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COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

ROY MCALISTER, KATHLEEN MCALISTER and MCALISTER TECHNOLOGIES, an Arizona corporation,

Petitioners,

v.

LOEB & LOEB, L.L.P., a California limited liability partnership,

Respondent.

Case No. 1 CA-CV 23-0212

Maricopa County Superior Court
Case No. CV 2018-012158
Hon. Scott McCoy

PETITION FOR REVIEW

This petition concerns an error in the Memorandum Decision on an issue of law so important that it would bar Petitioners from seeking $20 million in damages that is fully supported by unrebutted evidence. That $20 million difference, arising from an incorrect decision on an important issue of law, justifies granting the Petition for Review. *See* Ariz. R. Civ. App. Proc 23 (The incorrect decision of "important issues of law" supports grant of a Petition for Review).

The facts conclusively show that, from 2010 to 2015, hedge-fund manager Chris Haver invested $63 million in a new technology invented by Petitioners. In a

sworn affidavit, Haver explained that, in 2015, he was going to make an additional investment of $20 million in a closely related technology, also invented by the Petitioners in the present case.

In a lengthy deposition, Haver strongly reiterated the assertion in his sworn affidavit that he was going to make that $20 million investment in 2015. There was clear evidence that Haver had both the capacity *and* the opportunity to make the $20 million investment. There was virtually nothing contradicting Haver's testimony.

But the Court of Appeals upheld a summary judgment where the trial court weighed the evidence and the credibility of Haver's testimony—and decided that it would limit the value of the planned investment to zero. That was a massive error that would, before the case even started, reduce the possible damages by $20 million. The Court of Appeals provided absolutely no explanation or rationale for that error on a vitally important issue of law. The Court of Appeals then denied a Motion for Reconsideration that had carefully addressed and explained the error.

To put it mildly, the Court of Appeals incorrectly decided an important issue of law, effectively capping damages, when clear, strong, on-point evidence from a credible witness supported the $20 million in damages. To create that $20 million shortfall in assertable damages, the Memorandum Decision incorrectly applied the summary-judgment standard of *Orme School v. Reeves*, 166 Ariz. 301 (1990).

Since 1990, countless Arizona trial and appellate courts have applied the *Orme School* standard. *See*, *e.g.*, *Glazer v. State of Arizona*, 237 Ariz. 160 (2015). Abandonment of the *Orme School* standard resulted in an incorrect decision on a highly important issue of law.

Petitioners ask the Court to grant review to correct an error of law resulting from misapplication of basic summary-judgment principles.

ISSUE PRESENTED FOR REVIEW

1. If a witness testified consistently in an affidavit and deposition that the witness was going to do an act and there is unrebutted evidence that the witness had the capacity and opportunity to do the act, is summary judgment contrary to that evidence proper?

Chris Haver is a hedge fund manager. From 2010 to 2015, his fund invested $63 million in "Smart Plug" technology, an invention patented by Petitioners. Haver swore in an affidavit that in 2015, his fund was going to invest an additional $20 million in "Hydrogen Splitter" technology, an invention patented by Petitioners and closely related to their patented "Smart Plug" technology. In a long deposition, Haver strongly reiterated his intention to invest $20 million in the Hydrogen Splitter technology during 2015.

This Court held in *Orme School* that (1) all justifiable inferences must be drawn in the nonmoving party's favor; (2) courts may not weigh evidence or determine questions of credibility; and (3) courts must defer to the jury on disputed facts. This Court held that the standard for summary judgment is when viewing the

evidence in the light most favorable to Petitioners as the non-moving party, reasonable people could not find in favor of Petitioners. *Orme School*, 166 Ariz. at 308-11.

STANDARD OF REVIEW

This Court reviews a grant of summary judgment de novo, viewing the evidence and reasonable inferences in the light most favorable to the party opposing the motion. *Andrews v. Blake*, 205 Ariz. 236, 239-40 (2003).

SUMMARY OF MATERIAL FACTS

1. The Evidence

In the five years from 2010 to 2015, Haver invested $63 million to license distributor territories for Petitioners' "Smart Plug" technologies.[1] All of that money was invested before: (1) any factories were built, (2) any sales occurred, (3) any product was proven to work outside the laboratory, and (4) any other contingency occurred. In a Rule 80 Declaration filed at the trial court, Haver confirmed without prevarication that: "In 2015, my funding group would have paid McAlister Technologies, LLC an annual minimum license royalty fee of $20 million."[2]

When asked about these assertions at his deposition, Haver testified they

[1] Index of Record on Appeal ("IR") 394 at 2, 5, 9-10, 12; IR 397, Depo. of Chris Haver at 197.

