

2005

# John Carbaugh and Dixie Carbaugh v. Asbestos Corporation Limited, et al., Defendants and Appellees : Unknown

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca2](https://digitalcommons.law.byu.edu/byu_ca2)



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.

unknown.

unknown.

---

## Recommended Citation

Legal Brief, *Carbaugh v. Asbestos Corp*, No. 20050822 (Utah Court of Appeals, 2005).  
[https://digitalcommons.law.byu.edu/byu\\_ca2/6036](https://digitalcommons.law.byu.edu/byu_ca2/6036)

This Legal 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](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

FILED  
UTAH APPELLATE COURTS

JUL 13 2006

PARR WADDOUPS BROWN  
GEE & LOVELESS *A Professional Corporation*

*Attorneys at Law*

CHEYLYNN HAYMAN  
ch@pwlaw.com

July 13, 2006

Pat Bartholomew  
Clerk of Court  
Utah Supreme Court  
450 S. State Street  
Salt Lake City, Utah 84114

Re: *Carbaugh v. Asbestos Corp. Ltd., et al.*, 20050822-SC

Dear Ms. Bartholomew:

It has come to our attention that, when filing our appellee brief in the above-identified case, we inadvertently failed to attach copies of the following unpublished Utah Court of Appeals opinions in our addendum:

*Aiono v. Hogan*, 2005 UT App 331U

*BMC W. Corp. v. Deseret Crest Dev., Inc.*, 2002 UT App 193U

*Gillett v. Price*, 2004 UT App 460U

*Keeney v. Campbell Soup Co.*, 2005 UT App 514U

Included herewith are accurate copies of the foregoing unpublished opinions. We apologize for any inconvenience this oversight may have caused the Court.

Sincerely,

PARR WADDOUPS BROWN GEE & LOVELESS

*Cheylynn Hayman*  
Cheylynn Hayman



Pat Bartholomew  
July 13, 2006  
Page 2

---

Enclosures

cc (w/o enclosures): Alan R. Brayton  
S. Brook Millard  
C. Ryan Christensen

IN THE UTAH COURT OF APPEALS

-----ooOoo-----

Voi Aiono and Cheryl Aiono,	)	MEMORANDUM DECISION
	)	(Not For Official Publication)
Plaintiffs and Appellants,	)	
	)	Case No. 20040769-CA
v.	)	
	)	
<u>Kendall Hogan</u> , State Farm	)	F I L E D
Insurance, and Does 1 through	)	(July 29, 2005)
50,	)	
	)	2005 UT App 331
Defendants and Appellee.	)	

-----

Third District, Salt Lake Department, 030905421  
The Honorable Ann Boyden

Attorneys: David O. Drake, Midvale, for Appellants  
David N. Mortensen and Jared R. Casper, Provo, for  
Appellee

-----

Before Judges Billings, Bench, and Greenwood.

PER CURIAM:

Voi Aiono and Cheryl Aiono (the Aionos) appeal from the final judgment of the district court dismissing their complaint. The Aionos argue that the district court erred when it granted Kendall Hogan's motion for summary judgment and when it denied the Aionos' motion to amend their complaint. We affirm.

The Aionos filed a complaint in July 2000 against Hogan, State Farm Insurance (State Farm), and other Doe defendants after an automobile accident. The complaint was not served and the case was dismissed for failure to prosecute. Two days before the one year savings statute expired, see Utah Code Ann. § 78-12-40 (2002), the Aionos refiled their complaint. Hogan was the only party served with a summons and the complaint. After filing an answer and a stipulated discovery plan, Hogan filed a motion for summary judgment.

The Aionos did not file a response to Hogan's motion for summary judgment. Instead, the Aionos filed a motion to amend their complaint or, in the alternative, a motion for additional time. The Aionos alleged that they had named Hogan as the wrong party and that they should be allowed to "reflect Teresa R.

Peterson as the proper defendant." In the alternative, the Aionos sought additional time "to conduct discovery on the issue of potential liability of [Hogan]."

After oral argument, the district court granted the motion for summary judgment and denied the Aionos' motions. Regarding the latter, the district court specifically ruled that there was no unity of interest between Hogan and the alleged tortfeasor, Ms. Peterson, that could permit another amendment to the complaint to relate back to the filing of that complaint. The district court found that any amended complaint filed by the Aionos would thus be timed barred.

