1995

Gull Laboratories INC., a Utah coproration, v. Floyd E. Weston dba Metabolic Research Institute and Formula Technology, a Nevada corporation : Reply Brief

Utah Court of Appeals

B. Ray Zoll; Zoll and Branch.
Joseph C. Rust; Ian A. Forrest; Kesler and Rust.

IN THE UTAH COURT OF APPEALS

GULL LABORATORIES, INC., a Utah corporation, Plaintiff and Appellant, v. FLOYD E. WESTON dba METABOLIC RESEARCH INSTITUTE and FORMULA TECHNOLOGY, a Nevada corporation, Defendants and Appellees.	Case No. 950481 Priority No. 15 Assigned from Utah Supreme Court, Case No. 950132

REPLY BRIEF OF APPELLANT

B. RAY ZOLL (3607)
ZOLL & BRANCH
5300 South 360 West #360
Salt Lake City, Utah 84123
Telephone: (801) 262-1500
Attorney for Defendants/
Appellees

JOSEPH C. RUST (2835)
IAN A. FORREST (6542)
KESLER & RUST
2000 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111
Telephone: (801) 532-8000
Attorneys for Plaintiff/
Appellant

IN THE UTAH COURT OF APPEALS

GULL LABORATORIES, INC., a Utah corporation, Plaintiff and Appellant, v. FLOYD E. WESTON dba METABOLIC RESEARCH INSTITUTE and FORMULA TECHNOLOGY, a Nevada corporation, Defendants and Appellees.	Case No. 950481 Priority No. 15 Assigned from Utah Supreme Court, Case No. 950132

REPLY BRIEF OF APPELLANT

B. RAY ZOLL (3607)
ZOLL & BRANCH
5300 South 360 West #360
Salt Lake City, Utah 84123
Telephone: (801) 262-1500
Attorney for Defendants/
Appellees

JOSEPH C. RUST (2835)
IAN A. FORREST (6542)
KESLER & RUST
2000 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111
Telephone: (801) 532-8000
Attorneys for Plaintiff/
Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

MISCELLANEOUS AUTHORITIES

IN THE UTAH COURT OF APPEALS

GULL LABORATORIES, INC., a Utah corporation, Plaintiff and Appellant, v. FLOYD E. WESTON dba METABOLIC RESEARCH INSTITUTE and FORMULA TECHNOLOGY, a Nevada corporation, Defendants and Appellees.	Case No. 950481 Priority No. 15 Assigned from Utah Supreme Court, Case No. 950132

Appellant Gull Laboratories, Inc. (hereinafter "Gull") hereby submits this Reply Brief in response to the Brief of Appellees submitted by Floyd E. Weston dba Metabolic Research Institute and Formula Technology (hereinafter "Weston and Formula Technology").

I. ARGUMENT

A. AN ATTORNEY CAN BIND HIS CLIENT TO AN ORAL SETTLEMENT AGREEMENT

Weston and Formula Technology have cited both Utah Code Ann. § 78-51-32 and the case of John Deere Co. v. A&H Equipment, Inc., 876 P.2d 880 (Utah Ct. App. 1994), as limiting their attorney's power to bind them in a settlement agreement. Gull respectfully disagrees.

Utah Code Ann. § 78-51-32(2) states that an attorney and counselor has authority "to bind his client in any of the steps of an actionable proceeding by his agreement filed with the clerk or entered upon the minutes of the court, and not otherwise." In the case at bar, Mr. Zoll bound his clients Weston and Formula Technology by making an oral stipulation which was entered upon the minutes of the court. Such oral stipulations made on the record are permitted under Rule 4-504(8) of the Code of Judicial Administration. Thus Mr. Zoll was acting completely within the parameters set by § 78-51-32 and cannot now claim that his actions had no binding effect on Weston and Formula Technology.

Weston and Formula Technology misrepresent in their Brief what this Court has stated regarding Utah Code Ann. § 78-51-32 and an attorney's power to settle a matter on his client's behalf. They do this by citing only a portion of this Court's discussion on the subject. The following is the full quote from which Weston and Formula Technology cite only a portion:

> We do not believe, however, that § 78-51-32 was intended to void oral settlement agreements. Clearly, the power to settle a lawsuit resides in the client. If a client authorizes the attorney to settle the matter and has expressed an intent to be bound by the attorney's acts, absent a statute of frauds issue, an oral or privately negotiated settlement agreement is as valid as a signed, written settlement agreement that has been written on the minutes of the court.

