IN THE SUPREME COURT OF THE STATE OF NEVADA

RENO HILTON RESORT CORPORATION, A NEVADA CORPORATION, D/B/A RENO HILTON; PARK PLACE ENTERTAINMENT CORPORATION, A DELAWARE CORPORATION; AND FHR CORPORATION, A NEVADA CORPORATION,
Petitioners,
vs.
THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WASHOE, AND, THE HONORABLE STEVEN P. ELLIOTT, DISTRICT JUDGE,
Respondents,
and
DIANE VERDERBER, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED,
Real Party in Interest.

No. 41960

FILED

DEC 16 2005

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER GRANTING PETITION IN PART AND DENYING PETITION IN PART

This is an original petition for writs of certiorari, mandamus and prohibition challenging several rulings in a class action based on a 1996 outbreak of a Norwalk-like virus at the Reno Hilton.

We grant this petition in part. Our review of the record confirms that petitioner, Park Place Entertainment (PPE), was improperly and involuntarily substituted as a party-defendant during a jury trial for punitive damages in a class action suit. More particularly, the district court added PPE in the middle of the trial, without service of process in

violation of fundamental due process, in violation of important procedural rules, and without giving petitioner a realistic opportunity to litigate its potential liability for punitive damages.

Petitioners PPE, Reno Hilton Resort Corporation (RHRC), and FHR Corporation (FHR) petitioned this court for extraordinary relief, citing errors in rulings of the district court in a class action. The threshold issue is whether the claims raised by petitioners are appropriate for extraordinary relief.[1] Because the finding of successor liability and the subsequent punitive damages award based on that liability are issues that merit clarification and will further judicial economy in the underlying case, we grant the petition in part. The primary issue we decide is whether a party can be joined during trial as a successor corporation to the original defendants, without service of process or an opportunity to challenge successor liability.

---

[1]Jeep Corp. v. District Court, 98 Nev. 440, 443, 652 P.2d 1183, 1185 (1982) (holding that while mandamus is not "appropriate in the face of effective alternative remedies," in cases "where circumstances reveal urgency or strong necessity, extraordinary relief may be granted"); Smith v. District Court, 113 Nev. 1343, 1344-45, 950 P.2d 280, 281 (1997) (holding that this court may grant extraordinary relief where "an important issue of law requires clarification," and may include "considerations of sound judicial economy and administration" in determining the appropriateness of such relief); Civil Serv. Comm'n v. Dist. Ct., 118 Nev. 186, 188, 42 P.3d 268, 270 (2002) (holding that a writ "may issue to compel the performance of an act which the law requires . . . or to control an arbitrary or capricious exercise of discretion.").

As a preliminary matter, we note that the plaintiffs in the underlying action, who are real parties in interest to this petition, included in a pretrial statement a motion to amend the pleadings to substitute in PPE, and that the district court eventually granted the motion, terming it a "motion to substitute successor defendants pursuant to Rule 10" of NRCP. We therefore conclude that, although NRCP 25(c) permits substitution or joinder of a new party upon a transfer of interest from a named party to the new party, the district court granted the motion under NRCP 10.

"The district court has broad discretion to allow or deny joinder of parties."[2] NRCP 10(a) permits a plaintiff to amend a pleading accordingly when the name of a party whose name is not known is finally discovered.

Most of the case law dealing with substitution or late joinder of defendants involves whether statutes of limitation have expired. In one such case, this court gave the policy behind the use of NRCP 10(a):

> We commence with the premise that meritorious causes of action should not be frustrated where, despite reasonable diligence, the true identity of culpable parties is uncertain or unknown to plaintiff or plaintiff's counsel.[3]
>
> . . . .

---

[2]Cummings v. Charter Hospital, 111 Nev. 639, 645, 896 P.2d 1137, 1140 (1995).

[3]Nurenberger Hercules-Werke v. Virostek, 107 Nev. 873, 878, 822 P.2d 1100, 1103 (1991).

> Plaintiffs utilizing the pleading latitude provided by Rule 10(a) must exercise reasonable diligence in pursuing discovery and other means of ascertaining the true identity of the intended defendants, and then promptly move to amend their complaints pursuant to Rule 10(a). Whether reasonable diligence has been exercised is a matter of law to be determined by the district court. The right to amend and relate back should rarely be denied plaintiffs irrespective of the extent of the delay whenever the intended defendant has sought in any way to mislead or deceive the complaining party.[4]

This court has held that in determining if a proper defendant may be brought in to an action after the statute of limitations has run, three factors must be considered:[5] first, that the proposed defendant had "actual notice of the institution of the action;" second, that the defendant "knew that it was the proper defendant in the action;" and third, that the defendant "was not in any way misled to its prejudice."[6]

This court has further held that "[f]undamental due process requires that a person against whom a claim is asserted in a judicial proceeding have an opportunity to be heard and present his defenses."[7] This court has reversed a district court's order granting a motion to add a nonparty as the alter ego of the defendant corporation after entry of

---

[4]Id. at 881, 822 P.2d at 1105; see also Sullivan v. Terra Marketing of Nev., 96 Nev. 232, 607 P.2d 111 (1980).