Summary judgment is proper if there are no genuine issues as to any material fact and the moving party is entitled to judgment as a matter of law. See Utah R. Civ. P. 56(c). We give a trial court's decision to grant summary judgment no deference and review it for correctness. See Norman v. Arnold, 2002 UT 81, ¶15, 57 P.3d 997.

The Aionos' complaint alleged that Hogan negligently operated a motor vehicle and that such negligence directly caused their injuries. Hogan's motion for summary judgment was based upon Hogan's uncontested averments that he was not the driver of the vehicle involved in the underlying accident, but merely the co-owner of the vehicle with his son. Furthermore, Hogan averred that he did not give permission to the driver of the vehicle, Ms. Peterson, to operate the vehicle on the date of the accident. Thus, the uncontested statements set forth in Hogan's affidavit rendered summary judgment appropriate. See Utah R. Civ. P. 56(c) ("The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.").

Further, the district court correctly denied the Aionos' motion to amend their complaint. Utah Rule of Civil Procedure 15(c) governs the relation back of amendments. Rule 15(c) "allows a plaintiff to cure defects in his or her original complaint despite the intervening running of a statute of limitations." Penrose v. Ross, 2003 UT App 157, ¶9, 71 P.3d 631. "Generally, however, 'rule 15(c) will not apply to an amendment which substitutes or adds new parties for those brought before the court by the original pleadings.'" Id. (quoting Doxey-Layton Co. v. Clark, 548 P.2d 902, 906 (Utah 1976)).

There is an exception to this rule, which "'operates where there is a relation back, as to both plaintiff and defendant, when new and old parties have an identity of interest.'" Id. (quoting Doxey-Layton Co., 548 P.2d at 906). "'New defendants

sought to be added must have an identity of interest with the original party named in the complaint, so it can be assumed or proved the relation back is not prejudicial.'" Id. at ¶20 (quoting Nunez v. Albo, 2002 UT App 247, ¶29, 53 P.3d 2) (additional citations and quotations omitted). "'Identity of interest' as used in this context means that the parties are so closely related in their business operations that notice of the action against one serves to provide notice of the action to the other." Perry v. Pioneer Wholesale Supply Co., 681 P.2d 214, 217 (Utah 1984); see also Penrose, 2003 UT App 157 at ¶16 (holding that an identity of interest "requires parties to have the 'same' interest"). The Aionos have failed to make any showing that an identity of interest exists between any relevant parties in this case.

At oral argument, the Aionos admitted that there was no identity of interest between Hogan and Ms. Peterson. Instead, the Aionos argued, as they do on appeal, that there is an identity of interest between State Farm, whom the Aionos never served, and Ms. Peterson, of whom there is scant record evidence. The district court correctly held that this relationship was too attenuated and properly determined that the relation back doctrine does not apply to an amendment that adds new parties who have no identity of interest with existing parties. See, e.g., Penrose, 2003 UT App 157 at ¶19 (holding that father who owned vehicle did not have identity of interest with son who drove the vehicle); Perry, 681 P.2d at 217 (third-party action against supplier and manufacturer did not relate back to the filing of the original action as there was no evidence showing of any identity of interest with the third-party defendants other than privity of contract). Accordingly, the district court correctly denied the motion to amend the complaint.

Finally, the Aionos argue that the district court erred when it denied their motion for an extension of time. A review of the record reveals that a proper request under rule 56(f) of the Utah Rules of Civil Procedure was never made to the district court. Rule 56(f) states:

Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Utah R. Civ. P. 56(f).

By its clear language, rule 56(f) contemplates the filing of an affidavit. See id. Thus, Utah appellate courts have "refused to consider an argument that further discovery was necessary when the appellant had failed to file a Rule 56(f) affidavit." Callioux v. Progressive Ins. Co., 745 P.2d 838, 840 (Utah Ct. App. 1987). The Aionos did not file an affidavit as required by the rule.

Furthermore, "even if a party does file an affidavit or the court is willing to consider other material in place of an affidavit, the opposing party must nevertheless explain how the continuance will aid his opposition to summary judgment." Id. at 841. As set forth in Callioux,

the mere averment of exclusive knowledge or control of the facts by the moving party is not adequate: the opposing party must show to the best of his ability what facts are within the movant's exclusive knowledge or control; what steps have been taken to obtain the desired information . . .; and that he is desirous of taking advantage of these discovery procedures.