John Deere Co. v. A&H Equipment, Inc., 876 P.2d 880, 886, n. 11 (Utah Ct. App. 1994).

This Court has clearly stated the law in the State of Utah regarding settlements: an attorney can bind a client to a settlement agreement, and oral settlement agreements are as valid as signed, written agreements. For these reasons, Weston and Formula Technology must be held to the terms of the stipulation of settlement entered into by their authorized agent on their behalf.

B. *THE EXCUSABLE NEGLECT OF A PRINCIPAL IS NOT GROUNDS TO SET ASIDE THE REINSTATED SUMMARY JUDGMENT*

Weston and Formula Technology allege in their brief that Gull has failed to dispute the trial court's finding of excusable neglect on the part of Mr. Floyd Weston. The reason for this is simple. Floyd Weston was not the agent who bound Formula Technology and himself to the terms of the stipulation of settlement entered in open court. Mr. Ray Zoll was the agent acting on behalf of these two principals at that time. If there is excusable neglect which would justify the setting aside of the stipulation of settlement, that excusable neglect must be on the part of Mr. Zoll, the authorized agent, and not on the part of the principals, as claimed by Weston and Formula Technology. In this regard, Gull's attorney specifically asked the trial court whether it found any excusable neglect on the part of Mr. Zoll. The court's response was: "I'm not going to make a finding on that."

(R. at 834.) Instead, the court found excusable neglect only on the part of Mr. Weston. (R. at 833.) Herein lies the trial court's error.

To claim that the stipulation of settlement should be set aside because of excusable neglect on the part of one of the principals disregards the very essence of principal-agent law, i.e. that a principal is bound by the acts of its authorized agent. Horrocks v. Westfalia Systemat, 892 P.2d 14 (Utah Ct. App. 1995). Mr. Zoll, as an authorized agent, agreed to the stipulation of settlement on his client's behalf. If excusable neglect exists, it must be grounded in his behavior and not the principals'. This is particularly true since at no time have Weston and Formula Technology ever alleged that Mr. Zoll was not clothed with authority to settle the case. To the contrary, it is clear that Mr. Zoll had the full authority not only to represent Weston and Formula Technology in procedural matters, but also in this instance in discussing and agreeing to a settlement. That authority having been transferred to Mr. Zoll, Weston and Formula Technology are in no position to argue that their agent went beyond the scope of his authority, by settling on a basis different than their understanding of what the settlement would be. Under the circumstances of this case, there is no precedent in the State of

Utah which would permit the principals to be relieved of their obligations as agreed upon by their agent.

C. THE DATE FOR PAYMENT OF THE SETTLEMENT MONIES WAS FIXED AND FIRM

Weston and Formula Technology consistently refer to the date by which they obligated themselves to pay the settlement money as an arbitrary and flexible date. In so saying, they argue that there was no fixed time for payment but that the date established in the stipulation of settlement was merely a suggested time and that somehow it did not matter whether they made the payment by that time or by any other time. The mere recitation of this argument is sufficient to defeat it.

A review of the transcript of the stipulation of settlement shows that Mr. Zoll agreed that the settlement payment would be made to Gull within ten days. (R. at 615.) When Mr. Zoll started to condition the commencement of the ten days upon the court's order being signed, the court immediately confirmed that it was a set date, ten days from the hearing date. Mr. Rust, Gull's counsel, affirmed his agreement with the court by stating, "I think we have an agreement here," meaning that the parties had agreed to a payment date ten days from the date of the hearing and not ten days from the date of the stipulation being signed by the judge. (R. at 615.) Mr. Zoll did not pursue any further his request that

the money should be paid ten days from the date a written stipulation was signed by the court.

The date for payment was clarified even further when Mr. Rust pointed out that the payment date of October 1, 1994 fell on a Saturday. The court then stated that the date for payment should be moved to the following Monday, October 3rd. (R. at 616.) There was thus no guessing nor ambiguity regarding when the money was to be paid. It was specifically and unequivocally stated that the payment would be made by the date set or else the consequences of not paying would have to be met, namely that the full amount of the previously entered summary judgment would have to be paid. It is clear from the record that Mr. Zoll fully understood that the money had to be paid by October 3, 1994 at 5:00 p.m. or the prior judgment would be reinstated. There are no credible grounds for Weston and Formula Technology's claim that the payment date for the settlement money was arbitrary and that time was not of the essence under the stipulation.

