

BOISE, MONDAY, JUNE 15, 2009 AT 8:50 A.M.

IN THE SUPREME COURT OF THE STATE OF IDAHO

HOWARD HOUSTON,

Plaintiff-Respondent,

v.

JOHN HUNTING WHITTIER,

Defendant-Appellant.

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Docket No. 35287

Appeal from the District Court of the Fifth Judicial District of the State of Idaho, Blaine County. Hon. Robert J. Elgee, District Judge.

Elam & Burke, P.A., Boise, for Appellant.

Ned Williamson, Hailey, and Banks Law Office, P.C., Portland, Oregon, for Respondent.

This is a case to recover investments allegedly made by Howard Houston in Wood River Partners, L.P. (Wood River), in the amount of \$2.75 million, from January through September 2005. Wood River was placed into receivership by a federal district court in New York, after the Securities and Exchange Commission brought a lawsuit alleging fraud and misrepresentations by the partnership and its controllers.

From February 2003 through the Fall of 2005, Whittier was a general partner in Wood River and the managing member of Wood River Associates, LLC, which served as the general partner of Wood River. Wood River purported to be a hedge fund with offices located in San Francisco, California, and Ketchum, Idaho. During this same period, Whittier was the majority shareholder and principal executive of Wood River Capital Management, L.L.C., which served as the investment advisor to Wood River and to Wood River Partners Offshore, Ltd., a Cayman Islands general business corporation purporting to be an “offshore” hedge fund, of which Whittier was also the President and the only non-Cayman Island based director.

In late September 2005, the Securities and Exchange Commission commenced an expedited investigation into allegations that Wood River had been unable to pay a redemption request. On October 31, 2005, Whittier and Wood River Capital Management, LLC, Wood River Associates, LLC, Wood River Partners, L.P., and Wood River Partners Offshore, Ltd. (Wood River Entities) entered into a stipulated order granting a preliminary injunction against them and enjoining them from violating federal securities laws; preserving evidence; freezing assets; ordering an accounting; and appointing a Receiver for the Wood River Entities.

On February 1, 2007, a federal Grand Jury issued a criminal indictment against Whittier, charging him with four counts of securities fraud in connection with his failure to disclose to

investors the overconcentration of Wood River investments in Endwave and MediaBay stock, the failure to disclose ownership in excess of 5% and 10% of Endwave stock, and the failure to disclose ownership in excess of 10% of MediaBay stock. On May 30, 2007, Whittier pled guilty to counts 1, 2 and 4 of the indictment.

Houston filed a Complaint against Whittier on August 30, 2006, in the Fifth Judicial District Court of the State of Idaho, under Oregon Securities Laws, ORS 59.115 and related statutes, for unlawful solicitation and sale of securities to him through use of misrepresentations and omissions, and for the sales through a scheme or artifice to defraud. Houston also brought claims for negligence and breach of fiduciary duty. The district court granted Houston partial summary judgment on his first and second claims, alleging violations of Oregon Securities Law sections ORS 59.115, ORS 59.135 and ORS 59.137, which make it unlawful to sell securities through misrepresentations and omissions of material fact, to employ devices or schemes to defraud, or to engage in any act or practice which would operate as fraud or deceit on any person. Houston had argued summary judgment was proper under I.R.C.P. 56, because the material facts to support the claims were not in dispute. The district court issued a Final Judgment in favor of Houston for \$3,234,881 and dismissed the remaining claims against Whittier.

Whittier argues on appeal that the district court abused its discretion by allowing the late filing of Houston's reply memorandum and an affidavit in support of the brief, and erred in applying collateral estoppel principles to determine that Whittier's guilty plea to federal securities violations acted as admission to all elements of Oregon state securities laws. Whittier also argues the district court erred in applying Oregon law rather than Idaho law. Finally, Whittier argues the district should not have entered a final judgment on damages and erred in failing to require delivery of Houston's securities in Wood River in exchange for a final judgment.

BOISE, MONDAY, JUNE 15, 2009 AT 10:00 A.M.

