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10-30-2023

Orbitz Worldwide v. Eighth Jud. Dist. Ct., 139 Nev. Adv. Op. 40 (Sept. 28, 2023)

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Orbitz Worldwide v. Eighth Jud. Dist. Ct., 139 Nev. Adv. Op. 40 (Sept. 28, 2023)[1]

PURSUANT TO NRS 357.080(3)(b), A PRIVATE PLAINTIFF MAY MAINTAIN A QUI-TAM SUIT INVOLVING THE SAME ALLEGATIONS OR TRANSACTIONS ASSERTED IN A SEPARATE CIVIL SUIT ONLY WHEN THE SUITS ARE BROUGHT ON BEHALF OF DIFFERENT GOVERNMENTAL ENTITIES.

Summary

In an en banc decision, the Nevada Supreme Court considered an issue of first impression regarding NRS 357.080(3)(b).[2] Specifically, the court addressed whether NRS 357.080(3)(b) requires dismissal of a private action brought on behalf of the State under the Nevada False Claims Act ("NFCA"), where a political subdivision, such as a county, brings a subsequent civil suit on its own behalf against the same parties based on the same allegations or transactions in the private action. As a matter of first impression, the court utilized statutory interpretation to determine the Nevada Legislature's intent behind NFCA language that differed from its federal counterpart. The court held that NRS 357.080(3)(b) does not contain a sequencing requirement, as its federal counterpart does, and, thus, applies to any such private action, even if initiated prior to the civil suit's commencement. However, if the private action is filed on behalf of a different governmental entity than the civil action that involves the same defendant party and these same allegations or transactions, then the private action's dismissal is not required pursuant to NRS 357.080(3)(b).

Background

Mark Fierro and Sig Rogich (collectively, "relators") commenced a qui-tam suit on behalf of the State of Nevada against online travel companies (collectively, "OTCs").[3] The relators asserted that the OTCs knowingly avoided their respective obligations to pay transient-lodging taxes mandated by the Clark County Code and state law.[4] Specifically, the relators alleged the OTCs engaged in a scheme of renting rooms from hotels at a discounted wholesale rate, which is the figure that the OTCs calculated their owed transient-lodging tax obligations. However, the OTCs collected a transient-lodging tax from their customers based on a higher retail room rate. The OTCs would then pocket the difference.

With the relators having initiated a private suit on behalf of the State, the Attorney General weighed in, pursuant to the procedures set forth in the NFCA.[5] The Attorney General declined to intervene, and the relators were allowed to proceed with the qui-tam suit.

Over a year later, Clark County filed its own lawsuit against the same OTCs. Clark County alleged that these OTCs knowingly avoided paying the transient-lodging taxes they owed. Furthermore, Clark County alleged the OTCs engaged in a scheme of remitting lower transient-lodging taxes based on negotiated discounted wholesale prices despite collecting higher transient-lodging taxes from customers based on full retail prices, for respective hotel rooms.

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[1] By Elijah J. Miller.

[2] The Honorable Justice Linda Marie Bell recused herself and did not participate in this matter's discussion. The Honorable Justice Patricia Lee provided a concurrence.

[3] A qui-tam suit is a private lawsuit filed on behalf of an allegedly defrauded government entity.

[4] *See* NEV. REV. STAT. § 244.3352(1) (2023) (mandating counties impose transient-lodging taxes); Nev. Rev. Stat. § 244.3354 (2023) (delegating collection of transient-lodging taxes to the counties, with subsequent apportionment between the counties and the State under applicable law).

[5] NEV. REV. STAT. § 357.110 (2023).

Following the commencement of Clark County's civil action, the OTCs moved for summary judgment on the NFCA claim in the relator's private action, pointing to NRS 357.080(3)(b)'s government-action bar.[6] The OTCs argued that the relators were precluded from continuing to pursue the NFCA claim in their qui-tam suit because it was based on the same allegations or transactions as Clark County's civil suit, a point the relators conceded. The relators countered with the argument that the qui-tam suit was on behalf of a different governmental entity, the State, than Clark County's civil suit, which was on its own behalf.

During a hearing on the motion for summary judgment, the district court raised another issue: whether NRS 357.080(3)(b)'s government-action bar had a sequencing requirement. The qualifier "already" in the statute's language created uncertainty for the court on whether the sequential order of the suits was determinative in the decision. The district court ultimately denied summary judgment on this basis that the private action's commencement occurred before the civil action's commencement. The court opined that had the private action come after the civil action's commencement, it would be precluded pursuant to NRS 357.080(3)(b)'s government-action bar, as the governmental entity would be already a party.

In turn, the district court granted the relators' motion to leave to amend complaint. The relators amended the qui-tam complaint to clarify that the action sought recovery of transient-lodging taxes owed to the State. Furthermore, they alleged that the OTCs had knowingly or improperly deprived the State of owed transient-lodging taxes pursuant to the codes of Clark, Washoe, Douglas, Lyon, and Nye counties and state law.

