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Leslie Scot McNair v. Daniel Farris : Reply Brief

Utah Court of Appeals

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**UTAH COURT OF APPEALS
BRIEF**

DOCKET NO. 960507-CA

LESLIE SCOT McNAIR,
Plaintiff and Appellant,
vs.
DANIEL FARRIS,
Defendant and Appellee.

Case No. 960567-CA

REPLY BRIEF OF APPELLANT

APPEAL
FROM THE THIRD JUDICIAL DISTRICT COURT
COUNTY OF SALT LAKE, STATE OF UTAH
HONORABLE HOMER F. WILKINSON, JUDGE

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SUMMARY OF ARGUMENTS

Any one of the five following bases is independently sufficient to mandate reversal of the summary judgment entered by the trial court:

1. Reversal is mandated since Daniel Farris (Farris) failed to carry his burden as the moving party described in the case of Walker Drug Co., Inc. v. La Sal Oil Co., 902 P.2d 1229 (Utah 1995). This burden was not eliminated by reason of McNair's response.

2. Reversal is mandated since Leslie Scot McNair (McNair) could rely on his pleadings in accordance with Gadd v. Olson, 685 P.2d 1041 (Utah 1984).

3. Reversal is mandated since McNair's deposition showed there existed a genuine issue of material fact.

4. Reversal is mandated since McNair had until trial to present expert testimony, no pretrial or discovery order having been entered or violated.

5. Reversal is mandated since the dismissal should not have been with prejudice.

The first of these bases is addressed in connection with Farris's burden. The middle three bases are addressed in connection with McNair's response to the motion. The last is addressed lastly and separately.

ARGUMENT

1. IN MOVING FOR SUMMARY JUDGMENT, FARRIS DID NOT CARRY, NOR WAS HE EXCUSED FROM CARRYING, HIS BURDEN OF PRESENTING EVIDENCE THAT THERE WAS NO GENUINE ISSUE REGARDING THE NO-FAULT THRESHOLD.

In Farris's Brief, he does not dispute the following two points made by McNair in his brief: (1) Farris did not supply an affidavit showing that there was no permanent disability or permanent impairment based upon objective findings; and (2) Farris's initial burden as the moving party was no less at a pretrial held shortly before trial than at any other time.

Rather, Farris argues only that his burden as the moving party was met when he "pointed out" to the court that McNair had established no evidence to show such permanent disability or impairment. Brief of Appellee (Farris Brief) at 7-8.

Federal cases would require Farris to do more than "point out" an absence of evidence adduced.

Farris cites Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) as supporting his position that he did enough when he "pointed out" to the court that McNair had not produced evidence of permanent disability. In particular, he cites language of that case holding that Rule 56 of the Federal Rules of Civil Procedure does not require the moving party to support its motion with affidavits or other similar materials negating the opponents claims. Farris Brief at 7.

However, it is well to look at what the moving party did

in the Celotex case. The case involved a wrongful death claim against a manufacturer of asbestos products. The manufacturer had pursued discovery. In answer to interrogatories, the claimant had not been able to identify any witness or any other potential source of competent evidence to show that the decedent had ever been exposed to manufacturer's asbestos products. The manufacturer moved for summary judgment on this basis.

What more could the manufacturer have done in preparation for the motion? There were no witnesses identified for it to depose. In fact, had witnesses been identified, the manufacturer would clearly have had to do more:

Petitioner Celotex does not dispute that if respondent has named a witness to support her claim, summary judgment should not be granted without Celotex somehow showing that the named witness' possible testimony raises no genuine issue of material fact. Id. 477 U.S. at 328, 106 S.Ct. at 2555 (White, J., concurring).

In the instant matter, Farris had no such difficulties in preparing for his motion. McNair himself was obviously a witness. He had been deposed, but Farris did not even refer to the deposition, let alone quote parts pertinent to the motion.

