

1993

Mariamercedes Power v. Riverview Financial Corporation : Reply Brief

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1

 Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Russell C. Fericks; Gerald J. Lallatin; Richards, Brandt, Miller & Nelson; Attorneys for Appellant. Randall N. Skanchy; Deno G. Himonas; Jones, Waldo, Holbrook & McDonough; Attorneys for Appellee.

Recommended Citation

Reply Brief, *Mariamercedes Power v. Riverview Financial Corporation*, No. 930535 (Utah Court of Appeals, 1993).
https://digitalcommons.law.byu.edu/byu_ca1/5453

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

Utah C

MAY 27 1994

IN THE COURT OF APPEALS

STATE OF UTAH

MARIAMERCEDES POWER,

Plaintiff and Appellant,

vs.

RIVERVIEW FINANCIAL
CORPORATION,

Defendant and Appellee.

**APPELLANT'S
REPLY BRIEF**

Case No. 930535CA

Priority No. 15

**APPEAL FROM SUMMARY JUDGMENT ENTERED
IN THE THIRD DISTRICT COURT, SUMMIT COUNTY, UTAH
THE HONORABLE DAVID S. YOUNG
DISTRICT COURT JUDGE**

RUSSELL C. FERICKS
GERALD J. LALLATIN
RICHARDS, BRANDT, MILLER & NELSON
Attorneys for Appellant
Key Bank Tower, Seventh Floor
50 South Main Street
P.O. Box 2465
Salt Lake City, Utah 84110-2465
Telephone: (801) 531-2000
Fax No.: (801) 532-5506

RANDALL N. SKANCHY
DENO G. HIMONAS
JONES, WALDO, HOLBROOK & McDONOUGH
1500 First Interstate Plaza
170 South Main Street
Salt Lake City, Utah 84101

UTAH COURT OF APPEALS

DOCUMENT NO.

930535

IN THE COURT OF APPEALS

STATE OF UTAH

MARIAMERCEDES POWER,

Plaintiff and Appellant,

vs.

RIVERVIEW FINANCIAL
CORPORATION,

Defendant and Appellee.

**APPELLANT'S
REPLY BRIEF**

Case No. 930535CA

Priority No. 15

APPEAL FROM SUMMARY JUDGMENT ENTERED
IN THE THIRD DISTRICT COURT, SUMMIT COUNTY, UTAH
THE HONORABLE DAVID S. YOUNG
DISTRICT COURT JUDGE

RUSSELL C. FERICKS
GERALD J. LALLATIN
RICHARDS, BRANDT, MILLER & NELSON
Attorneys for Appellant
Key Bank Tower, Seventh Floor
50 South Main Street
P.O. Box 2465
Salt Lake City, Utah 84110-2465
Telephone: (801) 531-2000
Fax No.: (801) 532-5506

RANDALL N. SKANCHY
DENO G. HIMONAS
JONES, WALDO, HOLBROOK & McDONOUGH
1500 First Interstate Plaza
170 South Main Street
Salt Lake City, Utah 84101

TABLE OF CONTENTS

	<u>Page</u>
ARGUMENT	1
POINT I	
TRIAL COURT'S RULE 60(b)(7) CHANGE PRIOR RULINGS NOT GOVERNED BY RULE 54(b) STANDARD	1
POINT II	
NUMEROUS QUESTIONS OF FACT REMAIN FOR JURY TRIAL	6
CONCLUSION	9

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Caldwell v. Ford, Bacon & Davis Utah, Inc.,</u> 777 P.2d 483 (Utah 1989)	6
<u>Conder v. A.L. Williams & Associates, Inc.,</u> 739 P.2d 634, 637 (Utah App. 1987)	5
<u>Johnson v. Morton Thiokol, Inc.,</u> 818 P.2d 997 (Utah 1991)	8, 10, 11
<u>Laub v. South Central Utah Tel. Ass'n.,</u> 657 P.2d 1304 (Utah 1982)	3
<u>Lincoln Benefit Life Ins. Co. v. D.T. Southern</u> <u>Properties,</u> 838 P.2d 672 (Utah 1992)	3
<u>Salt Lake City Corp. v. James Constructors,</u> 761 P.2d 42 (Utah App. 1988)	1, 2, 5
<u>Sanderson v. First Sec. Leasing,</u> 844 P.2d 303 (Utah 1992)	6
<u>Timm v. Dewsnap,</u> 851 P.2d 1178 (Utah 1993)	3, 4, 5
<u>Thurston v. Box Elder County,</u> 835 P.2d 165 (Utah 1992)	8

