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Macris & Associates, Inc v. Neways, Inc, Thomas E. Mower and Leslie D. Mower : Reply Brief of Cross-Appellant

Utah Court of Appeals

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IN THE COURT OF APPEALS
FOR THE STATE OF UTAH

MACRIS & ASSOCIATES, INC.,

Plaintiff/Appellee/Cross-Appellant,

vs.

NEWAYS, INC., THOMAS E. MOWER,
and LESLIE D. MOWER,

Defendants/Appellants/
Cross-Appellees.

Case No: 980004-CA

PRIORITY NO. 15

(oral argument requested)

**REPLY BRIEF OF CROSS-APPELLANT
MACRIS & ASSOCIATES, INC.**

APPEAL FROM THE ORDER OF THE FOURTH JUDICIAL DISTRICT COURT,
HONORABLE JUDGE HOWARD H. MAETANI, PRESIDING
UTAH COUNTY, STATE OF UTAH

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III. INTRODUCTION

In a reply brief replete with misstatements and distortions of the record on appeal, appellants Neways, Inc. ("Neways"), Thomas E. Mower and Leslie D. Mower seek to enlist this Court in their campaign to evade Macris & Associates, Inc.'s ("Macris") valid claims and judgment. In previous litigation between Macris and Neways' predecessor, Images & Attitude, Inc. ("Images"), Macris asserted claims for a 1991 breach of a 1989 Autoqualification Agreement that obligated Images to pay Macris a portion of the monthly sales profits from Images' multilevel marketing business. What Neways and the Mowers are desperate to keep from this Court is their conduct during that litigation (the "Images action") which necessitated this lawsuit (the "Neways action"). Neways and the Mowers even resort to distorting and baldly misstating the record to conceal their actions.

The record, however, demonstrates the following facts which Neways and the Mowers want to disavow. Relying on that portion of the Autoqualification Agreement which provided that the agreement was to endure throughout the life of Images as long as Macris is active in promoting Images and Images' products, the Mowers formed Neways in August of 1992 with Images' officers, directors and shareholders, (R. at 11, 31, 173, 292, 323-24) and on the eve of the first trial setting, the newly formed Neways succeeded to Images' multilevel marketing business, acquiring substantially all of the assets, including all tangible assets and inventory of Images. (R. at 10, 35, 173, 259, 263.) All of the distributors of the multilevel marketing business, with the exception of Macris, were invited to become distributors under Neways with the same rank and position. (R. at 35, 171, 239-40, 291, 323-24.) Neways carried on the same business as Images, using the same facilities, employees, equipment, furnishings, and product formulations that Images had used before the transfer. (R. at 291, 323-24.) Of course,

after Neways was formed and succeeded to Images' multilevel marketing business, every effort was made during the Images action to deny any relationship between Images and Neways, even though in reality Neways and Images were essentially the same entity. (R. at 262.) Images and Neways were merely shells through which the multilevel marketing business was passed to evade liability to Macris.

This conduct which Neways and the Mowers now disingenuously deny demands that the doctrine of res judicata be held inapplicable to Macris' causes of action.

Neways was never a party in the Images action, and because Macris did not have a full and fair opportunity to litigate its fraudulent transfer, successor liability and alter ego claims in that case, Neways must not be held to have been in privity with Images.

Furthermore, the claims Macris asserts in this action against Neways and the Mowers are factually, chronologically, transactionally, and legally unrelated to the breach of contract claims it asserted during the Images action. In addition, Macris fraudulent transfer, successor liability and alter ego claims arose well after the commencement of the Images action and after any reasonable point in that litigation at which Macris could and should have asserted them. Moreover, it is Neways and the Mowers' conduct during the Images action that denied Macris its day in court and forced the parties into a seventh year of litigation. Neways and the Mowers' arguments to the contrary are an affront and are in callous disregard for their conduct as evidenced by the uncontroverted factual record.

IV. ARGUMENT

A. NEWAYS AND THE MOWERS MISSTATE THE RECORD AND IMPROPERLY CONTRIVE FACTS REGARDING NEWAYS' SUCCESSION TO IMAGES' MULTILEVEL MARKETING BUSINESS AND THE COURSE OF PROCEEDINGS DURING THE *IMAGES* ACTION.

In apparent recognition that the existing record on appeal does not support their

arguments, Neways and the Mowers resort to misstating and mischaracterizing the record. Neways and the Mowers major factual misstatements are in the areas of Neways' succession to Images' multilevel marketing business and the course of proceedings during the Images action.

Neways and the Mowers misstate the record with respect to Neways' succession to Images' multilevel marketing business. First, Neways and the Mowers make the novel assertion that Images' liability was transferred to Images' alleged successor corporation, Eclat, Inc. ("Eclat"). (Reply Brief of Appellant at 1, 24.) In support of this assertion, which Neways and the Mowers admit was not made to the trial court in connection with the parties' cross motions for summary judgment, (id. at 24) Neways and the Mowers represent that "the pleadings show that the parties agreed Eclat was Images' true successor" because Macris' Complaint alleges that "Eclat was formerly known as Images." (Id. (citing R. at 11, 174).) Macris' Complaint, however, does not state that Eclat was formerly known as Images, but rather states that Eclat was merely another name for Images: "Eclat, Inc. f/k/a Images International, Inc. a/k/a Images & Attitude, Inc. ("Images") is a Utah corporation." (R. at 11 (emphasis added).) This is what Neways and the Mowers admitted in their Amended Answer. (R. at 174.) Even if Eclat was alleged to be formerly known as Images, that does not mean, in and of itself, that Eclat is Images' successor. Furthermore, Neways and the Mowers' absurd argument that Macris should have conducted discovery into "Eclat's successorship" must not excuse their failure to bring it to the attention of the trial court. Schaer v. State, 657 P.2d 1337, 1342 (Utah 1983).