[2] IR 295, ¶ 5.

were "true and accurate" and that the only part of the Declaration he had an issue with years later was that the $20 million he had committed to pay was "woefully undervalued"—and that the deal would be worth $50 million per year today.[3]

2. Defendant's Attempt to Create a Fact Issue

Haver testified that Petitioners would have two revenue streams: (1) the "technology licensing plan" of $20 million per year from Haver's group;[4] and (2) a part of an "annual royalty" from sub-licensees, after the products came to market.[5]

At deposition, Respondent's counsel asked Haver how the annual royalties from sub-licensees, if there were any, would be split. Haver responded "**on the royalties side of it they were going to allow me to share in the royalties, and then I would also be the distributor for the State of Texas."**[6]

At the trial court, Respondent tried to twist this statement and argued that the phrase—"on the royalties side of it they were going to allow me to share in the royalties, and then I would also be the distributor for the State of Texas"—actually referred to the initial licensing fee of $20 million, not to royalties from sub-licensees. Respondent argued that this testimony showed the licensing fee was contingent and would therefore only be paid if there were subsequent sales.[7]

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[3] IR-449, Depo. of Chris Haver at 187-188.
[4] IR-295, ¶¶ 5 and 7.
[5] IR-295, ¶ 6.
[6] IR-363, Exh. 9, Depo. of Chris Haver at 85:7-10 (bolding added).
[7] IR-372.

Respondent could not explain why Haver, who distinguished between initial licensing fees and subsequent royalties in his Declaration,[8] would refer to the initial licensing fee as being "on the royalties side of it" in his deposition.[9]

Respondent also could not explain how "allow me to share in the royalties" could possibly refer to a "licensing" fee to be paid in the year "2015," when all parties acknowledged there were no royalties in 2015.[10] Respondent's argument got no traction and, unsurprisingly, the trial court did not adopt it.[11]

Respondent then tried to make a new argument at the Court of Appeals. Respondent argued[12] that at pages 133-134 of Haver's deposition (actually pages 86 and 200), Haver had supposedly testified that the initial licensing payment of $20 million was conditional.[13] Page 86 says nothing to support Respondent's argument. Page 200 clearly states that there would be an initial licensing payment, followed later by royalties, if there were sales.[14]

Respondent further argued that its assertion that the $20 million initial licensing payment was contingent on sales was the only reasonable interpretation of Haver's testimony and should be adopted as a matter of law.

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[8] IR-295, ¶¶ 5 to 7.

[9] IR-363, Exh. 9, Depo. of Chris Haver at 85.

[10] IR-295, ¶¶ 5 and 7; IR-449, Depo. of Chris Haver at 187-188.

[11] IR-570.

[12] Answering Brief at 38.

[13] Answering Brief at 38 (referring to IR-317, Exh. 8, Depo. of Chris Haver at 86, 200).

[14] IR-317, Exh. 8, Depo. of Chris Haver at 86, 200.

There is nothing in the record stating or implying that Haver's initial payment of $20 million was contingent, much less the required evidence that would compel a reasonable person to reach only that one conclusion.

3. The Court of Appeals' Opinion

As its sole basis for upholding summary judgment on the initial $20 million Haver licensing fee, the Court of Appeals' Memorandum Decision refers to three other potential investors and states that "O'Flynn, Karl and Burns each testified that they did not anticipate paying any royalty fees for years, until operations were underway and commercialization was achieved, and Burns testified that he had no knowledge as to when he would incur a responsibility to pay." *Mem. Dec.* ¶ 20. None of that applies to Haver, directly, indirectly, by implication, or even by inference: Haver testified his arrangement was different.

The Memorandum Decision also says the "factfinder would have to speculate either that the potential investors would have reversed their unwillingness to make immediate royalty payments or that the unknown technologies would have been successfully commercialized." *Mem. Dec.* ¶ 35. But there is no evidence, much less evidence justifying a ruling as a matter of law, that Haver was unwilling to make an immediate $20 million payment. He testified that he had the money and would make the payment in 2015, *without* pre-conditions.

On those two bases alone, the Court of Appeals upheld summary judgment

on the Haver $20 million initial payment and later denied a Motion for Reconsideration.

