1995

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. : Response to Petition for Rehearing

Utah Court of Appeals

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

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IN THE UTAH COURT OF APPEALS

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

RESPONSE TO PETITION FOR REHEARING

Appeal from Third Judicial District Court, Salt Lake County, State of Utah
Case No. 930900564 Judge Kenneth Rigtrup

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES

IN THE UTAH COURT OF APPEALS

GULL LABORATORIES, INC., a Utah corporation,	:	
	:	Case No. 950481
Plaintiff and Appellant,	:	Priority No. 15
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RESPONSE TO PETITION FOR REHEARING

Appellant Gull Laboratories, Inc. (hereinafter "Gull") hereby submits this Response to the Petition for Rehearing submitted by Appellees Floyd E. Weston dba Metabolic Research Institute and Formula Technology (hereinafter "Weston and Formula Technology").

INTRODUCTION

In presenting the Petition for Rehearing, Weston and Formula Technology have violated the cardinal rule of appellate procedure, which is to support "all statements of fact and references to the proceedings below . . . by citations to the record. . . ." Utah R. App. P. 24(a)(7). Of the fourteen separately stated and listed "Facts," not a single one gives a citation to the Record for support. It is submitted that one of the principal reasons for the lack of citation is that the Record does not support the claimed facts. Indeed, Weston and Formula Technology are raising in their Petition matters that have no support whatsoever. As a consequence, the Court should summarily dismiss the Petition.

ARGUMENT

I. THE "FACTS" CLAIMED BY WESTON AND FORMULA TECHNOLOGY HAVE NO BASIS WHATSOEVER

The Court will recall that at oral argument in this case, counsel for Weston and Formula Technology attempted to claim as being facts certain matters which at best were outside of the Record and at worst were simply not true. The Court admonished counsel for Weston and Formula Technology to avoid such statements. Unfortunately, the lesson does not appear to have been learned. The same misrepresentations made in oral argument as well as additional misstatements are now made in the Petition for Rehearing. The following are examples:

Record clearly rebuts that contention. The Court's attention is directed to the Order in question which has a mailing certificate dated September 22, 1994, showing a copy of the Order being sent to Mr. Zoll that day. (R. at 602.) What is not in the Record is any affidavit or other evidence of any kind that Mr. Zoll did not receive a copy of that Order. Also there is nothing in Judge Rigtrup's ruling which indicates in any way that Mr. Zoll did not receive a copy of the Order shortly after its date of service. Also not found in the Record is any objection to the Order by Mr. Zoll at any time. Therefore, the uncontroverted testimony, as supported by the Record, is that the Order signed by Judge Rigtrup on September 28, 1994 was sent to Mr. Zoll on or about September 22, 1994 and that he received it shortly thereafter.

2. Mr. Zoll claims he had insufficient time to object to the Order before the October 3rd payment date. (See Petition for Rehearing, Statement of Facts, No. 7.) As noted above, the Order was mailed to Mr. Zoll on September 22, 1994. Assuming three days for mailing, the five days in which to object expired on September 30, 1994. Even giving Mr. Zoll the benefit of the weekend thereafter, he still had all day October 3, 1994 in which to object before the payment was due. Mr. Zoll improperly counts the five days running from after the date the Order was signed by the court, which position has no support in any rule. Nevertheless, as noted, the Record is devoid of any objection at any time.

3. It is claimed that the Order was not prepared as provided by Rule 4-504 of the Utah Rules of Judicial Administration and as ordered by the court. (See Petition for Rehearing, Statement of Facts, Nos. 2, 5, and 9.) Contrary to the assertion of Weston and Formula

Technology, at no time did Judge Rigtrup order that the Stipulation first be approved as to form before it would be submitted to the court. That is what Mr. Zoll had proposed, but his proposal was never accepted. Nowhere in the transcript of the stipulation of September 21, 1994 does Judge Rigtrup require the proposed order to be first sent to Mr. Zoll for approval as to form. Nor did the parties stipulate that procedure as a requirement of the settlement. Further, Rule 4-504 does not require an approval as to form. Rather, the only requirement is that a copy of the proposed order be served upon opposing counsel who then has five days after service to object to the same.

II. THE DATE AN ORDER IS SIGNED IS NOT DETERMINATIVE OF WHEN THE TIME FOR OBJECTION BEGINS TO RUN

In making the claim that they never had property opportunity to object to the Order in question, Weston and Formula Technology count the date when Judge Rigtrup signed the Order as the beginning of the five day period in which to object. That date is immaterial with regard to filing an objection. The date which starts the running of the five day period is the date of service on opposing counsel. Utah Code of Judicial Administration, Rule 4-504(2).

In the case of Tolboe Const. v. Staker Paving & Const., 682 P.2d 843 (Utah 1984), the plaintiff argued that because an order had been signed by the judge before the five day period for making objections had expired, it was not a binding order. The Supreme Court disagreed, noting as follows:

> The fact that the court signed the documents prior to plaintiff's submission of objections and prior to the expiration of five days

> from the service of the documents, does not constitute a violation of this latter requirement. The requirement as well as the rule itself are binding *only upon counsel, not upon the trial court*.

Id. at 848-49 (emphasis added).

The Supreme Court found that there was no prejudice because any objections that were submitted still could be heard as long as they were made within the five days after service. Id. Since the date which starts the running of the five day period for objections is the date of the service of the order on opposing counsel, there was thus ample opportunity to object to the Order prior to October 3rd. However, no objection was filed much less within the five days. Under the circumstances, Rule 4-504(2) was not violated in any degree since the test is whether objections to an order were filed within five days after service, regardless of whether the order has been signed by a court.

