IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN HOFFMAN, INDIVIDUALLY; AND HOFFMAN, TEST, GUINAN & COLLIER, A PROFESSIONAL CORPORATION,
Petitioners,
vs.
THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WASHOE; AND THE HONORABLE CONNIE J. STEINHEIMER, DISTRICT JUDGE,
Respondents,
and
CHRISTIAN BUCK; AND ANNE BUCK-FENN, INDIVIDUALLY,
Real Parties in Interest.

No. 60119

FILED

DEC 16 2013

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER DENYING PETITION FOR WRIT OF MANDAMUS

This petition for a writ of mandamus was filed by petitioners John Hoffman and his law firm (collectively, Hoffman). The petition argues that the district court was obliged to grant partial summary judgment in Hoffman's favor on the malpractice claims asserted against him by real parties in interest, Christian Buck and Anne Buck-Fenn (collectively, the Bucks). We disagree and deny extraordinary writ relief.

I.

In 2002, Hoffman helped the Bucks modify an insurance trust that their parents, Leonard and Helen, had established 20 years earlier. Hoffman was the successor trustee, and the Bucks were trust

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beneficiaries. The modification was designed to avoid potential estate and gift tax problems. As part of the modification, the trust transferred the insurance policies it held on the lives of Leonard and Helen Buck and their children to a newly created limited liability company, Buck LLC. Also, a $3.85 million note was issued obligating Buck LLC to repay, with 7% interest, a previously undocumented loan from Leonard (or one of his trusts) to finance the policy premiums. When Helen Buck died in late 2002, Buck LLC used the payout on her life insurance policy to retire the note. No estate and gift tax problems arose.

In late 2007, the Bucks began inquiring more carefully about the 2002 transactions. They retained independent counsel and, in 2008, asked Hoffman to resign as manager of Buck LLC, which he did. On February 4, 2009, the Bucks sued Hoffman and Leonard.

The Bucks' complaint included both legal and equitable claims. Their legal claim was for attorney malpractice by Hoffman.[1] The equitable claims concerned trust administration and alleged breaches of fiduciary duty by Leonard and Hoffman as trustees. Although the Bucks filed a demand for jury trial, they acknowledged that they had a right to jury trial only on their malpractice claim. Their other claims arose "in relation to a trust[,] are subject to the court's equity jurisdiction, and therefore must be tried by a court and not a jury."

The Bucks filed a motion asking the district court to decide the equitable claims and for a jury to decide the malpractice claim. Hoffman

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[1]The Bucks also included a negligent supervision claim as part of their malpractice claim against Hoffman. For simplicity's sake, we refer to both as the malpractice claim.

agreed with this and also moved to stay the malpractice claim "until the remaining [trust-based] claims are litigated to final judgment." The district court stayed the malpractice claim and proceeded with a bench trial on the equitable claims.

On completing the bench trial, the district court issued written findings of fact and conclusions of law. The district court found that "the facts that form the basis of the claims relating to the repayment of the $3.85 million [premium] loan . . . were all known or reasonably should have been known by Christian and Anne Buck following the meeting on July 18, 2002 and after signing of their 2002 tax returns" and that the Bucks also knew in 2002 about the transfer of the policies to Buck LLC. Because the Bucks did not file their complaint until 2009, the district court concluded that the three-, four-, and six-year statutes of limitation in NRS 11.190 and NRS 11.220 barred the Bucks' equitable claims against Hoffman.

Hoffman then moved for summary judgment on the legal malpractice claim. He argued that the district court's findings of fact and conclusions of law determining that the statutes of limitations had run on the equitable claims carried issue-preclusive effect, requiring "summary judgment in [Hoffman's] favor . . . on the legal malpractice claim as well." The district court rejected Hoffman's motion. Emphasizing that "[t]he issues before the Court [in the bench trial] were limited to the equitable claims asserted in the Complaint," that the Bucks "reserved their right to a jury trial for the legal claims," and that it "made no specific findings related to [the malpractice] claim," the district court found that issues of

fact remained as to "whether [the Bucks] filed this action within the time period required under NRS 11.207."[2] The district court further concluded that "there is still a viable question of fact as to when [the Bucks] consulted with an attorney[,] when they had cause to know of a breach of Hoffman's various duties owed to them" as an attorney, "when [the Bucks] knew or should have known about the facts that form the basis of their claim against Hoffman for legal malpractice, and when they sustained the damage" alleged. Finally, the district court noted the Bucks' assertion that Hoffman "concealed errors and omissions"—as an example, his alleged conflict of interest in representing both their interests and Leonard's—"and that, pursuant to NRS 11.207(2), his concealment tolled the statute of limitations."

