2007

RJW Media, Inc. v. The Cit/Consumer Finance, Inc., Westland Title Insurance Agency, Inc., Lincoln title Tinsurance Agency, First Southwestern Title Agency of Utah, Inc. : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

RJW MEDIA, INC, a Texas corporation, Appellant/Cross-Appellee, vs. **THE CIT/CONSUMER FINANCE, INC.** a Delaware corporation; Appellee/Cross-Appellant, and **WESTLAND TITLE INSURANCE AGENCY, INC.** a Utah corporation, **d/b/a LINCOLN TITLE INSURANCE AGENCY,** and **FIRST SOUTHWESTERN TITLE AGENCY OF UTAH, INC.,** a Utah corporation, Appellees.	**REPLY BRIEF OF APPELLANT** Appellate Case No. 20070423 District Court Case No. 050500373 On Appeal from the Third District Court, Honorable Bruce C. Lubeck **ORAL ARGUMENT REQUESTED**

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LIST OF ALL PARTIES

Appellant/Cross-Appellee:	RJW Media, Inc.
Appellee/Cross-Appellant:	The CIT Group/Consumer Finance, Inc.
Appellee:	First Southwestern Title Agency of Utah, Inc.
Appellee:	Westland Title Agency, Inc., dba Lincoln Title Insurance Agency

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ARGUMENT

I. THE TRIAL COURT MISAPPLIRED THE LAW WHEN IT HELD THAT FIRST SOUTHWESTERN'S NON-EXPERT AFFIDAVITS SATISFIED *WYCALIS.*

RJW Media has not waived its right to appeal the trial court's elevation of non-expert affidavits to expert status and thereby invoke *Wycalis v. Guardian Title of Utah,* 780 P.2d 821 (Utah Ct. App. 1989). According to Civil Rule 56, summary judgment is appropriate only when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. UTAH R. CIV. P. 56(c); *Berenda v. Langford,* 914 P.2d 45, 50 (Utah 1996). Therefore, entitlement to summary judgment is a question of law, and the appellate court reviews "whether the trial court erred in applying governing law and whether the trial court correctly held that there were no disputed issues of material fact." *Berenda,* 914 P.2d at 50. Because entitlement to summary judgment is a question of law, the appellate court should "accord no deference to the trial court's resolution of the legal issues presented." *Id.*

It is well settled law in Utah that expert testimony is generally required to establish the standard of care required in negligence cases. *See Jensen v. IHC Hosp., Inc.,* 2003 UT 51, ¶ 96, 82 P.3d 1076 (stating that a party is "required to prove the standard of care through an expert witness who is qualified to testify about that standard."); *Wycalis,* 780 P.2d at 826 n.8 (stating that "expert testimony must ordinarily be presented to establish the standard of care."); *Nixdorf v. Hicken,* 612 P.2d 348, 352 (Utah 1980) (stating that the

general rule requires expert testimony to establish a standard of case, except where an expert opinion "could throw little light on the subject."). The only exception to the rule requiring expert testimony to establish a standard of care is where the standard is within the "common knowledge and experience of the layman," *Jensen*, 2003 UT 51 at ¶ 96, and expert testimony would do little to elucidate that standard. *Nixdorf,* 612 P.2d at 352; *see also Daniel, Mann, Johnson & Mendenhall v. Hilton Hotels Corp.,* 642 P.2d 1086, 1087 (Nev. 1982) (stating that expert testimony exception applies where an understanding of the standard involved "does not involve esoteric knowledge" of the particular profession at issue). The exception to expert testimony has been applied only where the duty breached is so obvious that it is within the common understanding of the general public; for instance, when a surgical instrument is left inside a patient's body. *See Nixdorf,* 612 at 352; *see also Schreiter v. Wasatch Manor*, 871 P.2d 570, 574-75 (Utah Ct. App. 1994) (the need to install emergency sprinkler systems in a retirement community where in-room smoking was permitted and many residents were non-ambulatory was a matter within the common understanding of laypersons); *Hilton Hotels,* 642 P.2d at 1087 (expert testimony was not required to define a standard of care where a professional surveyor misread accurate building plans).

The trustee obligations of a title officer are not within the knowledge and experience of a layperson. Accordingly, the limited "certain exceptions" to the general expert testimony rule do not apply in this case, and First Southwestern was required to

establish that it did not breach its duty under the circumstances as a matter of law. First Southwestern admits that it did not offer expert testimony as to the standard of care, and First Southwestern concedes that the Affidavits do not establish a standard of care for a trustee:

> The Affidavits do not constitute expert testimony because neither affidavit offered an opinion as to the standard of care or stated whether or not the standard of care was breached.

(Brief of Appellee at 23-24).

