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BRIEF

)CKET NO. 900188

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IN THE UTAH SUPREME COURT

STATE OF UTAH

EMMANUEL N. ONYEABOR, Appellant, v. PRO ROOFING INC., a Utah corporation, and PAM BATES, Respondents.	)	Supreme Court No. 900188

REPLY TO THE OBJECTION OF DEFENDANTS-RESPONDENTS WITH RESPECT TO, AND IN SUPPORT OF, PLAINTIFF-APPELLANT'S WRIT OF CERTIORARI FROM THE DECISION OF THE UTAH COURT OF APPEALS

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Clerk, Supreme Court, Utah

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INTRODUCTION

According to Rule 50, Utah Rules of Appellant Procedure, the Reply Brief shall address only "arguments first raised in the brief in opposition." Therefore, although the Appellant strongly disagrees with the argument and much of the statement of law set forth by the Respondent, these issues are not addressed in the Reply Brief.

QUESTIONS PRESENTED IN REPLY

The issues addressed in this Reply Brief are:

1. Was there a pre-trial order, as alleged by defendants, which permitted notice of Dr. Clark as an expert witness just 10 days before trial?

2. What was the true state of the record regarding notice of expert witnesses before trial?

3. Did Appellant misstate any law in the main brief?

ARGUMENT

POINT I

THERE WAS NO PRE-TRIAL ORDER WHICH ALLOWED DEFENDANTS TO GIVE LATE NOTICE OF DR. LINCOLN CLARK AS AN EXPERT WITNESS. THE DEALINGS OF THE PARTIES AND ORDERS OF THE COURT MAKE IT CLEAR THAT RESPONDENTS WERE ALLOWED LEAVE TO OBTAIN ONE REPLACEMENT EXPERT WITNESS FOR DR. BECK, NOT TO ADD AN ADDITIONAL EXPERT WITNESS.

Respondents stated in their Brief: "... the plaintiff received that notice [of Dr. Clark] ten days before trial as required by the pre-trial order." Respondents' Brief, p. 19 (emphasis added); see also Respondents' Brief, p. 5. Respondents thus imply that the trial court signed and adopted a pre-trial order, and that they were in compliance with that pre-trial order in giving notice of Dr. Clark as an expert witness 10 days before the February 2, 1987, trial. Respondents' statements in this regard are extremely misleading for the following reasons:

1. There was never as a signed pre-trial order. R. 248.

2. The proposed pre-trial order, executed by counsel 11 days before the scheduled November 17, 1986 trial date, contemplated that all expert witnesses had already been listed.

3. The trial court explicitly gave Respondents leave to replace only one witness, not to open the case up for additional witnesses.

Perusal of the proposed pre-trial order clearly shows wher it was received by the court, and that it was never signed.

R. 248. However, even if we assume that the unexecuted, proposed pre-trial order somehow applies de facto, it is clear that all proposed expert witnesses were listed. R. 243-6. That was certainly the understood intent of counsel and the court at the time it was drafted by Appellant's counsel. The context of the proposed order is extremely important; it was signed by respective counsel just 11 days before the then-scheduled trial. Respondents had already submitted a "defendants' witness and exhibit list", which had been incorporated into the proposed order. No additional expert witnesses were contemplated since it stated "in the absence of reasonable notice to opposing counsel to the contrary" in the preamble. R. 235. Respondents' expert witness list had already stated that they were only calling Dr. Edward C. Beck to testify on the brain injury issue. See proposed pre-trial order, R. 244.

Respondents' Brief conveys the impression that Respondents had leave to add expert witnesses up to 10 days of trial and therefore, plaintiff has no gripe. The falsity of these claims is best shown by the context of events leading to the fifth (and final) trial date (February 2, 1987):

a. In July, 1986, Appellant made a motion to amend the complaint to add a cause of action for brain injury. R. 135.

b. On August 28, 1986, Respondents replied with a motion for mental examination of the plaintiff, to be performed by Edward C. Beck, Ph.D., a neuropsychologist. R. 154.

c. No other request was made by defendants to have an expert examine the plaintiff on the issue of brain injury, prior to the scheduled trial date of November 17, 1986.

d. In this context the proposed pre-trial order was drafted and submitted to opposing counsel on November 6, 1986, or approximately 11 days prior to trial. Dr. Beck was listed as the Respondents' only brain injury expert in this draft of the pre-trial order. R. 244.