Id. at 840-41; see also Cox v. Winters, 678 P.2d 311, 312-14 (Utah 1984) (setting forth the requirements for a rule 56(f) application). Aside from the failure to set forth an affidavit, the Aionos failed to make any showing below that additional discovery was required in this case. Therefore, the district court correctly denied the Aionos' motion for addition time.

Accordingly, we affirm the order of the district court.

---

Judith M. Billings,  
Presiding Judge

---

Russell W. Bench,  
Associate Presiding Judge

---

Pamela T. Greenwood, Judge

IN THE UTAH COURT OF APPEALS

----ooOoo----

BMC West Corporation,  
Plaintiff and Appellee,

v.

Deseret Crest Development, Inc ,  
Jessica Barker, and Does 1-20,  
Defendants and Appellants

MEMORANDUM DECISION  
(Not For Official Publication)

Case No 20010269-CA

FILED  
June 6, 2002

2002 UT App 193

-----

Third District, Salt Lake Department  
The Honorable Leon A Dever

Attorneys  
Gary H Weight, Provo, for Appellants  
F Mark Hansen, Salt Lake City, for Appellee

-----

Before Judges Jackson, Greenwood, and Orme

ORME, Judge

We have determined that "[t]he facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument " Utah R App P 29(a)(3)

The trial court adopted, inter alia, the following statement by Plaintiff as its own finding "Defendants have oppos[ed] summary judgment with an affidavit they knew was not made on personal knowledge in violation of Rule 56(e) "(1) On appeal, Defendants have not marshaled the evidence supporting this finding and then shown why the evidence so marshaled is legally insufficient to support the finding See State v Gamblin, 2000 UT 44, ¶17 n 2, 1 P 3d 1108 We therefore conclude that the trial court did not exceed its discretion in striking Barker's affidavit on behalf of Deseret Crest Development See Utah R Civ P 56(e), GNS Partnership v Fullmer, 873 P 2d 1157, 1164 (Utah Ct App 1994)

With respect to the other rule 37 sanctions imposed by the trial court, the following finding, incorporated from Plaintiff's memorandum and not effectively challenged on appeal, amply supports the sanctions imposed "Defendants have clearly demonstrated a disregard for the rules of court, and an intent to delay, hinder and obstruct[ ]" See Morton v Continental Baking Co, 938 P 2d 271, 274 (Utah 1997) (holding imposition of rule 37 sanctions is within trial court's discretion when evidence supports finding that sanctioned party has engaged in "persistent dilatory tactics frustrating the judicial process") (quoting W W & W B Gardner, Inc v Park West



Village, Inc., 568 P 2d 734, 738 (Utah 1977))

Defendants contend that disputed issues of fact remain, precluding summary judgment. Defendants fail, however, to identify any portion of an affidavit, deposition, or answers to interrogatories, which has not been properly stricken, that disputes Plaintiff's factual contentions. Thus, we conclude the trial court's grant of summary judgment was also proper.<sup>(2)</sup> See Utah R. Civ. P. 56(c)

Accordingly, we affirm and remand only for a determination and award of the reasonable attorney fees and costs incurred by

BMC West on appeal. See Management Servs. Corp. v. Development Assocs., 617 P 2d 406, 409 (Utah 1980)

---

Gregory K. Orme, Judge

-----

WE CONCUR

---

Norman H. Jackson,  
Presiding Judge

---

Pamela T. Greenwood, Judge

1 Defendants contend that the trial court made only a "vague incorporation by reference of language from appellee's supporting memorandum," and that this "is insufficient to establish that the trial court relied on Rule 56 in striking the affidavits." On the contrary, the court explicitly stated: "For the reasons set forth in BMC West's supporting memoranda, incorporated here by reference as the Court's findings of fact and conclusions of law, the Court grants BMC's motion[.]" Rule 56 was specifically relied on in BMC West's memorandum referred to by the court.

2 Because Defendants took no action below under Rule 56(f) of the Utah Rules of Civil Procedure, they waived their opportunity to argue on appeal that summary judgment should not have been granted because Ben Magelsen has yet to be deposed.

IN THE UTAH COURT OF APPEALS

-----ooOoo-----

David K. Gillett and Majestic Air Services, Inc., a Utah corporation,  
Plaintiffs and Appellants,

v.

Steve Price,  
Defendant and Appellee.

MEMORANDUM DECISION  
(Not For Official Publication)

Case No. 20040682-CA

F I L E D  
(December 9, 2004)

2004 UT App 460
-----------------

-----

Third District, Sandy Department

The Honorable Royal I. Hansen

Attorneys: Stephen G. Homer, West Jordan, for Appellants

Randall L. Skeen, Salt Lake City, for Appellee

-----

Before Judges Billings, Bench, and Orme.