Neways and the Mowers also contend that Neways does not use the same facilities, employees, distributorships, and health and beauty product formulations that were used by Images before Neways' succession to the multilevel marketing business.

(Reply Brief of Appellant at 1, 23.) This contention is also made too late. Neways and the Mowers failed to controvert these facts to the trial court. (R. at 291, 323-24.) Thus, under Rule 4-501(2)(B) of the Utah Code of Judicial Administration, Neways and the Mowers must be deemed to have admitted these facts. Furthermore, Neways and the Mowers may not raise a factual issue for the first time on appeal. Schaer, 657 P.2d at 1342.

In addition, Neways and the Mowers assert, also for the first time on appeal, that many of Images' distributors would not join Neways, causing many former Images' distributors to not retain their same rank and position in Neways. (Reply Brief of Appellant at 2, 23.) Not only is this assertion made too late, but it is also irrelevant. The facts which demonstrate that Neways is a mere continuation of Images and that Neways succeeded to Images' multilevel marketing business to evade liability to Macris include that all of Images' distributors, with the glaring exception of Macris, were invited to become Neways' distributors. (R. at 35, 171, 239-40, 291, 323-24.) The fact that some of Images' distributors declined the invitation is not only understandable in light of the shell game Neways and the Mowers were perpetrating, it is also irrelevant.

Neways and the Mowers also misstate the record with respect to the course of proceedings of the Images action. First, Neways and the Mowers represent that two pleadings were filed in the Images action after Neways succeeded to Images' multilevel marketing business on September 1, 1992. (Reply Brief of Appellant at 2, 8, 12, 15, 16, 19, 21, 22, 24 and addendum). Nowhere in the record is such representation supported. Therefore, these representations and Neways and the Mowers' arguments

relating to such pleadings must not be considered.¹ Uckerman v. Lincoln Nat'l Life Ins. Co., 588 P.2d 142, 144 (Utah 1988); Territorial S&L Ass'n v. Baird, 781 P.2d 452, 455 (Utah Ct. App. 1989).

The portions of the record which Neways and the Mowers cite do not support their contentions regarding two additional pleadings in the Images action. Neways and the Mowers cite to Record pages 1-12, 227-28, 273-79, 323, 351 and 507, at pp. 12, 14 and 15. (Reply Brief of Appellant at 2, 8, 12, 15, 16, 19 and 22.) Neither these portions of the record nor any other portion present evidence that two pleadings were filed in the Images action after September 1, 1992. Furthermore, the record contains not even a whisper of a pleading filed by Macris in the Images action after September 1, 1992.

The only mention in the record of a pleading filed in the Images action after September 1, 1992 was by Neways and the Mowers' attorney during oral argument at the January 22, 1997 hearing on the parties' motions for summary judgment. (R. at 507, p. 15.) The only pleading mentioned, however, was Neways and Thomas Mowers' amended counterclaim and third party complaint. (R. at 507, p. 15.) Moreover, mere argument is no substitute for evidence. As this Court previously ruled, "[c]ounsel's recollection of the course of proceedings is no substitute for a record of those

¹ On July 14, 1998, Neways and the Mowers, recognizing that the representations and arguments in their Reply Brief relating to two additional pleadings from the Images action were not supported by the record, filed its Motion to Supplement Record with copies of the two pleadings. On July 27, 1998, Macris filed a Motion to Strike the Addendum to the Reply Brief of Appellant and Statement of Facts and Arguments based on Documents in Such Addendum and a memorandum in support of its motion and in opposition to Neways and the Mowers' Motion to Supplement the Record. As stated in Macris' memorandum, Neways and the Mowers cannot supplement the record with new material never introduced in the trial court. State v. Moosman, 794 P.2d 474, 478-79 n.17 (Utah 1990); Olson v. Park-Craig-Olson, Inc., 815 P.2d 1356, 1359 (Utah Ct. App. 1991); Territorial S&L Ass'n v. Baird, 781 P.2d 452, 455 (Utah Ct. App. 1989); Conder v. A.L. Williams & Assocs., Inc., 739 P.2d 634, 635-36 (Utah Ct. App. 1987). In lieu of repeating all of the points and authorities set forth in Macris' memorandum here, Macris incorporates such points and authorities as well as those set forth in Macris' Reply Memorandum in Support of its Motion to Strike the Addendum to the Reply Brief of Appellant and Statements of Fact and Arguments Based on Documents in such Addendum.

proceedings." Olson, 815 P.2d at 1359. Similarly, other courts have held that arguments of counsel cannot be considered as evidence in support of a fact contended on appeal. Kenyon v. Kansas Power & Light Co., 836 P.2d 1193, 1195 (Kan. Ct. App. 1992); Economy Carpets Mfg. and Distr., Inc. v. Better Business Bureau of Baton Rouge, Louisiana, Inc., 319 So. 2d 783, 786 (La. 1975); A Minor v. State, 454 P.2d 895, 896 (Nev. 1969); Town of Ashwaubenon v. Public Serv. Comm'n, 126 N.W.2d 567, 567 (Wis. 1964) (per curiam). Neways and the Mowers' statements of fact and arguments which refer or relate to pleadings filed in the Images action after September 1, 1992, must therefore be disregarded.

