

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT L. FULLERTON, AND
CORINNE F. BENNETT,
Appellants,
vs.
THE STATE OF NEVADA, THREAD
TECHNOLOGY, INC., AND MATTHEW
Q. CALLISTER,
Respondents.

No. 35189

FILED

OCT 29 2002

JANET L. M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richard*
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING

This is an appeal from orders of the district court granting partial summary judgment and awarding restitution in favor of Nevada investors in a receivership action. Appellants Fullerton and Bennett also challenge the district court's finding that respondent Thread Technology, Inc. (TTI), owns an exclusive license with regard to Fullerton's patent for an invention known as the ZipNut®.

This court's review of an order granting summary judgment is de novo.¹ Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, admissions, and affidavits on file show that there exists no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.² "A genuine issue of material fact is one where the evidence is such that a reasonable jury could return a verdict for the non-moving party."³

¹Tore, Ltd. v. Church, 105 Nev. 183, 185, 772 P.2d 1281, 1282 (1989).

²NRCP 56(c).

³Posadas v. City of Reno, 109 Nev. 448, 452, 851 P.2d 438, 441 (1993).

When a motion for summary judgment is made and supported as required by NRCP 56, the non-moving party may not rest upon general allegations and conclusions, but must, by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine factual issue.⁴ Evidence offered in support of, or in opposition to, a motion for summary judgment must be admissible evidence.⁵ All of the non-movant's statements must be accepted as true, all reasonable inferences that can be drawn from the evidence must be admitted, and neither the trial court nor this court may decide issues of credibility based upon the evidence submitted in the motion or the opposition.⁶

This case has a lengthy history. In 1979 Fullerton filed a patent application for a new type of nut. He then sought investors in California to help with developing prototypes. When he was unsuccessful in securing sufficient funds, he looked for prospects in Utah. In 1982 a Utah corporation was formed called Fullerton Zip Nut, Inc. Fullerton assigned his rights in the pending patent to the Utah corporation, and the assignment was recorded at the U.S. Patent Office.

The Utah venture was apparently unsuccessful because Fullerton then sought to elicit funds from Nevada residents. A Nevada corporation, Fullerton, Inc., was formed in 1984. Subsequently in 1985, Fullerton, Inc., and Fullerton Zip Nut, Inc., merged and the surviving

⁴NRCP 56(e); see also Bird v. Casa Royale West, 97 Nev. 67, 70, 624 P.2d 17, 19 (1981).

⁵Posadas, 109 Nev. at 452, 851 P.2d at 442.

⁶Great American Ins. v. General Builders, 113 Nev. 346, 350-351, 934 P.2d 257, 260 (1997).

corporation was Fullerton, Inc., Nevada. Fullerton, Inc., was now the successor-in-interest to the patent assignment.

Disputes arose between the Utah principals and Fullerton on two separate occasions. As a result, in April 1988, a complaint and request for a receivership over Fullerton, Inc., was filed in the Utah Federal District Court. The federal court granted the request for a receivership and issued an injunction prohibiting Fullerton from taking any action to impair the patent. However, Fullerton, or persons acting at his behest, attempted to call a shareholders meeting for the purpose of dissolving Fullerton, Inc. The federal court issued an order prohibiting the meeting.

In September 1988, Fullerton formed First Phoenix, a Nevada corporation, for the purposes of raising investment capital primarily from Nevada residents. Bennett was an officer and marketing director of First Phoenix as well as a close associate of Fullerton who worked with him to raise funds and promote the ZipNut® concept.

Despite the pending federal injunction, Fullerton caused a shareholder of Fullerton, Inc., Donald Brinkley, to file an action in the Second Judicial District Court seeking to compel a shareholder meeting for the purpose of dissolving Fullerton, Inc. and transferring the patent rights back to Fullerton. This was done because Fullerton had received investment funds from persons on the East coast, particularly in Virginia who wanted the rights to the patent to be assigned to a Virginia corporation, Crescent Products. A Virginia attorney, John Schell, assisted Fullerton in circumventing the Utah court's authority. The Nevada court permitted the shareholder meeting to be held. Thus, Fullerton, Inc., was dissolved and the patent was reassigned to Fullerton in mid-December of

1988. Fullerton then assigned the patent rights to Crescent on December 21, 1988, and the assignment was filed in the U.S. Patent office.