PER CURIAM:

This matter is before the court on motions by this court and Appellee Steve Price for summary dismissal on the basis of lack of jurisdiction. See Utah R. App. P. 10. The civil claim filed in district court related to allegations of theft of property. The

district court granted Price's motion for summary judgment in an order issued on June 16, 2004.

In response to the court's order, Appellant David Gillett filed a motion captioned "Plaintiffs' Motion For Reconsideration [Defendant's Motion For Summary Judgment]." This motion was filed on June 9, 2004, after the initial ruling on the motion for summary judgment was made, but prior to issuance of the final order. Gillett argued in the motion for reconsideration that the district court mischaracterized the documents relied upon in determining the statute of limitations had expired on Gillett's claim. Gillett also argued in the motion that factual issues existed and, as a result, summary judgment was improper.

Gillett's notice of appeal was filed on August 4, 2004. The notice of appeal was not timely filed from the order granting summary judgment, which was the final judgment. While Gillett's notice of appeal purports to appeal the denial of his motion to reconsider, he argues in his response to the motions for summary dismissal that the motion to reconsider should be construed as either a motion to alter or amend judgment or a motion for a new trial, pursuant to rule 59(e) of the Utah Rules of Civil Procedure. He cites Salt Lake Knee & Sports Rehabilitation v. Salt Lake City Knee & Sports Medicine, 909 P.2d 266, 268 (Utah 1995) and Watkiss & Campbell v. Foa & Son, 808 P.2d 1061, 1065 (Utah 1991), in support of his proposition.

If construed as a motion to alter or amend judgment or a motion for a new trial, Gillett's notice of appeal would be timely because these are post-trial motions, enumerated in rule 4(b) of the Utah Rules of Appellate Procedure, which toll the time for filing a notice of appeal until thirty days after issuance of an order denying the post-trial motion. See Watkiss & Campbell, 808 P.2d at 1064.

Gillett's motion, however, is not properly construed as a motion to amend or alter judgment or as a motion for a new trial. There is no indication that the trial court construed Gillett's motion as either a motion to alter or amend the judgment or as a motion for a new trial. Furthermore, the motion does not meet the requirements for either motion.

This court reviews the rulings of the trial court. Therefore, this court considers whether the trial court has abused its discretion in construing, or not construing, a motion to reconsider as a motion that tolls the time for filing a notice of appeal. Nothing in the district court's order denying Gillett's motion indicates that the court construed Gillett's motion as anything other than a motion to reconsider. Thus the district court did not abuse its discretion in declining to construe the motion as a rule 4(b) motion, especially given that the motion does not meet the requirements of a rule 59 motion. See Utah R. Civ. P. 59(a), (e).

Because Gillett's notice of appeal was timely from the order denying the motion to reconsider, the question remains whether this court has jurisdiction to consider an appeal of that order. Because the rules of civil procedure do not allow for a motion to reconsider, such a motion will be reviewed only if it could be properly brought under a rule, based on its substance, but was incorrectly captioned. See Salt Lake Knee & Sports Rehabilitation, 909 P.2d at 268. As we have already explained, Gillette's motion cannot be construed as a motion made under the rules of civil procedure.

For the forgoing reasons, this appeal is dismissed for lack of jurisdiction because of an untimely notice of appeal.

Price seeks attorney fees and costs based on rules 33 and 34 of the Utah Rules of Appellate Procedure. Price has not sufficiently argued, and we do not conclude, that this appeal was frivolous or for purposes of delay. We therefore decline to award attorney fees. Costs are awarded by operation of rule 34(a) of the Utah Rules of Appellate Procedure.

---

Judith M. Billings,

Presiding Judge

---

Russell W. Bench,

Associate Presiding Judge

---

Gregory K. Orme, Judge

IN THE UTAH COURT OF APPEALS

----ooOoo----

Tina Keeney, parent and	)	MEMORANDUM DECISION
natural guardian; and Chase	)	(Not For Official Publication)
Keeney, a minor,	)	
	)	Case No. 20040981-CA
Plaintiffs and Appellant,	)	
	)	F I L E D
v.	)	(December 1, 2005)
	)	
Campbell Soup Company,	)	2005 UT App 514
	)	
Defendant and Appellee.	)	

-----

Third District, Salt Lake Department, 030920573  
The Honorable L.A. Dever

Attorneys: William R. Hadley, Salt Lake City, for Appellant  
Scott M. Petersen, David N. Kelley, and Daniel Irvin,  
Salt Lake City, for Appellee

-----

Before Judges Davis, Greenwood, and Thorne.