In the case at bar, the Record shows that service was effectuated by mailing on September 22, 1994, but Weston and Formula Technology filed no objection to the Order at all. As such, there can be no claim of lack of opportunity to object or a violation of Rule 4-504.

III. A BINDING STIPULATION WAS REACHED IN OPEN COURT

The Petition for Rehearing completely ignores the fact that the parties, acting through their attorneys, had reached an agreement and consented to that agreement unequivocally in open court. As this Court has already ruled in its Memorandum Decision and as made so abundantly clear by all the cases which have addressed the subject, the parties' understanding is immaterial if they have authorized their agents to enter into an agreement and that agreement is unambiguous and unequivocal. Thus, once Mr. Zoll was empowered by his clients to represent them, and once Mr. Zoll entered into an unequivocal stipulation on the record in court, the deal was done. Although an Order was prepared, submitted, and signed, that step was not necessary in order to create an effective and binding stipulation. (See Utah Code of Judicial Administration, Rule 4-504(8).) Therefore, even though Gull maintains and the Record supports the proposition that the Order was properly prepared, submitted to opposing counsel, and properly signed by the court without any objection raised by Weston and Formula Technology, nevertheless even if the Order had not been prepared or the judge had not signed it, there was still a stipulation which was binding on the parties. That stipulation is so specific that there cannot be any mistake about its terms.

Even if there was an objection to the Order, such an objection could have been made only on the basis that the Order did not reflect the ruling of the court or the stipulation of the parties. In this case, the Order reflected exactly the agreement of the parties, as evidenced by the transcript of the stipulation between the parties. Moreover, Weston and Formula Technology

have never claimed any error in the wording of the Order. Rather, Mr. Weston has claimed that he did not perfectly communicate with Mr. Zoll about needing board approval of the stipulation. As this Court said in its Memorandum Decision, the important issue in this case is what was agreed upon between the attorneys in open court. That is the basis upon which the court can determine whether there was a meeting of the mind. All of the judges who have reviewed this matter, including Judge Rigtrup, are unanimous in stating that there was no ambiguity in that settlement agreement.

It is clear that at the time of the stipulation, Mr. Zoll did not condition his stipulation on board approval or condition the payment date on any subsequent event. If in fact he had been told by Mr. Weston that board approval had to be first obtained[1], he never breathed a word of that requirement in open court as part of the settlement stipulation. However, assuming that board approval was a requirement, both Mr. Weston and Mr. Zoll's conduct thereafter belie board approval being a condition. Considering the fact that the October 3rd date was repeated so many times during the settlement stipulation, at the very least each would have had some kind of obligation to check back with the other prior to October 3rd to discuss the status of the alleged board approval and to convey that approval or disapproval to Gull. Inasmuch as the first communication on the subject came after October 3rd (and after the Motion to Reinstate had

[1]Since Mr. Weston was a defendant personally, he obviously did not need some mythical board approval to commit himself to the settlement. Further, since he was the president of Formula Technology, as well as its major shareholder, it is hard to believe he needed board approval to settle a lawsuit.

been personally served upon Mr. Zoll)(R. at 613), it makes suspect any claim that Weston and Formula Technology were waiting for board approval.

Whatever secret information Mr. Weston had in his mind on September 21, 1994, or however imperfectly he communicated with Mr. Zoll, Weston and Formula Technology have established *no* basis whatsoever for claiming that they should be excused from the binding agreement entered into by Mr. Zoll as their agent. The stipulation should be upheld.

IV. THE TRIAL COURT DID NOT HAVE THE DISCRETION TO CHANGE THE TERMS OF THE STIPULATION

The argument of Weston and Formula Technology that Judge Rigtrup had "broad discretion" to modify or excuse non-performance of a settlement stipulation has no basis in the law. The "broad discretion" to set aside stipulations discussed in United Factors v. T.C. Associates, Inc., 445 P.2d 766 (Utah 1968) is with regard to "ordinary stipulations" and not with regard to a "stipulation for settlement." In the latter case, the basis for setting it aside requires "a showing equivalent to that necessary to set aside a contract in equity." Id. at 767.

Since the concept of setting aside settlement stipulations has heretofore been fully briefed, the court is referred to the Brief of Appellant, pp. 14-15, for further discussion of this point.

V. GULL SHOULD BE AWARDED ITS ATTORNEY'S FEES

A petition for rehearing suggests that the court did not understand the case when it was first presented to it or that there is some important precedent which it overlooked. Utah R.

App. P. 35. Both circumstances are extremely rare because of the thoroughness of appellate courts in reviewing the material submitted and also because appellate courts have to rely on the record and cannot find evidence outside of the record. In this instance, the Petition for Rehearing has sought to reargue many of the same points made in the original Appellees' Brief, spiced up by unsupported allegations. The Petition does not raise any matters supported by the Record which were not argued in the briefs and considered by this Court in reaching its decision. Thus there is no merit whatsoever to the Petition. Under the circumstances, therefore, it is submitted that the assertion the Petition has been made in good faith and not for purposes of delay is not true. Gull is entitled to its attorney's fees for having had to respond thereto.

CONCLUSION

In its Memorandum Decision, this Court has correctly stated the law pertaining to the situation at hand. To try avoid the consequences of that ruling, we have now been presented with a Petition full of misstatements while rehashing decided points. This Court should not condone that type of action. The Petition should be denied and this Court should award Gull its attorney's fees for having to respond thereto.

Respectfully Submitted.

DATED this 9 day of April, 1996.

KESLER & RUST

Joseph C. Rust
Attorneys for Plaintiff/Appellant

CERTIFICATE OF SERVICE

I hereby declare that I caused to be mailed, postage prepaid, a true and correct copy of the foregoing REPLY TO PETITION FOR REHEARING in Case No. 950481-CA this 9th day of April, 1996, to:

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