

2005

John Carbaugh and Dixie Carbaugh v. Asbestos Corporation Limited, et al : Reply Brief

Utah Court of Appeals

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IN THE SUPREME COURT OF UTAH

**JOHN CARBAUGH and
DIXIE CARBAUGH,**

Plaintiff/Appellant,

vs.

**ASBESTOS CORPORATION
LIMITED, et al.,**

Defendants/Appellee.

REPLY BRIEF OF THE APPELLANT

Supreme Court Case No.: 20050822-SC

Civil No.:010910746 AS

Master Case No. 010900863 AS

APPEAL FROM A FINAL JUDGEMENT OF THE
THIRD JUDICIAL DISTRICT COURT OF
SALT LAKE COUNTY, STATE OF UTAH
JUDGE GLENN K. IWASAKI

SEE FOLLOWING PAGE FOR
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OTHER APPEALS CONSOLIDATED WITH 20050822-SC

NONE

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GARLOCK, INC.

INGERSOLL-RAND COMPANY

MOUNTAIN STATES INSULATION
SUPPLY CO., INC.

PLUMBERS SUPPLY

RAPID-AMERICAN CORPORATION

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I. INTRODUCTION

Plaintiffs and Appellants John and Dixie Carbaugh (“Carbaugh” or “plaintiffs”) submit this brief in reply to the joint Appellees’ Brief of the asbestos defendants (“defendants”). Defendants’ arguments should be rejected, and the summary judgment dismissing Mr. Carbaugh’s claims should be reversed, because the conduct of plaintiffs’ pulmonary expert (Dr. Alvin Schonfeld), and of plaintiffs’ attorneys, was based on a valid, reasonable, and good faith interpretation of the law, and did not violate public policy. Dr. Schonfeld was professionally qualified to evaluate Mr. Carbaugh and each of the other plaintiffs to determine if they had an asbestos-related disease and the extent of their illness, and his testimony was sufficient to raise triable issues of fact. Further, the supplemental reports of Carbaugh’s other medical experts, Doctors Ganzhorn and Hammar, were sufficient to defeat summary judgment even if Dr. Schonfeld’s testimony is excluded. Contrary to defendants’ contentions, Carbaugh complied with the applicable procedures for requesting reconsideration, and the relief he requested should have been granted.

II. ARGUMENT

A. Defendants’ Policy Arguments Are Irrelevant And Based On Erroneous Facts

Appellees’ Brief is based in significant part on the spurious policy argument that Dr. Schonfeld’s evaluations violated public policy because he “conducted examinations and rendered diagnoses for the sole purpose of generating asbestos litigation claims.” (*e.g.*, Appellees’ Brief at 1). Defendants devote several pages of their brief to a description of the “asbestos litigation crisis,” implying that a medical professional who devotes time to assisting individuals who

believe they have been injured by exposure to asbestos is somehow at fault for creating or contributing to that crisis.

Defendants' mantra that plaintiffs' counsel hired Dr. Schonfeld "for the sole purpose of generating asbestos litigation claims" (*e.g.*, Appellees' Brief at 1, 3, 16, 31) is also factually untrue. As Appellants have illustrated to the district court and in their Opening Brief in the Court of Appeals, virtually all of the cases consolidated herein were filed months in *advance* of the time that plaintiffs retained Dr. Schonfeld. (*See* Plaintiffs' Memorandum in Opposition to Summary Judgment at 5-6; R 1363-1429; RT 6/6/05 pp. 9-10, 48.) In Carbaugh's case, it is undisputed that he filed his Complaint on June 29, 2001, following his diagnosis with lung cancer, and that Dr. Schonfeld had no contact with him until 2002. (*See* Appellants' Opening Brief at 8 and Record citations therein.) Since Carbaugh already had a good faith belief, supported by medical evidence, that he had an asbestos-related condition for which he is entitled to compensation, it is not surprising that Dr. Schonfeld confirmed that his lung cancer and pleural disease were indeed caused by exposure to asbestos. The hiring of an expert to evaluate and, if appropriate, opine about the medical condition of an individual who has previously filed a lawsuit alleging that he has been injured by asbestos does not amount to the sort of ambulance-chasing which defendants imply occurred here.