Neways and the Mowers also assert that during the Images action, "Macris' counsel spent three days at Neways' legal counsel's office reviewing Neways' financial documentation." (Reply Brief of Appellant at 2, 12, 16 and 19.) The record contains absolutely no evidence that such a review occurred. The portions of the record which Neways and the Mowers cite, Record pages 227, 273-79 and 507, pp. 12, 14 and 15, do not support their assertions. With the exception of Record page 507 at page 14, none of these pages contain the slightest hint that Macris' counsel spent three days at the offices of Neways' counsel reviewing Neways' financial information.

The only portion of the record that alleges such a review is page 14 of the hearing transcript which recorded the oral argument of Neways' counsel. (R. at 507, p. 14.) As stated above, however, argument cannot substitute for evidence in support of an alleged fact on appeal. This is especially inappropriate considering that all facts and inferences must be viewed in a light most favorable to Macris. Masters v. Worsley, 777 P.2d 499, 501 (Utah Ct. App. 1989).

In fact, the evidence submitted to the trial court contradicts Neways and the Mowers' unsubstantiated assertions. The only evidence regarding the information Images allowed Macris to review during the Images action was information showing monthly sales figures through August 31, 1992, the date on which Images claimed that it no longer operated the multilevel marketing business and was no longer liable under the Autoqualification Agreement. (R. at 262.) Contrary to Neways and the Mowers' baseless assertions, "Images never produced any information from Neways." (R. at 262.)

B. MACRIS' FRAUDULENT TRANSFER, SUCCESSOR LIABILITY AND ALTER EGO CLAIMS ARE NOT BARRED UNDER THE DOCTRINE OF RES JUDICATA BECAUSE NEWAYS WAS NOT IN PRIVACY WITH IMAGES.

Neways and the Mowers argue, and the trial court to a great extent agreed, that Macris' fraudulent transfer, successor liability and alter ego claims are precluded by a judgment in its favor on its breach of contract claims in the Images action. "In order for res judicata to apply, both suits must involve the same parties or their privies and also the same cause of action." Searle Brothers v. Searle, 588 P.2d 689, 690 (Utah 1978). One of the reasons that res judicata cannot apply is that the defendants in this action, with the exception of Thomas Mower, were not parties in the Images action. Furthermore, and contrary to Neways and the Mowers' arguments and the trial court's conclusion, Neways was not in privity with Images.

As discussed in the Brief of Cross-Appellant Macris & Associates, Inc. ("Brief of Cross-Appellant"), Utah law requires that for a nonparty to take advantage of a judgment in favor of a claimant whose later claims are sought to be precluded, the claimant must have had its day in court on the merits of its claims against the nonparty even though the nonparty was not present. (Brief of Cross-Appellant at 32-37.) This rule is mandated by the fairness and due process of law concepts that underlie and

permeate the identity of parties or privity requirement of *res judicata*. International Resources v. Dunfield, 599 P.2d 515, 517 (Utah 1979); 18 Charles A. Wright et al., Federal Practice and Procedure § 4448 (1982). In the Images action, Macris did not have a full and fair opportunity to litigate its fraudulent transfer, successor liability and alter ego claims. Litigation of these claims requires the presence of the transferee, the successor and the alter ego, Neways. Because Macris has not had its day in court with respect to these claims, Neways must not be held to be in privity with Images.

This Court must not be swayed by the arguments of Neways and the Mowers who have, since August and September of 1992, endeavored to deprive Macris of a full and fair opportunity to litigate its valid claims.² Neways and the Mowers repeat the argument they made in their opening brief that if Neways is liable as a successor to Images, it would necessarily be in privity with Images. (Reply Brief of Appellant at 7.) For this argument, Neways and the Mowers rely on the following statement in Searle Brothers v. Searle:

The legal definition of a person in privity with another is a person so identified in interest with another that he represents the same legal right. This includes a mutual or successive relationship to rights in property.

Searle, 588 P.2d at 698. Neways and the Mowers seek to expand the scope of the last quoted sentence to the point of absurdity. The Searle court did not state or intend that in all cases, parties involved in a successive relationship to property rights with each

² Neways and the Mowers qualify their privity arguments with a disclaimer which should compel this Court to find that Neways was not in privity with Images. Neways and the Mowers assert that "when Neways argues that it is Images' privity, it is only for purposes of this appeal." (Reply Brief of Appellant at 3 n.1.) Apparently, outside this appeal, Neways and the Mowers desire to deny that Neways is in privity with Images, much like they denied any relationship between Images and Neways during the Images action. (R. at 262.) Neways and the Mowers' disclaimer, in and of itself, should persuade the Court to hold that Neways was not in privity with Images. If Neways and the Mowers, who bear the burden of proving that Neways and Images are in privity and against whom the facts of this case must be viewed, feel the need to disclaim a privity relationship for purposes outside this appeal, this Court should reject such a relationship for purposes of this appeal.

other will be deemed to be in privity for res judicata purposes. Such a holding would be contrary to its numerous directions that the privity concept be applied with an eye towards ensuring that a party has had a full and fair opportunity to litigate its claims. Dunfield, 599 P.2d at 517; Baxter v. Utah Dept. of Transp., 705 P.2d 1167, 1169 (Utah 1985); Ruffinengo v. Miller, 579 P.2d 342, 344 (Utah 1978).

Moreover, the Searle Brothers v. Searle court did not need to go this far, as the facts of that case demonstrate. Searle Brothers v. Searle involved a dispute regarding interests in property known as the "Slaugh House." Searle, 588 P.2d at 690-91. In a prior divorce action, the Slaugh House was awarded to Edlean Searle and not Woodey Searle. Id. at 690. A later action was brought by Woodey's sons who claimed an undivided one-half interest in the Slaugh House. Id. The trial court dismissed the action on grounds of res judicata. Id. In reversing the trial court, the Utah Supreme Court found that Woodey's sons were not in privity with Woodey because their interest in the Slaugh House was neither mutual nor successive to Woodey's interests. Id. at 691.