REASONS THE PETITION SHOULD BE GRANTED

The incorrect decision of important issues of law provides a solid basis for granting a Petition for Review. Ariz. R. Civ. App. Proc. 23(d)(3). After all, this Court is the highest court of review. It is therefore this Court's responsibility to ensure that the law is correctly applied.

This Court has repeatedly granted review when the Court of Appeals incorrectly decided important issues of law. Cases of that nature include:

- Did waiver occur in specific post-trial proceedings? *State v. Diaz*, 236 Ariz. 361, 362 ¶ 6 (2014).
- Did an equitable distribution of marital joint property require an equal distribution of the assets? *Toth v. Toth*, 190 Ariz. 218, 219 (1997).
- Did the superior court lack subject-matter jurisdiction over certain issues of Native American law? *State v. Zaman*, 190 Ariz. 208, 209 (1997).
- Did the trial court's failure to honor a Rule 42(f)(1) notice of change of judge affect its subject-matter jurisdiction? *Taliaferro v. Taliaferro*, 186 Ariz. 221, 222 (1996).
- Was there a jurisdictional bar to a judge's power to order consolidation of a probate proceeding with a civil action brought by the estate being

probated against its former personal representative? *Marvin Johnson P.C. v. Myers*, 184 Ariz. 98, 100 (1995).

None of these errors of law compare in importance or broad applicability to the error of law that happened here. A witness had a recent history of making investments of nearly $13 million per year in a technology.[15] He testified in his affidavit and deposition that he had the needed funds and was going to invest $20 million in a closely related technology. There was virtually no contradictory evidence. But the Court of Appeals upheld summary judgment on this evidence, offered no rationale or explanation why summary judgment was proper based on that evidence, and then denied a Motion for Reconsideration.

In *Orme School*, this Court held that: (1) all justifiable inferences must be drawn in the nonmoving party's favor; (2) courts may not weigh evidence or determine questions of credibility; and (3) courts must defer to the jury on disputed facts. This Court held that the standard for resolving a summary judgment is, when viewing the evidence in the light most favorable to Petitioners as the non-moving party, reasonable people could not find in favor of Petitioners. *Orme School*, 166 Ariz. at 308-11.

Furthermore, this case involved damages evidence. In Arizona, the "jury is given the most deference in weighing evidence, drawing inferences, and reaching

[15] $63 million divided by five years (2010 to 2015) is $12.6 million per year.

conclusions on questions of negligence, causation, and damages." *Id*. at 310.

A witness testified in deposition and affidavit he was going to do an act and there was unrebutted evidence he had both the capacity and the opportunity to do the act. The Court of Appeals upheld summary judgment to the effect that the witness would *not* do the act as a matter of law and offered no explanation or rationale. This is a more important issue of law with broader application than any of the issues that provided the justifications for granting the petitions for review in *Diaz*, *Toth, Zaman, Taliaferro* or *Marvin Johnson*.

CONCLUSION

Because important issues of law with broad application have been incorrectly decided, the Court should accept the Petition for Review and permit full briefing on the substantive issues in this case.

DATED this 1st day of April, 2024.

THE ENTREKIN LAW FIRM

/s/ B. Lance Entrekin, Esq.
B. Lance Entrekin
Counsel for Petitioners

Certificate of Compliance

Pursuant to Rule 23(c) of the Arizona Rules of Civil Appellate Procedure, the undersigned attorney for the Appellants hereby certifies that the foregoing Petition: (1) is, with the exception of headings and footnotes, double spaced; (2) uses Times New Roman 14-point proportionately spaced typeface for text *and* footnotes; (3) contains 2,318 words (by computer count).

Certificate of Service

Under Rule 4(c) of the Arizona Rules of Civil Appellate Procedure, the undersigned attorney for Petitioners hereby certifies that two copies of the foregoing Petition were hand delivered to the following:

- Amy Abdo, Esq., Jessica L. Post, Esq., and Brett C. Gilmore, Esq., **FENNEMORE CRAIG, P.C.**, 2394 E. Camelback Rd., Ste. 600, Phoenix, AZ 85016, (602) 916-5000, amy@fennemorelaw.com, jpost@fennemorelaw.com, bgilmore@fennemorelaw.com, Attorneys for Respondent Loeb & Loeb LLP.

/s/ B. Lance Entrekin, Esq.
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