Despite acknowledging that it did not offer the Affidavits as designated expert testimony, First Southwestern attempts to create a middle ground by arguing that *Wycalis* and *Ortiz v. Geneva Rock Prod., Inc.,* 939 P.2d 1213 (Utah Ct. App. 1997), allow a party to factually demonstrate the standard of care in an industry by simply offering testimony by a worker in that industry, thereby eliminating the need for designated expert testimony. (Brief of Appellee at 16-17, 23). First Southwestern cites to language in a footnote in *Ortiz* that quotes *Wessel v. Erickson Landscaping Co,* 711 P.2d 250 (Utah 1985), to support its argument. (Brief of Appellee at 16-17, 23). However, the quoted language from *Wessel* actually stands for the proposition that an expert generally must work in the trade or profession about which he or she is testifying; *Wessel* does not hold that testimony by a worker or employee in an industry can substitute for designated expert testimony regarding a requisite standard of care in an industry. *See Wessel,* 711 P.2d at 253 (holding that testimony by an expert employed in another industry qualifies

as expert testimony as to standard of care only where the standard of care is identical for both professions).

Contrary to First Southwestern's argument, *Wycalis* and *Ortiz* do not eliminate the need to introduce expert testimony in order to factually establish an industry standard of care. Indeed, that proposition would virtually eliminate the need to ever designate experts pursuant to Civil Rule 26's requirements in negligence cases. Rather, *Wycalis* and *Ortiz* simply uphold the traditional standard in Utah negligence cases, and that standard requires expert testimony to establish a factual standard of care in an industry unless the standard is so universally self-evident that a layperson is already aware of the applicable standard of care. Because no expert exception applies to First Southwestern's standard of care, the non-expert Affidavits provided by First Southwestern cannot factually establish its standard of care.

Given that no qualified standard of care in the industry evidence was offered, the trial court clearly misapplied governing law in holding that First Southwestern was entitled to summary judgment under *Wycalis*. In its September 22, 2006 Ruling and Order, the trial court held that "*Wycalis* therefore left the door open for the probability that summary judgment may be appropriate where a case involved uncontroverted standard-of-the-industry evidence." (R. at 528). However, the Affidavits did not even purport to offer expert opinion as to the standard of care, and the Affidavits were not qualified as expert standard of the industry evidence creating a fixed-at-law standard of

care. (Brief of Appellee at 24). Nevertheless, the trial court elevated the Affidavits to expert status *sua sponte,* and held that no factual issues remained before the court. (R. at 528). This was an improper application of *Wycalis.*

II. CIVIL RULE 56 DOES NOT REQUIRE RJW MEDIA TO FILE COUNTER-AFFIDAVITS TO WARD OFF SUMMARY JUDGMENT IF FIRST SOUTHWESTERN MISSED THEMARK IN ITS OWN PRESENTATION OF EVIDENCE.

First Southwestern asserts that it was incumbent upon RJW Media to file affidavits opposing First Southwestern's non-expert Affidavits at summary judgment. But First Southwestern overlooks the simple truth that "it is not always required that a party proffer affidavits in opposition to a motion for summary judgment in order to avoid judgment against him." *Olwell v. Clark,* 658 P.2d 585, 586 (Utah 1982). As the Utah Supreme Court has noted,

> Rule 56(e) states specifically that a response in opposition to a motion must be supported by affidavits or other documents *only* in order to demonstrate that there is a genuine issue of fact for trial. However, "[w]here the party opposed to the motion submits no documents in opposition, the moving party may be granted summary judgment only 'if appropriate,' that is, if he is entitled to judgment as a matter of law."

Id. (emphasis in original). Accordingly, summary judgment should be entered only "if appropriate," regardless of whether a party submits affidavits in support or in opposition to a motion for summary judgment. *Id.; see also* UTAH R. CIV. P. 56(e).

Viewing First Southwestern's pleadings, the non-expert Affidavits, and all reasonable inferences to be drawn therefrom in favor of RJW Media, the question

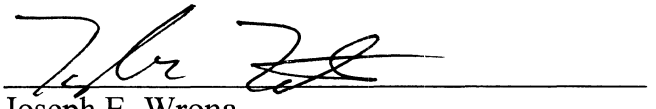
remains unanswered by the trial court as to whether First Southwestern's duty was fixed at law. The fact that First Southwestern has now admitted that it did not offer the Affidavits of Smith and Davis as expert testimony only reinforces the need for remand. (*See* Brief of Appellee at 23-24). RJW Media appeals the trial court's decision to elevate those unqualified affidavits to the level of proof necessary to support summary judgment under *Wycalis.*

CONCLUSION

For the reasons and authority cited *supra,* RJW Media requests that this Court reverse the grant of summary judgment in favor of First Southwestern and remand this case to the district court to allow RJW Media the opportunity to prove its breach of duty claim before a trier of fact in open court.

Respectfully Submitted this 28th day of November, 2007.

WRONA LAW OFFICES, P.C.



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CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of November, 2007, I caused two true and correct copies of the foregoing **REPLY BRIEF OF APPELLANT** to be delivered via first class mail, postage pre-paid, to:

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