

1987

Celia Anderson v. Broadbent and Woolf, Inc., a
Utah corporation, Robert M. Woolf, individually,
Dow Corning Corporation : Response to Petition
for Rehearing

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

870421

IN THE UTAH SUPREME COURT

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CELIA ANDERSON,)
)
Plaintiff/Appellant,)
)
vs.) Supreme Court No. 870421
)
BROADBENT & WOOLF, INC. A)
Utah corporation, ROBERT M.)
WOOLF, individually, DOW) Category 10
CORNING CORPORATION,)
)
Defendants/Respondents.)
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RESPONSE TO PETITION FOR REHEARING

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FILED

JAN 29 1991

Clerk, Supreme Court, Utah

IN THE UTAH SUPREME COURT

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Plaintiff/Appellant,)	
)	
vs.)	Supreme Court No. 870421
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TABLE OF CONTENTS

	<u>Page</u>
<u>TABLE OF CONTENTS</u>	ii
<u>TABLE OF AUTHORITIES</u>	iv
<u>ARGUMENT</u>	1
 <u>POINT I</u>	
 <u>CELIA ANDERSON MADE A PRIMA FACIE SHOWING OF JURISDICTIONAL FACTS</u>	 1
 <u>POINT II</u>	
 <u>THIS COURT SHOULD ALLOW ATTORNEY FEES FOR VIOLATION OF THE CERTIFICATION OF COUNSEL</u>	 5

TABLE OF AUTHORITIES

Page

CASES

<u>Anderson v. American Assn. of Plastic and Reconstructive Surgeons, et al.,</u> 148 Utah Adv. Rep. 3 (1990)	1
<u>Porco v. Porco,</u> 752 P.2d 365 (Utah App. 1988)	7

ARGUMENT

POINT I

CELIA ANDERSON MADE A PRIMA FACIE
SHOWING OF JURISDICTIONAL FACTS

This Court's legal analysis was as follows:

We hold that she [Celia Anderson] need only have made a prima facie showing that the trial court had personal jurisdiction over defendant in order to proceed to trial on the merits. Because the facts on which personal jurisdiction over defendants is asserted overlap the facts that will determine whether defendants are liable to Anderson, it was [not]¹ proper for the trial court to rule on personal jurisdiction based only on documentary evidence.

Anderson v. American Assn. of Plastic and Reconstructive Surgeons, et al., 148 Utah Adv. Rep. 3 (1990).

The Petition for Rehearing does not attack this Court's legal conclusion as stated above. Rather, the Petition only challenges the facts, and how those facts apply to the legal conclusions.

Thus, the Petition for Rehearing argues that:

Dr. Goldwyn submitted an Affidavit of Jurisdictional Facts . . . which remains uncontroverted by plaintiff. Likewise the ASPRS submitted a similar Affidavit of Jurisdictional Facts . . . which also remain uncontroverted.

(Petition for Rehearing at p. 7 -- Emphasis added.)

¹It appears that the word not was left out of the text by clerical error. Rehearing should be granted for the sole purpose of correcting that oversight.

In fact, nothing could be further from the truth. Celia Anderson vigorously challenged those self-serving affidavits.² See generally R. 1613-1616 and R. 1655-1660 and Substitute Brief of Appellant p. 2-10.

Specifically, Celia Anderson made a prima facie showing of jurisdictional facts. Each of Celia Anderson's jurisdictional facts is firmly grounded in the record. Listed below are the jurisdictional facts, as set forth in this court's opinion, together with the appropriate citation to the record:

1. Celia Anderson should not have been accepted into the program as she did not fit the program's patient profile. Rathjen depo., R. 1812, Exhibit 3, p. 25; Leonard depo., R. 1811, p. 70; Goldwyn depo., R. 1810, pp. 30-34. Compare Appellant's Reply Brief pp. 5-6.

2. Goldwyn's responsibility was to make sure that all patients admitted to the program fit the protocol. Rathjen's

²Petitioners Goldwyn and ASPRS seem to argue that Celia Anderson could only challenge the affidavits of ASPRS and Goldwyn by filing a counter-affidavit. It is true that Celia Anderson did not file a counter-affidavit. Rather Celia Anderson chose to rely on deposition testimony as well as documents produced through discovery. Compare Rule 56 U.R.C.P. ("The judgement sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits if any, show that there is no issue as to any material fact. . .") (Emphasis added.)

letter, 1/7/77, R. 1628. Compare Substitute Appellant's Brief, p. 5.

3. ASPRS participated in the program with Dow Corning as a cosponsor. Rathjen depo., R. 1812, pp. 0.101, 101-102; ASPRS minutes, R. 1669, 4/18/77. Compare Appellant's Reply Brief pp. 13-14, 21 and Substitute Appellant's Brief pp. 2-4.

4. Both ASPRS and Dow Corning may have violated duties imposed by federal drug law. Rathjen depo., R. 1812, Exhibit 4, p. 26; see also, R. 1608. Compare Appellant's Reply brief p. 5.

5. Dow Corning and Dr. Goldwyn all participated in preparing the consent form. Rathjen depo., R. 1812, p. 106; Id, Exhibit 8, p. 4, item 12. Compare Appellant's Reply Brief at pp. 10, 16 and Substitute Appellant's Brief pp. 3-4.

6. A committee of ASPRS selected Salt Lake City as a program site. ASPRS minutes 3/24/77, R. 1670. Compare Appellant's Reply Brief pp. 17-18.

