

1996

Leslie Scot McNair v. Daniel Farris : Brief of Appellee

Utah Court of Appeals

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IN THE COURT OF APPEALS FOR THE STATE OF UTAH

LESLIE SCOT McNAIR,

Plaintiff/Appellant,

vs.

DANIEL FARRIS,

Defendant/Appellee,

)
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)
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)

Case No. 960567-CA

Priority No. 15

BRIEF OF APPELLEE

Appeal from the Third Judicial District Court of
Salt Lake County, State of Utah
Honorable Homer F. Wilkinson, District Judge, Presiding

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ORAL ARGUMENT REQUESTED

IN THE COURT OF APPEALS FOR THE STATE OF UTAH

LESLIE SCOT McNAIR,)	
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Plaintiff/Appellant,)	Case No. 960567-CA
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vs.)	Priority No. 15
)	
DANIEL FARRIS,)	
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Defendant/Appellee,)	

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JURISDICTION STATEMENT AND NATURE OF THE PROCEEDINGS

This appeal is from a final Order of the Third Judicial District Court, Honorable Homer F. Wilkinson, dated December 29, 1995, granting summary judgment to defendant Daniel Farris. Pursuant to Utah Code Ann. § 78-2a-3(2) (1994), this court has jurisdiction over matters that have been transferred from the Supreme Court of Utah.

ISSUES ON APPEAL

The pertinent issue on appeal is whether the district court correctly granted summary judgment dismissing plaintiff's claim with prejudice, as plaintiff failed to meet the threshold requirements under the Utah No-Fault Act, Utah Code Ann. § 31A-22-309(1).

This court should review the district court's findings for correctness. Bergen v. Travelers Ins. Co., 776 P.2d 659, 662 (Utah Ct. App. 1989); see State Farm Fire and Cas. Co. v. Geary, 869 P.2d 952 (Utah App. 1994).

DETERMINATIVE AUTHORITY

The interpretation of the following constitutional provisions, statutes, ordinances, rules, and regulations is determinative in this matter:

Utah Code Ann. § 31A-22-309(1):

- (1) A person who has or is required to have direct benefit coverage under a policy which includes personal injury protection may not maintain a cause of action for general damages arising out of personal injuries alleged to have been caused by an automobile accident, except where the person has sustained one or more of the following:
 - (a) Death,
 - (b) Dismemberment,
 - (c) Permanent disability or permanent impairment based upon objective findings,

- (d) Permanent disfigurement, or
- (e) Medical expenses to a person in excess of \$3,000.

Rule 56 of the Utah Rules of Civil Procedure:

Rule 56. Summary Judgment.

- (b) For defending party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.
- (c) Motion and proceedings thereon. The motion shall be served at least ten days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

STATEMENT OF THE CASE

On October 10, 1994, an automobile accident occurred at 845 East 700 South, Salt Lake City, Utah, where plaintiff/appellant Leslie Scot McNair's ("McNair") foot was run over by an automobile. On October 17, 1994, McNair filed a complaint against defendant/appellee Daniel Farris ("Farris") for injuries which McNair had allegedly sustained. (R. 1-4) McNair sought coverage from Farris' personal injury protection ("PIP") carrier under the Utah No-Fault Act, Utah Code Ann. § 31A-22-309(1) (Utah No-Fault Act). On November 17, 1995, Farris filed a motion for summary judgment based on McNair's failure to meet the threshold requirements for maintaining a cause of action under § 31A-22-309(1). (R. 61-62) On December 29, 1995, the Third Judicial District Court granted Farris' motion. (R. 102-103) On January 8, 1996,

McNair filed a motion for new trial and a request to set aside the judgment. (R. 105-106)

McNair's motion was denied on March 11, 1996. (R. 153-155)

STATEMENT OF FACTS

On October 10, 1994, McNair was involved in an accident where his foot was run over by an automobile. On October 17, 1994, McNair filed a complaint against Farris for his alleged injuries, seeking coverage from Farris' PIP carrier under the Utah No-Fault Act. (R. 1-4)

On or about March 15, 1995, McNair filed a certification of readiness for trial. (R. 25-26) Following the filing of an objection of certification of readiness for trial by counsel for the defendant, plaintiff's counsel again filed a second certification of readiness for trial on or about September 13, 1995. (R. 29-30, 57, 58) Thereafter, on or about September 26, 1995, this matter was set for jury trial to begin on December 11, 1995. On or about November 17, 1995, Farris filed his motion for summary judgment, alleging that McNair had failed to meet the threshold requirements of the Utah No-Fault Act. (R. 61-62) At the time Farris made his motion for summary judgment, this matter had been pending for over one year and McNair had not incurred any additional medical treatment since November of 1994.