Rules

Utah Rules of Civil Procedure, Rule 54(b)	1, 2, 3, 4, 5
Utah Rules of Civil Procedure, Rule 60(b)(7)	1, 2, 3, 4, 6

ARGUMENT

POINT I

TRIAL COURT'S RULE 60(b)(7) CHANGE OF PRIOR RULINGS NOT GOVERNED BY RULE 54(b) STANDARD

Defendant argues that it makes no difference whether Judge Young considered the Motion for Relief from Order Denying Summary Judgment under Rule 60(b)(7), U. R. Civ. P., as originally filed, or under Rule 54(b), U. R. Civ. P. as now argued. To the contrary, the two rules set different standards. See Salt Lake City Corp. v. James Constructors, Inc., 761 P.2d 42, 44-45 (Utah App. 1988).

Rule 54(b) means "[a]ny judge is free to change his or her mind on the outcome of a case until a decision is formally rendered" Salt Lake City Corp. v. James Constructors, 761 P.2d at 45. However, Rule 60(b)(7) implicates "the 'law of the case' doctrine [which] is employed to avoid delay and to prevent injustice" such as expense and delay resulting from repetitive consideration of the same issues in a single case. Id. "Rule 54(b) allows courts to readjust prior rulings in complex cases as subsequent developments in the case might suggest The 'law of the case doctrine' nonetheless . . . create[s] a kind of presumption that the court's prior rulings, even if not certified as final under Rule 54(b), were correct and should stand." Id., pp. 44-45, n. 5.

Judge Wilkinson denied summary judgment on the implied-in-fact contract issue. Defendant asked Judge Wilkinson to change his mind in its first motion to reconsider in 1991. He didn't. Defendant addressed the same issue in 1992 when it asked Judge Noel to rule, in limine, that plaintiff's evidence of implied-in-fact contract terms of employment was not relevant or admissible. Judge Noel ruled that the evidence of the implied-in-fact contract was substantial, and he scheduled the case for trial on the basis of that evidence.

Defendant sought a fourth bite at the apple in 1993 when it asked Judge Young to reconsider Judge Wilkinson's denial of summary judgment on the implied-in-fact contract issue. The Motion to Reconsider (styled as "Defendant's Motion for Relief from Order", R. at 657-59) offered no new evidence. It suggested no "subsequent developments in the case" to justify a different result. This directly violated the law of case doctrine. "The law of the case doctrine is particularly applicable when, in the case of summary judgment, a subsequent motion fails to present the case in a different light, such as when no new material evidence is introduced." Salt Lake City Corp. v. James Constructors, 761 P.2d at 45.

Defendant argues that whether Judge Young applied the standard of Rule 54(b) or Rule 60(b)(7), the result would have

been the same. That is not correct. Where the judge who made the initial determination is not available to "change his mind" pursuant to Rule 54(b), defendant's motion should have been either denied outright or else held to the very high standards of Rule 60(b)(7). That requires "extraordinary" circumstances. Laub v. South Central Utah Tel. Ass'n., 657 P.2d 1304, 1306 (Utah 1982), Lincoln Benefit Life Ins. Co. v. D.T. Southern Properties, 838 P.2d 672, 674 (Utah 1992). Defendant didn't even attempt to meet the higher standard of Rule 60(b)(7).

Defendant relies on Timm v. Dewsnap, 851 P.2d 1178 (Utah 1993) to support its argument on this issue. It is inapposite. Timm v. Dewsnap involved a suit filed in September 1980 by lenders on a real estate transaction against their borrower. Lender obtained summary judgment on its claim in March 1981. Defendant's counsel did not appear to oppose summary judgment; and, importantly, the judgment did not address the defendant/borrower's counterclaim to reform the written instruments which the plaintiff/lender had sued to enforce. The defendant filed a Chapter 11 bankruptcy in April 1981. The bankruptcy was converted to Chapter 7 for liquidation in June 1984. It was not until January 1991 that the Chapter 7 bankruptcy trustee abandoned defendant's counterclaim as an asset of the bankruptcy estate. Defendant immediately asked the state

trial court for permission to amend her counterclaim and moved for reconsideration of summary judgment under Rule 54(b), U. R. Civ. P. The trial court refused, and ruled that "it had 'implicitly' denied the counterclaim when it granted summary judgment in 1981, and that the summary judgment was 'a final appealable judgment' at that time." 851 P.2d at 1180. The Supreme Court reversed and remanded.

