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Larry Ray Reeves v. Geigy Pharmaceutical, Inc., a division of Ciba-Geigy Corporation, a New York corporation; Eli Lilly and Company, an Indiana corporation; and Gerald R. Moress, M.D. : Brief of Appellant

Utah Court of Appeals

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BRIEF

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CKET NO. 880287-CA

IN THE SUPREME COURT OF THE STATE OF UTAH

LARRY RAY REEVES,

Plaintiff-Appellant,

v.

GEIGY PHARMACEUTICAL, INC.,
a division of CIBA-GEIGY
CORPORATION, a New York
corporation; ELI LILLY
& COMPANY, an Indiana corpora-
tion; and GERALD R. MORESS, M.D.,

Defendants-Respondents.

* * * * *

APPELLANT'S BRIEF

* * * *

On Appeal From the Third Judicial District Court
Of Salt Lake County, State of Utah
The Honorable J. Dennis Frederick Presiding

* * * *

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FILED
FEB 10 1987

Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

LARRY RAY REEVES,

*

Plaintiff-Appellant,

*

v.

*

GEIGY PHARMACEUTICAL, INC.,
a division of CIBA-GEIGY
CORPORATION, a New York
corporation; ELI LILLY
& COMPANY, an Indiana corpora-
tion; and GERALD R. MORESS, M.D.,

*

Case No. 860409

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Defendants-Respondents.

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APPELLANT'S BRIEF

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IDENTITY OF PARTIES

Appellant: Larry Ray Reeves

Respondents: Geigy Pharmaceutical, Inc., a New York Corporation;

Eli Lilly & Co., an Indiana corporation;

Gerald R. Moress, M.D.

STATEMENT OF ISSUES PRESENTED ON APPEAL

Did the lower court err in denying appellant Larry Ray Reeves the opportunity to conduct further discovery pursuant to Motion and an Affidavit submitted under Rule 56(f), U.R.C.P., prior to granting respondents' Motions for Summary Judgment, thereby violating legal principles of summary judgment and depriving appellant Reeves of his constitutional right to legal redress of his injuries?

STATEMENT OF THE CASE

Appellant Larry Ray Reeves seeks review of a ruling from the Third Judicial District Court, Salt Lake County, State of Utah, Judge J. Dennis Frederick presiding, granting respondents' Motions for Summary Judgment as to all claims asserted by appellant in a complex products strict liability and medical malpractice action.

STATEMENT OF FACTS

This is a complex products strict liability and medical malpractice action wherein appellant Larry Ray Reeves seeks damages from respondents CIBA-Geigy Inc., manufacturer of the drug Tegretol, Eli Lilly & Co., manufacturer of the drug Phenobarbital, and Dr. Gerald E. Moress, a physician who prescribed and administered these drugs to appellant as treatment for a seizure disorder, for injuries appellant Reeves suffered from these drugs, including third-degree, full-thickness chemical burns over 66.6% of his skin; damage to organs, tissue and muscles; severe, extensive and permanent scarring and disfigurement; extreme physical and mental pain and anguish; loss of earnings and earning capacity; repeated hospitalizations and medical expenses to date of approximately \$220,000.00.

Specifically, appellant Reeves claims that respondents Geigy and Lilly are strictly liable and/or negligent in their design, testing, manufacturing, marketing, distribution, labeling and promotion of the drugs Tegretol and Phenobarbital, particularly in failing to provide adequate warnings of the adverse side effects suffered by appellant Reeves, thereby causing him to suffer the injuries described above.

Appellant Reeves also claims that respondent Dr. Moress is strictly liable and/or negligent in prescribing, marketing, distributing and promoting the use of Tegretol and/or Phenobar-

bital to him for treatment of his seizure disorder, failing to warn appellant Reeves of the possible adverse side effects from the use of Tegretol and/or Phenobarbital, including the side effects suffered by appellant Reeves, failing to obtain appellant's informed consent to the administration of these drugs, and in failing to adequately monitor his use of these drugs, thereby causing the alleged injuries to appellant Reeves.