[5]Servatius v. United Resort Hotels, 85 Nev. 371, 455 P.2d 621 (1969).

[6]Id. at 373, 455 P.2d at 622-23.

[7]Nicoladze v. First Nat'l Bank of Nev., 94 Nev. 377, 378, 580 P.2d 1391, 1391 (1978).

judgment, finding error since "no hearing was held to enable appellant to controvert the alter ego allegation."[8] In an earlier, similar case, however, this court permitted such an alter ego addition after entry of judgment, since a hearing was held to determine the alter ego status of the added party.[9]

The general rule of successor liability is that "the assumption of a contract by one party does not vitiate the continuing liability of the party from whom the contract rights and obligations are assumed."[10] However, there are exceptions to the rule that asset purchasers are not liable as successors; one of those exceptions is when the purchasing entity expressly or impliedly agrees to assume the liability, and another is when the transaction is really a consolidation or a merger.[11]

---

[8]Id.

[9]McCleary Cattle Co. v. Sewell, 73 Nev. 279, 282, 317 P.2d 957, 959 (1957) ("Respondents are not seeking to substitute or add a new party to the old action. For the purposes of execution the timber company and the cattle company are to be regarded as identical.").

[10]Mt. Wheeler Power, Inc. v. Gallagher, 98 Nev. 479, 483, 653 P.2d 1212, 1214 (1982).

[11]Lamb v. Leroy Corp., 85 Nev. 276, 279-80, 454 P.2d 24, 26-27 (1969); see also Louisiana-Pacific Corp. v. Asarco, Inc., 909 F.2d 1260, 1263 (9th Cir. 1990) (dealing with one corporation's purchase of the assets of another, and facing liability under Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)).

In a recent case decided after the underlying action began, this court held that "the plaintiff bears the initial burden of presenting evidence to establish" the existence of at least one of the exceptions that permit a finding of successor liability.[12] If the plaintiff meets that burden by "set[ting] forth facts sufficient to establish a prima facie case of successor liability under one of the exceptions, the issue becomes one of fact, which must be determined by the jury."[13]

Transcripts of the underlying proceedings here indicate that the district court determined that the plaintiffs met the burden of a prima facie showing of successor liability. However, PPE was never served as a defendant, and therefore was denied the opportunity to meaningfully participate in the determination of successor liability. Nor was the jury permitted to determine any issues of fact as to successor liability based on the applicability of any of the exceptions.

The record also reveals that counsel for co-petitioner Reno Hilton Resort Corporation (RHRC) made representations to the court that were confusing as to which corporate entities were proper defendants here. However, it was consistently stated by counsel for RHRC that PPE was not a proper defendant, and the confusing statements were not made by counsel for PPE. Therefore, we conclude that PPE did not attempt to mislead the plaintiffs.

---

[12]Village Builders 96 v. U.S. Laboratories, 121 Nev. ____, ____, 112 P.3d 1082, 1086 (2005).

[13]Id. at ____, 112 P.3d at 1087.

We therefore grant the writ petition as to the substitution of PPE as a defendant during trial, concluding that the district court erred in granting the motion to substitute PPE as a defendant under NRCP 10.

The record reflects that the financial status of PPE was presented to the jury during its determination of punitive damages. Having determined that PPE was improperly substituted, we must, therefore, also grant the writ petition as to the award of punitive damages. Any award of punitive damages here should have been based on the financial status of co-defendants RHRC and FHR, Inc. If, following proper service and notice a hearing is held to determine if PPE is in fact a successor to RHRC and/or FHR, and a determination is made that one of the exceptions to the general rule of successor liability renders PPE liable, then the financial status of PPE could properly be considered by a jury in a subsequent punitive damages determination.

We emphasize that our partial grant of the writ petition overturns only the amount of the punitive damages awarded here. The findings by the jury as to the conduct and liability of RHRC and FHR are not affected. Thus, the class may proceed against RHRC and FHR for an amount of punitive damages.

Having examined the record and considered the requirements for writ relief, we conclude that PPE's other assertions of error do not warrant extraordinary relief.

Accordingly, we grant the petition in part and direct the clerk of this court to issue a writ of mandamus instructing the district court to vacate its order joining PPE as a successor corporation and to vacate its punitive damages award. We deny the petition in all other respects.

It is so ORDERED.

Becker, C.J.
Becker

Rose, J.
Rose

Maupin, J.
Maupin

Gibbons, J.
Gibbons

Douglas, J.
Douglas

Hardesty, J.
Hardesty

Parraguirre, J.
Parraguirre

cc: Hon. Steven P. Elliott, District Judge
Lionel Sawyer & Collins/Las Vegas
Arrascada & Arrascada, Ltd.
Lyle & Murphy
Walkup Molodia Kelly & Echeverria
Washoe District Court Clerk