

***Marcuse v. Del Webb Communities*, 123 Nev. Adv. Op. No. 30
(August 2, 2007)¹**

**CIVIL PROCEDURE – CLASS ACTION (STANDING) –
JUDICIAL ESTOPPEL**

Summary

Appeal of a district court's dismissal of a construction defect class action. Also, appeal from a district court's denial of appellants' motion to consolidate their claim and their motion for a separate trial within a class action (first action) and appeal from a district court's order granting respondent's motion to dismiss appellant's pursuit of a second action independent from the class action under the doctrines of res judicata and collateral estoppel (second action). The Nevada Supreme Court affirmed the district court's dismissal of the class action based on the settlement and reversed the district court's order granting respondent's motion to dismiss the second action.

Disposition/Outcome

First action: Affirmed. Unnamed class members who have already objected to the approval of a settlement in a timely manner at a fairness hearing have standing to appeal without formally intervening. However, the district court did not err in its final approval of the settlement and the appellants' objection to the settlement was focused on their right to recover resultant damages rather than the merits and actual subject matter of the class settlement as a whole. As such, the district court did not abuse its discretion in granting final approval of the settlement. Also, because respondents assured the district court that the appellants could still file a second action outside of the class action, the district court did not abuse its discretion in denying the motion to consolidate and the motion for a separate trial within the class action.

Second action: Reversed. When a party takes an inconsistent position to gain an unfair advantage, the doctrine of judicial estoppel applies and res judicata and collateral estoppel should not be applied to dismiss the relevant action.

Factual and Procedural History

Appellants Irwin and Edith Marcuse owned a home in the Sun City Summerlin housing development which was built by respondent Del Webb Communities, Inc. The homes, including the Marcuses' home, were constructed with defective unsleeved, underslab domestic water copper plumbing lines. In July 2001, five homeowners filed a class action lawsuit against Del Webb on behalf of Summerlin homeowners, based on the

¹ By Jeremy K. Cooper

latent deficiencies. The class consisted of all homeowners with unsleeved, underslab copper plumbing.

In January 2002, the district court certified the class. Class members could opt out of the class no later than November 15, 2002. By the November opt-out date, the Marcuses had neither opted out of the class nor experienced an actual plumbing failure. However, on May 23, 2003, the Marcuses house flooded. The source of the water was a leak or rupture in the underslab water pipes. The Marcuses could no longer opt out.

Del Webb paid for the costs of repairing the defective plumbing in the Marcuses' home, but did not compensate the Marcuses for the full damages that resulted, the resultant damages. Following negotiations with the class, the class plaintiffs agreed to dismiss from the class action all members who had experienced underslab plumbing leaks and whose defective plumbing had been repaired by Del Webb.

The Marcuses attempted to resolve their resultant damages claim within the class action by filing a motion to consolidate their claim with the class action claims, under NRCP 23 and NRCP 42(a). Del Webb opposed, arguing that (1) contrary to the requirements of NRCP 42(a), the Marcuses had failed to demonstrate any pending action involving a common question of law or fact, and (2) there were no common questions of law or fact between the Marcuses' claims and the class's claims, since the class action sought recovery for future damages, not resultant damages. However, Del Webb asserted that the Marcuses could pursue a second action against Del Webb to recover resultant damages. The district court denied the motion to consolidate.

The Marcuses filed another motion under NRCP 23 and NRCP 42(b) for a separate trial within the class action on their resultant damages. The Marcuses asserted that Del Webb had essentially agreed in its opposition to the motion to consolidate that a separate trial was appropriate. Del Webb opposed, arguing that (1) the Marcuses still had failed to file their own complaint or show any pending action, and thus their motion fell outside the scope of NRCP 42; (2) NRCP 23 did not support the Marcuses' position because the Marcuses were no longer members of the class, since the class sought recovery for future damages and the Marcuses had actual, not future, damages; and (3) a separate trial within the class action would prejudice Del Webb because it would not have any opportunity to conduct discovery. The court orally denied the Marcuses' motion.

