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**Bower v. Harrah's Laughlin, Inc.,
125 Nev. Adv. Op. No. 37 (September 10, 2009)¹**

CIVIL PROCEDURE- ISSUE PRECLUSION

Summary

Review of a district court's decision granting (1) a summary judgment based on issue preclusion, (2) a summary judgment based on the merits of a negligence cause of action, and (3) awards for attorney fees and costs.

Disposition/Outcome

The Court reversed the district court's decision as to issue preclusion, concluding that federal and state preclusion requirements were not met in this litigation. Secondly, the Court upheld the grant of summary judgment to those plaintiffs whose negligence cause of action proved to be meritless. Lastly, the attorney fees award was reversed for abuse of discretion, and the costs award was so changed as to accommodate those plaintiffs who were incorrectly precluded.

Factual and Procedural History

This case stems from the 2002 brawl in the Harrah's Casino in Laughlin, Nevada between two biker gangs, the Hell's Angels and the Mongols, in which several people were killed and a great number injured. Groups of plaintiffs, not directly involved in the fray, sued Harrah's under negligence theories in California state court, Nevada state court and Nevada federal court.

Michael Bower sued in Nevada state court. In the early stages of his litigation, two jury verdicts and a few summary judgments were awarded in favor of Harrah's. Harrah's attempted to use these cases to argue issue preclusion in its motion for summary judgment against Bower; however, Judge Denton, a state district court judge, denied Harrah's motion as to Bower. Subsequently, Bower's case was consolidated with the other named plaintiffs, including Robert Garcia and Noi Lewis before Judge Johnson.

Garcia and Lewis were outside the Harrah's Casino when Metro police arrived on scene during the 2002 fracas. Metro was roughshod while interrogating and arresting the two for suspicion of involvement in the fray. For instance, while arresting Lewis, a Metro officer ripped the strap to her shirt, exposing her breast. When Garcia protested the exposure, an officer struck him. Additionally, during the police's hours-long detention of the two, officers ignored Garcia's requests to leave in order that he may get his evening dose of seizure medication. Garcia suffered two seizures that evening. Later, Garcia and Lewis settled their federal case against Metro but still attempted to sue Harrah's in this present action under theories of negligence.

When Bower's case was consolidated in Judge Johnson's court, Harrah's moved for a motion for summary judgment based on issue preclusion against Mr. and Mrs. Fuller and Mr. and Mrs. Daniels; Harrah's also motioned for summary judgment against Garcia and Lewis based on the merits of their case. The district court ruled in favor of Harrah's as to every plaintiff with the notable exception Bower. Thereafter, Bower's counsel, at a hearing, suggested that Harrah's orally move for summary judgment against Bower—essentially, Bower asked for

¹ By John Ward

Judge Johnson to rehear the issue preclusion ruling of Judge Denton. Bower did so because he wanted to avoid wasting time preparing for trial by having Judge Johnson determine the disposition of the case then. Consequently, the district court granted (1) Harrah's oral motion to reconsider summary judgment against Bower, (2) Harrah's summary judgment motion against all plaintiffs based on issue preclusion, and (3) Harrah's summary judgment motion regarding Garcia and Lewis on the merits of their case.

Later, the district court granted Harrah's post-judgment motion for attorney fees in the sum of \$317,621.98, and costs in the sum of \$30,788.55. The district court found the plaintiffs in violation of NRS 18.010(2)(b) for unreasonably maintaining their lawsuit in the wake of the other federal and state cases which had ruled in favor of Harrah's.

Discussion

As an initial matter, the Court deemed Bower's summary judgment rehearing proper, holding that Judge Johnson had the authority to rehear the motion under NRCP 54(b), and that Bower's consent to the rehearing proscribed him from complaining of error on appeal.²

Issue Preclusion

The Court prefaces its analysis by acknowledging the general prohibition of issue preclusion in cases where a party seeks to assert judgment against a group or person who was not party to the previous litigation.³ The Court then identifies the only valid exception to the general rule applicable in this case, adequate representation.⁴ The Court also points out that this case was decided before *Taylor*, the 2008 U.S. Supreme Court decision which illuminates the present law on federal issue preclusion. The Court then discusses differences in terminology and analysis between federal⁵ and state⁶ preclusion laws and the retroactive application of *Taylor* to this case.

The Court found the district court applied federal "virtual representation" analysis when determining its motions for summary judgment against Bower, Mr. and Mrs. Fuller, and Mr. and Mrs. Daniels, which at the time was correct law, but which *Taylor* has now modified. Furthermore, the Court noted that Nevada issue preclusion law requires the parties in this case to be in privity with those parties from prior state court decisions before issue preclusion can be properly applied. The Court then holds that the district court erred by applying federal issue preclusion analysis to state cases.

² *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981).

³ *Taylor v. Sturgell*, 128 S. Ct. 2161, 2171 (2008).

⁴ Adequate representation is a narrow exception which applies issue preclusion to nonparties only if "(1) the interests of the nonparty and her representative are aligned, and (2) either the party understood herself to be acting in a representative capacity or the original court took care to protect the interests of the nonparty." *Id.* at 2176. Occasionally, adequate representation requires that the nonparty has also had notice of the original suit.