From approximately February 1989 to December 1990, First Phoenix issued shares of stock to Nevada investors. The investors were not informed of the details of the Utah proceedings and the potential claims against the patent rights as a result of the Utah action. Nor were they told about the assignment of the patent rights to Crescent. Fullerton and Bennett, or individuals acting on their behalf, led the investors to believe that First Phoenix and/or Fullerton controlled the patent rights.

Finally, another Nevada corporation, Zip Nut, Inc., was formed. The shareholders were composed of Fullerton, Bennett, and the Crescent/Virginia investors. The record is unclear as to the exact interest Zip Nut, Inc., claimed in the patent.

At some point, the Nevada investors became concerned that Fullerton was moving from the Reno, Nevada, area. They sought assistance from the attorney general's office. After investigating the matter, the attorney general filed a civil complaint against Fullerton, First Phoenix, Crescent, Zip Nut, Inc., Fullerton Design, and Fullerton, Inc., alleging various violations of NRS 90.460 and NRS 90.570. The complaint sought a receivership over the various corporate entities and Fullerton as an individual as well as injunctive relief to prevent any additional transfer of rights to the pending patent.⁷ The complaint was later amended to add Bennett as a defendant and to place a receivership over her voting shares.

The district court granted the State's request for receiverships and entered a preliminary injunction. Matthew Callister, Esq. was

⁷The patent was eventually issued in 1993.

appointed as the receiver for all the individuals and entities. After several hearings, Fullerton, Bennett, Crescent, First Phoenix and Zip Nut, Inc., proposed a settlement to the district court. John Schell represented all of these defendants.

Under the proposed resolution, the varying corporate entities would be merged into one company, Zip Nut, Inc. Shareholders in First Phoenix could receive a senior note for their shares secured by the patent rights, exchange their shares for stock in Zip Nut, or a combination of the above. All other shareholders would become shareholders of Zip Nut, Inc., through the merger. The patent would belong to Fullerton, with Zip Nut, Inc., having a "master license" on all products using the technology. Fullerton would be paid a royalty for the license, and the business plan attached to the proposal also indicated that Fullerton and Bennett would have consulting or employment agreements with Zip Nut, Inc. Zip Nut, Inc., would settle the Utah case with the end result being one corporate entity with the ability to develop and market the ZipNut® concept. John Schell would be the president and chief executive officer of Zip Nut, Inc.

The shareholders of the various corporate entities approved the concept, and the merger went through. The Utah matter was settled. All of the defendants, except Fullerton and Bennett as individuals, were dismissed from the lawsuit. John Schell resigned as counsel for Bennett and Fullerton. Various new investors brought cash infusion into Zip Nut, Inc., but the corporation continued to have financial difficulties. With the approval of the district court, the license possessed by Zip Nut, Inc., was pledged as collateral for loans or other cash infusions. Operations were moved to Virginia, but eventually Zip Nut, Inc., ended up in a Chapter 7 Bankruptcy proceeding. Callister was never notified of the bankruptcy and was unaware of its existence until after Zip Nut, Inc., was discharged.

However, Fullerton and Bennett were aware of the bankruptcy and contested several issues raised in the bankruptcy court.

Eventually the bankruptcy court determined that the license possessed by Zip Nut, Inc., was subject to foreclosure. It was sold to TTI, whose shareholders and directors were also involved with Zip Nut, Inc. Fullerton and Bennett have no equity ownership in TTI.

Over the years, Fullerton and Bennett have argued that no license ever existed, that a license existed but it was not an exclusive license, or that Zip Nut, Inc., and/or TTI materially breached any licensing agreement and, therefore, there is no longer a license. No written licensing, consulting, or employment agreements were ever executed between Fullerton, Bennett, and Zip Nut, Inc.

While the civil proceedings were pending, Fullerton and Bennett were charged and convicted of several counts of criminal securities' violations arising out of the First Phoenix transactions. This court upheld four of the convictions on appeal.⁸

Subsequent to the criminal convictions, the State moved the district court for summary judgment in the instant case. The district court granted summary judgment in two separate orders, first finding liability for violating NRS 90.460 and/or NRS 90/570, and then assessing damages in the form of restitution and costs relating to the receivership. Fullerton and Bennett filed a motion requesting that the district court declare either that no master licensing agreement was ever formed or it was materially breached and finding TTI no longer had licensing authority.

⁸Fullerton v. State, 116 Nev. 906, 8 P.3d 848 (2000).

