

1995

Gull Laboratories, Inc., a Utah corporation v. Floyd E. Weston dba Metabolic Research Insitute and Formula Technology, a Nevada corporation : Brief of Appellee

Utah Court of Appeals

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Appeal from Order of Dismissal of March 14, 1995 in favor of Appellees, and of Order of March 9, 1995, and Order to Vacate Judgment of February 8, 1995, before the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Judge Kenneth Rigtrup Presiding

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IN THE UTAH COURT OF APPEALS

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GULL LABORATORIES, INC.,	:	
a Utah corporation,	:	
	:	
Plaintiff and	:	Case No. 950481
Appellant,	:	
	:	
vs.	:	
	:	Priority No. 15
FLOYD E. WESTON dba METABOLIC	:	
RESEARCH INSTITUTE and	:	
FORMULA TECHNOLOGY, a Nevada	:	Assigned from Utah Supreme
corporation,	:	Court, Case No. 950132
	:	
Defendants and	:	930900564CV
Appellees.	:	

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BRIEF OF APPELLEES

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IN THE UTAH COURT OF APPEALS

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GULL LABORATORIES, INC.,	:	
a Utah corporation,	:	
	:	Case No. 950481
Plaintiff and	:	
Appellant,	:	
	:	
vs.	:	
	:	Priority No. 15
FLOYD E. WESTON dba METABOLIC	:	
RESEARCH INSTITUTE and	:	
FORMULA TECHNOLOGY, a Nevada	:	Assigned from Utah Supreme
corporation,	:	Court, Case No. 950132
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Defendants and	:	930900564CV
Appellees.	:	

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BRIEF OF APPELLEES

Appeal from Order of Dismissal of March 14, 1995 in favor of Appellees, and of Order of March 9, 1995, and Order to Vacate Judgment of February 8, 1995, before the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Judge Kenneth Rigtrup Presiding

STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction to hear this appeal pursuant to Utah Code Annotated §78-2-2(4). This case was assigned from the Utah Supreme Court to the Utah Court of Appeals on August 1, 1995.

DETERMINATIVE AUTHORITY

In addition to the relevant case law cited hereinafter, the Defendants and Appellees in the above-entitled case believe the following authority to be determinative of this dispute on appeal:

Rule 60, Utah Rules of Civil Procedure

Rule 4-504, Utah Code of Judicial Administration

Utah Code Annotated §78-51-32

Utah Code Annotated §68-3-2 (1953)

STANDARD OF REVIEW

The trial court is afforded broad discretion in ruling on a motion for relief from judgment pursuant to Rule 60(b), Utah Rules of Civil Procedure, and in setting aside a judgment, order or proceeding based upon excusable neglect, after taking into consideration all of the facts in a case. The trial court's determination will not be disturbed on appeal absent an abuse of discretion. Birch v. Birch, 771 P.2d 1114 (Utah Ct. App. 1989). Larsen v. Collina, 684 P.2d 52 (Utah 1984). Furthermore, a trial court has broad discretion to set aside a stipulation on a procedural matter. United Factors v. T.C. Associates, Inc., 445 P.2d 766 (Utah 1968).

STATEMENT OF ISSUES

1. Whether counsel for the Defendants and Appellees could bind the same with respect to the September 21, 1994 stipulation, when the stipulation involved a settlement of the entire case and did not involve merely a procedural matter, and when the trial court later found excusable neglect on the part of the Defendants and Appellees with respect to said stipulation.

2. Whether Judge Rigtrup of the Third Judicial District Court, in and for Salt Lake County, State of Utah, acted within his discretion in ruling in accordance with Rule 60, Utah Rules of Civil Procedure, and in enforcing the material terms to the stipulation of September 21, 1994.

3. Whether the Plaintiff and Appellant is barred from raising certain issues on appeal which were not raised at the trial court level. In particular, whether the Plaintiff and Appellant is barred from raising the issue of the propriety of Judge Hyde's referral of this case back to Judge Rigtrup, when this issue was neither raised below, nor did the Plaintiff and Appellant object to the substance of Judge Hyde's ruling below.