At the time Farris filed his summary judgment motion, McNair failed to present any evidence whatsoever that he had sustained permanent injuries. McNair had over one year to have such a determination made by competent members of the medical profession. However, McNair failed to have any such examinations conducted by the time of trial, and had no evidence whatsoever to establish that he had met either the monetary or disability requirements of the Utah No-Fault Act. Accordingly, the court granted Farris' motion for summary judgment and dismissed the case with prejudice. (R. 99-101)

SUMMARY OF ARGUMENTS

The district court had sufficient evidence to support a summary judgment ruling in favor of Daniel Farris. After over one year of discovery, and after McNair had certified readiness for trial, Farris moved for summary judgment based on McNair's failure to meet the Utah No-fault threshold requirements. On the eve of trial, McNair had incurred only \$1,222.20 in medical expenses and had in no way demonstrated that he had sustained a permanent injury. In Farris' motion for summary judgment, Farris brought these facts to the attention of the court. Accordingly, the burden of proof then shifted to McNair in order to raise an issue of fact that the threshold requirements had been met. However, McNair failed to meet this burden and instead relied on the bare allegations of his pleadings. Accordingly, summary judgment was appropriately granted by the Third Judicial District Court.

In addition to granting Farris' summary judgment, the court saw fit to dismiss McNair's claim with prejudice. The court committed no error in doing so, as it followed the purposes of the Utah No-fault statute and avoided uncertainty in the law and undue delay in the settlement of this controversy.

ARGUMENT

I. SUFFICIENT EVIDENCE SUPPORTS A SUMMARY JUDGMENT IN FAVOR OF DANIEL FARRIS.

Under Rule 56 of the Utah Rules of Civil Procedure, summary judgment is appropriate when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show there is no genuine issues as to any material fact." Utah Rules of Civil Procedure, 56 (1995).

In 1986, the United States Supreme Court decided three summary judgment cases, Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574 (1986); Anderson, et al. v. Liberty

Lobby Inc., et al., 477 U.S. 232 (1986); and Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

In each of these cases, the Supreme Court upheld the district court's summary judgment ruling by reversing the Court of Appeals. By doing so, the Supreme Court sent a clear message to trial courts that they should not hesitate to grant summary judgment when there is no real issue of material fact.

In Celotex Corp. v. Catrett, supra, the Supreme Court emphasized the importance of summary judgment by declaring that "summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the federal rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" Celotex, 477 U.S. at 327. The Supreme Court upheld the district court's summary judgment ruling in Celotex, and discussed the meaning of Rule 56 as follows:

In our view, the clear language of Rule 56 mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to a material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.

Id. at 322-23.

In Anderson, supra, the Supreme Court stated that the standard for determining the sufficiency of the evidence is the same as that applied in deciding a motion for directed verdict, i.e., whether the evidence presented in support of a claim is sufficient to support a reasonable jury verdict in favor of the claimant. Sufficiency requires more than a "scintilla" of evidence and more than an argument that a jury might disbelieve the other party's testimony. Anderson, 477 U.S. at 251-52. If a party asserting a claim does not make this "sufficient showing," there

is simply no reason to have a fact-finder determine any issue, and the motion must be granted.

Celotex, 477 U.S. at 322-23.

In Celotex, supra, the plaintiff commenced a lawsuit alleging that the death of her husband, Lewis H. Catrett, resulted from his exposure to products containing asbestos manufactured or distributed by fourteen named corporations. Plaintiff's complaint sounded in negligence, breach of warranty, and strict liability. Fourteen defendants, including Celotex Corp., filed motions for summary judgment. Celotex's motion, which was the first filed, argued that summary judgment was proper because the plaintiff had "failed to produce evidence that any Celotex product was the proximate cause of the injuries alleged" In particular, Celotex noted that the plaintiff had failed to identify, in answering interrogatories specifically requesting such information, any witnesses who could testify about the decedent's exposure to Celotex's asbestos products. The district court granted all of the motions for summary judgment filed by the various defendants. The court explained that it granted Celotex's summary judgment as there was no showing that the plaintiff was exposed to Celotex's product. Plaintiff appealed and a divided panel of the District of Columbia Circuit reversed. However, on appeal, the Supreme Court of the United States reversed, finding that Celotex was in fact entitled to judgment in its favor as a matter of law. Id.

In its decision, the United States Supreme Court specifically addressed the burden which moving and nonmoving parties bear upon a motion for summary judgment. The court specifically held the following:

- a. The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be

"no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof.

