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Summary of Weddell v. Sharp, 131 Nev. Adv. Op. 28 (May 28, 2015)

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Weddell v. Sharp, 131 Nev. Adv. Op. 28 (May 28, 2015)[1]

CIVIL PROCEDURE: CLAIM PRECLUSION

Summary

The Court held that a defendant may raise a defense of claim preclusion against a plaintiff's complaint even when that defendant was not a party or privy with a defendant in an earlier action brought by the plaintiff.[2] The Court modified the privity requirement established in *Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 194 P.3d 709 (2008) to incorporate nonmutual claim preclusion.

Background

Appellant Rolland Weddell and nonparty Michael Stewart were business partners; however, disputes arose regarding their multiple business dealings. Appellant and Stewart attempted to settle these disputes through a panel of three attorneys and the respondents in this case. Respondents signed a Memorandum of Understanding which acknowledged the potential conflict of interest, waived that conflict, be neutral in the dispute-resolution process, and agreed to render a decision that would be "binding, non-appealable and c[ould] be judicially enforced."

The Memorandum of Understanding failed to specify how the decision would be rendered. The respondents ultimately issued a decision that was favorable to Stewart, who then filed a lawsuit against appellant seeking declaratory judgment in regards to the decision. Appellant filed and answer and counterclaim, asking the court to enforce only a portion of the decision because of alleged biased behavior by the respondents during the decision process. Appellant did not assert any cross-claims against the respondents.

Appellant eventually confessed judgment and stipulated to dismiss his counterclaim. Over two years later, appellant initiated this cause of action against the respondents regarding the conduct of the respondents during the dispute resolution process. Respondents filed a motion to dismiss and requested attorneys fees as sanctions, both of which were granted by the district court.

Discussion

Five Star's test for applying claim preclusion

The Court originally modified the previous four-factor test for claim preclusion in *Five Star*.[3] *Five Star* employed the following test in regards to claim preclusion: "(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."[4]

Appellant argues that the district court erroneously found the first factor to have been satisfied. The district court held that respondents were sufficiently in privity with Stewart

[1] By Ashleigh Wise.
[2] This is known as nonmutual claim preclusion.
[3] 124 Nev. 1048.
[4] *Id*. at 1054.

because Stewart played a role in selecting the panel members and both Stewart and respondents had an interest in upholding the dispute-resolution decision. The Court determined that this was not a previously used definition of privity in this court.[5] The Court concluded that Stewart and the respondents did not have privity under an "adequate representation" analysis and reversed the district court. The Court however affirmed the granting of the motion to dismiss because the third prong of the Five Star test was satisfied and appellant's causes of action was barred by claim preclusion.

The doctrine of nonmutual claim preclusion

The Court took this opportunity to revisit the *Five Star* test for claim preclusion and incorporate the principals of finality and judicial economy. In the *Five Star* test it is implicit that, generally, a party need not assert every conceivable claim against every conceivable defendant in a single action.[6] However, federal courts apply claim preclusion in situations were the defendant in the second suit was not a party or in privity with a party in the first suit.

In *Airframe Systems, Inc. v. Raytheon Co.*, Airframe Systems filed a lawsuit against a parent company and one of its subsidiaries alleging copyright infringement.[7] The lawsuit was dismissed and Airframe Systems filed a second suit against the subsidiary and the former parent company that owned the subsidiary during the earlier portion of the subsidiary's alleged infringement.[8] The First Circuit concluded the former parent company could assert claim preclusion because both companies served "as interchangeable proxies" and had a "close and significant relationship."[9]

A similar result occurred in *Gambocz v. Yelencsics*, where Gambocz filed a lawsuit against a group of individuals alleging that group conspired to thwart Gambocz's mayoral candidacy. 468 F.2d 837, 839 & n.1 (3d Cir. 1972). This case was also dismissed; Gambocz's filed another lawsuit against the same individuals and three additional defendants with the same allegations.[10] The Third Circuit concluded newly named defendants could invoke claim preclusion when those defendants have "a close or significant relationship" with the previously named defendants.[11]