STATEMENT OF THE CASE

The relevant procedural facts in this case are as follows. The parties to this action entered into a stipulation in open court on September 21, 1994 in an effort to resolve the underlying contractual dispute herein [R 601, R 602, R 614]. Due to the illness of Judge Moffat, the Judge originally assigned to this case, Judge Rigtrup presided over the entry of this stipulation onto the Court record [R 614]. Time was not made of the essence for purposes of said stipulation, but instead an arbitrary and tentative deadline of October 3, 1994, was selected [R 601, R 602, R 614]. The corporate Defendant was not able to receive approval of the board of directors of the settlement agreement amount of \$7,500.00 by the arbitrary deadline date, and the Plaintiff and Appellant moved to reinstate a Summary Judgment which had been previously vacated by stipulation of the parties [R 586, R 605, R 628, R 657].

Due to the continued illness of Judge Moffat, Judge Hyde was assigned to hear the matter, and he ruled without oral argument, on November 18, 1994, to reinstate the Summary Judgment in the amount of \$38,842.74 [R 667]. The Defendants and Appellees submitted a Rule 60(b) Motion for Relief from the Summary Judgment, based upon excusable neglect [R 708]. Judge Hyde, on

February 8, 1995 [R 786] vacated his prior order reinstating the Summary Judgment, and ordered that Judge Rigtrup, who had been presiding during the time that the in-court stipulation was entered into on September 21, 1994, was the proper Judge to hear the issues incident to the Defendants' Rule 60(b) Motion, and the Plaintiff's Motion for Reinstatement of the Summary Judgment [R 786].

On February 27, 1995, Judge Rigtrup ruled that the Summary Judgment was not to be reinstated, but instead that the material terms to the stipulation of September 21, 1994, were to be enforced [R 828, R 832]. The case was then assigned to Judge Peuler [R 856]. The Plaintiff and Appellant filed its notice of appeal on March 17, 1995 [R 845] and its Amended Notice of Appeal on April 3, 1995 [R 850]. The procedural history of this case is outlined in greater detail within the Defendants' and Appellees' Statement of Facts, set forth hereinafter.

STATEMENT OF THE FACTS

1. On or about September 21, 1994, before the Honorable Judge Kenneth Rigtrup, the attorneys for the parties in this case entered into a voluntary stipulation and settlement agreement, purportedly resolving the dispute between the parties [see copy of transcript attached hereto as Exhibit "A", on page 2

at line 15; R 601, R 602, R 614].

2. Pursuant to the terms of the stipulation, and in accordance with the understanding of the Defendants' counsel at that time, the Defendants were to pay \$7,500.00 [R 601, R 602, R 614]. The stipulation and order were first to have been prepared by Mr. Rust, counsel for the Plaintiff, and the Defendants were first to have had the opportunity to sign the stipulation and approve the order as to form, pursuant to Rule 4-504, Utah Code of Judicial Administration [see Exhibit "A" and see Affidavits attached hereto as Exhibit "B"; R 601, R 602, R 614].

3. The settlement deadline date was tentatively scheduled for approximately ten (10) days after September 21, 1994, or October 4, 1994, *contingent upon* the appropriate approval of the corporate Defendant and the signing of an order by this Court [see Exhibit "B"; R 614, R 628, R 657].

4. Mr. Rust, counsel for the Plaintiff, assented to this arrangement by stating, "I think we have an agreement here" [see Exhibit "A", on page 2 at line 19; R 615].

5. Counsel for the Defendants, Mr. Zoll, communicated

with Defendant Floyd Weston over the telephone regarding this conditional stipulation and Mr. Weston, who was not clearly understood by Mr. Zoll, stated that prior to entering into the settlement agreement he would need to get the approval of the Board of Directors of the corporate Defendant [see Exhibit "B"; R 623, R 628, R 657].

6. Mr. Zoll described the material terms to the agreement to Mr. Weston at that time [see Exhibit "B"]. However, Weston misunderstood Zoll relative to the conditional October 3, 1994 deadline, and believed that the stipulation would not be binding until an order had been signed by the Judge, pursuant to his prior experience in such matters, until he had received a copy of the proposed order and until the approval of the Board of Directors of the corporate Defendant, in entering into the agreement, had been received [see Exhibit "B"; R 623, R 628, R 657].