IN THE SUPREME COURT OF THE STATE OF IDAHO

**SCOTT BERG, as Guardian Ad Litem, for)
TRACEY BERG, a minor,)
)
Plaintiffs,)
)
and)
)
STACEY BERG, as next friend for TRACEY)
BERG, a minor,)
)
Aggrieved Party-Appellant,)
)
v.)
)
ALYSSA KENDELL, individually and J.)
DOE, individually,)
)
Defendants-Respondents.)**

Docket No. 34763/35154

Appeal from the District Court of the Fifth Judicial District of the State of Idaho, Minidoka County. Hon. John K. Butler, District Judge.

Seiniger Law Offices, Boise, and Carty Law, Boise, for appellants.

Merrill & Merrill, Pocatello, for respondents.

On July 6, 2003, Tracey Berg, a minor child, sustained injuries after she was struck by a vehicle driven by Respondent Alyssa Kendall. On June 30, 2005, Scott Berg, acting as guardian ad litem for his daughter Tracey, filed a complaint against Kendall (*Berg I*). Over the following year, Mr. Berg's counsel was unable to remain in contact with her client and filed a motion to withdraw as Mr. Berg's attorney of record. A hearing was held on the motion on January 23, 2007, and on February 2, 2007, the district court entered an order permitting Mr. Berg's attorney to withdraw. On February 9, 2007, a copy of the order was mailed to Mr. Berg by certified mail. No written appearance was made by the plaintiff or on behalf of the plaintiff and the district court entered an order dismissing the complaint with prejudice.

On August 22, 2007, Tracey, through her mother Stacey Berg as next friend, moved the district court under I.R.C.P. 60(b) to have the dismissal modified to one without prejudice. The district court denied Tracey's motion. On December 2, 2007, Mrs. Berg, as a parent and next friend of Tracey, filed a complaint against Kendall (*Berg II*). Kendall filed a motion to dismiss based on the doctrine of *res judicata*, which was granted by the district court.

Appellants Tracey and Stacey Berg (collectively Appellants) appeal from the district court's denial of Tracey's motion for relief in *Berg I*. Appellants argue the district court did not have personal jurisdiction over Tracey because the procedures for bringing suit on behalf of a minor were not complied with and, therefore, the district court's dismissal in *Berg I* is void under I.R.C.P. 60(b)(4). In addition, Appellants argue the district court erred in denying Tracey's motion for relief under I.R.C.P. 60(b)(1) because Mr. Berg did not receive notice of the hearing on counsel's motion to withdraw. Furthermore, Appellants assert a parent's failure to comply with procedural rules or failure to prosecute in an action on behalf of a minor child are reasons justifying relief under I.R.C.P. 60(b)(6). Finally, Appellants argue the district court's dismissal with prejudice is a prospective judgment entitling Tracey to relief under I.R.C.P. 60(b)(5).

Appellants also appeal from the district court's dismissal of *Berg II* based on the doctrine of *res judicata*. Appellants argue that under Idaho case law a minor is not bound by a judgment where no guardian has been properly appointed. Appellants also argue that it is generally accepted that an action dismissed for lack of prosecution by the representative of a minor is not binding upon the minor in a separate suit.

Kendall argues the district court properly denied Tracey's motion for relief in *Berg I*, and that the district court properly granted Kendall's motion to dismiss in *Berg II*. Kendall seeks attorney fees on appeal pursuant to I.C. §§ 12-121 and 12-123.

BOISE, MONDAY, JUNE 15, 2009 AT 11:10 A.M.

IN THE SUPREME COURT OF THE STATE OF IDAHO

**MICHAEL L. CHANDLER, individually and)
doing business as LOOMIS CONSTRUCTION,)
)
Plaintiff,)**

v.)

**DAVID HAYDEN and STOREY JONES)
HAYDEN, husband and wife, CITY OF SUN)
VALLEY, a municipal corporation, BANK)
OF AMERICA, N.A., a national banking)
association, ROBERTSON STEPHENS,)
INC., a corporation, BLUE JEANS)
EQUITIES WEST, a corporation, UNITED)
STATES OF AMERICA, DEPARTMENT OF)
THE TREASURY, ROBERTS OCHI, LLC and)
DOES 1 through 10, inclusive,)**

Defendants.)