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[2]NRS 11.207 is the statute of limitations specific to legal (and veterinary) malpractice. It reads:

> 1. An action against an attorney or veterinarian to recover damages for malpractice, whether based on a breach of duty or contract, must be commenced within 4 years after the plaintiff sustains damage or within 2 years after the plaintiff discovers or through the use of reasonable diligence should have discovered the material facts which constitute the cause of action, whichever occurs earlier.
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> 2. This time limitation is tolled for any period during which the attorney or veterinarian conceals any act, error or omission upon which the action is founded and which is known or through the use of reasonable diligence should have been known to the attorney or veterinarian.

II.

A.

Hoffman now petitions this court to issue a writ of mandamus directing the district court to grant summary judgment in his favor on the malpractice claim. "A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station or to control an arbitrary or capricious exercise of discretion." *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008); *see* NRS 34.160. Writ relief is extraordinary and may issue, in the court's discretion, "only when there is no 'plain, speedy and adequate remedy in the ordinary course of law.'" *Cheung v. Eighth Judicial Dist. Court*, 121 Nev. 867, 869, 124 P.3d 550, 552 (2005) (quoting NRS 34.170; NRS 34.330).

Ordinarily, the right to an eventual appeal is an adequate legal remedy and defeats writ relief. *Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 224, 88 P.3d 840, 841 (2004). "[E]ven if an appeal is not immediately available because the challenged order is interlocutory in nature, the fact that the order may ultimately be challenged on appeal from the final judgment generally precludes writ relief." *Id.* at 225, 88 P.3d at 841. For these reasons, this court seldom exercises its discretion to consider "petitions for extraordinary writ relief that challenge district court orders denying motions for summary judgment, unless summary judgment is clearly required by a statute or rule, or an important issue of law requires clarification." *ANSE, Inc. v. Eighth Judicial Dist. Court*, 124 Nev. 862, 867, 192 P.3d 738, 742 (2008).

B.

Hoffman bases his petition for a writ of mandamus on the doctrine of issue preclusion. He acknowledges that different statutes of

limitation apply to the attorney malpractice and equitable breach-of-fiduciary duty and trust-related claims. But he insists that the district court's conclusion that the statutes of limitations barred the Bucks' equitable claims because they knew or should have known about the facts giving rise to the claims in 2002 yet delayed suit until 2009 applies to, and precludes, their malpractice claims. "[U]pon proper application of Nevada's [issue] preclusion law," Hoffman urges, the district court had a "mandatory duty" to grant summary judgment in his favor.

"Issue preclusion prevents relitigation of an issue decided in an earlier action, even though the later action is based on different causes of action and distinct circumstances." *In re Sandoval*, 126 Nev. ___, ___, 232 P.3d 422, 423 (2010). The burden of establishing preclusion lies with the party claiming it. 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure: Jurisdiction*, § 4405, at 110 (2d ed. 2002). For issue preclusion to apply, "(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 [must have been] actually and necessarily litigated." *Sandoval*, 126 Nev. at ___, 232 P.3d at 423 (first alteration in original) (quoting *Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1055, 194 P.3d 709, 713 (2008)). "'The availability of issue preclusion is a mixed question of law and fact,' in which 'legal issues predominate' and, '[o]nce it is determined [to be] available, the actual decision to apply it is left to the discretion of the tribunal' in which it is invoked." *Redrock Valley Ranch, L.L.C. v. Washoe Cnty.*, 127 Nev. ___, ___, 254 P.3d 641, 647 (2011) (alterations in original)

(quoting *Univ. & Cmty. Coll. Sys. v. Sutton*, 120 Nev. 972, 984, 103 P.3d 8, 16 (2004)).