7. The conditional agreement was never reduced to a written stipulation, and an order embodying said agreement was never signed by the Court, in accordance with the requirements of Rule 4-504(3), Utah Code of Judicial Administration.

8. Inasmuch as the members of the Board of Directors of the corporate Defendant were out of town at all relevant times, Floyd Weston was unable to get their approval for the settlement agreement. As a result, the \$7,500.00 amount was not paid to the Plaintiff by October 3, 1994 [see Exhibit "B"; R 623, R 628, R 657].

9. Mr. Weston personally contacted the agents for the Plaintiff on October 4, 1994, and informed them that the Board had not yet approved the agreement, but that the Defendants were otherwise still ready, willing and able to pay the settlement amount. The Plaintiff, by and through its agents, refused to accept the amount, claiming that the arbitrary and conditional deadline of October 3, 1994 had not been met by the Defendants [see Exhibit "B"; R 623, R 628, R 657].

10. In addition, on October 4, 1994, Mr. Zoll had a telephone conversation with Mr. Rust, wherein Zoll explained that the Defendant Formula Technology, Inc., required approval of its Board of Directors. Mr. Zoll further explained to Rust that Weston had misunderstood the outcome of the settlement conference, and was unaware of the October 3, 1994 deadline [see Exhibit "B"; R 623, R 628, R 657].

11. During the course of that conversation, no mention was made relative to a reinstatement of the Summary Judgment, or to any other form of default proceedings. Mr. Zoll then stated that the Defendants would still pay the \$7,500.00 to settle the matter by October 10, 1994. However, Mr. Rust refused to accept the arrangement [See Exhibit "B"; R 623, R 628, R 657].

12. Time was not made of the essence in the terms of the stipulation, but the October 3, 1994 deadline was tentatively designated as the end of the ten (10) day period after the settlement agreement was allegedly entered into [see Exhibit "A"; R 614]. Inasmuch as October 1, 1994 was a Saturday, counsel and the Court designated October 3, 1994 as the conditional deadline date. Therefore, that date had no independent significance as a deadline for the payment of the \$7,500.00 settlement amount [See Exhibit "A"; R 614].

13. The Plaintiff now unilaterally seeks to reinstate a Summary Judgment against the Defendants, in the amount of \$38,842.74, which was previously vacated, pursuant to a voluntary Stipulation between counsel on August 5, 1994 [R 586].

14. On or about November 4, 1994, the Third Judicial District Court was scheduled to hear the Plaintiff's Motion to Reinstate the Summary Judgment, which hearing was continued until November 18, 1994, due to the fact that the Judge assigned to hear this matter did not yet have the Court's file [R 666].

15. However, on November 18, 1994, this Court, the Honorable Judge Hyde presiding, made a ruling, granting the Plaintiff's Motion without ever affording the Defendants the opportunity for a hearing on the dispositive Motion, in spite of the Defendants' timely request for oral argument, made in accordance with Rule 4-501(3)(b), Utah Code of Judicial Administration [R 667].

16. The Defendants then filed a Motion for Relief from the Summary Judgment, pursuant to Rule 60(b), Utah Rules of Civil Procedure [R 704].

17. On or about February 2, 1995, Judge Hyde ruled to vacate his ruling of November 18, 1994, and ruled that Judge Rigtrup would be the proper judge to review the Defendants' 60(b) Motion, and to rule with respect to the Plaintiff's Motion for Reinstatement of Summary Judgment, due to the fact that Rigtrup

was the presiding Judge at the time of the September 21, 1994 stipulation [see transcript of hearing before Judge Hyde, attached hereto as Exhibit "C"; R 775, R 865 - R 904]. In addition, on or about February 8, 1995, Judge Hyde signed an Order vacating the Summary Judgment, in order that Judge Rigtrup could make a decision relative to these matters [R 786].

18. On or about February 27, 1995, this matter came before Judge Rigtrup for oral argument [see transcript of hearing before Judge Rigtrup, attached hereto as Exhibit "D"; R 828]. The Court, after having the opportunity to review the procedural history of the case and the underlying merits of the respective parties' claims, ruled to enforce the material terms to the stipulation entered into on September 21, 1994, and the Plaintiff subsequently appealed [R 828, R 845, R 850].