In Timm v. Dewsnap, the Supreme Court preserved a litigant's right to resolution of her case on the merits, where there was extended delay and where the original circumstances of the transaction were extremely suspect. In that case, the same trial judge was available to "change his mind" when his prior decisions left the case in a procedural limbo. (I.e., summary judgment granted on plaintiff's claim, with no affirmative disposition of defendant's counterclaim.) Under the circumstances, it was error for the trial court to not change its mind.

In the present case, there is no significant period of delay, no intervening change of circumstances, and no procedural limbo created by the prior decision of trial judges Wilkinson and Noel. In addition, neither of those judges were available to consider defendant's motion as a Rule 54(b) opportunity to change their minds on the basis of "new material facts" as required by

Salt Lake City Corp. v. James Constructors, 761 P.2d 42, 45 (Utah App. 1988). Finally, the effect of reconsideration in this case is devastating to plaintiff. Judge Young eliminated, rather than preserved Ms. Power's rights and interests. Defendant would like this Court to read Timm v. Dewsnup as requiring reconsideration any time a motion reasonably analogous to Rule 54(b) is made. It doesn't.

Defendant finally argues that application of the lower threshold of Rule 54(b) was harmless error. Accepting this argument would require this Court to assume that Power could never prevail in front of a reasonable jury. Two of three trial judges who reviewed the evidence disagree. Such an assumption is contrary to the presumption favoring the non-moving party (here, the plaintiff) in review of summary judgment. Johnson v. Morton Thiokol, Inc., 818 P.2d 997, 1000 (Utah 1991); Conder v. A.L. Williams & Associates, Inc., 739 P.2d 634, 637 (Utah App. 1987). An appellate court does not weigh the facts and sustain or reverse summary judgment based on probabilities of success at trial. The issue for appellate review is whether plaintiff had evidence to prove material issues of fact, not whether defendant had more or better evidence. Judge Young's conclusion that "all [of defendant's] assurances remained consistent with the

[plaintiff's] 'at will' status" simply ignores substantial record evidence to the contrary.

Judge Young's error in not requiring defendant to meet the high standard of Rule 60(b) was extremely harmful. It required Power to take a costly and time-consuming appellate detour enroute to realization of her constitutional right to jury trial. The summary judgment should be reversed and the case remanded for trial on the merits, as originally decided.

POINT II

NUMEROUS QUESTIONS OF FACT REMAIN FOR JURY TRIAL

In its response, defendant has summarized its best evidence to refute an implied-in-fact employment contract. There is nothing new here. What is important is that defendant does not contest the plaintiff's substantial evidence which rebuts the at-will presumption. A clearer question of fact for the jury is hard to imagine. The Utah Supreme Court has repeatedly recognized the jury as the appropriate arbiter of such disputes. Caldwell v. Ford, Bacon & Davis Utah, Inc., 777 P.2d 483, 486 (Utah 1989); Johnson v. Morton Thiokol, Inc., 818 P.2d 997, 1001 (Utah 1991); and Sanderson v. First Sec. Leasing, 844 P.2d 303, 306 (Utah 1992).

Defendant wants to draw this Court into an inappropriate fact-finding function, focusing solely on

defendant's evidence and ignoring plaintiff's support. The Court should not be seduced into this role. The law of at-will and implied-in-fact contracts in Utah has been stated repeatedly and clearly. It is time for juries to decide the cases, guided by the published legal standards:

Let the jury decide whether defendant 'repeatedly and in the simplest of terms' reserved the at-will presumption, as defense counsel claims.

Let the jury decide if defendant's reservation of at-will (i.e., "although we generally will follow a disciplinary process because we are at-will, The Company reserves the right to terminate a team member immediately") is "unequivocal" and "clear."

Let the jury decide if an at-will reservation buried 272 pages inside a 304 page manual is "clear and conspicuous", as required by Johnson v. Morton Thiokol, 818 P.2d at 999 and 1003, in the face of numerous earlier calls for team spirit, promises of advancement through initiative, and personal pledges of fair treatment and rational procedures from the defendant's owners.

Let the jury decide if express promises of specific discipline standards and procedures, made both in person and in a color video presentation published company-wide, manifest an intent of the parties for something other than at-will. (Johnson v. Morton Thiokol, 818 P.2d at 1001).

Let the jury decide if defendant's frequent, specific expressions of loyalty and concern for employees created an "atmosphere" in which employees reasonably expected something other than at-will as a standard by which

they would be treated. Thurston v. Box Elder County, 835 P.2d 165 (Utah 1992).