On February 8, 1984, appellant Reeves filed his Complaint and demand for jury trial. (R. 2-23) Respondent Lilly filed a motion to dismiss based upon lack of jurisdiction (R. 40-49), appellant responded (R. 49-53), and Respondent Lilly finally stipulated to jurisdiction. (R. 70-72)

Respondent Dr. Moress answered on March 2, 1984, (R. 32-39) and respondent Geigy filed its Answer on April 13, 1984. (R. 84-96)

In their Answers, respondents denied liability to appellant under the strict products liability and negligence theories asserted by appellant, and alleged numerous affirmative defenses to appellant's claims. (R. 32-39; 84-96)

On April 9, 1984, appellant Reeves commenced discovery, by interrogatories and requests for production of documents, regarding all facets of the manufacturing, testing, inspection, marketing, distribution, labeling and promotion of the drugs Tegretol and Phenobarbital, which caused appellant's injuries (R. 78-83), and defendant Dr. Moress's conduct in relation to the prescription,

marketing, distribution, promotion, administration and monitoring of Tegretol and/or Pheobarbital to appellant Reeves. (R. 75-77)

The foregoing discovery resulted in the production of several thousand pages of documents; the filing of numerous objections to interrogatories and requests for production of documents which appellant's counsel, together with respondents' counsel, spent considerable time and effort trying to resolve.

During the Spring and Summer of 1984, appellant also responded to respondents' interrogatories (R. 98-99; 116-117; 129-131) and the parties conducted numerous depositions. (R. 100-103; 113-114; 127-128)

Although appellant Reeves served his First Set of Interrogatories to respondent Lilly on April 9, 1984, (R. 81-83), respondent Lilly did not file its answers and objections until August 27, 1984. (R. 132-133)

In December, 1984, the parties conducted a second round of depositions, including the deposition of appellant Reeves and certain physicians at the University Medical Center, who were involved in the treatment of appellant Reeves' injuries. (R. 136-137)

In January, 1985, the mother of appellant Reeves was deposed (R. 140-144) and appellant Reeves served a second round of requests for production of documents seeking information regarding the knowledge of respondents Geigy and Lilly of adverse reactions to Tegretol and Phenobarbital. (R. 145-154)

On April 5, 1985, respondent Geigy produced approximately

2,000 documents in response to appellant's request and objected to producing numerous documents requested by appellant.

In May, 1985, appellant Reeves also requested information concerning adverse drug reactions to Tegretol and Phenobarbital from the United States Food and Drug Administration and in July and August, 1985, received several thousand computer printout pages of data concerning adverse drug reactions to the drugs Tegretol and Phenobarbital.

On February 25, 1986, Judge Frederick, pursuant to his usual practice of reviewing the status of cases pending more than one year, conducted a conference with counsel for the parties concerning the status of the case. (R. 157) At that time, appellant's counsel indicated to the Court that appellant was still involved in the completion of discovery and could not certify readiness for trial before sixty days or longer, due to previous commitments on other matters scheduled for trial and hearing, and the need to complete discovery in the action.

Based upon the parties' stipulation, the Court continued the matter for further status report in 60 days. (R. 157)

Appellant was still in the process of digesting and cross-checking the information concerning adverse drug reactions received from respondents and the F.D.A. when, on April 28, 1986, respondent Dr. Moress filed his motion for summary judgment (R. 175-177), based upon two grounds: (1) that Dr. Moress allegedly complied with existing standards of care in treating

appellant Reeves; and (2) that Tegretol and Pheobarbital, the two drugs prescribed by respondent Moress for appellant Reeves, were allegedly not the proximate cause of the injuries suffered by appellant Reeves.

In support of his Motion for Summary Judgment, respondent Dr. Moress submitted affidavits of two local physicians, Joel M. Thompson, M.D., and Leonard J. Swinyer, M.D., (R. 158-165), generally stating that, in their respective opinions, respondent Moress's treatment of appellant Reeves was appropriate. Dr. Swinyer also stated that he did not believe that the drugs Tegretol and/or Phenobarbital administered to appellant Reeves by respondent Dr. Moress were the cause of appellant Reeves's injuries.