On appeal, Fullerton and Bennett first contend that their due process rights were violated by the district court's failure to conduct an evidentiary hearing on the motions for summary judgment and their motion for a final determination regarding the patent license. However, Fullerton and Bennett cite to no authority for the proposition that an evidentiary hearing is required to decide a motion for summary judgment other than their general reference to due process rights. Further, principles of procedural due process do not mandate a hearing in every case because the fundamental requisite of procedural due process is an opportunity to be heard.⁹ Specifically, in any proceeding that is to be accorded finality, due process requires notice reasonably calculated "to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."¹⁰

Bennett and Fullerton were given notice of all the motions and an opportunity to argue and file pleadings. Thus, procedural due process was satisfied. Accordingly, we conclude that this contention lacks merit.

Next, Fullerton and Bennett argue that the reorganization that resulted in the merger of the corporations into Zip Nut, Inc., and the exchange of all shares for shares in Zip Nut, Inc., was an accord and satisfaction for all claims, including restitution, of the Nevada First Phoenix investors. Fullerton and Bennett also argue that the reorganization constitutes a waiver of the investors' claims to restitution. We disagree.

⁹Browning v. Dixon, 114 Nev. 213, 217, 954 P.2d 741, 743 (1998).

¹⁰Id.

“Accord is defined as ‘[a]n agreement whereby one of the parties undertakes to give or perform, and the other to accept, in satisfaction of a claim, liquidated or in dispute, and arising either from contract or from tort, something other than or different from what he is, or considers himself, entitled to.’”¹¹ As the district court noted, Nevada law requires the party availing himself of a plea of accord and satisfaction to bear the burden of proof and to establish clearly that there was a meeting of the minds of the parties, accompanied by sufficient consideration.¹²

There was no evidence establishing that the investors agreed to waive their right to restitution in return for stock in Zip Nut, Inc. Specifically, the 1991 consent orders and the Zip Nut, Inc. offer/reorganization plan underlying the orders reveal no express provisions indicating that the investors waived their right to restitution. Nor does the record of the hearings in which the reorganization was discussed indicate any intent for the reorganization to be an accord and satisfaction or waiver. Accordingly we reject this claim and conclude the district court did not err in finding a lack of waiver or accord and satisfaction.

Fullerton and Bennett next contend that partial summary judgment was improper because genuine issues of material fact existed as to liability, and as to the amounts owed to each investor, especially those involving the exchange of goods and services for First Phoenix stock.

With respect to liability, the State asserted Bennett and Fullerton were liable for restitution for violating NRS 90.460 (sale of

¹¹Walden v. Backus, 81 Nev. 634, 636-37, 408 P.2d 712, 713 (1965) (quoting 1 C.J.S. § 1(a) Accord and Satisfaction, 462).

¹²See id. at 637, 408 P.2d at 713-14.

unregistered security) and NRS 90.570(2) (fraud in the sale of securities). Bennett and Fullerton assert they are not liable because First Phoenix was exempt from the registration requirements and they never intended to defraud anyone.

NRS 90.460 makes it unlawful for a person to offer to sell or sell "any security in this state unless the security is registered or the security or transaction is exempt under [NRS chapter 90]."¹³ Exemptions from registration for certain transactions are set forth in NRS 90.530.¹⁴ At issue in this case is the limited/small offering exemption found at NRS 90.530(11), which may be claimed with respect to a transaction involving the offer to sell an unregistered security only if "[n]o commission or other similar compensation is paid or given, directly or indirectly, to a person, other than a broker-dealer licensed or not required to be licensed under [NRS chapter 90], for soliciting a prospective purchaser in this state."¹⁵

To prove a violation of NRS 90.460, "the state has the burden of proving that: (1) the defendant offered or sold a security in Nevada; and (2) the security was not registered."¹⁶ NRS 90.295 defines a security as including a corporation's stock. Pursuant to NRS 90.690, however, the State is not required to prove the non-applicability of an exemption

¹³NRS 90.460.

¹⁴See NRS 90.530 (listing exemptions from requirements of NRS 90.460).

¹⁵NRS 90.530(11)(c).