If anyone is to blame for the "explosion" in asbestos claims, it is, rather, the companies who, like defendants, continued aggressively to manufacture and market asbestos-containing products for decades after the lethal effects of exposure were known. As one eminent speaker asserted in his argument against the recently-defeated federal asbestos legislation proposal, it makes no sense that "what for one person would be deemed a tragedy, suddenly is called a

‘litigation crisis’ when it affects thousands of people.” In any case, defendants’ views about the litigation process are utterly irrelevant to these proceedings. If the Court finds that plaintiffs’ claims have merit, it is obligated to allow them to proceed regardless of whether or not it thinks there is “too much” asbestos litigation.

B. Dr. Schonfeld’s Evaluations Violated Neither The Letter Nor The Spirit Of The Medical Practices Act

The issue presented by this case is not whether the State of Utah has the right to regulate the practice of medicine by imposing reasonable licensing requirements, but whether (assuming for purposes of argument only that the Court finds that Dr. Schonfeld’s evaluations violated those requirements), his expert opinions should have been excluded and ignored in ruling on the merits of defendants’ motion for summary judgment. The district court clearly erred in ignoring these evaluations, and thus was also incorrect in its ultimate conclusion.

The Medical Practices Act is designed to “prevent[] the unauthorized, fraudulent, and incompetent practice of medicine.... The explicit legislative intent of the ... Act is to protect the public from those unqualified and untrained who, in conducting a business, purport to diagnose and treat human ailments and diseases for compensation.” *State v. Hoffman*, 733 P.2d 502, 504 (Ut.App. 1987). Dr. Schonfeld’s conduct does not fall within any of those proscriptions. Neither defendants nor the district court questioned the doctor’s credentials to evaluate the plaintiffs, or the techniques which he used for that purpose. Dr. Schonfeld is eminently qualified and highly trained in his profession, and there is no evidence that he has ever been subject to any type of disciplinary proceeding, in Utah or elsewhere. There was simply no factual basis for the district court’s conclusion that his testimony was “unreliable.”

Defendants' interpretation of the statutory exemptions for the giving of expert testimony (UCA § 58-67-305(8) and §58-68-305(8)) is so narrow as to read the exemption out of existence; they argue that the statute "contemplates allowing a person to hold himself out as a physician while testifying as an expert witness during the course of a legal proceeding, ..., nothing more." (Appellees' Brief at 23.) However, an expert must always do more than that; s/he must review medical records, occupational histories, radiographic evidence, testimony, etc. in order to determine the extent and potential causes(s) of the plaintiff's injuries, and to form a diagnostic opinion. Otherwise, the supposed expert's testimony is meaningless. Therefore, the issue is whether any of such foundational information may, or may not, be supplied directly by the client, in the form of an interview and routine, non-invasive procedures.¹ The parties agree that this question has not previously been addressed by the courts of Utah.

The primary authority cited by defendants in support of their assertion that the lack of a Utah medical license rendered Dr. Schonfeld's testimony unreliable are two unpublished memorandum decisions from trial courts in the States of Washington and Texas. (*See* Appellees' Brief at 28-29, 32 and notes 16, 17.) Those rulings, which would have no precedential value even in the jurisdictions in which they were issued, should not be considered here because (1) unreported trial level decisions are not properly citable (*see* Utah Rule Appellate Procedure

¹ There is no evidence that Dr. Schonfeld "treated" Mr. Carbaugh or gave him medical advice. His report (included in Appellant's Addendum) recommends only that he continue to have medical testing, and the obvious fact that he should quit smoking. Further, the report states that it was sent to plaintiffs' counsel for use in the litigation, not to Mr. Carbaugh. Having been retained to form an opinion as to the connection between Mr. Carbaugh's injuries and his exposure to asbestos, it was entirely appropriate for the doctor to share his expert conclusions with his clients.

30(f)²), and (2) defendants have failed to show that the substantive law of Washington and Texas is sufficiently similar to Utah law to satisfy the threshold level of relevance. Further, a reading of the decisions shows that they do little to support defendants' position.