- b. There is no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials negating the opponent's claim. On the contrary, Rule 56(c) which refers to the affidavits, "if any," suggests the absence of such a requirement, then Rules 56a and b provide that claimants and defending parties may move for summary judgment "with or without supporting affidavits." Rule 56(e) which relates to the form and use of affidavits and other materials, does not require that the moving party's motion always be supported by affidavits to show initially the absence of a genuine issue for trial.

Id. at 318 (emphasis added).

The principles articulated in Celotex have particular application in the instant case. As will be set forth in the following points, McNair has failed to sufficiently establish that he has met the threshold requirements under the Utah No-Fault Act. McNair clearly had adequate time for discovery, as Farris' motion for summary judgment was filed November 17, 1995--over a year after the original complaint was filed. Additionally, McNair filed two certifications of readiness for trial. Nevertheless, at no time has McNair produced any evidence that he has met the threshold requirements. In fact, after over one year for discovery, McNair has been unable to produce any evidence whatsoever which creates a genuine issue of material fact.

In Farris' motion for summary judgment, he pointed out to the district court that McNair had failed to meet both the monetary and disability requirements under the Utah No-Fault Act. McNair had sustained only \$1,222.20 in medical expenses, and had established no evidence whatsoever that he had sustained a permanent disability. Contrary to McNair's assertions in his

appellate brief, the burden then shifted to McNair to demonstrate that he had in fact met the threshold requirements, or that a material fact existed whether or not such requirements had been met. Instead, however, McNair rested on his bare pleadings, as the only evidence that such requirements had been met.

In his appellate brief, McNair claims that he "was entitled to rely upon the complaint to raise an issue of fact." (Appellant's Brief, p. 22.) Such an assertion is contrary to the case law clearly set forth by the United States Supreme Court in Celotex. In that case, the Supreme Court stated:

In cases like the instant one, where the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the "pleadings, depositions, answers to interrogatories, and admissions on file." Such a motion, whether or not accompanied by affidavits, will be "made and supported as provided in this rule," and Rule 56e therefore requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the "depositions, answers to interrogatories, and admissions on file," designate "specific facts showing that there is a genuine issue for trial."

Id. at 324 (emphasis added).

According to the language in Celotex, the burden was on McNair to demonstrate an issue of fact whether or not he had met the no-fault threshold requirements. McNair failed to do so, and accordingly, summary judgment was proper.

In McNair's appellate brief, he claims that the burden never shifted, as Farris never filed an affidavit affirming that McNair did not suffer permanent disability or permanent impairment. (See Brief of Appellant, p. 16-18.) In support of this assertion, McNair has cited the Celotex case. Unfortunately, however, the passages which McNair has cited from Celotex do not come from the Supreme Court's holding. Instead, the passages come from nonbinding concurring and dissenting opinions. Unlike McNair's claims, the Supreme Court of the United States has

clearly held in its official ruling in Celotex that "there is no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials negating the opponent's claim." Id. at 318 (emphasis added).

Similarly, although Utah courts have not directly ruled on the issue, a plain reading of Rule 56 demonstrates that a defending party may move, "with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof." Rule 56(b), U.R.C.P.; see also Gadd v. Olson, 685 P.2d 1041 (Utah 1984); Dybowski v. Hahn, 775 P.2d 445 (Utah App. 1989).

Accordingly, Farris' summary judgment motion, where it pointed out to the court specifically that McNair failed to meet the threshold requirements of the Utah No-Fault Act, shifted the burden to McNair to prove otherwise. Because McNair did nothing but rely on his pleadings, and set forth no evidence in support of his position, summary judgment was appropriately granted.

A. McNair Failed to Meet Statutory Threshold Requirements for Medical Expenses.

McNair has failed to meet the threshold requirements set forth in § 31A-22-309 of the Utah Code. Under § 31A-22-309:

- (1) A person who has or is required to have direct benefit coverage under a policy which includes personal injury protection may not maintain a cause of action for general damages arising out of personal injuries alleged to have been caused by an automobile accident, except where the person has sustained one or more of the following:
 - (a) Death,
 - (b) Dismemberment,
 - (c) Permanent disability or permanent impairment based upon objective findings,

- (d) Permanent disfigurement, or
- (e) Medical expenses to a person in excess of \$3,000.