Furthermore, Farris did not have to wait to see what witnesses McNair might identify. He could have had McNair submit to a medical examination under Rule 35 of the Utah Rules of Civil Procedure (URCP).

Finally, McNair had given Farris records identifying doctors who had already attended to him. Record at (R.) 78, 157, 163. No reference to these doctors nor to their opinions was

made in Farris's motion, because no effort had been made to contact them or find out their opinions.

Farris points out that there was over one year of discovery. Farris Brief at 4. Thus Farris had over one year to gather information in order to carry his burden as the moving party. Nevertheless, he did not do so. He should have waited until trial, when McNair would have had the burden of proof.

The Celotex Court pointed out that language from the case of Adickes v. S.H. Kress & Co., 398 U.S. 144, 159, 90 S.Ct. 1598, 1609, 26 L.Ed.2d 142 (1970) should not have been construed to require such a heavy burden on the moving party. However, the Celotex opinion agreed that the facts of that case showed the moving party had not carried its burden. Celotex, supra, 477 U.S. at 325, 106 S.Ct. at 2554.

Adickes involved a civil rights action where it was part of the prima facie case to show that some action was taken "under color of law." Adickes, supra, 398 U.S. at 150, 90 S.Ct. 1604. This element could be established by showing the presence of a policeman in the store. The Court ruled that the moving party "failed to fulfill its initial burden of demonstrating what is a critical element in this aspect of the case - that there was no policeman in the store." Id., 398 U.S. at 158, 90 S.Ct. at 1609. Since this burden had not been fulfilled, there was never any requirement for the other party to come forward with an affidavit properly asserting the presence of a policeman in the store. Id., 398 U.S. at 159, 90 S.Ct. at 1609.

Just as the Celotex opinion served to stop the language of the Adickes opinion from being construed too broadly, Justice White's concurring opinion serves to keep the language of the main Celotex opinion from being construed too broadly. He did so by stating:

It is not enough to move for summary judgment without supporting the motion in any way or with a conclusory assertion that the plaintiff has no evidence to prove his case. Celotex, supra, 477 U.S. at 328, 106 S.Ct. at 2555 (White, J., concurring).

Farris berates McNair's reference to this concurring opinion on the basis of its being nonbinding.¹ However, when the Court is divided five to four, as in the Celotex case, the concurring opinion is very persuasive. It shows that it would have been decided the other way had the defendant moved "for summary judgment without supporting the motion in any way or with a conclusory assertion that the plaintiff has no evidence to prove his case."

Thus the construction Farris gives the majority opinion in Celotex is too broad, as we can see from the concurring opinion.

Furthermore, as stated in the case of Harline v. Barker, 912 P.2d 433 (Utah 1996), the Utah Supreme Court was not bound by Celotex, and specifically declined to adopt the reasoning of the majority opinion in that case.

¹ On the other hand, it is interesting to note that Farris quotes from the syllabus. Farris Brief at 6-7. The syllabus constitutes no part of the opinion of the Court. See footnote Celotex, supra, 106 S.Ct. at 2549.

The governing Utah case law clearly requires Farris to do more as the moving party than he did.

The cases which do govern the interpretation of Utah Rules of Civil Procedure as they pertain to summary judgment have been decided by Utah Supreme Court and have been extensively set forth in McNair's opening brief.

For example, in the case of Walker Drug Co., Inc. v. La Sal Oil Co., 902 P.2d 1229 (Utah 1995), the Walkers had the burden at trial to prove that damage occurred within the limitations period. However, they had no such burden in response to a motion for summary judgment, where the moving party had not produced an affidavit showing that no damage had occurred within that period.

The only time a moving party does not have to carry its initial burden is when the responding party provides evidence showing that it cannot sustain its burden at trial. This occurred in the fact situation described in the case of Harline v. Barker, 912 P.2d 433 (Utah 1996). Even though the nonmoving party had no duty to provide evidence, the court was not required to ignore the fact that the evidence voluntarily provided proved the party could not succeed at trial.

