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## Summary of Alcantara v. Wal-Mart Stores, Inc., 130 Nev. Adv. Op. 28

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CIVIL PROCEDURE: CLAIM AND ISSUE PRECLUSION

**Summary**

Whether issue and/or claim preclusion can prevent an heir from asserting a wrongful-death claim under NRS 41.085(4) when the decedent’s estate had previously attempted but failed to succeed on a wrongful death claim under NRS 41.085(5).

**Disposition**

Issue preclusion may prevent an heir from asserting a wrongful death claim under NRS 41.085(4) if the four elements of the doctrine are satisfied.

**Factual and Procedural History**

The Appellant, Alcantara (“Alcantara”), filed a wrongful death action against Respondent Wal-Mart (“Wal-Mart”), in behalf of her daughter, when the father was fatally assaulted in a Wal-Mart parking lot. Wal-Mart moved for a motion to dismiss based on the doctrines of issue and claim preclusion because the case had already been brought by the decedent’s estate. In that action the jury found that Wal-Mart was not negligent and, therefore, not liable for the decedent’s death. The district court granted the motion to dismiss based on claim preclusion. This appeal followed.

**Discussion**

The Court reviewed the district court’s conclusions of law de novo.

*Statutory framework*

NRS 41.085 provides that the heirs of the decedent and the personal representative of the decedent are allowed to bring separate wrongful death claims, but they cannot pursue the other’s separate claim.<sup>2</sup> NRS 41.085(2) and (3), respectively, provide that “the heirs of the decedent and the personal representatives of the decedent may *each* maintain an action for damages” and that the causes of action “which arose out of the same wrongful act or neglect *may be joined*.” (Emphasis added).<sup>3</sup>

*Whether claim preclusion bar Alcantara’s claims*

Alcantara argued that the district court’s determination based on claim preclusion was erroneous because NRS 41.085 provides for separate claims. In order to resolve this issue, the

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<sup>1</sup> By Allison Vitangeli

<sup>2</sup> NEV. REV. STAT. § 41.085 (2013); *See Alsenz v. Clark Cnty. Sch. Dist.*, 109 Nev. 1062, 1064, 864 P.2d 285, 286 (1993).

<sup>3</sup> NEV. REV. STAT. § 41.085(2) & (3) (2013).

Court focused its analysis on the third prong of claim preclusion. Specifically, the Court sought to determine if “the subsequent action [was] based on the same claims or any part of them were or could have been brought in the first case.”<sup>4</sup>

The Court noted that the NRS 41.085 statutory scheme clearly created separate wrongful death claims for the heirs of a decedent and the decedent’s estate— one of the personal representative, or the estate, under NRS 41.085(5) and one of the heirs, Alcantara, under NRS 41.085(5). Accordingly, the two claims in the case were separate and failed to meet the requirement that the claims in the second claim be the same as those that were or could have been brought in the first case. Therefore, claim preclusion did not apply to this case despite the fact that both claims arose from the death of the decedent.

#### *Whether issue preclusion bars Alcantara’s claims*

In addition to its argument for claim preclusion, Wal-Mart also presented the argument that issue preclusion is appropriate in this case as an independent basis for affirming the appeal. In response, the Court looked into the four elements of issue preclusion<sup>5</sup> to determine if the doctrine applied to the present case. Before turning to a full analysis of the factors, the Court found that the second element was satisfied by pointing out that the prior case was finally resolved on the merits. The Court then turned to the other three elements of issue preclusion: same issues, same parties, and actually and necessarily litigated.

#### *The same issues*

Alcantara asserted that the first element of issue preclusion is not met because there are significant differences in the legal theories presented in the two actions. In the present case, Alcantara argued that Wal-Mart had a nondelegable duty to provide safe premises which, based on Alcantara’s assertion, was not made in the prior case by the estate.

The Court disposed of this argument by saying that the claim of nondelegable duty is not an independent cause of action, but instead one way to establish the duty requirement for proving negligence.<sup>7</sup> The Court also stated that “[I]ssue preclusion cannot be avoided by attempting to raise a new legal or factual argument that involves the same ultimate issue previously decided in another case.”<sup>8</sup> Wal-Mart’s negligence was the core of the first case and Alcantara’s nondelegable duty claim is not separate and distinct from that claim of negligence because it is based on the same facts and merely seeks to establish the duty element of negligence. Thus, this element was met.