The perfunctory decision of the trial judge in Washington does not reveal what the doctor did, and there, the court found that the report was unreliable, at least in part, because it was based on "nonconforming x-rays" taken by unregistered radiology technicians using unregistered and uncertified equipment. Further, the Texas decision relates to a completely different set of circumstances as are present here. The facts of that case actually bolster the Appellants' argument when compared with the instant matters. The judge in Texas found that about a dozen doctors and support staff had perfunctorily "screened" some 10,000 plaintiffs for silicosis by posing questions and following procedures created by plaintiffs' attorneys. Several of the doctors testified, in contradiction to the written reports on which plaintiffs based their claims, that they did not in fact undertake to "diagnose" the plaintiffs with silicosis or any other disease. (*See, e.g.*, Texas Opinion at 46.) The court found that many of the technicians who interviewed the plaintiffs and administered their x-rays and pulmonary function tests had "no medical training" and were unsupervised by any medical professional, and that at least one of the screening firms had previously been cited for non-compliance with state standards. (*Id.* at 63, 69, 71.) Moreover, in some cases, the agreement was that the medical evaluators would not be paid unless the clients subsequently decided to hire the lawyers who arranged for the screening. (*Id.* at 74-75.) Notably, the court expressly stated that the issue of the effect of some of the providers'

² None of the plaintiffs nor their counsel were involved in the cited cases.

lack of a license to practice in the state where the evaluations were performed *was not before the court*. (*Id.* at 92 n.80, 98 n.85.)

It is hardly surprising that in those very disparate cases, the court found the “expert reports” unreliable. Conversely, in this case, there is no evidence that Dr. Schonfeld’s procedures suffered from any irregularities which might render his opinions unreliable from a medical or scientific viewpoint. The district court was, accordingly, obliged to consider his report in determining whether Carbaugh met his burden of demonstrating an issue of fact sufficient to defeat summary judgment.

C. Plaintiffs’ Motion To Amend And Reconsider The Judgment Was Properly Filed

Regardless of how the Court rules on the admissibility issue, summary judgment should be reversed because it was an abuse of discretion both for the trial court to deny plaintiffs’ motion for reconsideration, and to refuse to consider the supplemental medical reports proffered by Carbaugh in support of his claims.

Defendants’ assertion that plaintiffs’ request for such relief was procedurally improper is based primarily on the Utah Supreme Court’s recent decision in *Gillett v. Price*, 2006 UT 24, 135 P.3d 861 (“*Gillett*”), and on plaintiffs’ alleged failure to comply with the procedural requirements for a motion for continuance under Rule 56(f). Neither of those contentions has merit.

Following the initial hearing of this matter, plaintiffs moved the district court, “pursuant to Rule 59(e),” “to amend its judgment and reconsider its Memorandum Decision of January 28, 2005.” The court’s decision reflects that it understood the procedural basis of the motion. In its Memorandum Decision of June 13, 2005, the court declared the motion timely, stating that,

“pursuant to Rule 59(e), a motion to alter or amend judgment ‘shall be served no later than 10 days after the entry of judgment.’ To date, judgment has not been entered, accordingly, timeliness is not an issue.” R 9231. The court appropriately proceeded to reconsider the merits of its prior ruling, although it reaffirmed its decision that defendants should prevail.

There is no legitimate basis for defendants to challenge the court’s agreement to hear plaintiffs’ motion. In *Gillett*, the Supreme Court acknowledged that motions to reconsider have been liberally allowed by the courts, stating that “a long line of cases from both the court of appeals and this court [have treated] motions to reconsider as rule-sanctioned motions based on the substance of the motion [citations].” (§ 8.) The Court held “that it is time this practice comes to an end,” but its holding is limited to post-final-judgment motions; “it does not affect motions to or decisions by the district courts to reconsider or revise nonfinal judgments, which have no impact on the time to appeal and are sanctioned by our rules.” (§ 10.) Further, *Gillett* cannot be retroactively applied to preclude motions, such as plaintiffs’, which were procedurally proper at the time they were filed. Defendants’ insistence that plaintiffs’ motion should have been rejected “based on the Utah Supreme Court’s recent and unequivocal rejection of this practice [of moving for reconsideration following the issuance of a memorandum decision granting summary judgment] in *Gillett*,” (Appellees’ Brief at 36) is entirely misguided.