The court's privity analysis in Searle was wholly consistent with the overarching requirement that Woodey's sons be given a full and fair opportunity to litigate their claims. If Woodey's sons succeeded to the same property interests as Woodey, treating them as in privity with Woodey would be proper because Woodey could transfer no greater interest than he had. McGarry v. Thompson, 114 Utah 442, 456-57, 201 P.2d 288, 295-96 (1948). Furthermore, binding Woodey's sons would be justified because "[t]o deny preclusion would be to deny the victor any assurance of repose and expose every judgment to defeat by simple conveyance." 18 Charles A. Wright et al., Federal Practice and Procedure § 4462 (1981).

In any event, to the extent that the Searle Brothers v. Searle court in one sentence stated that, in all cases, parties succeeding to property interests are in privity with their predecessors for res judicata purposes, that sentence is dictum and should not be followed.

An example illustrates the unfairness that would result if the Searle court's statement on which Neways and the Mowers rely was expanded in the manner they advance. The following fact scenario is presented in the Restatement (Second) of Judgments to illustrate the rule that the rendition of a judgment against one person liable for a loss does not terminate a claim that the injured party may have against another person who may be liable therefor:

A is the payee of note for \$1,000 executed jointly by B and C. In an action by A against B on the note, C is not joined as a party. B defends on the ground that the obligation was paid, but the court finds that payment was made only to the extent of \$300 and enters judgment for A for \$700. A may maintain an action against C on the note but his recovery is limited to \$700.

Restatement (Second) Judgments § 49 cmt. b., illus. 3 (1982). Under the approach advocated by Neways and the Mowers, if C happened to have succeeded to property owned by B, C and B would be in privity. Because the claim against C would be the same as the claim against B, and because the first action ended in a final judgment, A would be precluded by res judicata from suing C. Not only would this result be logically unjustifiable and unnecessary to achieve the goals of the res judicata doctrine, but it would be patently unfair. Even though C is just as liable to A as B, A is denied a full and fair opportunity to litigate its claim against C.

The other authorities cited by Neways and the Mowers in support of their argument that parties succeeding to property interests are in all cases in privity with their predecessors do not avail them. (Reply Brief at 7.) To the contrary, those authorities actually refute their approach. Nowhere in State in Interest of T.J., 945 P.2d

158, 163 (Utah Ct. App. 1997), did this Court state that persons in privity with each other includes persons having a mutual or successive relationship to rights in property. Instead, this Court reaffirmed the overarching policy of the identity of parties or privity requirement that parties be afforded "fair opportunit[ies] to litigate the issues." Id. at 163. Furthermore, rather than ascertaining whether the parties alleged to be in privity had mutual or successive relationships to rights in property, this Court stated that the "ability to control representation of rights is 'necessary to fulfill [the] function of privity to provide a day in court.'" Id. (quoting State ex rel. Dep't of Soc. Serv. v. Ruscetta, 742 P.2d 114, 117 (Utah Ct. App. 1987)).

Golden State Bottling Co. v. National Labor Relations Board, 414 U.S. 168 (1973), and Section 44 of the Restatement (Second) of Judgments do provide that a successor in interest of property may be in privity with the transferor, but only if the transferred property was the subject of the action in which the transferor was a party. Golden State Bottling Co., 414 U.S. at 179 ("Persons acquiring an interest in property that is a subject of litigation are bound by, or entitled to the benefit of, a subsequent judgment" (emphasis added)); Restatement (Second) of Judgments § 44 (1982) ("A successor in interest of property that is the subject of a pending action to which his transferor is a party is bound by and entitled to the benefits of the rules of res judicata to the same extent as his transferor" (emphasis added)). As discussed above, the privity analysis mentioned in Golden State Bottling Co. and Section 44 of the Restatement (Second) of Judgments comports with the overarching concept of fairness if applied in the context of litigation involving property interests. However, if property interests are not involved in the prior action, it would deprive a litigant of his day in court to treat the property interests as in any way pertinent to the privity determination.

C. **MACRIS' FRAUDULENT TRANSFER, SUCCESSOR LIABILITY AND ALTER EGO CLAIMS ARE NOT BARRED BY RES JUDICATA BECAUSE THESE CLAIMS ARE NOT THE SAME OR PART OF THE SAME CAUSES OF ACTION ON WHICH MACRIS PREVAILED IN THE *IMAGES* ACTION.**

Neways and the Mowers now recognize that "[b]efore a court can decide if a party 'could have and should have' included a claim [in a previous action], [the party asserting the res judicata defense] 'must first overcome the threshold determination of whether the claims, demands or causes of action of both cases are the same.'" (Reply Brief of Appellant at 9 (quoting Schaer v. State, 657 P.2d 1337, 1340 n.2 (Utah 1983).) Macris' claims in this case are different from its claims in the Images action because (a) they rest on a different state of facts; (b) they relate to completely different time periods; (c) they arise out of completely different transactions; (d) they rely on completely different rights; (e) they seek redress for completely different wrongs; (f) a judgment in the Neways action will not impair rights or interests established in Images action; and (g) Macris' fraudulent transfer, successor liability and alter ego claims could not have been asserted in the Images action because such claims required the presence of the transferee, the successor and the alter ego, Neways.