As shown below, the evidence provided by McNair showed he had a good chance of success at trial, rather than precluding the possibility of that success.

2. THERE WERE THREE INDEPENDENTLY SUFFICIENT WAYS THAT McNAIR RAISED A GENUINE ISSUE OF MATERIAL FACT REGARDING PERMANENT DISABILITY.

McNair could rely on his pleadings.

McNair alleged in his Complaint that "plaintiff was caused to and continues to suffer from ... (c) Permanent disability." R. 2.

Farris claims that this allegation in McNair's pleading was insufficient to raise an issue of fact, and thus summary judgment was proper. The basis for this claim is McNair's failure to follow the ruling in Celotex and comply with the requirement of Rule 56(e) URCP for the nonmoving party to go beyond the pleadings. Farris Brief at 8.

It is true that the moving party in Celotex had not supplied affidavits, and it is true the nonmoving party could not rely just on the pleadings. However, that moving party was relying on much more than pleadings. As explained above, that party also relied on one or more "depositions, answers to interrogatories, and admissions on file," in addition to pleadings.

Also as indicated above, whether Celotex and cases decided by the Utah Supreme Court can be reconciled or not is irrelevant. The Utah cases govern. That is why the Utah Court of Appeals referred the case of State v. Crosby, 302 Utah Adv. Rep. 36 (Utah 1996) to the Utah Supreme Court. The Court of Appeals was bound by a decision of the Utah Supreme Court

construing a rule of evidence, not by a later decision by the United States Supreme Court construing differently a comparable federal rule.

In the case of Gadd v. Olson, 685 P.2d 1041 (Utah 1984), the moving party essentially relied solely on the pleadings. In fact, the motion was for dismissal on the pleadings. That party argued that once its answer was filed, negating the affirmative allegations of the other party, the nonmoving party could no longer rely solely on pleadings. The Utah Supreme Court figured that such an argument must have been based on an interpretation of Rule 56(e) URCP. Id. at 1045.

However, the Supreme Court found Rule 56(e), properly construed, would be inapplicable where the moving party did not choose to support the motion with affidavits.

When read in light of section (b) of Rule 56, which provides that the party moving for summary judgment may do so "with or without supporting affidavits," it is clear that the section (e) requirement that a party opposing the summary judgment motion file counter-affidavits applies only when the moving party has elected to and has filed affidavits in support of the motion. If, as in this case, the moving party chooses not to or simply fails to file affidavits, section (e) is inapplicable. Id.

Thus, since Farris did not support his motion with an affidavit averring that McNair did not have a permanent disability, McNair's pleading that he did have a permanent disability was sufficient to raise or maintain that issue of fact.

Farris cites the case of Dybowski v. Hahn, 775 P.2d 445

(Utah App. 1989) in support of his position that moving without affidavits would not in any way reduce McNair's burden in responding. Farris Brief at 9. However, the Dybowski opinion does not state whether affidavits were supplied in support of the motion. Additionally, the moving party relied on depositions which clearly showed the nonmoving party could not carry her burden at trial.

On the other hand, Farris conspicuously left out McNair's testimony given in deposition concerning the extent and permanency of his disability. In addition to the pleadings, Farris relied solely on a conclusory statement that McNair did not suffer a "serious impairment of bodily function" (R. 66), a phrase derived from New York's statute, not Utah's. Compare New York Insurance Law, Section 5102(d) ("significant limitation of use of a body function or system") and Utah Code Section 31A-22-309(1)(c) ("permanent disability").

And of course, Farris did not mention in his motion, and urged the trial court to disregard, the possibility that McNair would have additional testimony at trial as to his permanent disability. R. 162.

McNair produced sufficient evidence of permanent disability.