Regardless of how the courts choose to handle such motions in the future, at the time relevant to the instant cases, there was significant precedent approving the filing of a motion to reconsider a decision granting or denying a motion for summary judgment, no matter how the motion was denominated. *See, e.g., Timm v. Dewsnap*, 921 P.2d 1381 (Utah 1996); *U.P.C., Inc. v. R.O.A. General, Inc.*, 990 P.2d 945 (Ut.App. 1999); *Trembly v. Mrs. Fields Cookies*, 884 P.2d

1306 (Ut.App. 1994). Among the courts' grounds for such reconsideration was a determination that amendment of the decision was necessary to prevent "manifest injustice." As summarized in *Trembly*,

A court can consider several factors in determining the propriety of reconsidering a prior ruling. These may include, but are not limited to, when (1) the matter is 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 reconsider 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.

884 P.2d at 1311. See also *Bennion v. Hansen*, 699 P.2d 757, 760 (Utah 1985) ("Any judge is free to change his or her mind on the outcome of a case until a decision is formally rendered."); *State v. Parsons*, 781 P.2d 1275, 1282 (Ut.App. 1989) (discussing the trial court's "inherent powers as the authority in charge of the trial" and its "broad latitude to control and manage the proceedings" and preserve the integrity thereof); Civil Procedure Rule 60(b) (authorizing the Court "on motion and upon such terms as are just," to relieve a party from the effect of a judgment or order for mistake, inadvertence, surprise, or "any other reason justifying relief.")

In the *Trembly* case, a defendant who was only partially successful on its motion for summary judgment twice asked the court to reconsider its ruling, basing its request on Rule of Civil Procedure 60(b)(7) on one occasion. The Court of Appeals held that Rule 60(b)(7) was inapplicable, but that Rule 54(b) did provide a basis for relief, and it affirmed on that basis.³ The

³ "Rule 54(b) of the Utah Rules of Civil Procedure provides, in pertinent part, that any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties ... is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." *Trembly*, 884 P.2d at 1310-11.

Court characterized Rule 54(b) as “allow[ing] a court to change its position with respect to any order or decision before a final judgment has been rendered [citation],” and further held that, “Because the substance, not caption, of a motion is dispositive in determining the character of the motion, [citation], we will treat Mrs. Field’s motion as a Rule 54(b) motion.” *Id.* at 1310. Rules 54(b) and 60(b) provide alternative legal bases for plaintiffs’ motion here, as well.

Similarly, in *Ron Shepherd Insurance Inc. v. Shields*, 882 P.2d 650 (Utah 1994), the Supreme Court noted that it had always held that “motions for reconsideration” will be entertained if they are permissible under any rule, and held that the trial court properly entertained further legal argument, *and considered supplemental affidavits*, which were submitted in the form of a motion for reconsideration. 882 P.2d at 653 n.4. The Court found that plaintiffs’ motion “was, in essence, not a motion for reconsideration at all, but simply a reargument of their opposition to defendants’ motion for summary judgment, *which a trial court is free to entertain at any point prior to entry of a final order or judgment.*” *Id.* (emphasis added). *See also Brookside Mobile Home Park, Ltd. v. Peebles*, 48 P.3d 968, 973 (Utah 2002) (Holding that it was appropriate for the trial court to reconsider summary judgment on the basis of the opposing party’s new legal argument and *supplemental affidavits* which “clarified” its position, and holding that, “Trial courts have clear discretion to reconsider and change their position with respect to any orders or decisions as long as no final judgment has been rendered.”); *J.V. Hatch Const., Inc. v. Kampros*, 971 P.2d 8, 11 (Ut.App. 1998) (Agreeing that no such thing as a “motion for reconsideration” on the basis of an erroneous application of the law exists, but holding that “a motion so titled may still be properly heard if it could have been brought under a different rule, ... but was improperly characterized.”)

Carbaugh's position is indistinguishable from that of the plaintiffs in *Ron Shepherd* and *Brookside*, in both of which the court accepted supplemental evidence and briefing without any showing that the evidence could not have been produced sooner because the information was relevant to the issues and necessary to do justice. The Court should reach the same result here.