SUMMARY OF THE ARGUMENT

The Plaintiff and Appellant has claimed that counsel for the Defendants and Appellees, B Ray Zoll, Esq., irreversibly bound his clients when he entered into the stipulation at issue, on the record, on September 21, 1994. The Plaintiff and Appellant thus claims that the trial court abused its discretion in failing to enforce said stipulation, the terms for which included the October

3, 1994 arbitrary deadline date, and in failing to reinstate the Summary Judgment. However, Utah Code Annotated §78-51-32, and the relevant case law interpreting this statute, provides that while an attorney binds his client with respect to procedural matters, the power to settle a lawsuit clearly resides in the client.

The Defendants and Appellees were not present in the court room at the time the stipulation was entered into by their attorney, and there was clearly a mistake of fact and an inadvertence with respect to receiving approval of the board of directors of the corporate Defendant for purposes of paying the settlement amount determined by the September 21, 1994 stipulation. The trial court properly found excusable neglect on the part of the Defendants and Appellees in this regard, as argued more fully hereinafter. Therefore, in the interests of justice and due to this inadvertence on the part of the Defendants and Appellees, the trial court Judge properly refused to enforce in its entirety the stipulation of September 21, 1994. This decision was squarely within the broad discretion of the trial court to set aside settlement stipulations, under such circumstances.

In addition, the Plaintiff and Appellant, at this point in the proceedings, takes issue with Judge Hyde's referral of the case back to Judge Rigtrup for purposes of a determination with respect to the Defendant's Rule 60(b) Motion for Relief from

Judgment, and with respect to the Plaintiff's Motion to Reinstate Summary Judgment, as a violation of the "law of the case" doctrine. However, it has been clearly held by the Utah appellate courts that a decision may be set aside in order to correct a mistake, and this does not amount to a violation of said doctrine. In any event, the Plaintiff failed entirely to make objection before the Third Judicial District Court with respect to Judge Hyde's Order referring the matter back to Judge Rigtrup, beyond a mere objection to the form of said Order. Therefore, this issue was not raised before the trial court and cannot properly be raised for the first time on appeal.

The Third Judicial District Court has acted at all relevant times within its broad discretion in this case, and the rulings made and relevant orders entered thereby, which the Plaintiff and Appellant has appealed, should properly be affirmed by the Utah Court of Appeals. Although this case has a complicated procedural history, involving several different judges, this is not the fault of the Defendants and Appellees, or of the Third Judicial District Court, and this factor has not impacted the propriety of the Court's ultimate decisions in this case, pursuant to the Court's broad discretion.

ARGUMENT

I. LIMITATIONS UPON AN ATTORNEY'S ABILITY TO BIND A CLIENT

The Plaintiff and Appellee has argued within its Appellate Brief that general principles of contract law are applicable in this case, in conjunction with an agent's ability to bind its principal. The Plaintiff and Appellee claims that B. Ray Zoll, as attorney of record for the Defendants and Appellees, acted as an ordinary agent, and bound the Defendants and Appellees in the same way, and to the same degree with respect to the settlement stipulation of September 21, 1994. However, Utah Code Annotated §78-51-32 (1953) more specifically delineates and describes the limitations to the attorney-client relationship, as follows:

78-51-32. Authority of attorneys and counselors.
An attorney and counselor has authority:

- (1) to execute in the name of his client a bond or other written instrument necessary and proper for the prosecution of an action or proceeding about to be or already commenced, or for the prosecution or defense of any right growing out of an action, proceeding or final judgment rendered therein.
- (2) to bind his client in any of the steps of an action or proceeding by his agreement filed with the clerk or entered upon the minutes of the court, and not otherwise.
- (3) to receive money claimed by his client in an action or proceeding during the pendency thereof or after judgment, unless a revocation of his authority is filed, and, upon payment thereof and not otherwise,

to discharge the claim or acknowledge satisfaction of the judgment.

