 After considering the evidence, the arbitrator noted plaintiff's termination resulted primarily from the accident, and the plaintiff's fault for the collision was undisputed. The arbitrator also found plaintiff failed to establish the BAC readings were inaccurate where the machines, despite other technical errors, had been properly calibrated. Additionally, the arbitrator found plaintiff failed to demonstrate the use of breath spray would have caused the magnitude of the readings taken. The arbitrator noted:

"In fact, [plaintiff's] explanation that his positive results were due to his use of breath spray before and between the two tests is simply not believable, and itself undermines his credibility. On the critical question of when and how much he had used the spray, he vacillated, increasing from two times to 'more than five times' during the course of the hearing. His claim to have been unobserved while waiting is belied by the fact that he was observed by a clerk and stopped when he sought to leave the area to make a phone call."

The arbitrator therefore determined plaintiff had a positive BAC on August 2, 2006, in excess of the City's policy, and that it was a second violation. Moreover, the arbitrator noted plaintiff backing his front-end loader into a legally parked van after consuming alcohol demonstrated "a serious lapse of judgment and endangered the safety and well-being of himself and the general public." Accordingly, the arbitrator determined plaintiff's discharge was not so arbitrary, capricious, or discriminatory as to constitute an abuse of the City's discretion. Plaintiff did not appeal or contest the arbitrator's award.

¶ 34

D. The Present Case

¶ 35 In July 2008, plaintiff filed a complaint, alleging defendant breached its duty to exercise ordinary care in the performance of its BAC testing by failing to properly (1) train and instruct Homerding in the procedures to be used in the questioning and control of test subjects and in the operation of the testing equipment and recording of test results; (2) supervise and control Homerding; (3) maintain the testing equipment; and (4) control the chain of custody of the testing equipment and the records of the test results. Plaintiff further claimed defendant's negligent acts resulted in defendant erroneously reporting plaintiff's BAC level exceeded the City's drug-and-alcohol policy, which proximately caused his termination. As a result of defendant's alleged negligence, plaintiff sought damages in excess of \$50,000.

¶ 36 In February 2009, defendant filed an answer denying any negligence and raising the affirmative defense that plaintiff's cause of action was barred by a prior judgment entered in plaintiff's case against the City. At the same time, defendant filed a motion for summary judgment, asserting plaintiff's claim was barred by collateral estoppel. Later that month, plaintiff responded to defendant's affirmative defense, asserting the issues in the present case had not been previously litigated in the case against the City. In April 2009, the trial court denied defendant's motion for summary judgment after finding plaintiff's cause of action was not barred by collateral estoppel. However, the court noted its ruling did not preclude defendant from raising a challenge based on a lack of proximate cause.

¶ 37 In September 2014, following the conclusion of discovery, defendant filed a second motion for summary judgment. This second motion for summary judgment is the subject of the present appeal. Therein, defendant asserted plaintiff's use of alcohol was only the secondary reason upon which the City terminated him, as the primary reason for his discharge

was the collision. Accordingly, defendant asserted plaintiff could not demonstrate defendant's alleged negligence proximately caused plaintiff's termination. Defendant also asserted the arbitrator heard the evidence regarding the alcohol-testing procedures and deemed those procedures adequate; therefore, it argued plaintiff was collaterally estopped from raising those issues in the present case. Attached to the motion for summary judgment were several documents, including (1) depositions taken of Bell and plaintiff and (2) the transcript from the arbitration proceedings. The depositions were largely consistent with the testimony adduced during the arbitration proceedings. In Bell's deposition, when asked, "Would the egregious accident in and of itself have been adequate" to terminate plaintiff's employment? Bell responded, "Yes, it would have." She explained the collision was considered egregious because plaintiff hit the vehicle with enough force to propel it across the street and into a utility pole despite the vehicle being in park. However, Bell also agreed that plaintiff's use of alcohol during the collision was a factor in determining whether to terminate his employment, as was plaintiff's allegation that the positive alcohol screen resulted from his consumption of breath spray. In other words, the City did not consider the collision in the absence of plaintiff consuming alcohol.

¶ 38 In plaintiff's deposition, he admitted the front-end loader he was driving for the City collided with a parked van but explained he did not see the van because it was in the loader's blind spot. Because the bumper on the loader was higher than the bumper on the van, he rolled slightly over the van, which slowly propelled the van across the street and into a utility pole. Plaintiff also admitted to consuming alcohol within 24 hours of the collision. He stated that he consumed three 12-ounce bottles of beer from 10:00 p.m. to 11:00 p.m. the previous evening. Upon meeting with Bell to discuss his termination, plaintiff said Bell told him the reason for his termination was due to a second violation of the City's drug-and-alcohol policy.