7. A committee of APSRS selected Woolf as a program physician. Rathjen depo, R. 1812, p. 102; Goldwyn depo., R. 1810, pp. 60, 116; Woolf depo., R. 1813, pp. 6-7. Compare Substitute Appellant's Brief pp. 8-9.

8. ASPRS assisted in preparing the consent form which it knew would be used in Utah. Rathjen depo., R. 1812, p. 102. Compare Substitute Appellant's Brief p. 9.

9. ASPRS with Dow Corning selected Dr. Goldwyn as medical monitor which included anticipated treatment in Utah. Rathjen depo., R. 1812, Exhibit 7, p. 2, item G; Id, Exhibit 8, p. 2, items 4e and 8a.

10. ASPRS investigated the potential for malpractice claims, including those that might arise in Utah. Rathjen depo., R. 1812, Exhibit 7, p. 6, item I3.

11. ASPRS trained Dr. Woolf knowing that he would use that training in Utah. Rathjen's letter, R. 1628, para. 11; Goldwyn depo., R. 1810, pp. 60-62. Compare Appellant's Reply Brief p. 10 and Substitute Appellant's Brief, pp. 7-8.

12. Goldwyn helped draft the consent form. Rathjen depo., R. 1812, p. 106. Compare Appellant's Reply Brief p. 10.

13. Goldwyn supervised the proper administration of the treatment program in Utah. Rathjen depo., R. 1812, Exhibit 3, p. 32; Rathjen's letter, R. 1628, para. 3. Compare Appellant's Reply Brief pp. 8-9.

14. Goldwyn authorized Celia Anderson's silicone injections. Goldwyn depo., R. 1810, pp. 30-34, 110-111; Goldwyn letter, 4/19/78, R. 1652. Compare Appellant's Reply Brief p. 6 and Substitute Appellant's Brief pp. 6-7.

15. Goldwyn assumed responsibility to monitor Celia Anderson's treatment and to follow up if there were problems.

Rathjen's letter 1/7/77, R. 1628. Compare Substitute Appellant's Brief pp. 5-7.

In summary, there was no reason to file a counter-affidavit. Instead, Celia Anderson relied on deposition and documentary evidence. Based upon such deposition and documentary evidence Celia Anderson made a prima facie showing of fifteen jurisdictional facts (above). Because these jurisdictional facts are entwined with the merits, a trial court judge should not decide jurisdiction. Rather the case should proceed for a trial on the merits. As this Court has concluded:

Because the facts supporting jurisdiction overlap the facts supporting liability, the trial court must allow defendants to renew their motion to dismiss for lack of jurisdiction at the close of Anderson's evidence.

148 Utah Adv. Rptr. p. 5.

POINT II

THIS COURT SHOULD ALLOW ATTORNEY FEES FOR VIOLATION OF THE CERTIFICATION OF COUNSEL

As required by Rule 35(a) Utah Rules of Appellate Procedure, petitioners certified that the Petition for Rehearing was presented "in good faith and not for purposes of delay." (See Petition for Rehearing p. 12).

However the substance of the Petition for Rehearing is merely a rehash of factual arguments. Specifically, ASPRS and

Goldwyn ask this court to rule, as a matter of law, that their version of the facts, their interpretation of the facts, and their inferences from those facts are correct.

For example, ASPRS and Goldwyn argue that:

The only conceivable relationship between ASPRS and the State of Utah arises from the fact that out of approximately 2,600 active members of the society, 30 members reside in this state.

(Petition for Rehearing p. 11.)

That statement simply ignores Celia Anderson's prima facie showing to the contrary. See paragraphs 3, 4, 6, 7, 8, 9, 10, 11 above.

Furthermore, ASPRS and Goldwyn argue that:

Dr. Goldwyn's only relationship with the State of Utah is an attenuated monitoring function and limited correspondence with Dr. Woolf arising out of either Anderson or her physician's unilateral monitoring function.

(Petition for rehearing p. 12.)

That statement simply ignores Celia Anderson's prima facie showing to the contrary. See paragraphs 2, 5, 9, 12, 13, 14, 15 above.

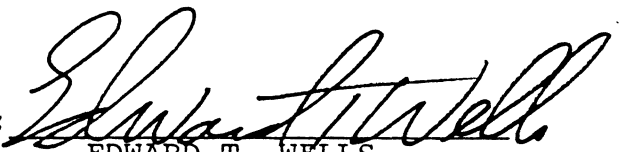
After full briefing, and full argument, this Court has told ASPRS and Goldwyn (in a very well-reasoned opinion) that a jury would have to decide between those two competing versions of fact. There is no basis--absolutely none--for ASPRS and Goldwyn to

again ask this Court, at this late stage of the litigation, to accept one version of the facts over another version.

If this Court chooses to allow attorney fees, the case should be remanded to the trial court for a factual determination of the amount thereof. See Porco v. Porco, 752 P.2d 365 (Utah App. 1988).

DATED this 29 day of January, 1991.

ROBERT J. DEBRY & ASSOCIATES
Attorneys for Plaintiff/Appellant

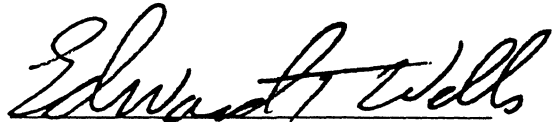
By: 
EDWARD T. WELLS

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing RESPONSE TO PETITION FOR REHEARING (Anderson v. Broadbent & Woolf, et al.), was mailed, postage prepaid, this 29 day of January, 1991 to the following:

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A handwritten signature in cursive script, appearing to read "Elliott Williams", is written over a horizontal line.

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