Respondent Dr. Moress also filed a memorandum in support of his Motion for Summary Judgment (R. 166-174) which included characterizations of fact and conclusions of fact purportedly supported by references to depositions of appellant Reeves's mother, Alma Cook, and appellant Reeves's treating physician, Dr. Glen Warden. (R. 167-169)

On April 30, 1986, respondents Geigy and Lilly filed their joint Motion for Summary Judgment, relying solely on the grounds previously asserted by respondent Moress and upon the memorandum and affidavits submitted by respondent Dr. Moress in support of his Motion for Summary Judgment. (R. 180-185)

Prior to receiving respondents' Motions for Summary Judgment, appellant Reeves had sought expert medical opinions concerning appellant's claims against respondent Dr. Moress for medical malpractice and appellant's claim that his injuries were caused by Tegretol and/or Phenobarbital, the drugs manufactured by respondents Geigy and Lilly and prescribed to appellant Larry Reeves by respondent Dr. Moress. The expert physicians consulted by appellant's counsel expressed the need for further information before they could render the opinions to oppose those stated by respondents' physicians in their affidavits supporting respondents' Motions for Summary Judgment.

Thus, on May 6, 1986, appellant's counsel filed a Motion To Extend Discovery and For Continuance of Hearing on Defendants' Motion For Summary Judgment, requesting additional time for discovery to oppose respondents' summary judgment motions. (R.186-187)

Appellant's counsel also filed an Affidavit In Opposition To Defendants' Motion for Summary Judgment under Rule 56(f), U.R.C.P., averring that appellant was unable to submit affidavits in opposition to the affidavits submitted in support of respondents' motions without further discovery which appellant requested the opportunity to conduct. Appellant's counsel further indicated that certain delays in completing discovery had occurred because of previously scheduled court matters and were in no way attributable to any lack of diligence on the part of appellant Reeves. (R. 188-190)

Respondents filed no objection to appellant's motion for additional discovery and filed no objection or motion to strike the Affidavit of appellant's undersigned counsel under Rule 56(f) prior to the hearing on respondents' motions for summary judgment and appellant's motion to continue discovery on June 2, 1986.

At that time, following oral argument on the motions, Judge Frederick granted respondents' Motions for Summary Judgment, denied appellant's Motion To Extend Discovery and dismissed this action "with prejudice", despite the affidavit of appellant's counsel filed in good faith pursuant to Rule 56(f), U.R.C.P., appellant's reasonable request for additional discovery to properly oppose the motions, and appellant's argument that the evidence offered by respondents in support of their Motions for Summary Judgment did not entitle respondents to be granted summary judgment against appellant Larry Reeves.

The Court did not make render any written findings, conclusions of law, or opinion regarding the basis for its decision to grant respondents' Motions for Summary Judgment and no record was made of the oral argument on the Motions or the Court's expressed reasons for granting the Motions.

SUMMARY OF ARGUMENT

The lower court erred in denying appellant Reeves the opportunity to conduct further discovery pursuant to Motion and an Affidavit filed under Rule 56(f), U.R.C.P., prior to granting respondents' Motions

For Summary Judgment, where respondents never objected to, or moved to strike, appellant's Motion or Affidavit prior to the hearing on the Motions, and appellant's requests for further discovery to oppose the Motions for Summary Judgment were made in good faith and were reasonable in light of the nature and circumstances of the action, thereby violating legal principles of summary judgment, and depriving appellant Reeves of his constitutional right to redress of injuries.

