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## Summary of Berkson v. Lepome, 126 Nev. Adv. Op. No. 46

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CONSTITUTIONAL LAW: Separation of Powers

**Summary**

Marilyn Berkson and Gertrude Malacky (“Appellants”) appealed a district court order dismissing their claims of undue influence, breach of contract, fraud, elder abuse and neglect, intentional misstatement of facts, negligence, conspiracy and per se violation of Nevada law and misconduct against Robert LePome, Barbara LePome, John Gorman, Howard Bloom, and Richard Donaldson (“Respondents”) on issue and claim preclusion grounds stemming from a 2004 probate and trust action between Appellants and Barbara LePome including undue influence charges that were overturned on appeal due to a lack of substantial evidence. At issue was whether NRS § 11.340 is an unconstitutional violation of separation of powers under Article 3, Section 1(1) of the Nevada Constitution and whether NRS § 11.340 prevented the doctrines of issue and claim preclusion from barring the Appellants’ claims. Appellants also appealed from a post-judgment order awarding attorney fees and costs for filing a frivolous claim.

**Disposition / Outcome**

As NRS § 11.340, which allowed a plaintiff to file a new action within one year after the reversal of a judgment for the plaintiff on appeal, violates the separation of powers doctrine by interfering with the judiciary’s authority to “hear and determine justiciable controversies”<sup>2</sup> and contradicting the established principles of issue and claim preclusion, it is unconstitutional and the Appellants cannot rely on it to continue their action. The Supreme Court affirmed the District Court’s dismissal of the action, but reversed the attorney fees and costs award. The Supreme Court felt that the award was an abuse of discretion for the district court to sanction the Appellants for filing a frivolous claim when Appellants relied on NRS § 11.340 which had never been reviewed and whose plain language clearly permitted them to re-file.

**Factual and Procedural History**

In 2001, respondent Howard Bloom petitioned for appointment of special administrators for the estate of Rose Miller, Appellants’ aunt, and for appointment of a trustee regarding the living trust of Rose Miller. Appellants opposed the two petitions on the grounds of undue

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<sup>1</sup> By Cayla Witty

<sup>2</sup> *Halverson v. Hardcastle*, 123 Nev. 245, 261, 163 P.3d 428, 439 (2007) (quoting *Galloway v. Truesdell*, 83 Nev. 13, 19, 422 P.2d 237, 242 (1967)).

influence and lack of testamentary capacity. The petitions and the civil complaint were condensed in district court. Eventually, only the undue influence issue remained, as the lack-of-testamentary-capacity claims were removed from the estate and trust actions and the civil complaint was dismissed as duplicative of the estate and trust actions or unrecognized under Nevada law.

After a jury found in favor of the Appellants on the undue influence issue, in 2006, the Supreme Court reversed that judgment, finding that the verdict was unsupported by substantial evidence. Following that reversal, Appellants filed a new complaint in district court with claims of undue influence, breach of contract, fraud, elder abuse and neglect, intentional misstatement of facts, negligence, conspiracy and per se violation of Nevada law and misconduct against all of the respondents. Respondents moved for dismissal based on claim and issue preclusion bars, amongst other things. The district court granted the dismissal of the complaint in its entirety. After Appellants filed this appeal, the district court awarded Respondents' attorneys fees and costs to sanction Appellants for filing a frivolous complaint. Appellants added this issue to their appeal.

## **Discussion**

Appellants claimed that NRS § 11.340 granted them the right to file a new complaint after their favorable jury verdict was reversed. They argued that this statute precluded the application of claim and issue preclusion to their claim, and therefore, the district court could not use those doctrines to dismiss their case. Looking at the statute's plain meaning with "each sentence, phrase, and word . . . meaningful within the context of the purpose of the legislation,"<sup>3</sup> the Court recognized that if NRS § 11.340 were to have any real effect, it would necessitate that claim and issue preclusion could not be applied to bar a new action filed under that statute. The Court concluded that this authorized both a procedure under which a new suit could be filed after a suit reversal *and* a bar to claim or issue preclusion affecting the new file after an appeal reversal.

However, Respondents argued that NRS § 11.340 should be struck down as unconstitutional as it "hampers the judiciary's ability to manage litigation through the application of the doctrines of claim and issue preclusion, and as a result, runs afoul of separation of powers principles."<sup>4</sup>

### *Separation of Powers*

The Nevada Constitution's separation of powers provision in Article 3, Section 1(1) delineates the foundation for "preventing the accumulation of power in any one branch of

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<sup>3</sup> Harris Assocs. v. Clark County Sch. Dist., 119 Nev. 638, 642, 81 P.3d 532, 534 (2003) (quoting Coast Hotels v. State, Labor Comm'n, 117 Nev. 835, 841, 34 P.3d 546, 550 (2001)).

<sup>4</sup> Berkson v. Lepome, 126 Nev. Adv. Op. No. 46 at 7 (2010).

government.”<sup>5</sup> This principle is further evidenced in the established coequal powers of the three branches (legislative, executive, and judicial). They each administer and perform in their own realms, “so as not to become a subordinate branch of government.”<sup>6</sup> Nevada Revised Statute § 11.340 is an act of the legislature that conflicts with the judiciary’s inherent power to manage litigation and reach finality in suits.

