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## Summary of Five Star Capital Corp. v. Ruby, 124 Nev. Adv. Op. No. 88

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*Five Star Capital Corp. v. Ruby*, 124 Nev. Adv. Op. No. 88 (Oct. 30, 2008)<sup>1</sup>

**CIVIL PROCEDURE – CLAIM PRECLUSION**

**Summary**

Appeal from a district court’s grant of summary judgment against petitioner Five Star Capital Corp. for bringing a second lawsuit barred by res judicata.

**Disposition/Outcome**

Affirmed the district court’s grant of summary judgment holding claim preclusion prevents a party from bringing a second lawsuit concerning the same facts and circumstances which was previously dismissed with prejudice and that constituted a valid, final judgment.

**Factual and Procedural History**

Five Star Capital Corp. (“Five Star”) brought its first lawsuit against Michael W. Ruby (“Ruby”), individually and as Trustee of the Ruby Revocable Trust, for a dispute arising from a contract to purchase real property. Five Star’s counsel failed to appear at the required pretrial calendar call and the district court dismissed the suit for this reason. Five Star’s counsel filed a motion to reinstate the case because the court’s minutes incorrectly stated the department for calendar call and this led to his failure to appear. The district court granted the motion and reinstated the case. A new calendar call meeting was scheduled.

Five Star retained new counsel prior to the rescheduled calendar call. Five Star’s new counsel failed to appear for the rescheduled calendar call because of confusion between the attorneys. At the request of Ruby, the district court dismissed the case<sup>2</sup>.

Five Star’s counsel did not appeal the dismissal of the case, but instead, filed a new lawsuit on the same contract. The new case brought an additional claim that was not in the first suit. Ruby filed a motion for summary judgment based on res judicata. The district court granted the motion and this appeal to the Supreme Court followed.

**Discussion**

**Adoption of the Doctrine of Claim Preclusion and the Doctrine of Issue Preclusion**

Due to considerable confusion regarding the doctrine of res judicata as it applies to the issues of claim preclusion and issue preclusion, the Court specifically adopts the separate terms “claim preclusion” and “issue preclusion” as the correct terminology. These two issues have different preclusive effects, different purposes, and separate and distinct tests, and therefore, are not interchangeable. The Court specifically notes that any prior opinions which are inconsistent with this separate treatment are incorrect.

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<sup>1</sup> By Michelle D. Alarie

<sup>2</sup> Dismissal was pursuant to Eight Judicial District Court Rule (EDCR) 2.69(c) which allows the court to dismiss an action for a party’s failure to attend a calendar call.

## Proper Test for Claim Preclusion and Issue Preclusion

The Court adopts a three-part test to determine whether claim preclusion applies: (1) the parties or their privies are the same, (2) the final judgment is valid,<sup>3</sup> and (3) the subsequent action is based on the same claims or any part of them that were or could have been brought in the first case. This test was first announced in *University of Nevada v. Tarkanian*.<sup>4</sup>

Claim preclusion may apply to all claims raised in an initial action, but also to all claims that could have been raised in the initial case, but were not. Claim preclusion is broadly defined in order to prevent subsequent litigation over the same facts and circumstances.

The Court's test for issue preclusion adopts a three factor test that was outlined in *Tarkanian*, but includes an additional factor in order to clarify the distinction between claim and issue preclusion. The test is as follows: (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.

Issue preclusion requires the issue to be actually and necessarily litigated because the purpose of the doctrine is to prevent re-litigation of a specific issue already decided in a previous suit between the parties.<sup>5</sup>

The Court highlights a need for both doctrines because there are numerous cases where only issue or claim preclusion will apply. In *United States v. Stauffer Chemical Co.* the distinction between the two doctrines was emphasized when the government requested the court to decide the issue of whether private contractors of the Environmental Protection Agency were "authorized representatives" of the government when this issue had already been decided in a previous case between the two parties.<sup>6</sup> Because the issue was identical, issue preclusion applied to prevent re-litigation of the issue, but because the two suits involved completely different facts and circumstances, claim preclusion had no place in the argument.<sup>7</sup>

### Claim Preclusion Applied to Five Star's Second Lawsuit:

For claim preclusion to apply (1) the parties or their privies are the same, (2) the final judgment is valid, and (3) the subsequent action is based on the same claims or any part of them that were or could have been brought in the first case. The first factor was not at issue as the parties are the same in the two actions.

As to the second factor, Five Star argued the first suit was not decided on its merits and there was no evidence in the court order that the dismissal was with prejudice, therefore the

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<sup>3</sup> Final judgment does not have to be on the merits of the case, but a final judgment is not valid for purposes of claim preclusion if the action was dismissed without prejudice for a reason that is not meant to have a preclusive effect (i.e., jurisdiction, venue, failure to join a party).

<sup>4</sup> *University of Nevada v. Tarkanian*, 110 Nev. 581, 598 (1994).

<sup>5</sup> *LaForge v. State, University System*, 116 Nev. 415, 420 (2000) (issue preclusion applies even if the issue is brought up in a different cause of action and different circumstances).

<sup>6</sup> *United States v. Stauffer Chemical Co.*, 464 U.S. 165 (1984)

<sup>7</sup> *Id.* at 165-169.

dismissal of the first suit cannot preclude the second suit. NRC 41(b) controls the issue of whether a dismissal has a preclusive effect and states “unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.” Five Star’s first suit was not dismissed for any of the enumerated reasons discussed in Rule 41(b); therefore the dismissal was an adjudication on the merits. Dismissal for failure to comply with court orders is the exact situation in which claim preclusion is meant to apply as it prevents a party from being allowed to re-file the same claim in the same court. Fairness to all parties requires that controversies must come to an end and because Five Star failed to avail itself of the allowed remedies following a dismissal, the Court must preclude Five Star’s second suit and not give them another chance to adjudicate the same claim.

As to the third factor in the test, Five Star argued that claim preclusion cannot act to bar the second suit because the second suit included a ground for recovery not brought up in the first suit.<sup>8</sup> This argument lacks merit because as the rule states, claim preclusion applies to both claims which were brought and claim which could have been brought in the first action. The second suit was based on the same facts and circumstances as the first suit, therefore, the breach of contract claim and request for damages could have been in the first suit.

#### Public Policy—allowing claim preclusion even when the substantive issue was not tried

Five Star claims that public policy favors resolution of lawsuits on their merits, and therefore because the substantive issue of the case was not tried, claim preclusion should not apply to bar a second suit. The Court rejected this argument and stated that only in paternity suits is there a public policy exception to claim preclusion. There is no reason to expand the exception, rather the purpose behind mandatory calendar call meetings would be defeated if a party was allowed to miss the meeting and have their suit dismissed, but then re-file the same suit because the matter was not adjudicated on the merits. Five Star’s own actions caused the dismissal of its suit and it made the mistake of not appealing the dismissal, therefore, it would be improper for the Court to disrupt long standing claim preclusion principles in order to correct Five Star’s mistake.

#### Conclusion

The district court properly granted summary judgment to respondent Ruby based on the doctrine of claim preclusion. Five Star’s second suit met the test for claim preclusion as it was between the same parties, a valid and final judgment was entered in the first suit, and the claims in the second suit were brought or could have been brought in the first suit. The doctrine of claim preclusion acts to prevent exactly what Five Star has tried to do. A party is not allowed to file endless amounts of lawsuits on the same set of facts and circumstances until they receive the judgment they desire.

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<sup>8</sup> Five Star’s second suit included a claim for breach of contract and requested damages, while Five Star’s first suit only requested substantial performance.