Farris claims that the following testimony in McNair's deposition is insufficient evidence of permanent disability:

Q. At the present time, Lee, do you have -- what problems are you having with your foot?

A. Extreme soreness. I have a problem with balance. The foot is weaker now. My leg is weaker, now, in fact, from being casted. I suppose that will come back. It is still very, very sore. It was

crushed and it was crushed slowly. The tire was turning and grinding on it. It is taking a lot longer to heal. It is not one simple injury, you know. Had I tripped and snapped a bone, you know, perhaps it would be simpler.

R. 123.² Farris Brief at 11.

Farris discounts this testimony on the basis that a jury cannot find the existence of permanent disability in the absence of expert medical testimony.

Farris first supports this position by citing three cases, Henley v. Rodeway Express, 699 S.W.2d 150 (Tenn. 1985), Employer's Ins. Co. of Alabama v. Heath, 536 S.W.2d 341 (Tenn. 1976), and Zoldas v. Louise Cab Corp., 489 N.Y.S.2d 468 (A.D.1 Dept. 1985).

Two of these cases, Henley and Employer's Ins. Co., address the issue of permanent disability as it pertains to worker's compensation. It is not surprising that the law would be more stringent where the permanent disability itself justifies an award. This is in contrast with the instant matter, where a finding of permanent disability serves only to permit the presentation of evidence in support of an appropriate award.

Had the legislature meant for a finding of permanent disability to require the same proof in the context of no-fault automobile insurance law, it had a pattern to follow in the form of the law pertaining to worker's compensation. The legislature

² As indicated in Beltran v. Allan, 302 Utah Adv. Rep. 23, 26 n.1 (Utah App. 1996), excerpts of a deposition presented to the court in memoranda are part of the record, regardless of whether the deposition was admitted or published.

did not choose to follow that pattern.

Even in the context of worker's compensation, expert opinion is not required to show the extent of the disability. Employer's Ins. Co., supra.

In the third case, the Zoldas case, the moving parties fully supported their motion, marshalling all evidence showing the seriousness of the injury, and supplying the affidavit of their neurologist finding no abnormalities. Furthermore, that case bolsters its conclusion by specifically referring to the word "significant," which appears in New York's law, but not in Utah's. New York Insurance Law, Section 5102(d), Utah Code Section 31A-22-309(1)(c).

However, even under New York law, the threshold of a "serious injury" may be proved at trial without expert testimony.

An example of this is found in the case of D'Avolio v. Dictaphone Corp., 822 F.2d 5 (2nd Cir. 1987). In that case, no expert testimony was used. Rather, the plaintiffs used medical records and their own testimony. This sufficed to show the existence of a "serious injury" under New York law since the evidence proved there was a medically determined injury which substantially prevented performance of customary daily activities.

Farris relies heavily on the case of Marino v. Rosen, 561 N.Y.S.2d 280 (A.D.2 Dept. 1990). Farris Brief at 12. That case also turned on whether there was a "serious injury." Id. at 282. The "speculative" medical testimony had to do with whether

there had ever been a bone fracture in his leg. Furthermore, the injured party testified that he was fully engaged in a number of sports activities.

In contrast, Farris has clearly broken more than one of McNair's bones. There is no testimony that McNair has ever again been able to use his foot as before. To the contrary, McNair's testimony is not only that his foot is extremely sore, but that it is weaker and causes him a problem with balance. R. 123. Finally, unlike in the Marino case, McNair has never had a chance to put on evidence at trial.

Farris states that the criteria applicable to his motion are the same as those applicable to a motion for a directed verdict, citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Farris Brief at 5. This may well be true, once the moving party has met its initial burden, a matter which was assumed and was therefore not an issue in Anderson. Id., 477 U.S. at 250 n.4, 106 S.Ct. at 2511 n.4.

As stated in Anderson, "If reasonable minds could differ as to the import of the evidence, however, a verdict should not be directed." Id., 477 U.S. at 250-251, 106 S.Ct. at 2511.