As the judiciary is responsible for its own procedures and rule-making necessary to carry out the administration of justice, it was held in *State v. Dist. Ct. [Marshall]* that “the legislature may not enact a procedural statute that conflicts with a pre-existing procedural rule, without violating the doctrine of separation of powers.”<sup>7</sup> The Court held that as such the statute should be struck and the court should be left to its own controls. This not only keeps the balances of power in line with constitutional mandates but also allows for the court to administer justice effectively, as they are in the best position to determine what is most efficient and workable.

### *Claim and Issue Preclusion*

The Court also held that while claim and issue preclusion are legal doctrines and not procedural rules, they were still subject to the same constitutional separation of powers analysis as procedural rules. The Court concluded that the public policy reasons behind the preclusion doctrines further supports the application of the same separation of powers analysis because both claim and issue preclusion are necessary for sound judicial administration and the preservation of fairness within the adversarial system. Because NRS § 11.340 expanded the time and resources needed to manage litigation for both the judiciary and the parties, the Court again held that the statute be struck on constitutional grounds for violating separation of powers principles.

### *Attorneys Fees and Costs Award*

As NRS § 11.340 had not been previously addressed and it clearly authorized the Appellants’ instant suit, the Court held that the suit could not be considered frivolous. In reviewing the award of attorney fees and costs, the Court concluded that the district court abused its discretion, as the statute permitted the Appellants’ repeat filing and the district court summarily awarded fees without citation to authority.

### **Dissenting Opinion**

In concurring with the dismissal of the case, Justice Pickering agreed that Appellants were barred from bringing these claims because the case had been resolved in the previous appeal and that finality should not be overcome as there was no procedural defect in the previous

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<sup>5</sup> *Sec’y of State v. Nev. State Legislature*, 120 Nev. 456, 466, 93 P.3d 746, 753 (2004).

<sup>6</sup> *Halverson*, 123 Nev. at 261, 163 P.3d at 439.

<sup>7</sup> 116 Nev. 953, 959, 11 P.3d 1209, 1212 (2000) (quoting *Whitlock v. Salmon*, 104 Nev. 24, 26, 752 P.2d 210, 211 (1988)).

decision. However, Justice Pickering dissented from the reasoning in the majority opinion that struck down NRS § 11.340.

Justice Pickering did not read the plain language of NRS § 11.340 to create an absolute right in the plaintiff who was reversed on appeal to re-file. Instead, Justice Pickering viewed NRS § 11.340 as a tolling statute for suits that were reversed on appeal but *had not been decided on the merits of the case*.

Justice Pickering argued that NRS § 11.340 dated back to 1861 and has since then begun with a reference to limitations periods and should always be read in relation to such concerns, not to defenses such as claim and issue preclusion.<sup>8</sup> Further, Justice Pickering noted that several other jurisdictions have similar tolling provisions, specifically pointing toward 3 Codes of California § 355.<sup>9</sup> Justice Pickering also pointed out that no other court read its cognate statute as the absolute right the majority here did.<sup>10</sup> The dissent also criticized the majority's jump to strike a statute when a more limited reading would not lead to the same result. In *Waite v. Burgess*, the Court declined to read a statute literally that would have also violated the Nevada Constitution's separation of powers clause.<sup>11</sup> Because Justice Pickering felt NRS § 11.340 could be read in a more restricted manner, Justice Pickering dissented from the majority's striking of that statute as unconstitutional and the majority's reversal of sanctions.

## **Conclusion**

Because the Court struck down NRS § 11.340 as unconstitutional for violating the separation of powers principle by creating a procedure at odds with judicial procedures already in place and barring the issue and claim preclusion doctrines as a defense to a re-filed suit, Appellants Berkson and Malacky could not rely on it to further the instant case. Since they did not provide any reasoning why their case could survive claim and issue preclusion otherwise, the Supreme Court affirmed the district court's dismissal. However, the Supreme Court reversed the district court's award of attorney fees and costs because at the time of filing, the Appellants had no reason to believe that relying on NRS § 11.340 for a re-filing would turn out to be a frivolous claim.

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<sup>8</sup> The majority also recognized the pre-statehood precedent for NRS § 11.340, but the majority emphasized that we had no precedent to rely on. 126 Nev. Adv. Op. No. 46 at 5, fn. 4.

<sup>9</sup> As noted, California does have a nearly identical version of this statute. However, both the California code and the New York code that California relied on in interpreting their own statute had sections added that aided a conclusion such as Justice Pickering asserted. 126 Nev. Adv. Op. No. 46 at 14.

<sup>10</sup> *See City of Orlando v. Murphy*, 94 F.2d 426 (5<sup>th</sup> Cir. 1938) (holding that the type of tolling statute mentioned has nothing to do with the right to retry a case after all the law in the case is settled).

<sup>11</sup> 69 Nev. 230, 232-33, 245 P.2d 994, 996 (1952). "In the light of our constitutional division of powers of government, it is our view that such an invasion of the sphere of the judicial department could not have been contemplated by the legislature." *Id.* at 233, 245 P.2d at 996.