ARGUMENT

POINT I. THE LOWER COURT ERRED IN DENYING APPELLANT THE OPPORTUNITY TO CONDUCT FURTHER DISCOVERY PURSUANT TO RULE 56(f), PRIOR TO THE ENTRY OF SUMMARY JUDGMENT, THEREBY VIOLATING LEGAL PRINCIPLES OF SUMMARY JUDGMENT, AND DEPRIVING APPELLANT OF HIS CONSTITUTIONAL RIGHT TO LEGAL REDRESS OF INJURIES

In Cox v. Winters, 678 P.2d 311, 312-313 (Utah 1984), relying on its prior decision in Strand v. Associated Students of the University of Utah, 561 P.2d 191 (1977), this Court reaffirmed the duty of lower courts to permit a party to conduct additional discovery pursuant to the filing of an affidavit under Rule 56(f), U.R.C.P., prior to granting a motion for summary judgment

Where, however, the party opposing summary judgment timely presents his affidavit under Rule 56(f) stating reasons why he is presently unable to proffer evidentiary affidavits, he directly and forthrightly invokes the trial court's discretion. Unless dilatory or lacking in merit, the motion should be liberally

treated. Exercising sound discretion the trial court determines whether the stated reasons are adequate.

Emphasis supplied.

This Court has also indicated that when an affidavit is filed in opposition to a motion for summary judgment and the movant does not object to, or move to strike, the affidavit before it is admitted, the movant waives the right to complain that the affidavit is not sufficient and waives his opposition to whatever evidentiary defects may exist. Strange v. Ostlund, 594 P.2d 877 (Utah 1979); Franklin Financial v. New Empire Development Co., 659 P.2d 1040 (Utah 1983).

In this case, as in all cases premised on theories of products strict liability and negligence, the threshold issue is whether the product in question caused the plaintiff's injury. If the product in question has been the subject of litigation for sometime, the fact that the product in question caused the injury suffered may be well established, and extensive discovery may be unnecessary. However, this is not always true.

As this Court observed in Berry By And Through Berry v. Beech Aircraft, 717 P.2d 670, 674 (Utah 1975), long delayed health hazards from prescription drugs and chemicals can cause disease and death many years after exposure. Litigation concerning the injuries inflicted from such diverse products as asbestos, the Dalkon Shield birth control device, and the

drug DES, graphically demonstrate that a decade of litigation may be required to discover the evidence necessary to establish, by competent evidence, the causative link between a product and a specific injury.

Why? Generally speaking, because the information showing that a particular product causes a particular injury is known only to the manufacturer of the product, and the manufacturer does not want to reduce its profits by publicizing the fact that its product causes certain injuries, or face the possibility that a government agency may require the product to be recalled and modified, or be withdrawn from the market.

In order to avoid disclosure of information that its product causes particular injuries, manufacturers may simply ignore reports of injuries, fail to report injuries to public agencies despite their legal duty to do so, fail to conduct proper tests and studies to verify whether certain injuries alleged to be caused by a particular product are, in fact, caused by the product, or simply conceal the facts from the public.

In the event that manufacturers do not publically disclose injuries from their products, persons who are injured by them are put in the position of having to bear the expense and trouble of obtaining the raw data which shows that the manufacturers are aware that certain injuries are being caused by their product, by virtue of reports from people using the product or the physicians

who are treating them.

After obtaining the data, the injured person must then find medical experts who can interpret the data, perform tests and form opinions as to whether a particular product causes a particular injury. This process, when undertaken in the context of litigation, is time consuming, expensive, and often requires several years to accomplish.

In this case, the record indicates that appellant Reeves had conducted vigorous discovery, that additional discovery was reasonably required and being pursued by appellant at the time respondents filed their Motions for Summary Judgment, that appellant made a timely Motion To Extend Discovery and filed a timely and appropriate Affidavit pursuant to Rule 56(f), verifying appellant's need to conduct further discovery to properly oppose respondents' Motions for Summary Judgment.

The record in this case also reveals that respondents never objected to appellant's motion to extend discovery and that respondents never objected to, or moved to strike, the Affidavit of appellant's counsel indicating the need for further discovery prior to the hearing on respondents' Motions for Summary Judgment.

Based upon the foregoing, appellant Reeves submits that the lower court's action in denying him the right to conduct further discovery to oppose respondent's Motions for Summary Judgment violated appellant's rights pursuant to Rule 56(f).

In addition, appellant Reeves contends that the lower court's action in denying appellant further discovery to oppose respondents' motions for summary judgment, deprived

appellant Reeves of his constitutional right to legal redress against respondents for his injuries.