In June 2004, the district court granted preliminary approval of a proposed class settlement for \$21.5 million. The proposed settlement notified the class members that the settlement was only for class plaintiffs whose homes had not yet been repaired, and that any homeowners whose plumbing had already been repaired would not receive any of the settlement proceeds.

The Marcuses immediately filed an independent complaint against Del Webb to initiate the second action. Del Webb filed a motion to dismiss the second action, arguing that the Marcuses had participated in the class action as class members, that their claims had already been litigated in the class action, and that the doctrines of res judicata and collateral estoppel prevented the Marcuses from re-litigating their claims. The district court determined that the Marcuses' status as class members in the class action, since the Marcuses never opted out of nor were removed from the class, barred re-litigation of any claims that were or could have been part of the class action. Thus, the district court

granted Del Webb's motion to dismiss the second action based upon the doctrines of res judicata and collateral estoppel.

In August 2004, the class representatives filed a motion for final approval of the settlement in the class action. The Marcuses opposed the settlement and challenged its effect on their resultant damages claim. Thereafter, the Marcuses filed an NRCP 60(b) motion for relief from any judgment, order, or proceeding in the class action that affected their ability to pursue their claim for resultant damages. The district court granted the class representatives' motion and approved the settlement. The district court then entered its final judgment—a stipulation and order dismissing the class action with prejudice. Finally, the district court denied the Marcuses' NRCP 60(b) motion but did not elaborate upon its reasoning. The Marcuses appealed the district court's order dismissing the class action with prejudice and the district court's order granting Del Webb's motion to dismiss the second action.

Discussion

Standing and final approval of the settlement

The Court stated that the issue of whether an unnamed class member has standing to appeal from the final judgment in a class action was an issue of first impression in Nevada. The Court cited *Devlin v. Scardelletti*, 536 U.S. 1, 14 (2002), recognizing that the United States Supreme Court has held that an unnamed class member who has already objected to the approval of a settlement in a timely manner at a fairness hearing has standing to appeal without formally intervening. The United States Supreme Court reasoned that unnamed class members are parties to the proceedings in that they are bound to the final settlement in a class action. If unnamed class members who timely object to a settlement in a fairness hearing lack standing to appeal the approval of the settlement, then they are deprived of the ability to preserve “their own interests in a settlement that will ultimately bind them, despite their expressed objections before the trial court.”²

The Court also cited *Powers v. Eichen*, 229 F.3d 1249, 1256 (9th Cir. 2000), in which the Ninth Circuit Court of Appeals held that an unnamed class member in a shareholders' securities fraud class action, after filing an objection with the trial court to the amount of attorney fees requested in a settlement, had standing to challenge the award of such fees without first intervening. As such, pursuant to *Devlin* and *Powers*, the Court held that the objection filed in connection with the class action settlement was sufficient to give notice of the Marcuses' intent to preserve the collateral relief they sought and that to require an application for intervention to raise the objection would unduly burden class proceedings. Accordingly, the Marcuses had standing to object to the proposed settlement and to appeal the district court's order dismissing the class action based on the settlement.³

² *Devlin v. Scardelletti*, 536 U.S. 1, 14 (2002).

³ The Court stated: “This conclusion also rests upon the unique nature of the class action, whereby an unnamed class member is a party to the class action despite being unnamed, even though only the named representatives pursue claims on behalf of the class.” *Marcuse v. Del Webb Communities*, 123 Nev. Adv. Op. No. 30 (August 2, 2007).

Even so, the Court did not find error in the district court's final approval of the settlement. Moreover, the Marcuses' objection to the settlement was focused on their right to recover resultant damages rather than the merits and actual subject matter of the class settlement as a whole. As such, the Court concluded that the district court did not abuse its discretion in granting final approval of the settlement.