¹⁶Fullerton v. State, 116 Nev. 906, 909, 8 P.3d 848, 850 (2000) (criminal case involving violations of NRS 90.460).

because the person claiming an exemption “has the burden of proving the exemption” in a civil action.¹⁷

The record reveals that Fullerton admitted during his criminal trial that he sold First Phoenix shares on at least one occasion and that Bennett admitted that she marketed, i.e., offered, First Phoenix shares and delivered stock certificates to investors. Further, the Director of Securities Registration and Licensing testified at their criminal trial and indicated that the First Phoenix stock was not registered in Nevada, nor were Fullerton and Bennett licensed sales representatives at the time of their actions. Fullerton and Bennett also asserted in their criminal trial that Greg McVickers was not paid a commission relating to the sale of stock, but instead was paid for sales of product. McVickers testified that it was for both. The jury rejected the exemption defense. Therefore, as to the four counts sustained on appeal, liability for violating the statute was established as against Fullerton and Bennett. Given the convictions and the previous testimony of Fullerton and Bennett, the district court did not err in finding no genuine issue of material fact existed as to the inapplicability of the NRS 90.530(11) exemption in the civil proceedings. Accordingly, we conclude that summary judgment was proper as to Fullerton and Bennett’s liability on the State’s unlawful sale of unregistered securities claim, at least as to the four convictions sustained by this court on appeal.¹⁸

¹⁷NRS 90.690(1).

¹⁸Bennett and Fullerton assert that the State must prove a securities violation with respect to each shareholder who was awarded restitution. We need not decide whether individual proof per investor is necessary in a civil, versus a criminal proceeding, as liability was also based on NRS 90.570(2) and (3).

As to the fraud allegations, it is unlawful to “[m]ake an untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made not misleading in the light of the circumstances under which they are made” in connection with the sale or purchase of securities.¹⁹ In this context, it is also unlawful to “[e]ngage in an act, practice or course of business which operates or would operate as a fraud or deceit upon a person.”²⁰

We conclude that, with two exceptions, the district court properly granted summary judgment on liability as to both Fullerton and Bennett on the fraud claims. Contrary to Fullerton and Bennett’s contention, this court recently held that “reliance and scienter are not required elements of securities fraud in state enforcement actions initiated under NRS 90.570(2) and (3),”²¹ and the record reveals that, at the very least, First Phoenix did not have rights to the patent when Fullerton and Bennett solicited investors for First Phoenix because Fullerton had previously assigned those rights to Crescent Products. Finally, on all but two of the claims, Fullerton and Bennett failed to come forward with any evidence, affidavit or otherwise, to refute the evidence presented by the State. Accordingly, as to all but two investors, we conclude the district court did not err in granting summary judgment as to liability.

The two exceptions involve the stock owned by Ida Brinkley and Joe Colvin. The record indicates that Donald Brinkley, Ida’s husband,

¹⁹NRS 90.570(2).

²⁰NRS 90.570(3).

²¹Secretary of State v. Tretiak, 117 Nev. 299, 310, 22 P.3d 1134, 1141 (2001), cert. denied, 122 S. Ct. 372 (2001).

was not a monetary investor in First Phoenix. He invested in the ZipNut® concept before First Phoenix was formed and received shares in Fullerton, Inc. His shares in Fullerton, Inc., were then exchanged for shares in First Phoenix. As to Mr. Colvin, he was the attorney who represented Donald Brinkley and/or Fullerton in the Nevada lawsuit that led to the dissolution of Fullerton, Inc., in violation of the Utah receivership. He had knowledge of the Utah injunction and an inference exists in the record that he may have been aware of the transfer to Crescent.

A genuine issue of material fact exists in both of these claims as to the basis for fraud liability. The affidavits and pleadings do not indicate or support a finding of fraud based on the same failure to disclose the Utah or Crescent information present with the other investors, and no other theory of liability was argued by the State. Therefore, the district court erred in granting summary judgment as to these claims.

Fullerton and Bennett also contend that the district court erred by awarding restitution to the investors named in the State's motion for damages because genuine issues of material fact exist concerning the amount of the investment.

In this case, the State proved its damages with copies of First Phoenix stock certificates issued to the investors, copies of cancelled checks payable to First Phoenix from many of the investors, invoices evidencing goods and services provided in exchange for First Phoenix stock, affidavits of investors, and a spreadsheet indicating the attorney general's office interest calculations. However, Bennett and Fullerton submitted affidavits contesting the value or circumstances of the investment as to the following persons:

- (1) Greg McVickers - \$20,000 in goods and services.

- (2) Ida Brinkley - \$50,000 invested in Fullerton, Inc., not First Phoenix.
- (3) James and Kay Hackbarth - \$1,907.28 in goods and services.
- (4) Joe Colvin - \$2,000 in services.
- (5) Peter Vasquez - \$5,000 in goods.

We conclude that with respect to all but the above enumerated amounts and investors, the district court did not err in finding no genuine issue of material fact existed as to the amount of the shareholder's investment and the interest calculations.

