2005

Hal Company v. Multi Media Musketeers and Jeff Brewer : Reply Brief

Utah Court of Appeals

UTAH COURT OF APPEALS

HAL COMPANY,

Plaintiff, Appellee, and
Cross-appellant,

v.

Appellate Number:
20050226

MULTI MEDIA MUSKETEERS and
JEFF BREWER,

Defendants, Appellants,
And Cross-appellees.

REPLY BRIEF OF APPELLANT
APPEAL FROM A FINAL JUDGMENT ENTERED IN THE FOURTH DISTRICT COURT, PROVO DEPARTMENT
(Civil No. 020405666)

Jackson Howard
HOWARD, LEWIS & PETERSON, P.C.
120 East 300 North Street
PO Box 1248
Provo, UT 84603
Attorney for Plaintiff/Appellee

Joseph R. Goodman, Jr.
JOSEPH R. GOODMAN, JR. L.C.
2825 East Cottonwood Parkway
Suite 500
Salt Lake City, UT 84121
Attorney for Defendants/Appellants

UTAH COURT OF APPEALS

HAL COMPANY,

Plaintiff, Appellee, and
Cross-appellant,

v.

Appellate Number:
20050226

MULTI MEDIA MUSKETEERS and
JEFF BREWER,

Defendants, Appellants,
And Cross-appellees.

REPLY BRIEF OF APPELLANT
APPEAL FROM A FINAL JUDGMENT ENTERED IN THE
FOURTH DISTRICT COURT, PROVO DEPARTMENT
(Civil No. 020405666)

Jackson Howard
HOWARD, LEWIS & PETERSON, P.C.
120 East 300 North Street
PO Box 1248
Provo, UT 84603
Attorney for Plaintiff/Appellee

Joseph R. Goodman, Jr.
JOSEPH R. GOODMAN, JR. L.C.
2825 East Cottonwood Parkway
Suite 500
Salt Lake City, UT 84121
Attorney for Defendants/Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited:

Statutes and Rules Cited:

ARGUMENT

I. PREJUDICE TO MULTI MEDIA MUSKETEERS AND BREWER IS OBVIOUS.

A perverse fact of this entire proceeding is that HAL Company prevailed at the trial court level, only at a fraction of the relief it sought. The reasons for the reduction in this judgment to HAL Company are numerous, and could best be articulated by Judge Hansen, who took all evidence and heard all arguments at the time of trial in this matter. Judge Hansen ruled as to treble damages, and Judge Hansen declined to award HAL Company any attorney's fees. The trial judge, having heard evidence on all matters presented, and having heard oral argument based upon said evidence, did find in favor of HAL Company, entering judgment in favor of HAL Company for $1,038.45, a ruling consistent with the trial judge's findings on the day of trial. HAL Company took issue with these findings and this judgment, and did brief the matter before Judge Hansen a second time, and again HAL Company was not granted any additional relief beyond the original judgment amount of $1,038.45 was upheld by Judge Hansen[1]. Only after the case was re-assigned to Judge McVey, and after HAL Company was granted a third bite at the apple, this time couched as a "Motion to Correct Docket," was the original judgment trebled and augmented with outrageous attorney's fees, bringing the judgment

[1] As HAL Company correctly points out, they were entitled to and did receive the opportunity to attack the propriety of the trial court's decision, and to argue for a change or correction thereof. Judge Hansen heard the arguments of HAL Company, and denied them the relief ultimately granted them by Judge McVey.

amount to $7,407.77, an increase of $6,369.32.

As a result of the highly irregular activity of the district court below, Multi Media and Brewer have been prejudiced in the amount of $6,369.32. Further, and as argued below, this modification of the original findings of Judge Hansen took place at a hearing to "Correct the Docket," and after Judge Hansen had already heard the arguments made by HAL Company and had ruled against them. Given the nature of the motion filed by HAL Company, and the hearing set therein, Multi Media was not given appropriate notice that it would be forced to reargue the earlier-filed motion. At the time of the hearing of Judge McVey, the only correction of the docket required was to enter Judgment in conformity with the findings entered by Judge Hansen and nothing more[2].