D. THE STIPULATION OF SETTLEMENT IS CLEAR AND UNAMBIGUOUS

Weston and Formula Technology's repeated reference to the confused procedural history of this case and the "confounded judicial proceedings" only serve as a smoke screen to the real issue of whether the stipulation of settlement was clear and unambiguous in its terms. Gull freely admits this case has had a

confused procedural history with several judges presiding over the case. However, the crux of this case involves but one hearing, i.e. the hearing when the stipulation of settlement was made. At that one hearing there was but one judge present together with representatives of both parties. The agreement reached at this hearing is clear and unambiguous in its terms, lacking any procedural confusion or confounded judicial proceedings. Weston and Formula Technology must not be allowed to escape the consequences of their breach of the stipulation of settlement by claiming confusion.

There is also no basis for Weston and Formula Technology's claim that the stipulation of settlement was entered into inadvertently. A review of the stipulation demonstrates a clear understanding on Mr. Zoll's behalf that he was binding his clients.

Finally, Weston and Formula Technology cannot claim that Gull is seeking a windfall based on a technicality by requesting that the summary judgment be reinstated. The trial court clearly states during the stipulation that, "in the event there is a default, then Mr. Rust can submit an affidavit that it wasn't paid; judgment may then enter as previously entered by Judge Moffat." Mr Zoll responds: "Yes. And Mr. Rust prepare the dismissal papers?" (R. at 616.) The parties mutually agreed to the penalty should Weston and Formula Technology breach the terms of the stipulation.

E. GULL HAS FULLY PRESERVED ALL ISSUES RAISED IN THIS APPEAL

Weston and Formula Technology claim that the issue of whether Judge Hyde could vacate his previously entered order was not properly preserved at the trial level and cannot now be raised for the first time on appeal. Without citing any authority in support of their position, Weston and Formula Technology simply state that Gull did not "object" to Judge Hyde's order rescinding the reinstated summary judgment and therefore cannot argue against the rescission on appeal. Gull respectfully submits that there is no requirement that such an objection be made. The only objection that could have been made was a motion for reconsideration or an interlocutory appeal, neither of which courts view with favor. The preservation of the issue of whether Judge Hyde could have rescinded the judgment is that it was ruled upon and the time for appealing from the ruling did not commence until there was a final disposition of the entire case. There is no question that Gull has timely appealed from the final disposition of the case. Therefore, the issue has been properly preserved for appeal.

II. CONCLUSION

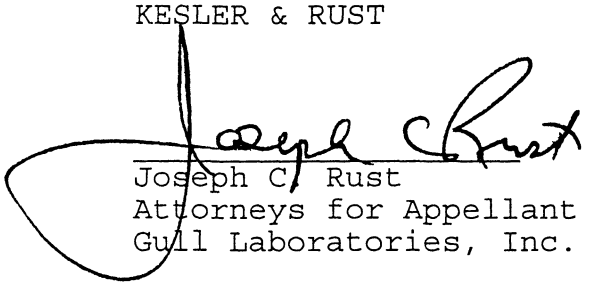
For the aforementioned reasons, Gull respectfully requests that both Judge Rigtrup's order of March 9, 1995 finding excusable neglect on the part of Mr. Weston and Judge Hyde's order of February 8, 1995 setting aside summary judgment against Weston and

Formula Technology be vacated, and that Judge Hyde's order of November 18, 1994 granting Gull's motion for reinstatement of summary judgment and the subsequent summary judgment dated December 2, 1994 against Weston and Formula Technology and in favor of Gull in the amount of $38,842.74 plus interest be reinstated.

Respectfully submitted,

DATED this 11 day of September, 1995.

KESLER & RUST

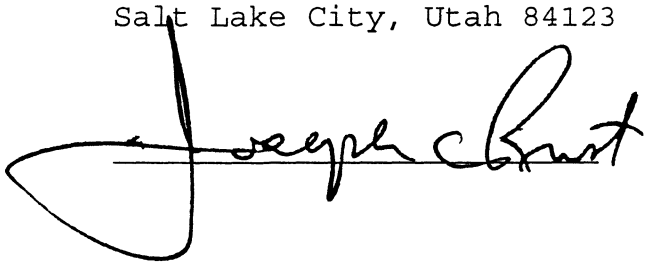


Joseph C. Rust
Attorneys for Appellant
Gull Laboratories, Inc.

CERTIFICATE OF MAILING

I hereby declare that I caused to be mailed a true and correct copy of the following **REPLY BRIEF OF APPELLANT**, Case No. 950481, postage prepaid, this 11th day of September, 1995, to:

B. Ray Zoll
ZOLL & BRANCH
5300 South 360 West, Suite 360
Salt Lake City, Utah 84123



gull\repbrief.wes