⁵ A party can establish the preclusive effect of a prior federal decision by showing the issue he seeks to preclude is (1) "identical to the issue alleged in the prior litigation," (2) has been "actually litigated" in that previous litigation, and (3) that the issue's outcome was a "critical and necessary part" of the previous judgment. *Id.* at 2179-80.

⁶ Nevada's issue preclusion law requires that (1) the issue to be identical, (2) the initial ruling be final and on the merits, (3) the party sought to be precluded was a party to or in privity with a party in the prior case, and (4) "the issue was actually and necessarily litigated." *Five Star Capital Corp. v. Ruby*, 124 Nev. __, __, 194 P.3d 709, 713 (2008).

Thereafter, the Court systematically analyzes the prior federal and state cases Harrah's contends created a preclusive effect in this present litigation.⁷ The Court, however, found factual and legal incongruities. Consequently, the Court held that the plaintiffs of the present litigation were not adequately represented in any of the federal cases of *Yvette*, *Schoenleber*, *Alcantar*, *Nolan*, or *Sweers* that resulted in beneficial rulings for Harrah's. Nor did the court find privity between the present plaintiffs and those involved in the state court cases of *Salvador Barreras*, *Collins* or *Ramirez* as the present plaintiffs did not acquire interest from the plaintiffs in those previous actions through inheritance, succession, purchase, or inclusion through a certified class action.⁸ Therefore, the Court held that summary judgment by way of issue preclusion was improper.

Summary Judgment on the merits as to Garcia and Lewis proper

The Court held that Metro was an unforeseeable, superseding, intervening cause of Garcia's and Lewis's harm, thereby making Garcia's and Lewis's negligence cause of action against Harrah's unsustainable. When a third party commits an intentional tort or crime, that act is a superseding cause of the plaintiff's harm and severs liability for the negligent party who created the opportunity for the third party to perform the tort or crime.⁹ Thus, in such a case, the negligent party will only be liable if the crime was foreseeable as measured from the time of the alleged negligent act which created the opportunity for crime.¹⁰ The Court held that Metro's acts were not the type of harm expected from Harrah's negligence in failing to protect its patrons from the criminal acts of gangs. Thus Metro's acts were unforeseeable intentional torts and, therefore, severed Harrah's liability as to Garcia and Lewis.

Attorney fees and costs award

The Court held that the district court abused its discretion in awarding Harrah's attorney fees under NRS 18.010(2)(b)¹¹ because the plaintiffs did not unreasonably maintain their lawsuit. Furthermore, the Court held there is no evidence that any of the plaintiffs' claims were unreasonable or brought to harass. Therefore, the Court invalidated the district court's award of attorney fees.

Additionally, the award of costs as to all plaintiffs was inappropriate under NRS 18.020(3) as, according to this Court's decision in this appeal, Harrah's only prevailed against Garcia and Lewis. Therefore, Harrah's was only entitled to costs spent while defending this action against Garcia and Lewis; the Court vacated the award of costs as to everyone else.

⁷A Nevada federal court's jury and a California superior court's jury returned verdicts favoring Harrah's. *Barreras v. Harrah's Laughlin, Inc.*, No. CV-S-03-0661-RLH-PAL (D. Nev. Mar. 18, 2005); *Ramirez v. Harrah's Entertainment, Inc.*, No. 1-02 CV810665 (Cal. Super. Ct. Apr. 28, 2005). The federal district court for the district of Nevada granted Harrah's summary judgment in four other cases. *Schoenleber v. Harrah's Laughlin, Inc.*, 423 F. Supp. 2d 1109 (D. Nev. 2006); *Alcantar v. Harrah's Laughlin, Inc.*, No. CV-S-03-1195-HDM (RJJ) (D. Nev. June 14, 2005); *Nolan v. Harrah's Laughlin, Inc.*, No CV-S-02-1611-PMP (LRL) (D. Nev. Jan. 14, 2005); *Sweers v. Harrah's Laughlin, Inc.*, No. CV-S-04-0378-RCJ-RJJ (D. Nev. Dec. 22, 2004). State district courts of Nevada also granted Harrah's motions for summary judgment in two more cases. *Collins v. Harrah's Laughlin, Inc.*, No A472232 (Nev. Dist. Ct. Nov. 21, 2005); *Barreras v. Harrah's Laughlin Inc.*, No. A484654 (Nev. Dist. Ct. June 13, 2005).

⁸ *Paradise Palms v. Paradise Homes*, 89 Nev. 27, 31, 505 P.2d 596, 599 (1973).

⁹ RESTATEMENT (SECOND) OF TORTS § 448 (1965).

¹⁰ *Id.*

¹¹ NEV. REV. STAT. § 18.010(2)(b) states in pertinent part that a district court may award attorney fees if a claim is "brought or maintained without reasonable ground or to harass the prevailing party."

Conclusion

The district court misapplied federal and state issue preclusion laws when determining the outcome of Harrah's motions for summary judgment. However, the district court correctly entered summary judgment against plaintiffs Garcia and Lewis for a failure to maintain causation in their negligence cause of action against Harrah's. Additionally, the district court's previous decision on issue preclusion incorrectly affected the court's award of attorney fees and costs, which were limited accordingly.