Subsections (2) and (3) of the above statute were discussed and interpreted by the Utah Court of Appeals in the case of John Deere Co. v. A&H Equipment, 876 P.2d 880 (Ut. App. 1994), citing State v. Musselman, 667 P.2d 1061 (Utah 1983).

It was held in John Deere Co., that in Musselman, the only other Utah case to cite this statute at that time, the Court "noted the long-established rule that attorneys can make procedural decisions in a lawsuit but it is the client's right to make decisions regarding settlement." The Utah Court of Appeals in John Deere Co. further held that:

We believe, however, that the thrust of §78-51-32(2) is to give attorneys the power to act on their client's behalf, in most cases without prior consultation, as to those **procedural matters** of a lawsuit for which attorneys have the expertise and obligation to act in the best interests of their clients. Section 78-51-32(2) protects an attorney from disciplinary action for so acting. . . **Clearly, the power to settle a lawsuit resides in the client** [emphasis added].

Therefore, although in general terms an attorney acts as an agent for his client, the above statute describes, defines and limits that particular agency relationship, to be distinguished from a customary principal-agent relationship pursuant to the common law of agency.

Utah Code Annotated §68-3-2 (1953) provides in relevant part that when a statute of the State of Utah and the general common law come in conflict,

The rule of the common law that statutes in derogation thereof are to be strictly construed has no application to the statutes of this state . . . The statutes establish the laws of this state respecting the subjects to which they relate, and their provisions and all proceedings under them are to be liberally construed with a view to effect the objects of the statutes and to promote justice.

Pursuant to the language of the above statute, it is clear that Utah Code Annotated §78-51-32 takes precedence over the general common law with respect to the nature and limitations of an attorney's agency relationship with his or her client.

Accordingly, the Defendants and Appellees were not irreversibly bound by the acts of B. Ray Zoll, Esq., for purposes of the settlement stipulation of September 21, 1994.

Therefore, Judge Rigtrup did not abuse his discretion in ruling that the Defendants and Appellees were not bound by the October 3, 1994 arbitrary deadline of the September 21, 1994 stipulation. The stipulation was not reduced to writing pursuant to the requirements of Rule 4-504(3), Utah Code of Judicial Administration, and there was a miscommunication between counsel and the Defendant Floyd Weston, which the Court found to amount to excusable neglect on the part of the Defendants and Appellees.

Due to this inadvertence, and based upon Utah Code Annotated §78-51-32, regarding the limitations of an attorney's ability to bind his or her client, Judge Rigtrup properly refused to enforce in its entirety the stipulation of September 21, 1994.

II. THE TRIAL COURT CLEARLY ACTED WITHIN ITS BROAD DISCRETION IN SETTING ASIDE THE REINSTATED SUMMARY JUDGMENT, AND IN ENFORCING THE MATERIAL TERMS OF THE STIPULATION

In the case of United Factors v. T.C. Associates, Inc., 445 P.2d 766 (Utah 1968), it was held that it is within the discretion of the trial court to determine whether settlement stipulations should be vacated or, alternatively, whether they should be enforced. In addition, the case of First of Denver Mortgage Investors v. C.N. Zundel and Associates, 600 P.2d 521 (Utah 1979), it was held by the Utah Supreme Court that parties are bound by their stipulations unless upon motion they are relieved therefrom by the court, "which may, in the interest of justice and fair play, set aside a stipulation for **inadvertence** or justifiable cause [emphasis added]. Also see Robbins v. Cook, 734 P.2d 415 (Utah 1986) [The court has broad discretion to set aside a stipulation on a procedural matter. Upon timely motion, the court may set aside a stipulation for inadvertence or justifiable cause when it is in the interest of justice to do so].

Such is clearly the case here, and Judge Rigtrup's ruling was

well within the sound discretion of the trial court, and in the furtherance of justice. Judge Rigtrup found that there was inadvertence and excusable neglect on the part of Defendant Floyd Weston [R 828, R 830] with respect to the October 3, 1994 deadline and thus, pursuant to the case law cited above, held that the Defendants and Appellees were not bound by the deadline date of the September 21, 1994 stipulation.