Although Utah courts have not directly dealt with the issue, other jurisdictions addressing the matter have held that summary judgment is appropriate for determining whether or not an individual has met these threshold requirements for no-fault coverage. Zoldas v. Louise Cab Corp., 489 N.Y.S.2d 468 (1985). In Zoldas, a plaintiff was a passenger in a taxi cab which collided with another motor vehicle. The plaintiff sustained some injuries, but failed to meet the no-fault threshold requirements. Defendants moved for summary judgment due to plaintiff's failure to meet no-fault threshold requirements and for failure to establish that plaintiff had suffered from a serious injury. The court found for the defendants and held that the plaintiff could not demonstrate that he suffered "a serious injury." Accordingly, the court granted defendant's motion for summary judgment and dismissed the complaint. Id. at 470. In support of its holding, the court discussed the purpose for the no-fault threshold requirement, stating:

In enacting the no-fault law, the legislature modified the traditional tort precepts for disposing of automobile accident claims and instituted a plan for compensation victims without regard to fault. The new legislation was intended to correct certain infirmities under the common law system, and was designed to assure that, without regard to fault, automobile accident victims will be promptly and fully compensated at least for their basic economic loss.

In order to achieve this objective, and at the same time, to restrict the escalating costs of automobile insurance, the right of an injured person to sue for his injuries was limited to those who suffered serious injury. There can be little doubt that the purpose of enacting an objective verbal definition of serious injury was to significantly reduce the number of automobile personal injury accident cases litigated in the courts, and thereby help maintain the no-fault premium. The verbal definition provided in the legislation placed a reasonable restriction and further limitation on the right to sue, in order to preserve the valuable benefits of no-fault, at an affordable cost.

Thus, except in unusual circumstances, not here present, a person may not sue for personal injuries arising out of negligence in the use or operation of a motor vehicle except in the case of a serious injury.

Id. (emphasis added) (citations omitted).

In order for an individual to recover under the Utah No-Fault Act, the individual must incur a threshold requirements of \$3,000 in medical expenses, or he must suffer a permanent disability. In the present matter, there is no factual dispute regarding the extent of McNair's injuries. The controversy is not what injuries were sustained, but whether such injuries meet the requisite legal threshold necessary under U.C.A. § 31A-22-309. Under the Code, McNair must sustain medical expenses in excess of \$3,000 to recover. However, McNair has only incurred medical expenses totaling \$1,222.20. There is no issue as to any material fact regarding the amount of medical expenses which McNair has incurred. Accordingly, Farris is entitled to judgment as a matter of law.

B. McNair Has Presented No Evidence to Demonstrate Serious Impairment as Required Under the Utah No-Fault Statute.

McNair claims that although he has only sustained \$1,222.20 in medical expenses, threshold requirements under the No-Fault Act have been met, as he has suffered a "permanent disability." In support of this assertion, however, McNair has failed to bring forth any credible evidence. McNair alleges that he is entitled to rely upon his pleadings as evidence that he suffered a permanent disability. (See Appellant's Brief, pp. 21-22.) In addition, McNair claims that because he testified in his deposition that his foot was sore, that such is sufficient to establish a permanent disability. McNair is severely mistaken.

Although Utah courts have not directly addressed this issue, numerous cases in other jurisdictions have specifically held that expert medical testimony is required to establish the

permanency of an injury. See 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); Zoldas v. Louise Cab Corp., 489 N.Y.S.2d 468 (1985).

For example, in Merino v. Rosen, 561 N.Y.S.2d 280 (1990), the plaintiff commenced an action to recover damages for injuries alleged to have been sustained in an automobile accident. The action proceeded to a jury trial and the Supreme Court dismissed the complaint upon the ground that the plaintiff had failed, as a matter of law, to prove that he had suffered a serious injury within the meaning of New York Insurance Law, § 5102(d). At trial, the plaintiff had medical experts testify as to his disability. The court found, however, that the medical testimony was speculative at best, and was contradicted by other competent medical proof. The plaintiff argued, however, that his subjective complaints of continuing pain were sufficient to establish a serious injury. The court disagreed, however, and found that such subjective complaints of continuing pain are not sufficient to establish a serious injury for purposes of overcoming the no-fault threshold requirements. Accordingly, the Court of Appeals affirmed the Supreme Court's decision dismissing the complaint at the close of plaintiff's case. Id.

In his brief, McNair claims that because he testified in his deposition that he experienced continuing pain in his foot, that such was sufficient to establish permanent disability. At no time has McNair supplied any medical testimony to support his assertions. As is demonstrated by the foregoing cases, such medical testimony is necessary to establish a permanent disability. Because McNair failed to do so, Farris was entitled to summary judgment in his favor.

As a final argument, McNair claims that he "never had a duty to produce evidence of a permanent injury." (Appellant's Brief, p. 21.) McNair claims that he had until the time of trial, and not until the time of pre-trial, to prove compliance with the no-fault threshold requirements.

Once again, however, McNair's arguments are flawed. While McNair is correct in the fact that he had until the time of trial to prove compliance with the no-fault threshold requirements, McNair forgets that he certified his readiness for trial on not only one, but on two occasions.