DAVIS, Judge:

Tina Keeney appeals the trial court's grant of summary judgment in favor of Campbell Soup Company (Campbell). We affirm.

In reviewing a grant of summary judgment, we view the facts and all reasonable inferences drawn from them in the light most favorable to Keeney, who is the nonmoving party in this case. See Lovendahl v. Jordan Sch. Dist., 2002 UT 130, ¶13, 63 P.3d 705. We affirm only if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. See id. (citing Utah R. Civ. P. 56(c)). We review the trial court's conclusions of law for correctness. See id.

To prove negligent infliction of emotional distress (NIED), a claimant must prove "'illness or bodily harm.'" Harnicher v. University of Utah Med. Ctr., 962 P.2d 67, 69-70 (Utah 1998) (quoting Restatement (Second) of Torts § 313 (1965)). "[T]he emotional distress suffered must be severe; it must be such that a reasonable [person], normally constituted, would be unable to adequately cope with the mental stress engendered by the

circumstances of the case.'" Id. at 70 (second alteration in original) (citations omitted). While "illness" encompasses mental illness stemming from the negligent act of another, such illness must be established by expert testimony, Hansen v. Mountain Fuel Supply Co., 858 P.2d 970, 975 (Utah 1993), and may not be merely subjective, see Harnicher, 962 P.2d at 71.

Keeney claims that, as a result of her encounter with the tooth in the can of Campbell's soup, she suffered the following illness and bodily harm: (a) loss of twenty to thirty pounds, (b) hyper-vigilance toward prepared foods, (c) abnormal and aberrant behavior associated with food, and (d) teasing by fellow employees for her unusual behavior toward food. Keeney admits in her brief that she never sought medical attention for herself and never contracted any infectious diseases relating to the encounter.

We agree with the trial court that Keeney has not alleged the type of illness or bodily harm sufficient to support an NIED claim. This case is similar to Hansen, where several workers learned they had been exposed to asbestos over the course of a few months. See 858 P.2d at 972. Although the workers suffered respiratory problems at the time of exposure, they had no lasting physical difficulties. See id. at 973. Nonetheless, they filed an NIED claim, alleging that their worries about the exposure had caused general anxiety and sleeplessness. See id. In its review, the Utah Supreme Court focused its analysis on two factors: (1) the duration and nature of the exposure to the dangerous substance and (2) the likelihood that disease will actually occur. See id. at 975. The court concluded that due to the limited exposure and lack of asbestos-related disease, their anxiety was not of a magnitude with which "a reasonable person, normally constituted, would be unable to adequately cope." Id.

Here, where the exposure and the danger of disease is much more attenuated than that in Hansen, we reach the same conclusion. Keeney's distress after the exposure has produced some weight loss, anxiety, and vigilance in preventing future exposure, but the alleged magnitude of these effects is belied by the fact that her exposure never resulted in an infectious disease after three years and that she has never sought medical assistance for herself. Moreover, she has not provided expert testimony that her anxiety is a symptom of mental illness. We recognize that Keeney's experience may have been disturbing, but the resulting anxiety, vigilance, and weight loss is within a reasonable person's power to cope.

Keeney also argues that the trial court should have granted her request for a mental health evaluation. However, she made this request only in her memorandum in opposition to Campbell's

motion for summary judgment and never asserted it as a formal rule 56(f) motion with the required affidavits. See Utah R. Civ. P. 56(f) (requiring party to submit affidavits stating reasons why it could not obtain the evidence requested during discovery). Accordingly, we decline to remand the case to reopen discovery. See Grynberg v. Questar Pipeline Co., 2003 UT 8, ¶57, 70 P.3d 1 ("Simply asserting that more discovery is needed and that a proper response to the motion for summary judgment is impossible . . . is inadequate to overcome summary judgment. Parties . . . cannot justify further discovery without providing a viable theory as to the nature of the facts they wish to obtain." (internal quotations and citations omitted)).

We affirm.

---

James Z. Davis, Judge

-----

WE CONCUR:

---

Pamela T. Greenwood, Judge

---

William A. Thorne Jr., Judge