Applying these precepts to this petition, we cannot conclude that the district court had a mandatory duty, enforceable by extraordinary writ, to grant summary judgment in Hoffman's favor. The district court's decision on the equitable claims has yet to produce a final, appealable judgment because the malpractice claim against Hoffman remains open. It has resolved some but not all of the claims against Hoffman. Under NRCP 54(b), "any order or other form of decision, however designated, which adjudicates the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the parties, *and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the rights and liabilities of all the parties.*" (Emphasis added).

"Recent decisions have relaxed traditional views of the finality requirement by applying issue preclusion to matters resolved by preliminary rulings or to determinations of liability that have not yet been completed by an award of damages or other relief." 18A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure: Jurisdiction*, § 4434, at 110 (2d ed. 2002). Nonetheless, issue preclusion normally "should not apply within the framework of a continuing action," *id.* at 130-31, especially where the trial court retains "the power to revisit earlier rulings made in the course of a single continuing action" *id.* at 130, and has declined to accord its interlocutory ruling issue-preclusive effect. *Compare id.* at 120-22 (noting that interlocutory summary-judgment rulings are "vulnerable to appellate reversal" and so "frequently are found unsuitable support for [issue]

preclusion," making it appropriate "to recognize a relatively wide zone of discretion in determining whether preclusion is appropriate"), *with Holt v. Reg'l Tr. Servs. Corp.*, 127 Nev. ___, ___, 266 P.3d 602, 607-08 (2011) (noting that the "'general rule of claim preclusion does not apply if the court in the first action expressly reserves the right to maintain a second action' or defense" and that "'[t]he same rule should hold for issue preclusion'" (quoting 18 *Federal Practice and Procedure: Jurisdiction*, *supra*, §§ 4413, at 314 & 4424.1, at 642)).

The district court was asked but declined to give its interlocutory decision of the equitable claims issue-preclusive effect. It cited, among other factors, its concern that it did not hear the Bucks out on facts unique to the attorney malpractice claims and the statute of limitations applicable to those claims, NRS 11.207. As an example, the district court expressed concern that different conflict-of-interest rules and disclosure obligations applied to Hoffman as an attorney than applied to him in his role of trustee and manager of Buck LLC. *See also* NRS 11.207(2) (providing specific tolling rules for concealment that, while similar to the tolling rule applicable in other professional malpractice contexts, *see* NRS 41A.097(3), have no direct counterpart in NRS 11.190 or NRS 11.220). If this is so, then the Bucks may yet overcome the statute of limitations. The district court did not abuse its discretion, much less exercise that discretion in an intolerably arbitrary or capricious way, when it declined to give preclusive effect to its interlocutory decision on the equitable claims.

Awada v. Shuffle Master, Inc., 123 Nev. 613, 173 P.3d 707 (2007), on which Hoffman relies, does not suggest a different outcome. *Awada* came to this court on direct review of a final judgment ordering

rescission of a contract based on a bench-trial finding of fraudulent inducement, followed by the district court's dismissal of competing breach-of-contract claims. We held that, "[w]hen the district court bifurcated the claims in this case, conducted a bench trial on Shuffle Master's counterclaim for rescission, and used its findings of fact and conclusions of law to dispose of Awada's contract-based claims, it did so without abusing its discretion." Id. at 621, 173 P.3d at 712. Here, the district court exercised its discretion differently, on a different record presenting different questions of law and fact, and the case comes before us on a petition for a writ of mandamus, not direct appeal. If anything, *Awada* supports denial of writ relief, given the deference it extends the district court's discretion.

We do not now decide NRS 11.207's application to the malpractice claim remaining in this case or whether that decision must abide trial or may follow additional substantive motion practice. We hold simply that, on the record presented, extraordinary writ relief is not warranted.

Pickering, C. J.
Pickering

Saitta, J.
Saitta

Hardesty, J.
Hardesty

cc: Hon. Connie J. Steinheimer, District Judge
Lemons, Grundy & Eisenberg
Solomon Dwiggins & Freer
Washoe District Court Clerk