Before the relators filed their amended complaint, the OTCs moved for reconsideration of the order denying summary judgment, arguing the court's interpretation of NRS 357.080(3)(b) conflicted with the plain language of the statute. Specifically, the OTCs argued that the government-action bar was triggered by the contemporaneous existences of any private action and civil action on behalf of a governmental entity involving the same allegations or transactions against the same parties, regardless of sequential order. Also, they argued that the relators' amended complaint would not sufficiently differentiate the private action from the civil action and, thus, trigger the same statute: NRS 357.080(3)(b).

The relators countered both arguments in this motion for reconsideration of the order denying summary judgment. First, they contended with the district court's holding that private actions commenced before Clark County's civil suit commencement were not subject to NRS 357.080(3)(b)'s government-action bar; the amended complaint's supersession of the original complaint kept this qui-tam action in that class. Second, the relators argued that their amended complaint's inclusion of new allegations regarding owed transient-lodging taxes in multiple counties throughout Nevada sufficiently differentiated the private suit on behalf of the State from Clark County's civil action.

Following a hearing, the district court denied reconsideration without articulating a rationale. The OTCs subsequently filed a petition for writ of mandamus or prohibition challenging district court order denying motion for summary judgment with the Supreme Court of the State of Nevada.

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[6] The NFCA's government-action bar precludes a party from maintaining a private action if such action is based on the same allegations or transactions subject of a civil action to which a State or political subdivision is already a party. NEV. REV. STAT § 357.080(3)(b) (2023).

Discussion

The Court Elected to Entertain the OTCs' Petition for Writ Relief

The court, here, had to exercise its discretion to determine whether the OTCs' petition warranted writ of mandamus relief.[7] Since writ relief is an extraordinary remedy, the court issues such relief at its discretion.[8] When there is no other plain, speedy, and adequate legal remedy, a writ of mandamus is available to correct clear error or an arbitrary or capricious exercise of discretion.[9] Generally, the court declines to consider writ petitions that challenge interlocutory district court orders denying motions for summary judgment.[10] However, the court will exercise its discretion to hear writ petitions where "an important issue of law needs clarification."[11]

Here, the OTCs' writ petition raised issues of first impression of statewide significance. This petition of purely legal questions regarding the effect of NRS 357.080(3)(b) on a private suit filed on behalf of one governmental entity prior to a civil suit being filed on behalf of another distinct governmental entity enticed the court. As such, the court elected to exercise its discretion to entertain this writ of mandamus with statewide significance: clarifying a statute that authorizes private parties to recover fraudulently obtained government funds and return those funds to the public fisc.

The NFCA's Government-Action Bar

The court had never before directly analyzed the scope of NRS 357.080(3)(b), so it had the task of resolving an issue of first impression.[12] The court held that application of NRS 357.080(3)(b) was a question of statutory interpretation, which it reviewed de novo.[13] In this statutory interpretation, the court enforced plain meaning when the statute was unambiguous.[14] It also strived to interpret sections "in harmony with the statute as a whole."[15] For undefined words, the court gave them their "plain and ordinary meaning."[16]

Furthermore, in this case involving a state statute modeled after a federal statute, the court considered interpretation of the federal statute as "helpful" insight for its subsequent interpretation of the state statute.[17] The court resorted to external sources or rules of statutory interpretation only in the instance that ambiguity gave rise to more than one "reasonable" interpretation.[18]

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[7] The court rejected the OTCs' alternative petition for a writ of prohibition because the district court had jurisdiction to hear and determine the matter under consideration: NRS 357.080(3)(b)'s government-action bar. Goicoechea v. Fourth Jud. Dist. Ct., 96 Nev. 287, 289, 607 P.2d 1140, 1141 (1980).
[8] State v. Eighth Jud. Dist. Ct. (Anzalone), 118 Nev. 140, 146, 42 P.3d 233, 237 (2002).
[9] Int'l Game Tech., Inc. v. Second Jud. Dist. Ct. 124 Nev. 193, 197, 179 P.3d 556, 558 (2008).
[10] *Id.* at 197, 179 P.3d at 558.
[11] *Id.* at 197–98, 179 P.3d at 559.
[12] The court had previously made only general remarks about NRS 357.080(3)(b). *See, e.g.*, Int'l Game Tech., Inc. v. Second Jud. Dist. Ct., 122 Nev. 132, 139, 127 P.3d 1088, 1094 (2006) (stating "[g]enerally, a false claims action may not be maintained if administrative or court proceedings involving the same underlying facts and allegations were previously investigated").
[13] In re Resort at Summerlin Litig., 122 Nev. 177, 182, 127 P.3d 1076, 1079 (2006).
[14] City of Reno v. Yturbide, 135 Nev. 113, 115–16, 440 P.3d 32, 35 (2019).
[15] Branch Banking & Tr. Co. v. Windhaven & Tollway, LLC, 131 Nev. 155, 158, 347 P.3d 1038, 1040 (2015).
[16] *In re Resort*, 122 Nev. at 182, 127 P.3d at 1079.
[17] *See Int'l Game Tech.*, 122 Nev. at 150, 127 P.3d at 1101.
[18] *See* Univ. & Cmty. Coll. Sys. of Nev. v. Nevadans for Sound Gov't, 120 Nev. 712, 731, 100 P.3d 179, ,193 (2004).

