IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MELANI SCHULTE, Appellant, vs. EFTIHIA FAFALEOS; AND PAUL COLLINS, Respondents.	No. 68685
MELANI SCHULTE, Appellant, vs. EFTIHIA FAFALEOS; AND PAUL COLLINS, Respondents.	No. 69034

FILED
JUN 09 2017
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

Melani Schulte appeals from district court orders granting summary judgment and awarding attorney fees. Eighth Judicial District Court, Clark County; James Crockett, Judge.

Schulte is the sole owner and director of Sabreco, Inc., which filed for bankruptcy. Schulte brought suit against Eftihia Fafaleos and Paul Collins for money they allegedly converted from Sabreco. The district court granted summary judgment in favor of Fafaleos and Collins, finding Schulte lacked standing to bring suit because she was not Sabreco's trustee in the bankruptcy case. The district court subsequently granted Fafaleos and Collins' motion for attorney fees.[1] On appeal, Schulte argues the district court improperly granted summary judgment and attorney fees as she had standing to bring suit.

This court reviews a district court's order granting summary judgment de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d

[1]We do not recount the facts except as necessary to our disposition.

17-901208

1026, 1029 (2005). Summary judgment is proper if the pleadings and all other evidence on file demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. *Id.*

Standing is also an issue of law that this court reviews de novo. *Arguello v. Sunset Station, Inc.*, 127 Nev. 365, 368, 252 P.3d 206, 208 (2011). Under NRCP 17(a), "[e]very action shall be prosecuted in the name of the real party in interest." "A real party in interest is one who possesses the right to enforce the claim and has a significant interest in the litigation." *Arguello*, 127 Nev. at 368, 252 P.3d at 208 (internal quotation marks omitted). "The inquiry into whether a party is a real party in interest overlaps with the question of standing." *Id.*

"[T]he bankruptcy code endows the bankruptcy trustee with the exclusive right to sue on behalf of the estate." *Estate of Spirtos v. One San Bernardino Cty. Superior Court Case Numbered SPR 02211*, 443 F.3d 1172, 1176 (9th Cir. 2006). In cases where a trustee has not been appointed, the debtor becomes a debtor in possession. 11 U.S.C. § 1101(1). A debtor in possession generally has "all the rights . . . and powers, and shall perform all the functions and duties . . . of a trustee." 11 U.S.C. § 1107(a). This includes the capacity to sue and be sued. 11 U.S.C. § 323(b).

While it is apparent that Sabreco, not Schulte, is the debtor in the associated bankruptcy case, Schulte was the sole owner and director of Sabreco at the time the complaint in this case was filed. And because no trustee has been appointed in Sabreco's bankruptcy case, Schulte was the only person qualified to act on behalf Sabreco as the debtor in possession. Therefore, Schulte had standing to bring suit on behalf of Sabreco.

Although Schulte filed a complaint in her individual capacity, summary judgment was not proper. NRCP 17(a) provides that "[n]o action

shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest." Just a couple of months prior to trial and after Fafaleos and Collins filed a motion for summary judgment, a senior district court judge, sua sponte, requested that the parties brief the issue of standing. As a result, Fafaleos and Collins filed a supplemental motion objecting for the first time to Schulte's standing on the basis of Sabreco's bankruptcy. Schulte then filed her supplemental motion moving to amend the complaint to clarify that she brought the suit in her capacity as representative of Sabreco.[2] The district court denied Schulte's motion to amend and granted summary judgment.

Although a motion to amend is left to the sound discretion of the district court, *State, Univ. & Cmty. Coll. Sys. v. Sutton*, 120 Nev. 972, 988, 103 P.3d 8, 19 (2004), a district court abuses its discretion when it "bases its decision on a clearly erroneous factual determination or it disregards controlling law." *MB Am., Inc. v. Alaska Pac. Leasing*, 132 Nev. ___, ___, 367 P.3d 1286, 1292 (2016). Here, the district court came to a clearly erroneous decision regarding Schulte's standing that substantially impacted the ruling on Schulte's motion to amend. Rather than substitute in an entirely new plaintiff, as the senior district court judge suggested, Schulte's amendment would have clarified that Schulte brought the suit in her official capacity as Sabreco's representative. In addition, the district court failed to analyze the motion to amend in light of the directive

[2]We note, however, that Schulte's use of the word "trustee" in the proposed amended complaint could be misleading because she has not been appointed trustee in Sabreco's bankruptcy case.

contained in NRCP 17. Because this motion practice transpired a couple of months before trial, the district court refused to allow reasonable time for Schulte to amend her complaint to clarify she brought suit on behalf of Sabreco. Sabreco possessed evidence of a criminal conviction evincing that the company funds were embezzled and it was necessary for it to file a civil suit to recoup monies wrongfully taken. Therefore, under these facts the district court abused its discretion in denying Schulte' motion to clarify her standing.

Because Schulte had standing to bring suit on behalf of Sabreco as a debtor in possession, the district court's order granting summary judgment must be reversed.[3] In addition, because summary judgment was improper, it follows that the award of attorney fees must also be reversed. *See* NRS 18.010(2) (authorizing awarding attorney fees to the "prevailing party"). Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.

Silver, C.J.

Gibbons, J.

[3]Because we conclude the order granting summary judgment must be reversed, we need not further address the district court's ruling on Schulte's motion to alter or amend judgment.

TAO, J., concurring:

I fully agree with everything stated by my colleagues in the thorough and well-crafted order of reversal and remand, but add the following observations regarding how Nevada interprets the doctrine of "standing" in an effort to help guide the parties and district court on remand.