The Marcuses' motion to consolidate and motion for a separate trial

The Court cited both NRCP 42(a) and FRCP 42(a) to establish that both allow for consolidation of actions that involve a common question of law or fact. Furthermore, the Court pointed out that it has held that a district court exercises its own sound discretion in considering a motion to order a separate trial under NRCP 42(b).⁴ The Court cited *State, Dep't of Mtr. Vehicles v. Moss*, 106 Nev. 866, 868, (1990), stating that "[p]olicy strongly favors deciding cases on their merits." The Court also mentioned its support of the class action framework because it promotes efficiency and justice and that, ordinarily, judicial economy would promote the trial of claims such as the Marcuses' claims within a class action. However, in opposing the Marcuses' motion to consolidate and motion for a separate trial within the class action, Del Webb claimed that the Marcuses were free to file a second action against Del Webb outside of the class action. Thus, because the Marcuses could file a second action, they would not suffer any prejudice if the district court denied their motion to consolidate and motion for a separate trial within the class action. As such, the Court determined that the district court did not abuse its discretion in denying the motion to consolidate and the motion for a separate trial within the class action.

Judicial estoppel and the dismissal of the second action

The Court stated that the application of judicial estoppel is a question of law which this court reviews de novo.⁵ The Court reviewed five criteria for when judicial estoppel applies.⁶ The central purpose of judicial estoppel is to guard the judiciary's integrity, and thus a court may invoke the doctrine at its own discretion.⁷ However, the Court stated that judicial estoppel should be applied only when "'a party's inconsistent position [arises] from intentional wrongdoing or an attempt to obtain an unfair advantage.'"⁸ The Court added that the doctrine of judicial estoppel "does not preclude changes in position that are not intended to sabotage the judicial process."⁹

The Court noted that in its opposition to the Marcuses' motion to consolidate, Del Webb asserted that the Marcuses were not members of the class. Yet in its motion to

⁴ C.S.A.A. v. District Court, 106 Nev. 197, 199, 788 P.2d 1367, 1368 (1990).

⁵ NOLM, LLC v. County of Clark, 120 Nev. 736, 743, 100 P.3d 658, 663 (2004).

⁶ The five criteria are as follows: (1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake. *Id.* (quoting *Furia v. Helm*, 4 Cal. Rptr. 3d 357, 368 (Ct. App. 2003)).

⁷ *Id.*

⁸ *Id.* (quoting *Kitty-Anne Music Co. v. Swan*, 4 Cal. Rptr. 3d 796, 800 (Ct. App. 2003) (alteration in original)).

⁹ *Id.*

dismiss and during the hearing on the motion, Del Webb argued that the Marcuses were members of the class and had thereby already litigated their issues in the class action suit. Thus, based on the five criteria for applying judicial estoppel, the Court stated that it was clear that judicial estoppel was the appropriate basis upon which to deny the motion to dismiss as Del Webb took totally inconsistent positions in the separate judicial proceedings. Furthermore, given the timing and the degree of inconsistency between the two positions, the Court found it evident that Del Webb's second position was designed to obtain an unfair advantage and did not represent a mere change in position. Accordingly, the Court concluded that the district court erred by granting the motion to dismiss based upon the doctrines of res judicata and collateral estoppel, when it should have denied the motion based upon the doctrine of judicial estoppel.

Conclusion

First action: Affirmed. Unnamed class members who have already objected to the approval of a settlement in a timely manner at a fairness hearing have standing to appeal without formally intervening. However, the district court did not err in its final approval of the settlement and the appellants' objection to the settlement was focused on their right to recover resultant damages rather than the merits and actual subject matter of the class settlement as a whole. As such, the district court did not abuse its discretion in granting final approval of the settlement. Also, because respondents assured the district court that the appellants could still file a second action outside of the class action, the district court did not abuse its discretion in denying the motion to consolidate and the motion for a separate trial within the class action.

Second action: Reversed. When a party takes an inconsistent position to gain an unfair advantage, the doctrine of judicial estoppel applies and res judicata and collateral estoppel should not be applied to dismiss the relevant action.