¶ 39 In October 2014, plaintiff filed a response to defendant's motion for summary judgment. Plaintiff first asserted defendant's collateral-estoppel claim had been previously raised and denied in the earlier motion for summary judgment. Second, plaintiff argued disputed issues of material fact existed as to whether defendant's negligence caused the City to terminate his employment. Plaintiff attached transcripts from a second discovery deposition of Bell. Bell stated that the City had no records of employees who went through the termination and grievance proceedings after a second violation of the City's drug-and-alcohol policy, as those individuals who received notice of a second positive test resigned their positions. She also brought in the disciplinary records of employees who had been in collisions while at work. The vast majority of those situations resulted in written reprimands and the remaining occurrences resulted in brief suspensions.

¶ 40 Plaintiff also submitted portions of the depositions of his supervisor, a coworker, and Officer Tommy Lee Walters, the responding police officer, all of whom neither detected the smell of alcohol emanating from plaintiff on the date of the collision, nor observed plaintiff acting impaired.

¶ 41 In December 2014, the trial court entered a written order granting defendant's motion for summary judgment. The court found no issue of material fact remained because the collision created a basis for plaintiff's termination independent of his positive BAC test. Accordingly, the court determined plaintiff failed to demonstrate his termination was caused by any negligent actions on behalf of defendant.

¶ 42 This appeal followed.

¶ 43 II. ANALYSIS

¶ 44 On appeal, plaintiff contends the trial court erred in granting summary judgment in favor of defendant because a genuine issue of material fact exists as to whether his termination was causally related to his positive BAC test.

¶ 45 Summary judgment is appropriate where "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2012). To determine whether a genuine issue of material fact exists, "a court must construe the pleadings, depositions, admissions, and affidavits strictly against the movant and liberally in favor of the opponent." *Williams v. Manchester*, 228 Ill. 2d 404, 417, 888 N.E.2d 1, 9 (2008). A genuine issue of material fact exists where reasonable persons "might draw different inferences from the undisputed facts." *Id.* Our review is *de novo*. *Id.*

¶ 46 Plaintiff points to several documents in the record to demonstrate a genuine issue of material fact exists as to whether defendant's alleged negligence in administering the BAC testing caused his termination. Defendant contests a question of material fact exists but argues, even if a question of material fact exists, plaintiff's claim is barred by collateral estoppel based on the arbitration proceeding between plaintiff's union and the City. We agree.

¶ 47 Though the trial court did not specifically rule on the collateral-estoppel issue in defendant's second motion for summary judgment, we may affirm on any basis in the record. See *Jandeska v. Prairie International Trucks, Inc.*, 383 Ill. App. 3d 396, 398, 893 N.E.2d 673, 675 (2008). The doctrine of collateral estoppel "bars relitigation of an issue already decided in a prior case." *People v. Tenner*, 206 Ill. 2d 381, 396, 794 N.E.2d 238, 247 (2002). A party raising the issue of collateral estoppel must establish: "(1) the issue decided in the prior adjudication is identical with the one presented in the suit in question, (2) there was a final judgment on the

merits in the prior adjudication, and (3) the party against whom estoppel is asserted was a party or in privity with a party to the prior adjudication." *Gumma v. White*, 216 Ill. 2d 23, 38, 833 N.E.2d 834, 843 (2005). Even when the minimum requirements are met, application of the doctrine should be avoided if doing so would unfairly prevent a party from presenting his claim. *Talarico v. Dunlap*, 177 Ill. 2d 185, 195, 685 N.E.2d 325, 330 (1997). The primary concern is whether the plaintiff had a full and fair opportunity to explore the contested issues during the previous proceedings. *Id.*

¶ 48 The parties do not dispute the arbitration proceedings ended with a final judgment on the merits or that plaintiff was a party or in privity with the union that represented his interests in the prior adjudication. The central question in this case, therefore, is whether the issue decided in the prior adjudication is identical to the one presented in the case at bar. The party asserting collateral estoppel must demonstrate " 'with clarity and certainty' " the facts determined by the prior judgment, and it must conclusively appear that the current disputed facts were at issue and necessarily decided by the prior adjudication. *Dearborn Maple Venture, LLC v. SCI Illinois Services, Inc.*, 2012 IL App (1st) 103513, ¶ 24, 968 N.E.2d 1222. With these principles in mind, we turn to the allegations in this matter.