This same criterion was accepted in the case of Parker v. Nakaoka, 722 P.2d 1028 (Hawaii 1986):

We hold that whether Appellee met the threshold requirement is for the jury to determine inasmuch as the facts relating to Appellee's injury are in dispute and reasonable minds could differ on whether Appellee sustained an injury which consists, in whole or in part, in a significant permanent loss of use of a part or function of her body. Id. 722 P.2d at 1031.

The Utah Supreme Court discussed criteria for a directed verdict in the case of DeBry v. Cascade Enterprises, 879 P.2d 1353, 1359 (Utah 1994):

A directed verdict and a judgment n.o.v. are justified only if, after looking at the evidence and all reasonable inferences in a light most favorable to the nonmoving party, "the trial court concludes that there is no competent evidence which would support a verdict in his favor." [Citations.] A motion should be denied "[i]f reasonable persons could reach differing conclusions on the issue in controversy."

McNair stated that his foot was weaker and extremely sore, and that it was causing him a problem with balance. All of the reasonable favorable inferences that could be drawn from that statement had to be considered. Certainly a reasonable person hearing this testimony one year after the injury might conclude that McNair was suffering from a permanent disability.

Anticipated expert testimony at trial could not be precluded.

On pages 12 and 13 of his brief, Farris sets forth two bases for his assertion that McNair was wrong in claiming he had until the time of trial, rather than just until the time of pretrial, to prove compliance with the no-fault threshold.

First, McNair's counsel twice filed a certification of readiness for trial.

Second, McNair did not supply additional evidence when moving for a new trial, although the vacated trial date had passed.

Farris supports neither of these bases with case law, nor by reference to any applicable rule.

There is no rule or case law requiring that a party come forward with evidence before trial because that party filed a certification of readiness for trial. Although a party may feel that it is ready for trial, and certifies as much, it is certainly not out of the ordinary for that party to continue its preparation. In the course of that preparation it is also not uncommon for a party to realize that additional evidence must be gathered for presentation at trial.

Only a properly supported motion for summary judgment requires the opposing party to supply, before trial, affidavits of witnesses pertaining to the issues adequately addressed in the motion. Such affidavits are not required at pretrial merely because the party opposing the motion has certified its readiness for trial.

Naturally, if it is clear at pretrial that the necessary evidence cannot be gathered for trial, a summary disposition of some sort probably will be appropriate.

However, such was not the factual scenario in the instant matter. McNair's plan was to work to obtain additional pertinent evidence that very day following pretrial. R. 157, 162.

As to Farris's second reason regarding the passage of the date originally set for trial, a trial date is irrelevant if the trial is stricken. McNair has never been permitted to put on evidence at trial. McNair cannot be required to supply affidavits of witnesses pertaining to all issues on which he

bears the burden of proof merely because it is after the date on which the trial had originally been set.

It may be true that a motion for a new trial based on newly discovered evidence would require support in the form of affidavits setting forth that additional evidence. However, a motion for a new trial based on an error of law would need no more evidentiary support than that which was before the court when the original ruling was made.

Thus neither McNair's certifications of readiness for trial nor the passage of the date on which the trial had originally been set would justify precluding McNair's expert witnesses from testifying at trial. As indicated in the cases of Dugan v. Jones, 615 P.2d 1239 (Utah 1980) and Berrett v. Denver and Rio Grande W. R., 830 P.2d 291 (Utah App. 1992), cert. denied, 836 P.2d 1383 (Utah 1992), a trial court generally only may exclude the testimony of an expert witness if the party seeking to call that witness has violated a court order.

As stated in the case of Pifcho v. Brewer, 77 F.R.D. 356 (M.D. Pa. 1977), pretrial may not be a substitute for trial. Only if there clearly will be no material issues of fact to be resolved at trial may judgment be ordered beforehand.

