

**IN THE SUPREME COURT
STATE OF NORTH DAKOTA
SUPREME COURT NO. 20160313**

SNAPS Holding Company,
a North Dakota Corporation,

Plaintiff and Appellee
and Cross-Appellant

v.

Jim Leach and Elizabeth Leach,
and
Darlene Leach, Steve Leach, Frank A. Barber,
Sherry Barber, Dennis J. Meyer, Jerry Nelson,
Marjo Nelson, Kathy Hegland, Michael Hegland,
Rebecca Soloway, William Ockert, Delores
Reznychek, John Bergstrom,
Janice Scott, John W. Scott, and all other
shareholders of IDA of Moorhead Corporation,
as listed on Exhibit A, attached hereto and made
a part hereof by reference

Defendants, Appellants,
and Cross-Appellees

Defendants and Appellees

On Appeal from Judgment entered on August 15, 2016
East Central Judicial District, Cass County, North Dakota
Cass County Case No. 09-2014-CV-3605

The Honorable Steven L. Marquart

REPLY BRIEF OF SNAPS HOLDING COMPANY

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INTRODUCTION

[1] The issue of SNAPS' entitlement to damages under the 2011 stock purchase agreement was not and could not have been raised in the Arizona judgment domestication proceeding. Accordingly, the Arizona decision was not res judicata of the contract claims asserted in North Dakota. The district court therefore erred in its res judicata ruling.

ARGUMENT

I. REVIEW OF THE DISTRICT COURT'S RES JUDICATA RULING.

[2] Jim and Steve Leach both argue that this Court may not review the district court's res judicata decision, which was the sole basis for dismissing SNAPS' contract claims against them. They provide no legal support for their argument, nor is there any, and it should be rejected.

[3] It appears that Jim and Steve Leach think SNAPS somehow waived or failed to preserve the issue below. But SNAPS plainly opposed Jim and Steve Leach's summary judgment motion on the basis of res judicata. In response to the motion, among other things, SNAPS argued that the Arizona decision was not res judicata of its contract claim in North Dakota because "the Arizona action was [only] seeking to domesticate a North Dakota judgment"; the Arizona decision was explicitly "restricted to the state of Arizona"; and "the Arizona Order [is] irrelevant to this case." Doc. #142 ¶¶ 8, 12. SNAPS also explained below the stark difference between the Arizona proceeding and the North Dakota action: "The [North Dakota] lawsuit is about indemnification pursuant to a contract, not about a judgment." Doc. #124 ¶ 7.

[4] Furthermore, after the district court made its res judicata ruling, SNAPS filed a motion for reconsideration, again opposing the application of that doctrine to the

contract claim. Doc. #245. That motion focused solely on the res judicata issue, as although Jim and Steve Leach argued several grounds for summary judgment, the district court made its decision solely on the basis of res judicata. App. 84-88.

[5] Thus res judicata was twice opposed below. The summary judgment ruling is reviewed de novo and the motion for reconsideration is reviewed for an abuse of discretion, which includes a misapplication of law. First Union Nat'l Bank v. RPB 2, LLC, 2004 ND 29 ¶ 7, 674 N.W.2d; Langer v. Pender, 2009 ND 51, ¶ 12, 764 N.W.2d 159. That decision is fully reviewable on appeal.

II. RES JUDICATA DOES NOT BAR SNAPS' CONTRACT CLAIM.

A. Res Judicata Requires a Prior Decision on the Same Facts.

[6] Neither Jim nor Steve Leach cites any authority giving res judicata effect to a decision refusing to domesticate a foreign judgment. Nor does either disagree with the recitation of the law of res judicata set forth in SNAPS' brief.

[7] In that regard, Steve Leach notes that res judicata applies when a party “has conceived of some new legal theories in which to clothe the same facts and events that gave rise” to the prior action. S. Leach Br. ¶ 51 (emphasis added). Jim Leach notes that res judicata applies when the subsequent claim is “based on the same or nearly the same factual allegations” as the decided claim. J. Leach Reply Br. ¶ 11. Thus their contention that res judicata bars SNAPS' contract claim is not premised on the law, but on an inaccurate portrayal of the Arizona proceedings and decision.

B. The 2011 Contract and Sale Were Not at Issue In Arizona.

[8] Jim Leach argues that “the claims [in Arizona and North Dakota] both arise out of the same contractual indemnification claim in the contract between SNAPS and Leach.” J. Leach Reply Br. ¶ 12. That is false. While it is true that SNAPS seeks to

enforce the stock purchase agreement in the North Dakota action, it did no such thing in Arizona. Rather, in Arizona, SNAPS asserted rights in the judgment itself by virtue of Danuser's 2014 assignment of the judgment to SNAPS and IDA. The 2011 contract and the 2014 assignment are entirely separate transactions.