Neways and the Mowers argue that various tests used to determine if a later claim is the same as a previous claim favor a finding that the claims in the Images action are the same as the claims in the Neways action. Application of these tests, however, shows the exact opposite. (See Brief of Cross-Appellant at 19-25.) In their application of these tests, Neways and the Mowers rely on the same contentions for each. These contentions are (1) their mantra that Macris' claims in this action arose from Images' 1991 breach of the Autoqualification Agreement; (2) the facts, proof and evidence used to obtain damages in the Images action will be used to prove damages

in the Neways action; (3) Macris had a full and fair opportunity to obtain all of its damages in the Images action; and (4) Macris had full knowledge of its fraudulent transfer, successor liability and alter ego claims. Each of these contentions is meritless.

1. Macris' Fraudulent Transfer, Successor Liability and Alter Ego Claims Arose Out of the August 1992 Formation of Neways and Images' September 1, 1992 Transfer of Its Assets to Neways.

Contrary to Neways and the Mowers much repeated slogan, Macris' claims in the Neways action did not arise out of the 1989 execution and Images' 1991 breach of the Autoqualification Agreement. (Reply Brief at 4, 11, 12, 14, 17.) Macris' claims in this action rest on different facts, different time periods, different transactions, different evidence, different rights, different wrongs, and the actions of different parties than its claims in the Images action. What Neways and the Mowers want this Court to ignore is that Macris' claims in this action arose out of the formation of Neways in August of 1992 and Images' transfer of its assets, including the multilevel marketing business, to the newly formed corporation on September 1, 1992, the eve of the first trial setting in the Images action. Whereas the Images action dealt with whether the Autoqualification Agreement was valid and whether Images unjustifiably and inexcusably breached that agreement, the Neways action will deal with the formation of Neways, the relationship between Images and Neways, the circumstances surrounding Images' transfer of its multilevel marketing business and other assets to Neways, and Neways' operation of the multilevel marketing business. As Neways and the Mowers admitted during the hearing on the parties' motions for summary judgment, the Autoqualification Agreement

won't be before this Court. The issue that will be before this Court is by virtue of corporate reorganizations, transfers for consideration[,] whether or not we, Neways, has [sic] assumed [liability] by virtue of the fraudulent conveyance statute, or whether or not it's the same entity by virtue of some common law theories.

(R. at 507, pp. 23-24.)

Neways and the Mowers argue that Macris' claims in this action arose out of the 1991 breach of the Autoqualification Agreement because in this case, Macris seeks the same damages it sought in the Images action. (Reply Brief of Appellant at 4, 11, 12, 14, 17.) Macris, however, is not seeking the damages arising from Images' breach of the Autoqualification Agreement that it sought in the Images action. Again, Neways and the Mowers refuse to acknowledge Neways' formation with insiders of Images and succession to Images' multilevel marketing business and other assets. It is this conduct that gives rise to the damages Macris seeks in this case. (R. at 1-12.) In addition, these damages include punitive damages which Macris could not have obtained on its breach of contract claims in the Images action.

In any event, the fact that Macris may seek some of the damages it would have received in the Images action but for Neways and the Mowers' fraudulent conduct is not determinative. First, Macris' claims in this action are different in every conceivable way from its claims in the Images action. In addition, "where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, . . . a new suit may be sustained. . . ." Pepper v. Zions First Nat'l Bank, N.A., 801 P.2d 144, 148-49 (Utah 1990); see also Doe v. Allied-Signal, Inc., 985 F.2d 908, 914 (7th Cir. 1993) ("[A] critical piece of the puzzle [giving rise to plaintiff's later asserted claims] was [defendant's] charge of tactics during the lawsuit. Without this information, [plaintiff] could not have known that she had a claim."); Estate of Covington v. Josephson, 888 P.2d 675, 678 (Utah Ct. App. 1994) cert. denied, 910 P.2d 425 (Utah 1995) (holding that party was not barred by res judicata when in prior action it relied on opponent's representations that if true would have made further litigation

unnecessary). Images' transfer of its multilevel marketing business and all other tangible assets on the eve of the first trial setting in the Images action to Neways, which was only recently formed by Images' insiders, was the reason that Macris' recovery was limited. Furthermore, during the Images action, every effort was made to separate Neways from Images. Thus, Macris was "prevented from exhibiting fully [its] case, by fraud or deception practiced on [it] by" Neways and the Mowers. Pepper, 801 P.2d at 148-49.

This Court has allowed parties to maintain a second action to seek the same relief they sought in a prior action. Masters v. Worsley, 777 P.2d 499, 509 (Utah Ct. App. 1989). In Masters, the first action was a divorce proceeding in which Masters, despite his efforts to avoid it, was ordered to pay child support for three children born during his marriage to Worsley. Id. at 500. In a later action, Masters alleged that the child support obligations ordered by the first court were induced by fraud committed by Worsley during the first action. Masters therefore sought rescission of his child support obligations. Id. Despite the fact that Masters' objective in the second action was the same as his objective in the first, to avoid the obligation of child support, this Court held that res judicata was inapplicable. Id. at 509.

Neways and the Mowers' reliance on Reed v. Marketing Services International, Ltd., 540 F. Supp. 893 (S.D. Tex. 1982), to support their argument is misplaced. Neways and the Mowers argue that this case stands for the proposition that where two lawsuits seek the same damages, the second is barred by res judicata. (Reply Brief of Appellant at 16-17.) This case says no such thing. The court dismissed the second suit because "the acts complained of, the complaints filed and the evidence to be adduced in this action are identical to the acts complained of, the complaints filed and

the evidence adduced in the [prior] action." Reed, 540 F. Supp. at 898. Moreover, the court found that the relief the plaintiffs sought in the second action was the only thing different from the prior action: "In essence, the only substantial difference in the present suit is the remedies sought." Id.