The concept of nonmutual claim preclusion promotes finality and judicial economy. A plaintiff's second suit against a new party should be precluded "if the new party can show good reasons why he should have been joined in the first action and the plaintiff cannot show any good reasons to justify a second chance."[12] The Court adopted the doctrine of nonmutual claim preclusion because the *Five Star* test is "overly rigid." For nonmutual claim preclusion to apply, then a defendant must demonstrate that (1) there has been a valid final judgment in a previous action; (2) the subsequent action is based on the same claims or any party of them that were or could have been brought in the first action; and (3) the parties or their privies are the same in the

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[5] *See* Bower v. Harrah's Laughlin, Inc., 125 Nev. 470, 481, 215 P.3d 709, 718 (2009); Alcantara v. Wal-Mart Stores, Inc., 130 Nev. Adv. Op. 28, 321 P.3d 912, 917–18 (2014).

[6] *See* Humphries v. Eighth Jud. Dist. Ct., 129 Nev. Adv. Op. 85, 312 P.3d 484, 490 (2013); Exec. Mgmt., Ltd. v. Ticor Title Ins. Co., 114 Nev. 823, 837, 963 P.2d 465, 474 (1998).

[7] 601 F.3d 9, 11–14 (1st Cir. 2010).

[8] *Id.*

[9] *Id*. at 17–18.

[10] 468 F.2d at 839.

[11] *Id*. at 840–41.

[12] 8A Charles Alan Wright, et al., *Federal Practice and Procedure* § 4464.1 (2d ed. 2002);

instant lawsuit as they were in the previous lawsuit, or the defendant can demonstrate that he or she should have been included as a defendant in the earlier suit and the plaintiff fails to provide a "good reason" for not having done so.

In the case at hand there was a valid final judgment in the declaratory relief action between appellant and Stewart. The Court concluded that appellant should have brought his current claims in the prior lawsuit. Appellant asserted he lacked the necessary facts to bring suit against respondents until he made a confession of judgment. If accurate, then appellant would have good reason; however, the record disproves the assertion. The counter claims made by appellant formed the basis for the causes of actions at bar and thus precludes his claim.

Conclusion

The Court adopted the doctrine of nonmutual claim preclusion, adding the factor that a plaintiff must provide a "good reason" for failing to include the new defendant in the previous action in order to withstand claim preclusion. The Court affirmed the decision of the district court.

Dissent

Justices Pickering and Douglas dissented. The nonmutual claim doctrine was neither briefed nor argued by the parties. Furthermore, appellant did not bring forth the same claim nor did the claim involve the same parties. The decision of the court dilutes the first and third factors of the Five Star test and brings uncertainty regarding claim preclusion.

Claim preclusion promotes consistent outcomes of cases but also allows for second suits involving different parties or different claims to proceed. Nonmutual claim preclusion expands the persons who can assert claim preclusion and should be used cautiously and is generally disfavored. Nonmutual claim preclusion should only be used when the party to be precluded should have joined his new adversary in the original litigation, which is not present in this case. The original lawsuit dealt with declaratory judgment not fraudulent behavior. Additionally, there are problems with calling a declaratory judgment a claim, especially a confessed judgment. Appellant was also the defendant to Stewart's declaratory judgment complaint and did not control the persons Stewart sued or joined.

It is unusual for parties seeking to confirm or vacate mediation to join the mediators. The mediator does not have a stake in whether the decision is confirmed. Appellant's claims against the mediators depended on Stewart winning declaratory judgment and this opinion could unnecessarily expand litigation to avoid results like this one.

Gambocz v. Yelencsics is not applicable to the current action because of the "close or significant relationship" between the defendants in the two suits. Here, appellants dispute with Stewart is different than the dispute with the respondents. The dissent cannot agree that appellant was required to join the mediators as third-party or counterclaim defendants to the *Stewart v. Weddell* declaratory judgment suit.