The Appellant is attempting to turn a \$7,500.00 settlement amount into a \$38,842.74 judgment, without providing the Appellees the opportunity to present their case on the merits at trial, at which trial the Appellees have felt confident all along that they would prevail. The Appellant has conceded that this case has a confused procedural history. The clarification and resolution of this dispute has been months in coming, due to the fluctuations in judges to whom the case has been assigned, through no fault of any of the parties to this action. Furthermore, the Appellant has not disputed the lower court's finding of excusable neglect on the part of the Appellee Floyd Weston [R 828, R 830]. This is true in spite of the Appellant's erroneous implication that this neglect was in fact due to the actions of the Appellees' counsel, who it has been alleged irreversibly bound the Defendants and Appellees. As set forth within the Affidavit of Floyd Weston [see Exhibit "B"; R 628], the board of directors of the corporate appellee were

out of town and otherwise unavailable to approve the settlement agreement, which fact was not known to Weston at the time of the September 21, 1994 stipulation, and which fact was not properly communicated between the Appellees and their counsel [see Exhibit "B"; R 628].

Although the actions of an attorney will under ordinary circumstances serve to bind his or her client with respect to procedural matters, as set forth above, a trial court has broad discretion with respect to stipulations and pursuant to Rule 60(b), Utah Rules of Civil Procedure, to set aside a judgment, order or proceeding based upon excusable neglect, after taking into consideration all of the factors in a case. Birch v. Birch, 771 P.2d 1114 (Utah Ct. App. 1989) [The trial court is afforded broad discretion in ruling on a motion for relief from judgment under Subdivision (b), and its determination will not be disturbed absent an abuse of discretion]. Larsen v. Collina, 684 P.2d 52 (Utah 1984) [The trial court has discretion in determining whether a movant has shown "mistake, inadvertence, surprise, or excusable neglect," and the Supreme Court will reverse the trial court's ruling only when there has been an abuse of discretion].

The Plaintiff and Appellant has not once, throughout these proceedings, provided evidence or even asserted that time was of the essence when the settlement agreement of September 21, 1994

was verbally entered into before Judge Rigtrup, and has never even claimed that this deadline date was a material term to the stipulation. The Appellant furthermore has not provided any claims or evidence of prejudice suffered due to the passing of this arbitrary October 3, 1994 deadline. This is especially true, in light of the fact that the Appellees tendered the payment amount only a few days after this "deadline," which payment was inexplicably refused by the Appellant. The Appellant is merely seeking a windfall based upon a technicality, and has at this point determined that it is no longer satisfied with the settlement amount of \$7,500.00 which it previously and voluntarily agreed to in open court.

But for the unavoidable inadvertence, the resulting excusable neglect of the Appellees, and the confounded judicial proceedings of the case, the settlement amount would have been paid by the arbitrarily chosen deadline date, and this entire case would have been resolved in October of 1994. Besides the fact that the Appellees claim the terms to the stipulation were ambiguous, said stipulation was entered into based upon an inadvertence and mistake of fact as set forth above, and there were outside factors giving rise to the Appellees' excusable neglect in this regard.

Judge Rigtrup took all of these factors into account, and given the confused procedural history of this case, the Court

merely added the appropriate amount of accrued interest, costs, and \$1,500.00 in attorney's fees to the original settlement amount of \$7,500.00. This decision amounted to a fair and logical resolution of this matter. The lower Court had the broad discretion to rule as it did, and the Appellant has provided neither evidence of an abuse of this discretion, nor any compelling reasons why this determination should be disturbed on appeal, merely adding to the fees and costs to the parties.

III. THE APPELLANT FAILED TO RAISE BELOW THE ISSUE OF THE PROPRIETY OF JUDGE HYDE'S RULING OF FEBRUARY 2, 1995, AND HAS WAIVED THE RIGHT TO DO SO ON APPEAL

The Plaintiff and Appellant has argued, within its Appellate Brief, that Judge Hyde improperly referred this case back to Judge Rigtrup for a determination on the Defendants' and Appellees' Motion for Relief from Judgment, pursuant to Rule 60(b), Utah Rules of Civil Procedure, and on the Plaintiff's and Appellant's Motion to Reinstate Summary Judgment. The Plaintiff and Appellant further claims that the ruling of Judge Hyde of December 2, 1994 [R 675], reinstating the Summary Judgment, became "the law of the case", after which time the Defendants and Appellees filed their Rule 60(b) Motion for Relief from this Judgment. However, Rule 60(b), Utah Rules of Civil Procedure, provides a clear and obvious means for vacating judgments, and the filing of a motion pursuant

to this Rule does not amount to a violation of the "law of the case doctrine."