Article I, Sections 7, of the Utah Constitution guarantees that "No person shall be deprived of life, liberty or property without due process of law." Article I, Section 11, declares that an individual shall have a right to a "remedy by due course of law" for injury to one's "person, property, or reputation."

In Berry By And Through Berry v. Beech Aircraft Corp., 717 P.2d 670 (Utah 1985), this Court relied upon this constitutional provision in declaring Section 3 of the Utah Products Liability Act, Utah Code Ann., Section 78-15-1, et. seq. (1953), unconstitutional insofar as it barred claims for injuries from products which were asserted "more than six years after the date of initial purchase for use or consumption, or ten years after the date of manufacture of a product." In so holding, this Court exhaustively reviewed the historical antecedents of Article I, Section 11, noting the "fundamental obligation of government to provide reasonable remedies for wrongs done persons." 717 P.2d at 675-681.

In the instant case, the lower court, in denying appellant Reeves the opportunity to conduct reasonable discovery to oppose respondents' motions for summary judgment prior to granting the motions, deprived appellant Reeves of his right to legal redress against respondents for his injuries as arbitrarily as the products liability statute of repose struck down by this Court in Berry.

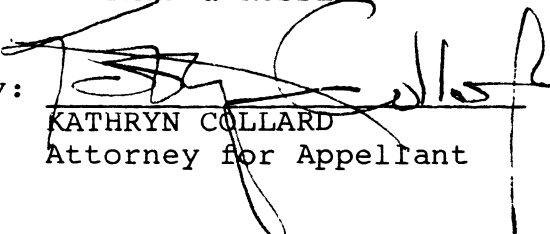
Summary judgment must be supported by evidence, admissions and inferences which, viewed in the light most favorable to the losing side, establish that "there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law." Geneva Pipe Co. v. S & H Ins. Co., 714 P.2d 648 (Utah 1986) This principle of summary judgment assumes, and fundamental notions of fairness as embodied in Article I, Sections 7 and 11, of the Utah Constitution demand that the party opposing summary judgment be afforded a fair and adequate opportunity, under the facts and circumstances of the particular case, to conduct the discovery necessary to adduce facts in opposition to a motion for summary judgment, before his constitutional right to legal redress can be forever foreclosed, as occurred in this case.

CONCLUSION

The lower court committed reversible error and deprived appellant Reeves of his fundamental, constitutional legal right to redress of injuries, when it granted respondents' Motions for Summary Judgment without affording appellant Reeves a reasonable opportunity to conduct discovery pursuant to a timely Motion to Extend Discovery and an Affidavit filed, in good faith, pursuant to the provisions of Rule 56(f), U.R.C.P., in order to properly oppose the motions.

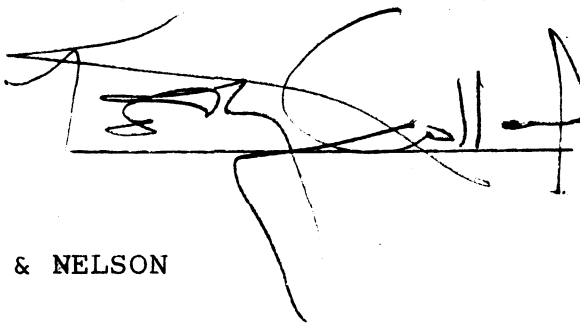
In consequence of the points and authorities set forth herein, appellant Larry Ray Reeves respectfully requests that this Court reverse the summary judgments entered by the lower court, and remand this case with instructions to the lower court to permit appellant Reeves a reasonable time for discovery to oppose respondents' Motions for Summary Judgment.

DATED AND RESPECTFULLY SUBMITTED this 9th day of February, 1987.

COLLARD & RUSSELL
By: 
KATHRYN COLLARD
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of February, 1987,
I mailed copies of Appellant's Brief On Appeal to all counsel
of record for respondents at their addresses as shown below,
by depositing the same in the U.S. Mail, postage prepaid.

A handwritten signature in dark ink, appearing to read "P. Keith Nelson", is written over a horizontal line.

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