As to the five enumerated investors, we need not address the issues involving Brinkley and Colvin since we have already determined the district court erred in granting summary judgment on those claims. With respect to Vasquez, his stock was issued in exchange for an antique automobile. Fullerton and Bennett issued the stock after receiving an appraisal on the car, and they cannot now disavow their own actions in this regard. Thus, the district court did not err in finding no genuine issue of material fact existed as to the value of Vasquez' investment. Finally, as to the McVickers and Hackbarth claims, given the affidavits of Bennett or Fullerton, we conclude a genuine issue of material fact exists regarding their claims for restitution based upon goods and services, and the district court erred in granting restitution on the goods and services claims.

Finally, Fullerton and Bennett contend that the district court abused its discretion by determining that respondent Thread Technology, Inc., holds an exclusive license, and they urge this court to require the district court to vacate its order creating and continuing the license of Fullerton's Zip Nut patent or to make the license non-exclusive and to define the terms of the license.

"[R]es judicata precludes parties or those in privity with them from relitigating a cause of action or an issue which has been finally determined by a court of competent jurisdiction."²² This court recognizes that the doctrine of res judicata embodies two concepts: issue preclusion and claim preclusion.²³ Issue preclusion, or collateral estoppel, prevents a party from relitigating any issue that was "actually and necessarily litigated" in a previous suit.²⁴ Claim preclusion, or merger and bar, precludes "a subsequent action on the same claim or part thereof."²⁵ "The modern view is that claim preclusion embraces all grounds of recovery that were asserted in a suit, as well as those that could have been asserted, and thus has a broader reach than collateral estoppel."²⁶

For issue preclusion to apply, three pertinent elements must be present: (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; and (3) the party against whom the judgment is asserted must have been a party or in privity with a party to the prior litigation.²⁷

In the instant case, res judicata would apply under either issue or claim preclusion. Our review of the record reveals that on at least two

²²University of Nevada v. Tarkanian, 110 Nev. 581, 598, 879 P.2d 1180, 1191 (1994).

²³Id.

²⁴Id. at 599, 879 P.2d at 1191.

²⁵Id.

²⁶Id. at 600, 879 P.2d at 1192.

²⁷Id. at 598, 879 P.2d at 1191.

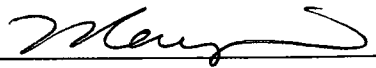
occasions federal courts have determined that a valid exclusive license exists: (1) when the bankruptcy court determined the license was an asset of the estate subject to foreclosure; and (2) when the federal district court in Virginia ruled on Fullerton's claims of patent infringement. In addition, Nevada District Judge Stone determined as early as 1992 that Zip Nut, Inc., held an exclusive master license to the patent and later authorized the license to be pledged as security. Thus, this issue was decided long ago, and the district court did not err by recognizing that Thread Technology, Inc., holds an exclusive license to the patent. Similarly, the record reflects that the district court did not abuse its discretion in finding that the license had not been materially breached and determining the conditions of the licensing agreement.

We note, however, that the term of the license has never been established and remains subject to proceedings below. In considering what constitutes a reasonable term for the license, the district court may consider, in addition to evidence concerning lengths of patent licenses, the State's interest in providing full restitution to the investors and reimbursement for the costs of the receivership.

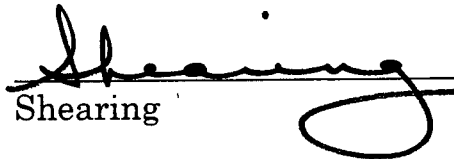
We reverse those portions of the district court's order granting summary judgment on the Brinkley and Colvin claims and awarding \$20,000.00 plus interest on McVickers' claim for goods and services and \$1,907.28 plus interest on the Hackbarths' claim for goods and services. We affirm the district court's orders in all other respects and remand this matter to the district court for further proceedings consistent with this order. On remand, the district court shall recalculate interest on the


remaining restitution awards to McVickers and the Hackbarths, representing their cash investments.²⁸

It is so ORDERED.



_____, C.J.
Maupin


_____, J.
Young


_____, J.
Shearing


_____, J.
Rose


_____, J.
Leavitt


_____, J.
Becker

cc: Hon. Steven R. Kosach, District Judge
Mortimer Sourwine & Sloane, Ltd.
Attorney General/Carson City
Attorney General/Reno
Callister & Reynolds
Jeffrey A. Dickerson
Washoe District Court Clerk

²⁸We have considered appellants' remaining claims of error and find them to be without merit.