In any event, it has been held that "the law of the case doctrine does not prohibit a judge from catching a mistake and fixing it," Gillmor v. Wright, 850 P.2d 431 (Utah 1993). It was further held in Gillmor that:

Among situations where reconsideration of a previously decided issue is recognized as desirable, notwithstanding the law of the case, is when there is a "need to correct a clear error or prevent manifest injustice." [citing Federal Practice, §4478, at 790; emphasis added].

Finally, the Utah Court of Appeals held in McKee v. Williams, 741 P.2d 978, 981 (Utah Ct. App. 1987), that the trial court can change a ruling until a final decision is formally rendered, and that the trial court judge in McKee did not abuse his discretion by rescinding his prior decision.

In any event, however, the issue regarding the propriety of the referral of this case from Judge Hyde back to Judge Rigtrup was not raised before the trial court, and the issue has thus been waived by the Plaintiff and Appellant for purposes of this appeal. It was held in State v. Smith, 866 P.2d 532, 533 (Utah 1993) that, "It is black-letter law that an appellate court will not address issues raised for the first time on appeal except in extraordinary circumstances . . ." [emphasis added], citing Ong International, Inc. v. 11th Ave. Corp., 850 P.2d 447 (Utah 1993). Also see State

v. Allen, 839 P.2d 291 (Utah 1992) and State v. Steggall, 660 P.2d 252 (Utah 1983).

Following Judge Hyde's ruling of February 2, 1995, vacating the Reinstatement of Summary Judgment and referring the matter back to Judge Rigtrup, the Plaintiff and Appellant objected only to the form of the proposed Order submitted by the Defendants and Appellees, and signed by Judge Hyde on February 8, 1995 [R 789]. There was never any objection below whatsoever with respect to Judge Hyde's involvement in this case, or with respect to the propriety of Judge Hyde's decision to refer the case back to Judge Rigtrup, pursuant to Rule 4-504(2), Utah Code of Judicial Administration. This issue has only been raised by the Plaintiff and Appellant for the first time on appeal, and thus it has not been preserved for said purposes. In accordance with the applicable case law, this argument has been waived by the Plaintiff and Appellant and should not be afforded any weight whatsoever at this stage of the proceedings.

CONCLUSION

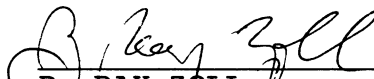
The Plaintiff and Appellant has attempted, by taking advantage of the fact that the Defendants did not pay the settlement amount on the arbitrary and conditional deadline date, to avert the merits of this case, and to do everything possible to

avoid going to trial. This is due to the fact that the Plaintiff's substantive claims in this case have been nonmeritorious. Manifest injustice would result in this case if the Defendants are burdened with a \$38,842.74 Summary Judgment, when that judgment was previously voluntarily vacated by a Stipulation between the parties. This is especially true, inasmuch as the Plaintiff has already agreed to accept \$7,500.00 as a full settlement of all claims to resolve this dispute. Judge Rigtrup clearly took this position in ruling in favor of the Defendants, and enforcing the material terms to the September 21, 1994 in-court stipulation. The Judge properly ruled that Defendants and Appellees were not bound by the arbitrary deadline date of October 4, 1993, due to inadvertence, and consistent with Utah Code Annotated §78-51-32.

Judge Rigtrup had the full opportunity to review all of the background facts and judicial proceedings which comprise this case. The Judge properly ruled that the material terms to the previous settlement agreement between the parties of September 21, 1994 should remain in force, despite the elapsing of the initial arbitrary deadline date for making said payment. The Judge ruled that there had been excusable neglect on the part of the Appellees, in light of the mistake of fact thereby, and the convoluted procedural history of this case. The trial court Judge

had broad discretion, in the interests of justice and fair play,
to make such a determination, pursuant to the Utah Rules of Civil
Procedure, and in accordance with the applicable Utah case law.