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**FIRST AMERICAN TITLE INSURANCE)
COMPANY,)**

Plaintiff-Cross-Appellant,)

v.)

**MICHAEL L. CHANDLER, individually and)
doing business as LOOMIS CONSTRUCTION,)**

Defendant-Cross-Respondent.)

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**MICHAEL L. CHANDLER, individually and)
doing business as LOOMIS CONSTRUCTION,)**

Third-Party Plaintiff,)

v.)

**DAVID HAYDEN and STOREY JONES)
HAYDEN, husband and wife,)**

Third-Party Defendants.)

Docket No. 33695

Appeal from the District Court of the Fifth Judicial District of the State of Idaho, Blaine County. Honorable Robert J. Elgee, District Judge.

Lawson & Laski, PLLC, Ketchum, for appellant/cross-respondent Michael Chandler.

Robertson & Slette, PLLC, Twin Falls, for respondent/cross-appellant First American Title Insurance Co.

This is a lien priority case. David and Storey Hayden hired Appellant/Cross-Respondent Michael Chandler to construct a new home for the Haydens in Sun Valley, Idaho. Chandler began work on the house in the spring of 2000. In November of 2000, the Haydens informed Chandler that they were acquiring a \$5 million construction loan from Bank of America, using the property to secure the loan. Before issuing the loan, Bank of America acquired title insurance through Respondent/Cross-Appellant First American Title Insurance Company (First American) insuring that its deed of trust was a first lien on the property. Before issuing the title insurance policy, First American inspected the property and determined that Chandler had already performed substantial work on the house. Thus, Chandler's inchoate mechanic's lien right potentially had priority over Bank of America's deed of trust. Consequently, First American required Chandler and the Haydens to sign an indemnity agreement (the Agreement) before it issued title insurance to Bank of America. Chandler and the Haydens signed the Agreement.

The Agreement required Chandler and the Haydens to submit current financial statements to First American before it agreed to issue the title insurance policy. However, the Haydens submitted financial statements that were approximately six months old after First American issued the title insurance policy and Chandler did not submit any financial statements to First American. After receiving the title insurance policy, Bank of America released the proceeds of the loan to the Haydens. The Haydens were experiencing financial difficulties and used \$3.5 million of the loan proceeds to pay other debts instead of using the proceeds for the construction of their home.

In November 2003, the Haydens financial condition deteriorated to the point where they could no longer continue the construction of their home. On December 30, 2003, Chandler recorded a mechanic's lien on the property in the amount of \$1,491,020.33. Subsequently, Robertson Stevens, Inc. (Robertson Stevens), acquired a judgment against the Haydens in excess of \$20 million and recorded the judgment in Blaine County. Bank of America subsequently acquired Robertson Stevens as a subsidiary.

In May 2004, Chandler filed a separate foreclosure action against the Haydens, Bank of America, and Robertson Stephens. Robertson Stephens and Bank of America counterclaimed and sought to foreclose on their liens. In November 2004, First American, tendering a defense for Bank of America under the title insurance policy, filed the instant action for specific performance of the Agreement against Chandler. The Agreement required Chandler to release any mechanic's lien that he filed against the property within 20 days of filing the lien. First American filed two motions for summary judgment with the district court asking the court to order Chandler to specifically perform the Agreement and release his mechanic's lien. The

district court denied both motions because Robertson Stevens would receive a windfall through enhanced lien priority.

First American then filed a third motion for summary judgment asking the district court to subordinate Chandler's mechanic's lien to Bank of America's deed of trust. The district court granted First American's third motion for summary judgment. Chandler appeals the district court's third grant of summary judgment. First American appeals the district court's denial of its first two motions for summary judgment seeking specific performance of the Agreement. Chandler and First American both appeal the district court's award of attorney fees to First American below. First American also requests an award of attorney fees on appeal.