2. The Evidence that Will Be Used to Prove Damages in the Neways Action Had Never Been Introduced in the Images Action.

In arguing that the claims in this action are the same as the claims in the Images action, Neways and the Mowers rely heavily on their contention that evidence that Macris will use to prove damages in this action is the same evidence it used to recover damages in the Images action. (Reply Brief of Appellant at 8, 10, 14, 17.) Neways and the Mowers are wrong. In the Images action, Macris recovered damages incurred through August 31, 1992, because on September 1, 1992, Neways succeeded to the multilevel marketing business. (R. at 250.) Evidence from the Images action of Macris' damages through August 31, 1992, will not be used in the Neways action for three reasons. First, no evidence was used in the Images action to prove damages. Images stipulated to the amounts awarded as damages. (R. at 249-50.)

Second, even if evidence had been used to prove damages through August 31, 1992, such evidence need not be used in the Neways action. Neways is liable for such damages because it is the successor, alter ego and fraudulent transferee of Images. Evidence that Neways is the successor, fraudulent transferee and alter ego and of the judgment in the Images action is all that Macris need introduce to obtain the amount of its judgment from Neways. This is illustrated by the trial court's partial grant of Macris' motion for summary judgment on its successor liability claim. (R. at 425-27.)

Third, Macris' remaining damages will be proven with different evidence than the evidence that would have been used in the Images action had Images not stipulated to the damages amount. For instance, the pertinent time period will be after August 31, 1992, rather than before that time. Also, the pertinent amounts will be different because Macris' damages are partially based on the profits of Neways' monthly sales. Thus, it is not true that evidence needed to prove damages in the Neways action was used in the Images action.

Even if evidence of damages would be used again in the Neways action, that is no ground to find that Macris' claims in this action are the same as its breach of contract claims in the Images action. The evidence used to prove liability will be wholly different. The evidence of liability in the Images action focused on the 1989 formation and Images' 1991 breach of the Autoqualification Agreement. In this action, the evidence of liability will focus on the formation of Neways, the relationship between Neways and Images, and the circumstances surrounding Images' transfer of its assets, including the multilevel marketing business, to Neways.

3. Macris Did Not Have an Opportunity to Recover on Its Fraudulent Transfer, Successor Liability and Alter Ego Claims in the *Images* Action.

After endeavoring to deprive Macris of a full and fair opportunity to litigate its claims during the Images action through a corporate shell game, Neways and the Mowers callously argue that Macris had a full and fair opportunity in that action to assert all of its claims and recover all of its damages. (Reply Brief of Appellant at 7, 8, 15, 17.) The very basis for this action is Neways and the Mowers' fraudulent acts which they perpetrated to evade and defeat Macris' valid claims and judgment. If given the opportunity to prove their claims, Macris would thereby show that it was deprived a fair

opportunity to fully recover its damages.

In addition, an indispensable party to Macris' current claims was not present in the Images action. To prevail on its fraudulent transfer, successor liability and alter ego claims, Macris has to assert them against the transferee, the successor and the alter ego, Neways.

Neways and the Mowers admitted in this case that Macris could not have brought its current claims during the Images action. In their first response to Macris' Complaint in this action, their Motion to Dismiss or Alternatively to Stay Proceedings, Neways and the Mowers argued that Macris' claims against them were "Not Ripe for Decision and Therefor [sic] Should be Dismissed." (R. at 34 (emphasis in original).)

Neways and the Mowers argued:

In the case at bar, [Macris'] claims for Fraudulent Transfer, Successor Liability and Alter Ego turn first upon a finding that [Images] has a liability to [Macris]. Since the determination has not been made, the claims asserted herein have not sharpened into an actual or imminent clash of legal rights and obligations between the parties and as such, the hypothetical application of [a rule of law] to a situation in which the parties might, at some future time, find themselves is unripe for adjudication under the ripeness doctrine. . . .

Further, continuation of this lawsuit, prior to a final determination of liability in [the Images action] would waste judicial resources as well as subject the parties to unnecessary litigation expenses.

(R. at 34 (emphasis added) (quotations omitted).)

In their Reply Brief, Neways and the Mowers attempt to recant this prior position by asserting that they withdrew their motion because, "after comparing the facts to Utah law, it was clear that res judicata did in fact bar the second lawsuit." (Reply Brief of Appellant at 3 n.2.) This is nothing more than unsubstantiated revisionism. Neways and the Mowers withdrew their motion because the basis for it--that a final

determination of the Images action had not yet occurred--disappeared. On June 6, 1995, the trial court in the Images action issued its Memorandum Decision, ruling in favor of Macris. (R. at 134.) On July 10, 1995, Neways and the Mowers withdrew their motion. (R. at 61.) Moreover, Neways and the Mowers later admitted that "Judge Burningham's Memorandum Decision [in the Images action] rendered Defendants' Motion moot." (R. at 134.)

4. The Record Does Not Support Neways and the Mowers' Argument that Macris Had Full Knowledge of Its Current Claims in Time to Assert Them in the *Images* Action.

In their attempt to show that Macris' current claims are the same as those in the Images action, Neways and the Mowers repeatedly argue that Macris had full knowledge of its current claims during the Images action. (Reply Brief of Appellant at 12, 15, 16.) The record, however, reveals that the earliest Macris had knowledge of the facts underlying its claim was only shortly before the trial in the Images action when it filed its Complaint in the Neways action. The record reveals that during the Images action, Images and Thomas Mower tried to separate Images from Neways. (R. at 262.) Furthermore, as stated above, Neways and the Mowers' contention that Macris' counsel reviewed Neways' financial documents is unsupported and contradicted by the record which discloses that Macris was allowed access only to financial information showing sales figures through August 31, 1992. (R. at 262.) Arguments unsupported by the record must not be considered. Uckerman, 588 P.2d at 144. Furthermore, all facts and inferences must be viewed in Macris' favor. Masters, 777 P.2d at 501.