Defendants instead characterize plaintiffs' motion as a request for a continuance under Rule 56(f). The cases they cite are inapposite not only on procedural grounds, but also on the facts, for in each of them the alleged need for additional discovery was either raised for the first time on appeal, *see, e.g., Jackson v. Layton City*, 743 P.2d 1196, 1198 (Utah 1987), or the advantages to granting the appellants more time was unclear. For example, in *In re Sonnenreich*, 2004 UT 3, 86 P.3d 712, the Court affirmed summary judgment for the plaintiff in a State Bar disciplinary proceeding on the ground that the Office of Professional Conduct had failed to come forth with any evidence to rebut plaintiff's sworn assertion that she had never received notice of the disciplinary action against her. The decision was based on the familiar rule that a party opposing summary judgment is obligated to come forward with evidence to show that it is entitled to proceed to trial, and that "it is not enough to rest on allegations alone." 86 P.3d at 725. Similarly, in *Fenn v. Redmond Venture, Inc.*, 2004 UT App 555, 101 P.3d 581, the Court affirmed summary judgment because the speculative evidence in plaintiffs' affidavits, *even if true*, was demonstrably insufficient to raise a triable issue of fact. The Court also held that plaintiffs' motion to alter or amend the judgment and for additional discovery under Rule 56(f) was properly denied because the motion was untimely, and plaintiffs offered no *explanation* for why additional discovery was necessary, or as to what they hoped to prove. Finally, in *anywhere Questar Pipeline Co.*, 2005 UT 8, 101 P.3d 11, a defendant in a breach of

contract/misrepresentation case moved to dismiss plaintiff's claims, and the court treated the motion as one for summary judgment. Although plaintiffs did not file a Rule 56(f) motion, the Court of Appeals considered whether they were entitled to such relief. The Court found, to the extent the issue had been addressed in plaintiffs' briefs, that:

we agree with the district court that they "have failed to demonstrate how additional discovery would be of any assistance to their response to defendants" motion. Simply asserting that more discovery is needed and that a proper response to the motion for summary judgment is impossible due to the other party's failure to cooperate with discovery requests is inadequate to overcome summary judgment. [citation] Parties must "offer more than conclusory assertions to demonstrate the existence of a genuine issue for trial," and cannot justify further discovery without providing a viable theory as to the nature of the facts they wish to obtain. [citation]

70 P.3d at 15. *See also Franklin v. Stevenson*, 1999 UT 61, 987 P.2d 22, 25, in which the Court found that, because plaintiff's case rested entirely on the then-novel theory of "recovered memory," there was no indication that plaintiff could produce new admissible evidence in response to the court's exclusionary ruling.

The situation here is patently distinguishable from these cases. It is undisputed that Dr. Schonfeld's expert report (as well as the reports of Dr. Ganzhorn and Dr. Hammar), were, if admitted, more than sufficient to defeat summary judgment and entitle Carbaugh to proceed to trial. It was also perfectly clear to the district court and to opposing parties, what additional evidence Carbaugh required, how and why that need arose, and that given additional time, Carbaugh could almost certainly provide a substitute expert report from a Utah physician. Under these circumstances, it was an abuse of discretion for the district court to deny the relief sought in Carbaugh's motion to reconsider.

III. CONCLUSION

The district court's dismissal of the claims of dozens of plaintiffs at issue is premised on two unprecedented interpretations of the Medical Practices Act: first, that the Act precludes an out-of-state expert like Dr. Schontfeld from obtaining from his clients the basic foundational evidence needed to prepare his opinions; and second, that the Act includes an exclusionary rule which requires the court to completely disregard the reports of an otherwise qualified expert who violates the Act in adjudicating the merit of a motion for summary judgment. For the reasons stated in their Opening Brief, Appellants submit that the court's construction of the Act is overly restrictive, especially as applied to this case.

Regardless of how the Court resolves this legal issue, however, it should at a minimum hold that the district court's refusal to consider Carbaugh's supplemental evidence and/or to allow him additional time to replace Dr. Schontfeld's report with a report from a pulmonologist licensed in Utah was an abuse of discretion. In the face of the undisputed medical evidence that Mr. Carbaugh in fact suffers from an asbestos-related disease, it cannot be determined as a matter of law that he cannot prove his claims. Consequently, Appellants must be permitted the opportunity to present their claims to a jury.

Dated: July 3rd, 2006

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on this 21st day of July, 2006, a true and correct copy of the foregoing pleading was served via U.S. first class mail, postage prepaid to the following:

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