#### *The same parties or their privies*

Alcantara next argued the third element was not met because she was not in privity with the estate in the prior action. Moreover, Alcantara argued that the district court erred when it

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<sup>4</sup> *Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1054, 194 P.3d 709, 713 (2008)

<sup>5</sup> The four elements are:

- (1) the issue decided in the prior litigation must be identical to the issue presented in the current action;
- (2) the initial ruling must have been on the merits and have become final; ...
- (3) the party against whom the judgment is asserted must have been a party or in privity with a party to the prior litigation”; and
- (4) the issue was actually and necessarily litigated.

*Five Star*, 124 Nev. at 1055, 194 P.3d at 713.

<sup>7</sup> See *Armingier v. Associated Outdoor Clubs, Inc.*, 48 So. 3d 864, 869 (Fla. Dist. Ct. App. 2010).

<sup>8</sup> See *Laforge v. State, Univ. and Cmty. Coll. Sys. of Nev.*, 116 Nev. 415, 420, 997 P.2d 130, 134 (2000).

relied on the Restatement (Second) of Judgments section 41<sup>10</sup> because the Nevada Supreme Court had not adopted that section. Wal-Mart countered Alcantara's argument by pointing out that she was a beneficiary of the estate and was therefore adequately represented in the estate's litigation of Wal-Mart's alleged negligence in the prior action. This would render her in privity with the estate and issue preclusion would prevent her current claims.

In response to these arguments, the Court took this opportunity to adopt the Restatement (Second) of Judgments section 41's examples of privity that arise when a plaintiff's interests are being represented by someone else. Next, the Court applied the Restatement section 41(1)(c)<sup>11</sup> to the present case and concluded that Alcantara was in privity with the estate in its prior action. Alcantara was bound to the prior judgment because the estate was representing her interests as an heir to the estate. Therefore, the representation was sufficient for privity.<sup>12</sup> Additionally, "since the issue for determining relief under NRS 41.085(4) and NRS 41.085(5) is the same —Wal-Mart's negligence— the estate fully represented Alcantara's interests as to the issue of negligence."

Finally, the Court noted that sections 46(3) and 47 of the Restatement (Second) of Judgments are also relevant in this matter despite the fact that they involve different procedural scenarios than the present case.<sup>13</sup> These sections state "that issue preclusion will apply to a second case brought by a beneficiary of the decedent if the prior case brought by the decedent or the decedent's estate is unsuccessful." Accordingly, this element was met.

#### *Actually and necessarily litigated*

Lastly, the Court looked at whether the fourth element of issue preclusion was met in this case. The previous case determined whether Wal-Mart was liable for the decedent's death based on negligence. Since the previous case was determined on the merits, the issue of Wal-Mart's negligence was actually and necessarily litigated in the prior action. Thus, this element along with all others for issue preclusion were met.

#### **Conclusion**

The Court, in following the reasoning in *Evans v. Celotex Corp.*<sup>15</sup> found that Wal-Mart's negligence was properly raised in the prior action brought by the decedent's estate. Therefore, issue preclusion applies to Alcantara's claim and she is barred from re-litigating the issue of Wal-Mart's negligence. The Court affirmed the decision of the district court to dismiss the case.

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<sup>10</sup> See RESTATEMENT (SECOND) OF JUDGMENTS § 41 (1982).

<sup>11</sup> RESTATEMENT (SECOND) OF JUDGMENTS § 41(1) (c) (1982) ("(1) A person who is not a party to an action but who is represented by a party is bound by and entitled to the benefits of a judgment as though he were a party. A person is represented by a party who is: ... (c) The executor, administrator, guardian, conservator, or similar fiduciary manager of an interest of which the person is a beneficiary").

<sup>12</sup> See *Young v. Shore*, 588 F. Supp. 2d 544, 548–49 (D. Del. 2008) (Relying on Restatement (Second) of Judgments § 41 (2008), to determine that because the plaintiff was a beneficiary of the estate, she was in privity with the estate for purposes of the prior action and issue preclusion barred the subsequent action.).

<sup>13</sup> See RESTATEMENT (SECOND) OF JUDGMENTS § 46–47 (1982); See also comment c to § 46 and § 47.

<sup>15</sup> 238 Cal. Rptr. 259, 260 (Ct. App. 1987).