2006

# Mountain West Surgical Center, L.L.C. and Mountainwest Medical Properties, L.L.C. v. Hospital Corporation of Utah, dba Lakeview Hospital, a Utah corporation : Reply Brief of Cross-Appellant

Utah Court of Appeals


Craig G. Adamson; Craig A. Hoggan; Debra G. Griffiths; Dart, Adamson and Donovan; Counsel for Plaintiffs Appellants.
Andrew H. Stone; Marci Rechtenbach; Ryan M. Morris; Jones, Waldo, Holbrook and McDonough; Counsel for Defendant Appellee.

**IN THE UTAH SUPREME COURT**

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| MOUNTAIN WEST SURGICAL CENTER, L.L.C. and MOUNTAINWEST MEDICAL PROPERTIES, L.L.C., | : | |
| Plaintiffs/Appellants, | : | Case No. 20060243-SC |
| vs. | : | District Court Case No. 040600019 |
| HOSPITAL CORPORATION OF UTAH, d/b/a LAKEVIEW HOSPITAL, a Utah corporation, | : | |
| Defendant/Appellee. | : | |

# REPLY BRIEF OF CROSS-APPELLANT (ORAL ARGUMENT REQUESTED)

**APPEAL FROM THE SECOND JUDICIAL DISTRICT COURT IN AND FOR DAVIS COUNTY, STATE OF UTAH, HONORABLE THOMAS L. KAY**


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## TABLE OF CONTENTS

## ARGUMENT

### I. THE DISTRICT COURT ERRED BY REFUSING TO STRIKE THE AFFIDAVIT OF RICHARD VINCENT

In its brief, HCU pointed out that the district court erred by refusing to strike the affidavit of Richard Vincent, because the affidavit is inadmissible for two independent reasons. First, the affidavit is untimely in light of Mountainwest's failure to participate in discovery. Second, the affidavit's operative paragraphs—including its central paragraph, paragraph 13—lack proper foundation.

#### A. The Affidavit Is Untimely in Light of Mountainwest's Utter Failure to Respond to Discovery

In response to the first argument, Mountainwest claims that it did make efforts to participate in discovery. Specifically, Mountainwest argues that it made efforts to gather documents. See Reply Br., at 17. Mountainwest also claims that it made documents available for inspection and review, responded to outstanding discovery requests, and worked on a draft protective order. Id.

Mountainwest fails to discuss, however, the timing of its asserted efforts. The only thing it even claims to have been doing prior to the expiration of the discovery deadlines was making efforts to gather documents. *All* of the other activities Mountainwest mentions —making documents available, responding to discovery requests, working on a protective order—occurred *after* the discovery deadlines had passed and *after* HCU had already filed its motion for summary judgment. See generally R. at 226-52 (pages spanning ten months of time and reflecting no activity whatsoever from Mountainwest). During the actual discovery phase of this case, Mountainwest did essentially nothing. It did not serve initial

disclosures as required. It did not respond to written discovery requests seeking, *inter alia*, the names of witnesses that Mountainwest planned to use to support its case (at least not until after fact discovery had closed and a motion for summary judgment was on file). It did not respond to a motion to compel.[1] It propounded no discovery of its own, and took no depositions.

Only *after* being served with a summary judgment motion upon the expiration of all discovery deadlines did Mountainwest spring into action and finally produce a document (an affidavit) bearing the name of a witness (Richard Vincent) that it planned to use to support its claims. The issue here is whether a litigant can be allowed to stave off summary judgment with testimony by a witness it was obliged to disclose both in its initial disclosures and in responses to written interrogatories, yet did not disclose that witness (or the identity of any other witnesses) at any point during discovery. To allow Mountainwest to avoid summary judgment under these circumstances would be unjust, and would render discovery deadlines and scheduling orders meaningless.