Let the jury decide if the 1 hour and 15 minute video presentation of defendant's President and Chairman of the Board, with its numerous factual scenarios stating explicitly what was fair in the way of employee treatment, was "sufficiently definite to operate as a contract provision." Johnson v. Morton Thiokol, 818 P.2d at 1002.

Let the jury decide what it means when defendant qualified its employee handbook with the introductory statement: "we do not expect this handbook to answer all of your questions. Your supervisor will be your major source of information." And then plaintiff's supervisors and superiors represented that termination would only occur for cause and after following disciplinary processes.

Let the jury decide what was objectively intended and understood when defendant's Chairman of the Board represented in living color that "the values of the company are without question the most important thing One of the things you are going to find in terms of the values here, is that they're absolutes. . . . The success of Mrs. Fields has really been a function of the values of the company. . . . This is like coming home, this is like building a relationship [which you need to understand] early on in your career with Mrs. Fields Your career path with Mrs. Fields . . . more than anything else depends on your commitment to this value system. . . . The values of the company that we are going to elaborate this morning have not changed from the day that [Debbie Fields] opened the store in August of 1977. . . . What has changed are almost every procedure in the company." And those comments were followed up by defendant's President, Debbie Fields, who said

"commitment to our people: that's number one.
. . . Everything that you do is absolutely
grounded to these values that you will soon
learn about. . . . And I'm real clear. . .
. you also need to know that you can hold me
100% accountable'

Defendant's citation to cases from other states and even federal courts should not cloud the issue. Utah's courts have consistently held that issues of intent, objective understandings, and the sufficiency of representations to constitute contractual terms are questions of fact which should not be lightly withdrawn from the jury. The trial court's foray into fact finding should be corrected by a reversal and remand for trial on the merits.

CONCLUSION

The appeal can easily be decided on the "law of the case" doctrine. Judge Young impermissibly substituted his judgment in place of two prior refusals to dismiss by Judge Wilkinson and a consistent factual review by Judge Noel through Motion in Limine. In essence, he sat in appellate review of his peers. No new facts were offered by the defendant to support reconsideration. The new case law offered by defendant in support of the motion did not change the applicable legal principles.

The appeal can also be decided on the more fundamental level of summary judgment standards. Substantial evidence

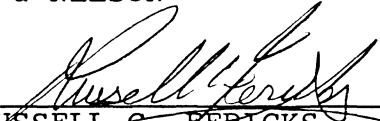
supports the plaintiff's claim of an implied-in-fact employment contract which is terminable only for cause after specific standards of fairness and procedures for discipline are observed. Defendant doesn't contest the existence of that information. Rather, it hangs its hat on inclusion of the term "at-will" in the initial application form which was given to plaintiff as an administrative afterthought after plaintiff had started work, which was buried deep in a Policies and Procedures Manual, and which was expressed equivocally in an Employee Handbook. Defendant does not contest that written terms can be overridden by verbal representations, by conduct of parties, or by subsequent modifications.

The only way for this Court to sustain summary judgment under these circumstances is to rule, as a matter of law, that whenever the term "at-will" shows up in employee documents, it always trumps contrary representations, other terms of employment, and inconsistent courses of dealing. Contrary to defendant's claim (p. 10 of defendant's brief), that is not the holding of Johnson v. Morton Thiokol, 818 P.2d 997, 1003-4 (Utah 1991), or of any other opinion in Utah. Such a result would be a step backward into a darker employment era. It would encourage employers to pander for employee loyalty and enhanced performance with no risk that their words would ever be taken seriously or

that they would be held accountable for the normal consequences which strong expressions of obligation create in all other areas of commercial endeavor. Johnson v. Morton Thiokol, 818 P.2d 997, 1005 (Utah 1991) Stewart, J. concurring.

DATED this 27th day of May, 1994.

RICHARDS, BRANDT, MILLER
& NELSON



RUSSELL C. PERICKS
GERALD J. LALLATIN
Attorneys for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that four true and correct copies of the foregoing instrument, having been executed and entered by the Court, has been mailed, first-class, postage prepaid, on this 27th day of May, 1994, to the following:

Randall N. Skanchy, Esq.
Deno G. Himonas, Esq.
JONES, WALDO, HOLBROOK & McDONOUGH
1500 First Interstate Plaza
170 South Main Street
Salt Lake City, Utah 84101



rcf\POWER.RB