The NFCA, modeled after the 1986 amendments to its federal counterpart, aims to "expose and combat attempted fraud against the government."[19] To achieve this goal, qui-tam actions by which "a private plaintiff…bring[s] an action…on his or her own account and that of the State or a political subdivision, or both the State and a political subdivision," are authorized for NFCA violations.[20] Once a qui-tam NFCA action is commenced, the Attorney General or the Attorney General's designee has an opportunity to intervene in the suit.[21] If intervention is elected, then the private plaintiff effectively cedes control of litigation.[22] If intervention is declined, then the private plaintiff may proceed with the action.[23]

However, certain qui-tam actions are precluded.[24] Ultimately, the provision at issue, NRS 357.080(3)(b), the government-action bar, precludes a private NFCA action from being "maintained" if based on allegations or transactions also the subject of civil action in which "the State or political subdivision" is "already" a party.

NRS 357.080(3)(b) May Apply Even Where the Qui-Tam Action Precedes the Governmental Entity's Action

The court first dealt with the relationship between the words "maintain" and "already"[25] in NRS 357.080(3)(b). Neither word was defined in the NFCA.

The court noted that the Legislature departed from the federal counterpart, by substituting "maintain" for "bring" in the respective provision of the NFCA.[26] In the past, the court has interpreted "maintain" and "bring" to have different meanings in other statutes.[27] Under the common definition, "maintain" means to "continue (something)."[28] In *Madera*, the court concluded that "maintained" extended the statute "to pending matters."[29] Further, the *Madera* court reasoned that the Legislature's use of the word "maintain" alongside "brought" evidenced intent to apply different meanings.[30] Likewise, NRS 357.080 uses "maintain" and "bring" at different points, evidencing a similar intent to distinguish the two words.

Thus, the court concluded that NRS 357.080(3)(b)'s government-action bar contained no sequencing requirement, like its federal counterpart. NRS 357.080(3)(b) precludes not just the bringing of a private action after relevant civil action commences, but also the maintaining of one.[31] While the district court erred in determining otherwise, the issue of whether NRS 357.080(3)(b) still required dismissal where there are two different governmental entities remained.

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[19] *Int'l Game Tech.*, 124 Nev. at 198, 179 P.3d at 559; *see also* NEV. REV. STAT. § 357.040(1) (2023).

[20] *See* NEV. REV. STAT. § 357.080(1) (2023). The NFCA also allows the Attorney General or the Attorney General's designee to bring action on a similar basis. *See* NEV. REV. STAT. § 357.040(1)(a)-(i), (2) (2023); NEV. REV. STAT. § 357.070(1)-(2) (2023).

[21] NEV. REV. STAT. § 357.080(2) (2023).

[22] NEV. REV. STAT § 357.110(3) (2023).

[23] NEV. REV. STAT. § 357.110(2) (2023).

[24] NEV. REV. STAT. § 357.080(3) (2023).

[25] The court determined "already" was defined as "[b]y this or a specified time," but noted that that it does not always convey succession. *See Already*, AMERICAN HERITAGE DICTIONARY (5th ed. 2011).

[26] *Compare* 31 U.S.C. § 3730(e)(3).

[27] *See, e.g.*, Madera v. State Indus. Ins. Sys., 114 Nev. 253, 258–59, 956 P.2d 117, 120–21 (1998).

[28] *Maintain*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[29] *See Madera*, 114. at 258–59, 956 P.2d at 120–21.

[30] *See id.* at 259, 956 P.2d at 121.

[31] The court did note that only the Attorney General or their designee may assert NFCA claims in a civil action after the relevant qui-tam action. NEV. REV. STAT. § 357.080(2) (2023).

NRS 357.080(3)(b) Does Not Bar a Qui-Tam Action on Behalf of One Governmental Entity Where the Separate Civil Action Has Been Brought by or on Behalf of a Different Governmental Entity

The court ultimately had the task of holding whether a private suit commenced on behalf of one governmental entity, such as the State, was precluded when a civil suit on behalf of another governmental entity, such as Clark County, was filed against the same party involving the same allegations or transactions. To apply NRS 357.080(3)(b), the court started by comparing the two actions: (1) a suit brought by a private plaintiff under NRS 357.080(1) and (2) a civil action in which a "State or political subdivision" is already a party.