In the instant matter, not only was McNair planning to testify at trial, but every effort was being made to have expert witnesses present at trial, which witnesses were expected to testify regarding the fact of permanent disability as set forth in McNair's complaint. Thus the result of that trial, and

particularly the finding of a reasonable jury on that issue, was in no way predetermined.

3. A DISMISSAL AT PRETRIAL FOR FAILURE TO MEET THE THRESHOLD REQUIREMENTS SHOULD NOT BE WITH PREJUDICE.

Farris cites the case of Jepson v. State Dept. of Corrections, 846 P.2d 485 (Utah App. 1993) and claims it supports his position that the dismissal of McNair's cause of action was appropriately with prejudice. Farris's rationale is that the Jepson case stands for the proposition that the time for proving a case should not be extended. Farris Brief at 14.

It is true the Jepson case did not allow a claimant to wait to file an action until the no-fault threshold had been reached, regardless of the expiration of the limitations period as measured from the time the injury occurred. But the opinion acknowledged that the claimant would have more time after filing to reach the threshold, namely, until the trial. As indicated above, McNair was precluded from going to trial, that is, trial was never held.

Furthermore, even if McNair had no chance of showing compliance with the no-fault threshold at trial, and dismissal was justified, a dismissal without prejudice would only extend the time for filing another year or until the end of the original limitations period. This would not "introduce considerable uncertainty into the law, as well as unduly prolonged controversy over many cases." Farris Brief at 14.

As indicated, the Jepson case, part of which that quote

paraphrased, dealt with allowing an injured party to wait until the threshold requirements were met before filing an action. Clearly that could take an indeterminate number of years. That would indeed be "introducing considerable uncertainty into the law as well as unduly prolonging controversy over such cases." Jepson, supra, 846 P.2d at 488, quoting Carter v. Cross, 373 So.2d 81, 83 (Fla. App. 1979), cert. denied, 385 So.2d 755 (Fla. 1980).

Since it would not lead to the horrors described by Farris, any pretrial dismissal for failure to meet the no-fault threshold should be without prejudice, especially where it appears that the threshold may be met before the expiration of the appropriate limitation period.

This would comport with the general rule that courts favor deciding cases upon the merits.

Dismissal with prejudice ... is a harsh and permanent remedy when it precludes a presentation of a plaintiff's claims on their merits. Our rules of procedure are intended to encourage the adjudication of disputes on their merits. Bonneville Tower v. Thompson Michie Assoc., 728 P.2d 1017, 1020 (Utah 1986).

CONCLUSION

Although each of the five following bases is sufficient to mandate reversal of the summary judgment, all of them apply to this case:

1. Farris failed to carry his burden as the moving party in his motion for summary judgment. This burden was not met by McNair's response and thus the motion could not be

granted.

2. Since Farris chose not to rely upon affidavits, and in fact did not rely upon anything other than pleadings and conclusory statements, McNair's pleadings were sufficient to preclude summary judgment.

3. McNair's deposition showed there existed a genuine issue of material fact regarding permanent disability.

4. Since no pretrial or discovery order was entered or violated, McNair had until trial to present the expert testimony he anticipated.


5. Dismissal should not have been with prejudice since the merits were not reached.

Therefore, for each and all of the foregoing reasons, this Court should reverse the Order Granting Defendant's Motion for Summary Judgment, or in the alternative, it should reverse the Order Denying Plaintiff's Motion for a New Trial. The case should then be remanded for trial. In the alternative, the dismissal should be ruled to be without prejudice.

REQUEST FOR ORAL ARGUMENT

McNair does not object to Farris's request for oral argument, and in fact, joins in respectfully requesting that oral argument be had in this case.

DATED this 21st day of November, 1996.


 LYNN P. HEWARD
 Attorney for Plaintiff and Appellant

MAILING CERTIFICATE

I hereby certify that two copies of the foregoing Brief were mailed to Joseph J. Joyce, 9 Exchange Place #600, Salt Lake City, UT 84111 on this 22nd day of November, 1996.

Lynn Renard