II. JUDGE MCVEY LACKED AUTHORITY TO MODIFY RULING OF JUDGE HANSEN.

Apparently mindful of the fact that this case, as decided by Judge Hansen, resulted in judgment of only a bit more than $1,000.00, and that this case had already consumed substantial judicial resources, Judge Hansen did not issue a written memorandum decision on May 24, 2004. In ruling against HAL Company's first objection to the findings made at the trial court, Judge Hansen did enter Multi Media's Findings of Fact and Conclusions of Law. The law of this case was established on May 24, 2004; Judge Hansen had heard the arguments of HAL Company, both at trial and in their post-trial brief, and Judge Hansen *ruled against HAL Company and their arguments*. It is quite

---

[2] *State v. Leatherbury,* 65 P.3d 1180 (Utah 2003), cited by HAL Company, deals with the timing of an appeal, not a case in which six months later a different judge enters Judgment entirely inconsistent with the Findings.

possible that if Judge Hansen issued a memorandum decision, we would not be here, as a memorandum decision would have inarguably alerted HAL Company of its obligation to seek appropriate appellate relief. This was not done, and fortuitously for HAL Company, Judge McVey was reassigned to the case and, either through inadvertence or neglect, allowed HAL Company to attack the judgment a second time. In this third setting, Judge McVey ruled in contravention of Judge Hansen and in contravention of the law of this case which was inarguably set on May 24, 2004. Upon information and belief, it is reasonable to assume that Judge Hansen would not have suddenly overturned his two (2) prior rulings merely because of the persistence of HAL Company.

On August 30, 2004, HAL Company filed a motion and memorandum to "Correct the Docket." Nothing in this motion or memorandum references Rule 54 of the Utah Rules of Civil Procedure, and deals only with the apparent irregularities in the docket going back to May 24, 2004. Again, this "Motion to Correct Docket" was the pleading which led to the law of this case being turned on its head[3].

HAL Company's reliance upon *Trembly v. Mrs. Fields Cookies,* 884 P.2d 1306 (Utah Ct. App. 1994) is misplaced. Namely, at 1311, the Appellate Court set forth several factors which a court can consider in "determining the propriety of reconsidering a different ruling. These may include, but are not limited to, when (1) the matter is

[3] Multi Media again reasserts that this Motion and Memorandum gave no notice to it of the substantive effect of the arguments HAL Company would make in December, 2004. Nothing in the August 30, 2004 Memorandum makes reference to any error in the rulings of Judge Hansen, objects to the amount of the judgment, or to the denial of attorney's fees. Ambushing Multi Media by entirely overturning the judgment without any prior notice or even argument made that it should be overturned is highly irregular and must not be allowed to stand.

presented in a 'different light' or under 'different circumstances;' (2) there has been a change in the governing law; (3) a party offers new evidence' (4) 'manifest injustice' will result if the court does not consider the prior ruling; (5) a court needs to correct its own errors; or (6) an issue was inadequately briefed when first contemplated by the court." In Judge McVey's memorandum decision, reference is made to a review of the trial tapes, but not to a review of arguments held on the post-trial motions in which the identical issues were previously waived. The actual decision sought to be overturned, the May 24, 2004 entry of Findings, was, apparently, not even reviewed by Judge McVey, and accordingly, none of the factors set forth in *Trembly* were addressed by Judge McVey. The appropriate analysis should have been of the post-trial motions, at which time HAL Company first raised these arguments, and not of the trial itself. Accordingly, Judge McVey's decision necessarily failed to address any of the factors set forth above which would have, arguably, enabled him to alter the earlier decision.

Finally, and as HAL Company points out, the *Trembly* decision involves a review of Rule 54 of the Utah Rules of Civil Procedure. No where in HAL Company's August 30, 2004 Memorandum is Rule 54 referenced or even alluded to. Accordingly, and again, Judge McVey lacked authority, even pursuant to Rule 54, to modify the Findings of Judge Hansen, as the Motion before the Court was not properly brought pursuant to Rule 54.