The court noted the importance of the disjunctive "or" used in the civil action.[32] This disjunctive is also present in NRS 357.080(1), distinguishing between "the State" and "political subdivision." The NFCA further cements this distinction by not defining "political subdivision" as coextensive to "the State."[33] This consistency throughout the statute points to the Legislature's intent to apply a singular, distinct meaning to both "the State" and "political subdivision" in any applicable provision. Furthermore, the NFCA departed from the federal FCA's use of "the Government" in respective provisions.[34]

Here, the Court concluded that the private suit, while including Clark County and invoking its county code, was seeking recovery simply on behalf of the State and its owed portion of transient-lodging taxes from the OTCs. Clark County's civil suit on its own behalf, of course, sought recovery of transient-lodging taxes owed to its respective political subdivision.

Failure to Apply Government-Action Bar Does Not Usurp Legislative Intent to Ensure Governmental Control Over Governmental Claims

The OTCs attempted to allege that a failure to apply the government-action bar in this case would usurp legislative intent to ensure government officials controlled government claims. To the contrary, the NFCA incentivizes private citizens to recover fraudulently obtained funds from violators on behalf of a governmental entity.[35] This incentivization of private action on behalf of governmental entities aligns with the public policy of expending resources efficiently.

Furthermore, the NFCA confers control over false-claims litigation exclusively on the Attorney General.[36] Only the Attorney General may investigate alleged NFCA liability.[37] The Attorney General may intervene at any time, even if after initially declining.[38] If the Attorney General does intervene, the Attorney General takes over the litigation.[39] Even if the Attorney General does not intervene, the private plaintiff must continue to provide all pleadings associated with the matter.[40]

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[32] Reiter v. Sonotone Corp., 442 U.S. 330, 339, 99 S.Ct. 2326, 2331 (1979).

[33] NEV. REV. STAT. § 357.030 (2023) (defining "political subdivision" as including counties, cities, and "any other local government" entity).

[34] *See* 31 U.S.C. § 37030(e)(3).

[35] *See* NEV. REV. STAT. § 357.210(1), (2) (2023) (permitting a private plaintiff to receive anywhere from fifteen to thirty percent of a recovery).

[36] *See* Simonian v. Univ. & Cmty. Coll. Sys. of Nev., 122 Nev. 187, 190, 128 P.3d 1057, 1059.

[37] NEV. REV. STAT. § 357.070(1), (2) (2023).

[38] *See* NEV. REV. STAT. § 357.130(2)-(3) (2023).

[39] *See, e.g.*, NEV. REV. STAT. § 357.120(3) (2023).

[40] NEV. REV. STAT. § 357.130(1) (2023).

Conclusion

The court held that, although the NFCA does not have a sequential requirement, a private action on behalf of one governmental entity against the same party involving the same allegations or transactions as a civil action on behalf of a different governmental entity does not warrant dismissal under NRS 357.080(3)(b). Here, the fact that the relators' qui-tam action commenced prior to Clark County's civil action against the OTCs for owed transient-lodging taxes did not rule out preclusion of the former, due to the NFCA's lack of sequential requirement. However, the fact that the relators' qui-tam action was on behalf of the State while Clark County's civil action was on its own behalf meant that NRS 357.080(3)(b)'s government-action bar was not triggered. The OTCs' writ of mandamus or prohibition challenging district court order denying motion for summary judgment was therefore denied.

Concurrence

In her concurrence, Justice Lee agreed with the result but disagreed with the majority's interpretation of NRS 357.080(3)(b). Particularly, the word "already" was given insufficient analysis, and the majority's interpretation still left the contradiction created by the statute's concurrent use of the words "maintain" and "already" unreconciled. While not unreasonable, the majority's interpretation encompassed future events, straining the definition. Justice Lee argued that a natural reading of NRS 357.080(3) lends to a sequencing requirement; changing a single word from "bring" to "maintain" while retaining the word "already" does not clearly indicate the Legislature's intent. A private action may not be "maintained" if based on allegations or transactions in proceedings that the governmental entity is "already" a party to (emphasis added in the original). Finally, Justice Lee contended that public policy would not permit qui-tam actions, only for a political subdivision to "swoop in at any time."[41]

While Justice Lee argued that statutory interpretation concludes with NRS 357.080(3)(b)'s government-action bar containing a sequential requirement, she acknowledged that the facts of the present case did not render the government-action bar applicable.

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[41] Orbitz Worldwide v. Eighth Jud. Dist. Ct., 139 Nev. Adv. Op. 40 at 2 (Sept. 28, 2023) (Lee, J. concurring).