In the federal courts, standing is a constitutional requirement originating in the "case or controversy" clause of Article III of the United States Constitution. But the Nevada Constitution does not contain a "case or controversy" clause. Thus, in the courts of Nevada, the doctrine of standing is not a constitutional command but rather merely a judicially-created doctrine of convenience. *See In re Amerco Derivative Litigation*, 127 Nev. 196, 213, 252 P.3d 681, 694 (2011) ("Although state courts do not have constitutional Article III standing, Nevada has a long history of requiring an actual justiciable controversy as a predicate to judicial relief.") (internal quotation marks omitted) (citing *Doe v. Bryan*, 102 Nev. 523, 525, 728 P.2d 443, 444 (1986)).

The doctrines of "standing" and "real party in interest" overlap and are frequently confused with each other; the briefing by the parties below reflects some of this confusion and appears to assume that the two are the same. Sometimes the two doctrines are interchangeable for all practical purposes important to a particular case, but sometimes they are not. *See Pillsbury Co. v. Wells Dairy, Inc.*, 752 N.W.2d 430, 434 (Iowa 2008) ("courts have held that simply because a party has standing does not mean that he or she is the real party in interest and vice versa").

The "real party in interest" rule embodied in NRCP 17 asks whether a party possesses "a significant interest in the litigation." *Arguello*

v. Sunset Station, Inc., 127 Nev. 365, 368, 252 P.3d 206, 208 (2011). In colloquial terms this boils down to whether the plaintiff is the correct party to bring the suit. *See Elley v. Stephens*, 104 Nev. 413, 416-17, 760 P.2d 768, 771 (1988) ("appellants are asserting someone else's potential legal problem; they are not the proper party to assert [this claim]"); *see also Hammes v. Brumley*, 659 N.E.2d 1021, 1030 (Ind. 1995) (citing *Bowen v. Metro Bd. Of Zoning Appeals*, 317 N.E.2d 193 (Ind.App. 1974) (a real party in interest is the person who is the true owner of the right sought to be enforced).

The doctrine of standing to some extent implicates this inquiry as well, but it asks additionally whether the plaintiff incurred an injury sufficiently severe, and of a type acknowledged as legally cognizable, such that there is any kind of suit to be brought at all. *See Schwartz v. Lopez*, 132 Nev. ___, ___, 382 P.3d 886, 894 (2016) (to establish standing, a party must show the occurrence of an injury that is "special," "peculiar," or "personal" to him and not merely a generalized grievance shared by all members of the public); *see also Hammes*, 659 N.E.2d at 1029–30 (doctrine of standing inquires whether a party has an actual demonstrable injury that directly resulted from the conduct at issue sufficient to sustain a lawsuit). Thus, merely because a party qualifies as a real party in interest under NRCP 17 does not by itself mean that it also possesses legal standing; in order for standing to exist the plaintiff must also have suffered a legally redressable harm and the suit must be both "ripe" and not "moot" (at least as to the particular plaintiff) at the time of the lawsuit.

Perhaps the simplest example illustrating where these doctrines diverge would be a suit filed to seek an advisory opinion from the court on an unresolved legal question which has not yet caused injury: the plaintiff may well possess some interest in the outcome of the advisory

opinion under NRCP 17 in the sense that the answer might affect it in the future, but if the plaintiff has not yet suffered any legal harm, it lacks standing to sue because there is not yet any cognizable relief the court could grant via the suit. *See Elley*, 104 Nev. at 416-17, 760 P.2d at 771. In those cases, the concept of standing operates to limit judicial overreach by preventing courts from engaging in something very close to writing legislation pre-emptively and instead restricting them to their proper role of resolving concrete disputes already at hand. *See generally* John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 Duke L.J. 1219, 1230 (1993) ("Separation of powers is a zero-sum game. If one branch unconstitutionally aggrandizes itself, it is at the expense of the other branches."); Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U.L.Rev. 881, 881 (1983) (ignoring questions of standing "will inevitably produce—as it has during the past few decades—an overjudicialization of the process of self-governance").

The difference between these two doctrines matters because both must be satisfied in order for a suit to be brought or maintained by the plaintiff in question. In the case at hand, the district court found that Schulte lacked standing to sue because she was not Sabreco's trustee in the bankruptcy case. But what the district court really seemed to mean was that Schulte was not the real party in interest, because the court expressed concern regarding only whether Shulte was the right party to assert the litigation and did not inquire into whether there were any other impediments (such as mootness, ripeness, non-justiciability, or lack of cognizable injury) to Schulte's right to sue. And here's why that makes a difference: if the problem is merely that the action did not name the correct real party in interest, then amendment of the pleadings under NRCP 17 to

substitute the right party is a proper remedy that would easily fix the defect. But if the problem is something else falling under the umbrella of "standing," such as mootness or lack of ripeness to the claim itself, then a pleading amendment by itself might not be enough to solve the problem.

That might be a distinction without a difference in this case; I fully agree that, based on what the district court did, a pleading amendment was warranted and reversal is necessary for all of the reasons set forth by my colleagues. Once that amendment is done, there may be no further question about whether the parties or pleadings are proper. But it's not entirely out of the question that the application of the two doctrines may lead to different results down the line after amendment and, if so, the parties ought to be clear on precisely what's being challenged and what's not.

Tao, J.
Tao

cc: Hon. James Crockett, District Judge
James J. Jimmerson, Settlement Judge
Law Office of Amberlea Davis
Chasey Law Offices
Eighth District Court Clerk