e. A few days later, on November 8, 1986, Respondents made a motion for a continuance of the trial (R. 252-7) on the grounds that Dr. Beck was ill, and could not testify. The stated reason was to allow Respondents:

> ... to obtain the services of <u>another expert witness</u> and permit <u>that witness</u> to review the voluminous medical records, test results and evaluations involved in the claim and personally evaluate plaintiff prior to the scheduled trial on November 17, 1986. (emphasis added)

R. 254.

f. Appellant strongly objected to the continuance; but when it appeared that the judge was going to grant it, counsel stated clearly the understanding that the continuance not simply be an excuse to do more discovery, but <u>only</u> to obtain <u>one</u> expert witness to replace Dr. Beck who was allegedly ill. The following colloquy occurred at the November 10, 1986, hearing on the continuance: November 10, 1986:

> MR. SYKES: ... I think Bill and I have an understanding, but I just want to make it a matter of record that <u>this is not reopening discovery in general</u>. This is <u>just for the</u>

purpose of getting one witness to replace Dr. Beck. Is that your understanding also?

THE COURT: Yes, it is my understanding.

MR. SYKES: Okay. (emphasis added)

(T. R-23-24).

g. A few days later, Respondents submitted the name of Dr. Lincoln Clark, a psychiatrist, who subsequently examined Mr. Onyeabor. Dr. Clark's withdrawal from the case is well documented in the briefs. He stated he was irrevocably withdrawing from the case. The court held a hearing on December 5, 1986, to deal with the issue of Dr. Clark's withdrawal.

h. Mr. Stegall stated at the hearing that he had a Dr. Cook from Denver lined up to replace Dr. Clark. (T. S-27) The trial was continued with the clear understanding that Judge Dee would get it back on the calendar as quickly as he could. (T. S-26:13) Once again, it was clear that the continuance was to enable Mr. Stegall to obtain a replacement witness for Dr. Clark, not to simply reopen discovery, which had long since been closed. (R. S-30:19) This understanding with respect to the discovery cut-off was clearly shown by the following colloquy at the hearing on November 10, 1986:

MR. STEGALL: Your Honor, we had a 2:00 cut-off for filing witnesses and exhibits. Are we moving that back?

MR. SYKES: I think we ought to move it back.

THE COURT: Move it back so you can have an opportunity to tell him who, and they will have an opportunity to counter.

> MR. SYKES: Can we move it back one week. Is that okay Bill?
>
> THE COURT: Is that alright with you [Mr. Stegall]?
>
> MR. STEGALL: I will indicate it is my understanding we are not reopening discovery, but certainly if Mr. Sykes needs to get not only that witness but potentially others, I would work with him, but we're not ...
>
> THE COURT: Right ... (emphasis added)

T. R-25. Thus, all parties and the court viewed the case as having been ready for trial both in November and in December of 1986, the only reason for the continuances was to allow Respondents to get a replacement expert witness on the brain injury issue. There was never any contemplation in the eyes of the court or counsel that these extensions of time were simply to plow more furrows of discovery with additional witnesses.

Rule 26(e)(1)(B) requires that a party must "seasonably ... supplement" discovery with respect to the identity of expert witnesses expected to be called. Discovery had been closed. Appellant's earlier discovery had requested the identity of experts and the name of Lincoln Clark as a "resurrected witness" was simply not provided until it was too late for Appellant to fairly prepare to counter his testimony.

POINT II

THE LAW WAS NOT MISSTATED IN APPELLANT'S BRIEF

Respondents' Brief points out that Appellant cited the case of DeMarines v. KLM Royal Dutch Airlines, 433 F.Supp. 1047 (E.D. Pa. 1977), which has been reversed. See 580 F.2d 1193

(1978). The reversal of the district court case was simply overlooked. However, no implication should be drawn that the law of the original DeMarines case is any way repudiated by courts in general. DeMarines was reversed on its facts. T\the law cited in Point II of Appellant's main brief is the majority rule and should apply to this case.

DATED this 16th day of July, 1990.

ROBERT B. SYKES
Attorney for Appellant/Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing REPLY TO THE OBJECTION OF DEFENDANTS-RESPONDENTS WITH RESPECT TO, AND IN SUPPORT OF PLAINTIFF-APPELLANT'S WRIT OF CERTIORARI FROM THE DECISION OF THE UTAH COURT OF APPEALS was served upon the party at the address listed below, by hand-delivering 4 copies thereof on the 16th day of July, 1990.

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