On or about March 15, 1995, McNair's counsel filed a certification of readiness for trial. (R. 25-26) Following the filing of an objection of certification of readiness for trial by Farris' counsel, McNair's counsel again filed a second certification of readiness for trial on or about September 13, 1995. (R. 57-58) Thereafter, on or about September 26, 1995, the underlying matter was set for a jury trial to begin on December 11, 1995. On or about November 17, 1995, Farris filed his motion for summary judgment, alleging that McNair had failed to meet the threshold requirements of the Utah No-Fault Act. (R. 61-62) At the time Farris made his motion for summary judgment, the matter had been pending for over one year, and McNair had not incurred any additional medical treatment since November of 1994.

After summary judgment was granted in favor of Farris, McNair filed his motion for new trial. (R. 105-106) In said motion, McNair suggested that additional examinations by physicians would reveal a determination of permanent injury. At the time McNair filed his motion for new trial, the December 11, 1995 jury trial date had come and gone. Nevertheless, McNair had still failed to bring forth any evidence whatsoever that he had sustained a permanent impairment. McNair had over a year to enlist the help of medical providers to establish that he had suffered a permanent impairment. However, McNair failed to do so. At the time of trial, and at the time of McNair's post-trial motions, McNair had failed to undergo such medical examinations, and had no evidence whatsoever to establish that he had met either the monetary or disability requirements of the Utah No-Fault Act. Accordingly, the district court was justified in granting Farris' motion for summary judgment.

II. THE COURT'S DISMISSAL OF THE CASE WITH PREJUDICE WAS PROPER.

As a last resort, McNair claims that the district court was in error for dismissing his case with prejudice. McNair is once again mistaken, as the court was completely justified in making such a finding.

In Jeppson v. State Dept. of Corrections, 846 P.2d 485 (Utah App. 1993), the plaintiff filed a claim against the state to recover for personal injuries arising from a collision involving a state vehicle. The question arose as to the time a cause of action accrues under the Utah No-Fault Act, U.C.A. § 31A-22-309. The court held that a plaintiff's cause of action accrues at the time of the accident. The court noted that as long as the plaintiff meets the threshold requirement by the time of trial, his claim will not be dismissed. However, a plaintiff is not entitled to extend the time for meeting the threshold requirements. If an individual was allowed to do so, it would introduce considerable uncertainty into the law, as well as unduly prolonged controversy over many cases. Id. at 488.

The court in Jeppson refused to extend the time for filing a claim under the No-Fault Act until the plaintiff met the threshold requirements. By analogy, once a claim has been filed, and the trial date has passed, the plaintiff should not be allowed to further extend the time period for entering medical expenses. If the court were to have dismissed McNair's claims without prejudice, such would have been the case. If McNair was allowed more time to incur medical expenses, he would in essence be allowed to consider future medical expenses in order to meet threshold requirements. Such a consideration is unwarranted under the Utah No-Fault Act and was properly avoided by the district court.

CONCLUSION

McNair had a duty to bring forth evidence that he had met the threshold requirements under the Utah No-Fault Act. After over a year of discovery, Farris brought a motion for summary judgment before the district court, pointing out that McNair had failed to meet both the monetary and disability requirements under the No-Fault Act. Under the explicit holding of the United States Supreme Court in Celotex, the burden then shifted to McNair to raise a material issue of fact that he had met the threshold requirements. However, instead of responding to Farris' motion, McNair rested on the allegations made in his complaint. McNair admitted the fact that he had not incurred the \$3,000 amount to meet the no-fault threshold, yet failed to provide any evidence whatsoever that he sustained a permanent disability. In response to Farris' summary judgment, as well as in his motion for new trial, McNair made no attempt to create an issue of fact. As such, the trial court correctly granted Farris' motion for summary judgment. Accordingly, Farris respectfully requests that the trial court's summary judgment and dismissal with prejudice be affirmed.

REQUEST FOR ORAL ARGUMENT

Defendant/appellee Farris respectfully requests oral argument be heard in the present case.

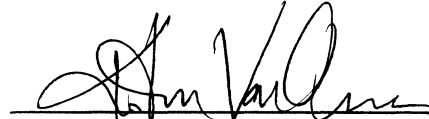
ADDENDUM

No addendum is required.

DATED this 21st day of October, 1996.

Respectfully submitted,

STRONG & HANNI



Joseph J. Joyce

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209267nh

MAILING CERTIFICATE

I hereby certify that two true and correct copies of the foregoing document were mailed,
first-class postage prepaid, this 21st day of October, 1996, to the following:

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