[9] In fact, neither the Arizona court's final ruling, nor any other ruling it issued, even mentions the stock purchase agreement, its indemnification provision, or the 2011 sale. Doc. #102, 103, 105, and 276. The only matters at issue related to SNAPS' ownership and control of IDA, Danuser's 2014 assignment of the judgment to IDA and SNAPS, and the effect of that assignment. Id. The contract obligations of IDA's prior owners to SNAPS were not at issue. Id.

[10] The following summary of the Arizona proceeding verifies those facts:

[11] January 2, 2014: Danuser executes a notice of filing a foreign judgment, which along with related papers are filed on January 21, 2014, in Maricopa County, Arizona. Doc. #251. The accompanying affidavit names only Jim Leach as "Defendant." Doc. #249.

[12] March 4, 2014: Arizona attorney Shelton Freeman appears on behalf of Jim Leach. Doc. #254.

[13] June 23, 2014: Arizona attorney David Brown appears on behalf of SNAPS and IDA. Doc. #262. No other appearances are entered. Steve Leach never appears.

[14] August 21, 2014: The Arizona court enters a minute entry order "striking IDA's Notice" of foreign judgment. Doc. #276. In its ruling, the court "declines to apply the common law rule of extinguishment" to the assignment and states that "the validity

and enforceability of the Assignment is governed by the doctrine of contribution.” Id. The court determines that because IDA and Leach are joint tortfeasors of an intentional tort, IDA is not entitled to contribution for paying the judgment, and thus the assignment, with respect to IDA, is invalid. Id. The issue, then, is whether joint tortfeasors are entitled to contribution for paying a judgment, not whether the liability has been allocated by contract.

[15] The issue of whether SNAPS is the alter ego of IDA with respect to the assignment is reserved for further litigation. That issue ultimately is set to be tried at an evidentiary hearing.

[16] January 15, 2015: The Arizona court enters a minute entry order finding that SNAPS: “was the alter ego of IDA at all material times to the issues before this court.” Doc. #298.

[17] February 11, 2015: The Arizona court “sets forth its findings of fact and conclusions of law in [a] final written and signed Order.” Doc. #225. The court states that the matter before it is one “seeking to domesticate a North Dakota judgment.” Id. Beyond that, no substantive claims are addressed (because none were asserted). The court’s discussion makes no mention of the stock purchase agreement, its indemnification provision, or the 2011 sale of IDA stock to SNAPS. Nor does it mention Steve Leach.

[18] The Arizona court concludes its February 11, 2015, order as follows:

THE COURT RULES as follows:

1. Both A.R.S. § 12-2501(C) and N.D.C.C § 32-38-01(3) prohibit contribution between intentional joint tortfeasors.
2. Consequently, if a joint tortfeasor of an intentional tort is assigned a judgment against a fellow joint tortfeasor, the assignment is invalid in an action by the former to enforce the judgment against the

latter, as held in caselaw cited by IDA and SNAPS, Wright v. Haskins, 260 N.W.2d 536 (Iowa 1977).

3. In the case that resulted in the Judgment, the trier of fact found that IDA and Leach, jointly and severally, committed an intentional tort against Danuser.

4. Danuser assigned the Judgment to IDA and SNAPS.

5. Thus, IDA is prohibited from domesticating and executing on the Judgment against Leach *in State of Arizona*.

6. The corporate form must be disregarded where one corporation is so organized and controlled, and its affairs are so conducted, that it is merely an instrumentality or adjunct of another corporation, if (1) there is unity of control and (2) observance of the corporate form would sanction a fraud or promote injustice.

7. SNAPS was the alter ego of IDA at all material times.

8. Thus, SNAPS, like IDA, is also prohibited from domesticating and executing on the Judgment against Leach *in State of Arizona*.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. The Judgment is unenforceable by IDA against Leach *in State of Arizona*.

2. The Judgment is unenforceable by SNAPS against Leach *in State of Arizona*.

3. Leach's Objection to the Notice is granted.

4. The Notice is stricken; and

5. SNAPS, IDA, and any subsequent assignees or owners of the Judgment are hereby permanently enjoined from enforcing the Judgment against Leach *in State of Arizona*.

Doc. #225.¹

¹ The *italicized* text was inserted in handwriting and initialed by the presiding Judge, Michael L. Barth. The initials are not depicted in the above quote.

[19] Again, the order does not mention the stock purchase agreement, its indemnification provision, the 2011 stock purchase by SNAPS, or Steve Leach.