III. JUDGE HANSEN'S FINDINGS NOT ENTERED "BY MISTAKE."

The key element underpinning the specious reasoning of HAL Company is that, somehow, Judge Hansen entered the May 24, 2004 Findings of Fact by "mistake." Such

an assertion is inflammatory and entirely unsupported by evidence. Judge Hansen has not testified, has not offered any statement or commentary that these Findings were a mistake, and barring such an admission, this Court must assume that Judge Hansen entered the Findings of Fact and Conclusions of Law he felt were appropriate in this matter. Any assertion to the contrary can be given no weight[4].

By making this argument, HAL Company acknowledges the injustice served upon Multi Media and Brewer below. Only by such a bold allegation of error on Judge Hansen can the actions of Judge McVey be supported. HAL Company is mindful of the fact that it's August 30, 2004 Motion and Memorandum seek only a narrow remedy, and that Judge McVey went far beyond even what was requested when he set aside the Findings of Fact entered, appropriately, by Judge Hansen.

IV. AWARD OF ATTORNEY'S FEES BELOW IN ERROR.

For all of the reason set forth in the earlier brief, and echoed herein, the award of attorney's fees below to HAL Company was a mistake. This mistake should not be compounded by the award of attorney's fees at this time.

---

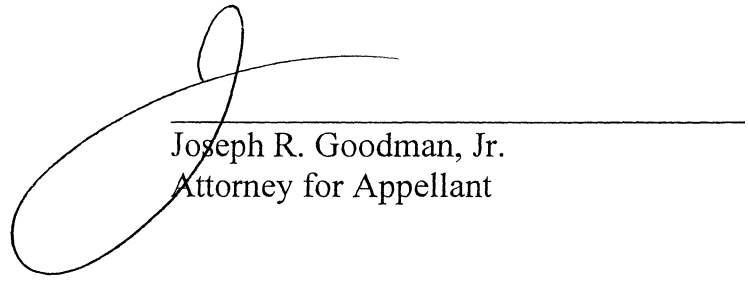
[4] HAL Company also asserts that Judge McVey reviewed the April 7, 2004 videotape as well, even though no mention of this is made in the written memorandum prepared by Judge McVey. This Court cannot assume that Judge McVey did something barring admissible evidence on this point. Again, the errors below are evidenced by HAL Company's attempt to have this Court make numerous assumptions about the actions of the trial court judges below. Such assumptions cannot be made by this Court.

CERTIFICATE OF SERVICE

I hereby certify that I am employed by Joseph R. Goodman, Jr., L.C., and that I served two (2) true and correct copy of the foregoing **APPELLANT'S REPLY BRIEF,** via first class mail, postage prepaid, on the following:

Jackson Howard
HOWARD, LEWIS & PETERSON, P.C.
120 East 300 North Street
PO Box 1248
Provo, UT 84603
Attorney for Plaintiff/Appellee

on this 30 day of January, 2006.

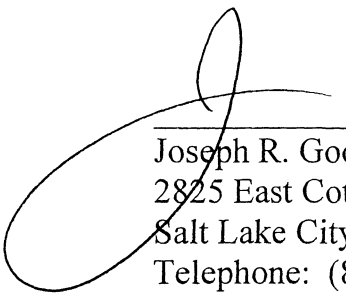


Joseph R. Goodman, Jr.
Attorney for Appellant

RELIEF SOUGHT

Appellant seeks remand to the District Court for the entry of Findings of Fact and Conclusions of Law, and Judgment in conformity therewith, consistent with the Findings made at the time of trial, and consistent with the Findings entered on May 24, 2004 by the trial judge.

DATED this 30 day of January, 2006.



Joseph R. Goodman, Jr.
2825 East Cottonwood Parkway, Ste. 500
Salt Lake City, UT 84121
Telephone: (801) 990-3300
Facsimile: (801) 990-3305