In addition, Neways and the Mowers' argument regarding Macris' alleged knowledge of its current claims is irrelevant. As Neways and the Mowers now acknowledge, "even if a plaintiff is aware of the factual basis for a suit at the filing of

another suit, he or she is not obligated to bring all claims together if they do not arise out of the same transaction." Macko v. Byron, 555 F. Supp. 470, 479 (N.D. Ohio 1982); (Reply Brief of Appellant at 9.) Thus, Neways and the Mowers' argument regarding Macris' alleged knowledge begs the question of whether its claims in this action are the same as those in the Images action.

D. MACRIS WAS NOT REQUIRED TO AMEND ITS COMPLAINT TO ASSERT ITS CURRENT CLAIMS.

As Neways and the Mowers admit, to prevail on their res judicata defense, they must, in addition to satisfying the identity of parties and claims requirements, show that Macris' current claims are ones that could and should have been brought in the Images action. (Reply Brief of Appellant at 9.) Most courts and commentators hold that for a claim to be barred, it must have arisen at the time the first suit was commenced or asserted in a pleading. (See authorities cited on page 27 of the Brief of Cross-Appellant Macris & Associates, Inc.) Rule 13(a) of the Utah Rules of Civil Procedure echoes this near universal principle.

Neways and the Mowers disregard the majority rule and Rule 13(a) to argue that Macris had a duty to amend. Such a rule, however, would lead to disruption and confusion. As stated in Whitley Construction Co. v. Whitley, 213 S.E.2d 909, 911 (Ga. Ct. App. 1975), "[t]he fact that [procedural rules] contain[] liberal provisions making it possible to amend the pleadings during the course of the trial [does] not require the plaintiff to so amend in every case in which he might amend It is more practicable to have a certain cut off time. . . ." (Emphasis in original.)

The question becomes what should be the "cutoff time"? Obviously, a claim arising after judgment was entered could not possibly have been raised and therefore is not barred. Estate of Covington v. Josephson, 888 P.2d 675, 678 (Utah Ct. App. 1994)

(holding that claim arising "well after the completion of the prior action . . . was not 'ripe for adjudication.')."³

The commencement of trial might seem a tempting cut-off point. The problem with this standard is that a new claim cannot simply be added and tried in all circumstances. "[I]t must be remembered that [adding a claim] requires the requisite proof, which in many cases might be somewhat complicated" Whitley Constr., 213 S.E.2d at 911. Also, the closer to trial, the less likely it is that a court would grant permission for an amendment. Girard v. Appleby, 660 P.2d 245, 248 (Utah 1983); Mountain America Credit Union v. McClellan, 854 P.2d 590, 592-93 (Utah Ct. App. 1993), cert. denied, 862 P.2d 1756 (Utah 1993).

The majority of cases therefore hold that claims arising after the commencement of an action need not be asserted or lost to the preclusive effect of res judicata. (See authorities cited at page 27 of the Brief of Cross-Appellant Macris & Associates, Inc.) In its opening brief, Macris stated that an appropriate cut-off point could also be the claimant's last pleading in the earlier suit. Obviously, such a pleading would have to be one in which the claimant could have asserted claims. The purpose of establishing a point in litigation after which newly arisen, similar claims need not be joined is to select a time at which accrued claims could and should be asserted. It would make no sense to select a point in litigation at which claims could not have been readily asserted. This is what Macris intended in its opening brief. Indeed, the record on appeal contains no pleading filed by Macris in the Images action after its June 9, 1992 Second Amended Complaint. (R. at 192, 203.)

³ Neways and the Mowers argue that this case imposes a duty to amend on parties discovering additional, similar claims before judgment. Such a reading is impossible. In Josephson, this Court found res judicata inapplicable. Josephson, 888 P.2d at 678. Furthermore, the Court did not speculate on what the result would be if the claim had arisen before the judgment in the first suit.

Neways and the Mowers argue that the filing of the last pleading in which a party could not have asserted claims is an appropriate cutoff point for res judicata purposes. (Reply Brief of Appellant at 21-22.) Specifically, Neways and the Mowers argue that Macris filed a pleading, a reply to Images' amended counterclaim,⁴ on August 23, 1993, and that because Images' fraudulent transfer to Neways occurred on September 1, 1992, Macris could and should have asserted its current claims. (Id. at 2, 21-22.) First, as discussed above, the record offers no support for the contention that any pleadings, much less a pleading by Macris, were filed in the Images action after September 1, 1992. In any event, a plaintiff's reply to a counterclaim, contrary to Neways and the Mowers' insinuations throughout their Reply Brief, does not offer a party an opportunity to investigate and assert claims. For this reason, no court or commentator has advanced the time at which a reply to a counterclaim or similar responsive pleading is filed as an appropriate point in litigation before which arisen claims will be barred by res judicata and after which they will not. Therefore, even if this Court could consider Macris' alleged reply to amended counterclaim, it should not because it is entirely irrelevant to the question of whether Macris' current claims could and should have been asserted in the Images action.

