

IN THE SUPREME COURT OF THE STATE OF NEVADA

NANCY C. FAUBEL,
Appellant,

vs.

C & D RESTAURANTS, INC., D/B/A T'S
MESQUITE ROTISSERIE,
Respondent.

No. 38487

FILED

MAR 11 2002

JAIME E. M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richard*
CHIEF DEPUTY CLERK

ORDER DISMISSING APPEAL

This is an appeal from a judgment, certified as final under NRCP 54(b), dismissing C & D Restaurants as a defendant and requiring plaintiff Faubel to pay C & D Restaurants \$16,524.23 in attorney fees and costs. Because the certification appeared improper, and the judgment did not appear to be amenable to NRCP 54(b) certification, we ordered appellant Faubel to show cause why the appeal should not be dismissed for lack of jurisdiction. In particular, it appeared that the claims asserted in the action are so closely related that we would necessarily decide important issues pending below in order to decide the issues appealed.

In response, Faubel concedes that certification was improper and requests that we dismiss the appeal. C & D Restaurants, however, in an uninvited response to our show cause order, argues that the appeal should not be dismissed because C & D Restaurants was completely eliminated from the district court case and would be prejudiced by having to wait for a final decision, while neither Faubel nor the remaining defendant would be prejudiced by a resolution of this appeal. We conclude that C & D Restaurants' analysis is flawed, and that this appeal must be dismissed.

Under Hallicrafters Co. v. Moore,¹ certification is improper if the claims asserted in the action are so closely related that this court must necessarily decide important issues pending below in order to decide the issues appealed. Here, the complaint alleges that C & D Restaurants and the remaining defendant were both negligent based on the same conduct. The negligence claims are virtually identical. In order to decide whether the district court erred by dismissing the complaint against C & D Restaurants, based on the court's determination that Faubel's negligence claim is barred by the economic loss doctrine, we would necessarily determine whether Faubel's pending negligence claim is also barred by the economic loss doctrine.

Nevertheless, because this is a "parties" case in which certification is based on the complete removal of a party from the action, the fact that a decision by this court will affect the outcome below cannot be the deciding issue.² Under Mallin v. Farmers Insurance Exchange,³ a different balance of factors must be considered:

When a district court is asked to certify a judgment based on the elimination of a party, it should first consider the prejudice to that party in being forced to wait to bring its appeal. Second, the district court should consider the prejudice to the parties remaining below if the judgment is certified as final. The standard from Hallicrafters . . . should be part of this analysis. The district court should weigh the prejudice to the various

¹102 Nev. 526, 728 P.2d 441 (1986).

²Mallin v. Farmers Insurance Exchange, 106 Nev. 606, 797 P.2d 978 (1990).


³Id. at 611, 797 P.2d at 982.


parties and should certify a judgment as final in a "parties" case if the prejudice to the eliminated party would be greater than the prejudice to the parties remaining below.

Here, there would be no prejudice to C & D Restaurants "in being forced to wait to bring its appeal" because there is neither reason nor authority for C & D Restaurants to appeal; it obtained the relief it requested and is not aggrieved by the district court's judgment. On the other hand, a resolution of this appeal would prejudice one of the remaining parties because it would determine the outcome of the pending negligence claim. The district court should not have certified its judgment as final. Accordingly, as certification was improper and we lack jurisdiction, we

ORDER this appeal DISMISSED.


_____, J.
Young


_____, J.
Agosti


_____, J.
Leavitt

cc: Hon. Peter I. Breen, District Judge
Terry A. Simmons, Settlement Judge
Mirch & Mirch
Rogers & Shadek
Washoe District Court Clerk