¶ 49 According to plaintiff, defendant's alleged breach in the duty of ordinary care proximately caused the City to terminate his employment. In his complaint, plaintiff alleged defendant breached its duty of reasonable care by failing to properly (1) train and instruct Homerding in the procedures to be used in the questioning and control of test subjects and in the operation of the testing equipment and recording of test results; (2) supervise and control Homerding; (3) maintain the testing equipment; and (4) control the chain of custody of the testing equipment and the records of the test results. According to plaintiff, that breach of the

duty of reasonable care led to inaccurate BAC test results, which ultimately caused the City to terminate his employment.

¶ 50 Plaintiff asserts the arbitrator did not determine whether he had been terminated for the collision independent of the BAC test results. Rather, plaintiff contends the arbitrator found the City had grounds to discharge plaintiff for his reckless behavior in driving heavy machinery with elevated levels of alcohol in his system. Additionally, plaintiff asserts he did not refute or address the BAC tests in the arbitration proceedings in such a way that he should be precluded from challenging defendant's administration of BAC tests to plaintiff. Because the arbitrator did not specifically find the City made its decision independent of the BAC test results, plaintiff asserts the facts raised in his negligence claim against defendant have not been addressed "with clarity and certainty" so as to be barred by collateral estoppel. We disagree.

¶ 51 The arbitration proceedings consisted largely of plaintiff's union challenging defendant's record-keeping, testing procedures, the reliability of the BAC-testing machines and, by extension, the testing results. Following the presentation of evidence, the arbitrator issued an extensive written order outlining its findings of fact. The arbitrator heard from Brucker, Van Dolah, and Homerding, who all testified as to their qualifications and confirmed the BAC machines had been properly calibrated and verified pursuant to Lifeloc's quality-assurance plan. The arbitrator also heard testimony about errors in defendant's record-keeping and malfunctioning BAC machines. In considering all of the evidence, the arbitrator found the technical issues related to defendant's record-keeping and the BAC machines failed to demonstrate plaintiff's BAC readings were incorrect.

¶ 52 With respect to plaintiff's use of breath spray, the arbitrator heard evidence from both Dr. Henson and Brucker that breath spray can impact BAC testing. Although the use of

breath spray could have had an immediate effect BAC testing, the effect dissipates quickly. Moreover, the arbitrator found plaintiff's story regarding the use of breath spray incredible. Not only did plaintiff offer contradictory testimony regarding the number of times he used the breath spray prior to testing, Homerding did not recall plaintiff asking her about the effect of breath spray on the BAC testing. Even if plaintiff had asked Homerding about the impact of his breath spray after the first test yielded a positive result, his testimony that he subsequently used the breath spray prior to the second test was also incredible. As a result, the arbitrator found Homerding properly administered plaintiff's BAC test and accurately reported its findings.

¶ 53 Plaintiff asserts the central issue in this case is whether he had consumed alcohol prior to submitting to BAC testing at defendant clinic, and he further argues that issue was not raised in the arbitration proceedings. To the contrary, in the arbitration proceedings, the arbitrator rejected plaintiff's sole explanation for his elevated BAC scores by finding his story regarding the use of breath spray unbelievable. By finding defendant's BAC testing was accurate, the arbitrator necessarily determined plaintiff had alcohol in his system such that his BAC exceeded 0.05, well in excess of the City's drug-and-alcohol policy. Thus, we find plaintiff's argument unpersuasive.

¶ 54 Moreover, our review of the record reveals the overarching issue in both the arbitration proceedings and the present case was whether plaintiff's BAC results were accurate. Throughout the extensive testimony presented in the arbitration hearing, the arbitrator learned of defendant clinic's (1) training and instruction of its agents; (2) level of supervision over its agents; (3) maintenance of its testing equipment; and (4) record-keeping procedures. The arbitrator also learned of the various issues and concerns that arose during plaintiff's BAC testing. After hearing all of the evidence, the arbitrator deemed the overall BAC test results to

be accurate, finding, "[i]n sum, the City has proved by a preponderance of the evidence that [plaintiff] had a positive alcohol concentration test on August 2, 2006." Because the arbitrator made specific findings in which he found the BAC-testing results to be accurate, the alleged actions or inactions of defendant could not have been the proximate cause of plaintiff's loss of employment. Thus, plaintiff is barred by the doctrine of collateral estoppel from challenging the accuracy of the BAC testing in the present case. Accordingly, we conclude the trial court did not err in granting defendant's motion for summary judgment.

¶ 55

III. CONCLUSION

¶ 56

For the foregoing reasons, we affirm the trial court's judgment.

¶ 57

Affirmed.