

1993

Joe D. Trembly v. Mrs. Fields Cookies Corporation : Reply Brief

Utah Court of Appeals

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**STATE COURT OF APPEALS
BRIEF**

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DOCKET NO.

93-0635 CA

IN THE COURT OF APPEALS

STATE OF UTAH

JOE D. TREMBLY

Plaintiff and Appellant,

vs.

MRS. FIELDS COOKIES
CORPORATION,

Defendant and Appellee.

**APPELLANT'S
REPLY BRIEF**

Case No. ~~93-0290~~

93-0635-CA

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

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IN THE COURT OF APPEALS

STATE OF UTAH

JOE D. TREMBLY

Plaintiff and Appellant,

vs.

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**APPELLANT'S
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Case No. 930290

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ARGUMENT

POINT I

CHANGING PRIOR RULINGS UNDER RULE 54(b) CANNOT BE CONSIDERED INDEPENDENT OF RULE 60(b)(7)

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, "the 'law of the case' doctrine 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 on 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. On an identical motion in limine in the companion case of Power v. Riverview Financial (a/k/a Mrs. Fields Cookies) Judge Noel ruled that the evidence of the implied-in-fact contract was both substantial and relevant. Judge Noel scheduled the cases 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 contract of employment issue. The Motion to Reconsider (styled as "Defendant's Motion for Relief from Order", R. at 657-59) offered no new evidence. 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 finally argues that application of the lower threshold of Rule 54(b) was harmless error. This requires this Court to assume that Trembly could never prevail in front of a reasonable jury. Two of three trial judges (i.e., Wilkinson and Noel) who reviewed the evidence, disagree. And such an assumption is exactly opposite to the presumption in review of summary judgment. 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 error in not requiring defendant to meet the high standard of Rule 60(b) was extremely harmful. It required plaintiff to take a costly and time consuming appellate detour enroute to realization of his 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. 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 its 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 has been stated repeatedly and clearly in

decisions of this Court and in the Utah Supreme Court. It is time for juries to decide the cases, guided by the published legal standards:

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

Let the jury decide if Mrs. Fields Cookies' reservation of at-will ("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" in the face of numerous earlier calls for team spirit, promises of advancement through initiative, and pledges of fair treatment and rational procedures.

Let the jury decide if express promises of specific discipline standards and procedures, made both in person and in a colored 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 Mrs. Fields Cookies' 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 Mrs. Fields Cookies' 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 Mrs. Fields Cookies qualified its vaunted employee handbook ("we do not expect this handbook to answer all of your questions. Your supervisor will be your major source of information." R. at 789) 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 Mrs. Fields Cookies' 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 the 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" R. at 499-503.

Plaintiff'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 question 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. 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. The plaintiff's right to jury trial has been usurped by an impermissible fact finding of the trial court. 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 that information. Rather, it hangs its hat on inclusion of the term "at-will" in the initial application form, a Policies and Procedures Manual, and an Employee Handbook. Defendant does not contest that written terms can be overridden by verbal representations, by conduct of parties, or by subsequent modifications. Defendant claims that the at-will language is clear and conspicuous, although it is buried deep within the voluminous manuals and appears in text which is equivocal and ambiguous.

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 will always trump contrary representations, other terms of employment, and inconsistent courses of dealing. That is not the holding of any case either in Utah or from any other jurisdiction cited by defendant. Such a holding 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 contractual consequences which strong expressions of obligation create in all other areas of commercial endeavor.

DATED this 23rd day of December, 1993.

RICHARDS, BRANDT, MILLER
& NELSON

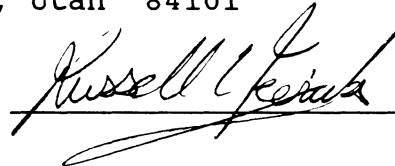


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two 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 23rd day of December, 1993, to the following:

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