[20] June 3, 2015: The Arizona court enters an order identical to the February 11, 2015, order discussed above which includes a statement that “no further matters remain pending and the Judgment is entered pursuant to Rule 54(c).” Doc. #239.

[21] Thus, the Arizona proceeding dealt solely with the issue of whether the Danuser judgment should be domesticated in the State of Arizona. That issue turned on whether Danuser’s 2014 assignment of the judgment to SNAPS and IDA was effective. That is an entirely separate transaction from the 2011 stock purchase agreement and its allocation of liability for the Danuser judgment. Accordingly, the Arizona ruling is not res judicata of the contract claim brought in North Dakota. The district court’s res judicata ruling therefore should be reversed.

C. Steve Leach Was Not Part of the Arizona Proceeding.

[22] Steve Leach claims that “the Arizona litigation was, in reality, SNAPS seeking to enforce the Danuser judgment against Jim and Steve.” S. Leach Br. ¶ 40. That is false as to Steve (and, as explained above, unavailing as to Jim). Steve was not even part of the Arizona proceedings and did not appear there.

[23] In fact, there was no reason for Steve to appear in Arizona. The judgment was not “against” Steve, as he falsely claims in his brief. S. Leach Br. ¶ 39. The judgment and amended judgment expressly state, “All claims against Steve Leach . . . are dismissed with prejudice.” Doc. #373-374.

[24] Thus there was nothing in the Danuser judgment to be enforced against Steve in Arizona or anywhere else. On that basis alone, nothing that happened in Arizona could be res judicata of a claim against Steve. See App. 4 ¶ 12 (nothing that res

judicata did not apply to Elizabeth Leach because she “was not a party in the Arizona action”).

D. The Contract Claim Could Not Have Been Joined.

[25] Steve Leach argues that SNAPS could have joined its contract claim with the domestication proceeding in Arizona under Arizona Rule of Civil Procedure 18. S. Leach Br. ¶ 61. But it could not have, because under that rule only a “party asserting a claim to relief” may join additional claims with it. 16 A.R.S. Rules Civ. Proc. 18. SNAPS did not assert a claim for relief in Arizona, but merely attempted to domesticate a judgment.

III. THE ALTERNATIVE GROUNDS FOR SUMMARY JUDGMENT ARGUED BY STEVE LEACH ARE NOT RIPE FOR REVIEW.

[26] Steve Leach argues that summary judgment in his favor may be affirmed based on grounds other than res judicata. S. Leach Br. ¶¶ 77-102. Yet Steve Leach acknowledges that the district court never ruled on his motion advancing those arguments, which was opposed by SNAPS. S. Leach Br. ¶ 13; Doc. #124. This Court does not address issues not considered below. Beeter v. Sawyer Disposal, LLC, 2009 ND 153, ¶ 20, 771 N.W.2d 282. There is no decision to review. Those issues should be addressed, if at all, by the district court on remand.

CONCLUSION

[27] SNAPS respectfully requests that this Court reverse paragraphs 1 and 2 of the Judgment, affirm the balance, and remand the case for further proceedings.

Dated: February 17, 2017

/s/ Benjamin J. Hasbrouck

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CERTIFICATE OF COMPLIANCE

The undersigned, as attorneys for SNAPS Holding Company in the above matter, and as the authors of the above brief, hereby certify, in compliance with Rule 32 of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with proportional typeface and the total number of words in the above brief, excluding words in the table of contents, table of authorities, signature block, certificate of service and this certificate of compliance, totals 1,967.

Dated: February 17, 2017

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Defendants, Appellants,
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AFFIDAVIT OF SERVICE

Andrea Nowak, being first duly sworn, deposes and says that on February 17, 2017, she served the following documents:

Reply Brief of SNAPS Holding Company

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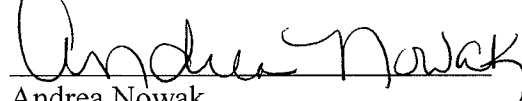
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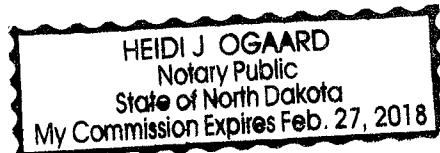
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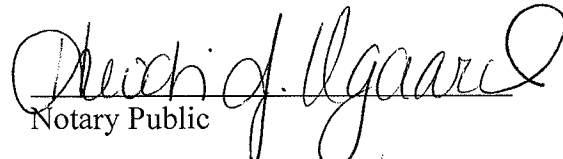
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To the best of affiant's knowledge, the address above given was the actual address of the party intended to be so served. The above documents were served in accordance with the provisions of the Rules of Civil Procedure.


Andrea Nowak

Subscribed and sworn to before me on February 17, 2017.




Notary Public

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