Neways and the Mowers also argue that Macris had a duty to amend their complaint in the Images action to assert their current claims, irrespective of whether such claims arose before or after Macris' pleadings. Cases on which Neways and the Mowers rely, however, do not support their contention. First, Neways and the Mowers

⁴ On page 22 of their Reply Brief, Neways and the Mowers described Macris' pleading as "an Amended Counterclaim and Answer to Third Party Complaint." Neways and the Mowers have admitted that this was a typographical error and the pleading they allege Macris filed is a Reply to Amended Counterclaim and Answer to Third Party Complaint. (Reply Memorandum to Neways' Motion to Supplement Record and Memorandum in Opposition to Macris' Motion to Strike the Addendum and Portions of the Reply Brief of Appellants at 2 n.1.)

distort the Utah Supreme Court's decision in Badger v. Badger, 254 P. 784 (Utah 1927). This case actually supports the majority rule that claims arising after the commencement of an action are not precluded by res judicata. (See Brief of Cross-Appellant at 28-29.) In apparent recognition of Badger v. Badger's support for the majority rule, Neways and the Mowers resort to mischaracterizing that decision with their argument that the court favored amendments to include new claims because it "explicitly held that if new facts had surfaced during the first petition, plaintiff 'would have been granted leave to amend.'" (Reply Brief of Appellant at 20 (quoting Badger, 254 P. at 788.) The court made no such holding. Neways and the Mowers improperly take the quoted portion of Badger completely out of context. In stating that leave to amend would have been granted, the court was not referring to the appellant's first petition to modify a divorce decree, but was instead referring to the later petition that was stricken on grounds of res judicata. Id. at 788. The court's discussion was directed to the issue of "whether or not the trial court committed prejudicial error in striking the amended [second] petition," not whether the appellant could and should have asserted additional facts in her first petition for modification of the divorce decree. Id.

Neways also improperly relies on Everett Plywood Corp. v. United States, 512 F.2d 1082 (Ct. Cl. 1975), Harnett v. Billman, 800 F.2d 1308 (4th Cir. 1986), and O'Shea v. Amoco Oil Co., 886 F.2d 584 (3d Cir. 1989). (Reply Brief of Appellant at 12, 18-19.) The Everett Plywood court refused to apply the rule advanced by Neways and the Mowers and instead applied the rule that claims arising after the commencement of the first action are not barred by res judicata:

a separate action founded on a single nondivisible contract may be maintained if the later claim is severable from the earlier one, and, if at the time of the commencement of the earlier suit, the later claim was not then capable of being asserted.

Everett Plywood Corp., 512 F.2d at 1087, 1088 (emphasis added). Harnett is also unavailing to Neways and the Mowers because claims that were barred by res judicata arose before commencement of the first action. Harnett, 800 F.2d at 1310-11, 1314, 1315.

Neways and the Mowers represent that O'Shea v. Amoco Oil Co., 886 F.2d 584 (3d Cir. 1989), holds that because "[t]he plaintiff did not plead 'all related claims,' including those that became ripe only two months before trial in the first action, res judicata barred the second suit." (Reply Brief at 12.) Neways and the Mowers, however, completely distort the facts and result of this case. In O'Shea, the plaintiff and defendant entered into a franchise contract which required plaintiff to operate a franchise 24 hours a day. O'Shea, 886 F.2d at 586. In the first action, plaintiff sued the defendant claiming that the 24-hour requirement was unreasonable under state common law. Id. at 587. Contrary to Neways and the Mowers' assertion, the plaintiff did not prevail in the first action. Id. In the second action, plaintiff again claimed that the 24-hour requirement was unreasonable, but this time asserted the New Jersey Franchise Practices Act ("NJFPA") Id. at 589. It is true that two months before trial in the first action, defendant terminated the franchise agreement. Id. at 587. Contrary to Neways and the Mowers' contentions, however, this termination had no bearing on the plaintiff's NJFPA claim. The NJFPA claim was the same as plaintiff's claim under common law in the first action. In fact, the court specifically held that the plaintiff's "NJFPA claim that the 24-hour provision was unenforceable as a matter of state law clearly arose before his state court litigation. Indeed, [there is] no reason why [the

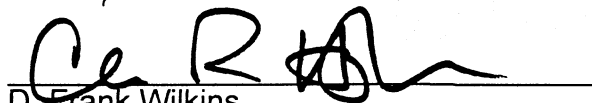
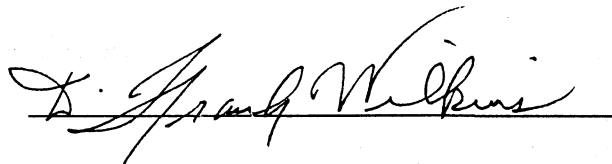
plaintiff] could not have brought his NJFPA claim at the inception of his state court suit." Id. at 591. Thus, despite Neways and the Mowers' misstatements, the O'Shea court did not dismiss on res judicata grounds claims that "became ripe only two months before trial." (Reply Brief of Appellant at 12.)

V. CONCLUSION

This Court should reverse the trial court's summary judgment in favor of Neways and the Mowers and affirm the trial court's summary judgment in favor of Macris. This Court should also reverse the trial court's decision to deny Macris' motion for summary judgment to the extent it ruled that res judicata limits Neways' successor liability to the judgment entered in the Images action.

DATED: September 2, 1998.

BERMAN, GAUFIN, TOMSIC & SAVAGE

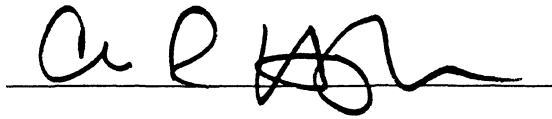


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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on September 21, 1998, two true and correct copies of the REPLY BRIEF OF CROSS-APPELLANT MACRIS & ASSOCIATES, INC. were mailed via first class mail, postage prepaid, to the following:

Allen K. Davis
150 East 400 North
Salem, Utah 84653

A handwritten signature in black ink, appearing to read "A K Davis", is written over a horizontal line.