It bears noting that Mountainwest has never come forward with any actual evidence that the discovery could not have been completed in a timely manner; indeed, Mountainwest failed to seek extensions of the relevant deadlines as they approached. All Mountainwest has

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[1] Mountainwest belittles its failure to respond to the motion to compel by stating that the motion "was never submitted to the trial court for decision." See Reply Br., at 17. It was never submitted because Mountainwest continually told HCU that a written response to the motion would be forthcoming, and asked for extensions of time to respond. HCU granted these extensions for a while, but after the extensions had added up to several months and the fact discovery cutoff had passed, HCU elected to simply file a summary judgment motion rather than submit the motion to compel.

ever offered is excuses of counsel regarding its failure to meet the mandated deadlines. The district court correctly recognized that, under these circumstances, parties are *not* entitled to a "do-over," and the district court correctly ruled that Mountainwest's utter failure to participate in discovery was an alternative means for granting HCU's summary judgment motion. Mountainwest claims this ruling was error because the district court made this ruling without being asked to do so, see Aplt. Br., at 21-22, but this is incorrect. HCU asked the district court to strike the Vincent affidavit, which was the only evidence Mountainwest presented in support of their lawsuit, and if the affidavit had been stricken, the same result would have obtained. Thus, HCU *did* ask the district court to dismiss Mountainwest's claims on that ground, and the fact that the district court did so through more direct means is of no moment.

In the end, the Vincent affidavit is untimely and should have been stricken from the record on this ground alone.

**B. The Affidavit Lacks Proper Foundation**

In response to the second argument—that the Vincent affidavit lacks proper foundation—Mountainwest attempts to argue that Paragraphs 12, 14, 15, 17, 18, and 19 have sufficient foundation. See Reply Br., at 19-22. Significantly, however, Mountainwest has not even attempted to argue that Paragraph 13 of the Vincent affidavit has proper foundation. See id. And, as noted in HCU's earlier brief, Paragraph 13 is the central paragraph of that affidavit. If that Paragraph is stricken, the entire affidavit is rendered essentially meaningless. That Paragraph states as follows:

> The notice of lis pendens effectively stopped the project. SDCH did not deed the property to Mountainwest Properties and Mountainwest Properties' lender withdrew its commitment for construction financing.

See R. at 409.

HCU pointed out in its initial brief that "Mr. Vincent is not qualified to testify regarding the reasons for SDCH's failing to deed the properties to his LLCs or why Mountainwest's lender withdrew its commitment for construction financing. He is not a representative of either SDCH's or Mountainwest's lender." See HCU Br., at 48-49. Mountainwest makes absolutely no response to this argument, effectively conceding that Mr. Vincent is actually not qualified to testify about the effect of the lis pendens on the construction project. Mountainwest needs admissible testimony from someone at the lender or at the title company on this point. Only those individuals can truly say why the medical facility was "effectively stopped." Anything Mr. Vincent has to say on the issue is hearsay and/or without foundation. We do not know whether there were other reasons that the financing did not go through, or whether the title company refused to insure title to the property based solely on the Lis Pendens or for some other reason. Because Mountainwest completely ignored this case during the discovery phase, these facts were never elicited, and Mountainwest has no evidence from anyone competent to testify thereto that any legal "process" had any effect on the project.

For these reasons, the district court erred by not striking the affidavit of Richard Vincent, and the district court's decision in this regard should be reversed.

## CONCLUSION

For all of the foregoing reasons, the district court's order dismissing both of Mountainwest's claims should be affirmed, the district court's order refusing to strike the affidavit of Richard Vincent should be reversed, and all of Mountainwest's claims against HCU should be dismissed, with prejudice and on the merits.

DATED this 2nd day of November, 2006.

JONES, WALDO, HOLBROOK & McDONOUGH

By: _____

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## CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of November, 2006, I caused to be sent, via first-class U.S. Mail, postage prepaid, two (2) true and correct copies of the foregoing **REPLY BRIEF OF CROSS-APPELLANT** to the following:

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