DATED this 23 day of August, 1995.

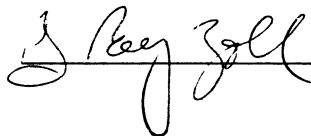


B. RAY ZOLL
Attorney for Defendants/Appellees

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the
foregoing, with postage prepaid thereon, on this 24 day of
August, 1995, to the following:

JOSEPH C. RUST
IAN A FORREST
KESLER & RUST
2000 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111
Attorneys for Plaintiff/Appellant



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IN THE THIRD JUDICIAL DISTRICT COURT FOR
SALT LAKE COUNTY, STATE OF UTAH

* * *

GULL LABORATORIES,
Plaintiff,

-vs-

WESTON,

Defendant.

COPY

Case No. 930900564
STIPULATION, 9-21-94

BE IT REMEMBERED that on the 21st,
1994, at 9:00 o'clock a.m., this cause came on for
hearing before the HONORABLE KENNETH RIGTRUP,
District Court, without a jury in the Salt Lake
County Courthouse, Salt Lake City, Utah.

A P P E A R A N C E S:

For the Plaintiff: JOSEPH RUST
Attorney at Law

For the Defendant: RAY ZOLL
Attorney at Law

CAT by: CARLTON S. WAY, CSR, RPR

Exhibit "A"

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THE COURT: This is in the matter of Gull
s versus Floyd E. Weston; File 930900564.

May we have your appearances for the use?

MR. RUST: Joseph Rust on behalf of the

MR. ZOLL: Ray Zoll representing the
your Honor.

THE COURT: And it's my understanding Defendant will pay Plaintiff \$7,500 within suffer default judgment to enter as entered?

MR. ZOLL: That is correct, your Honor.

Can we say ten days from the stipulation
by the Judge, the stipulation and order,
we would prepare the papers and we'd
be ready to form?

MR. RUST: I think we have an agreement

THE COURT: On or about 5:00 p.m.,
October 1.

MR. ZOLL: That's agreeable, your Honor.

MR. RUST: Yes.

THE COURT: Is that agreeable?

1 MR. RUST: October 1 is a Saturday, your
2 Honor.

3 THE COURT: 5:00 p.m. on Monday?

4 MR. ZOLL: That will be agreeable.

5 MR. RUST: That will be the 3rd.

6 MR. ZOLL: That will be the 3rd.

7 October 3rd by 5:00 o'clock --

8 THE COURT: \$7,500.

9 MR. ZOLL: -- and dismissal --

10 THE COURT: In the event there is a
11 default, then Mr. Rust can submit an affidavit that
12 it wasn't paid; judgment may then enter as previously
13 entered by Judge Moffat.

14 MR. ZOLL: Yes. And Mr. Rust prepare the
15 dismissal papers?

16 THE COURT: Yes.

17 Each party to pay their own fees and
18 costs.

19 Okay.

20 MR. ZOLL: Thank you, Judge.

21 (Hearing adjourned.)

22

23

24

25


FILED
DISTRICT COURT
54 OCT 14 PM 3:35
BY 

Exhibit "B"
44362

1. I am of adult years and competent to make this Affidavit for said purposes. All the statements hereinafter set forth within this Affidavit are made by me on the basis of my personal and direct knowledge of the matters to which said statements pertain. If called as a witness by a court of competent jurisdiction, I am able to and shall testify as to each and all of said matters in the manner heretofore set forth in this Affidavit.

2. I am a citizen of the United States and a resident of the State of Utah over the age of 18 years.

3. I am an individual Defendant in the above-entitled matter, and I am the President of the corporate Defendants involved herein.

4. The Court in this case requested that the parties discuss settlement. My counsel called me and described the settlement negotiations. Although I was involved in the settlement agreement of September 21, 1994, I misunderstood my counsel over the telephone, relative to the October 4, 1994 deadline.

5. I anticipated that a written order would be prepared, providing me with a chance to review it and make sure that it was acceptable, as per prior experience I have had with the local rules of this Court.

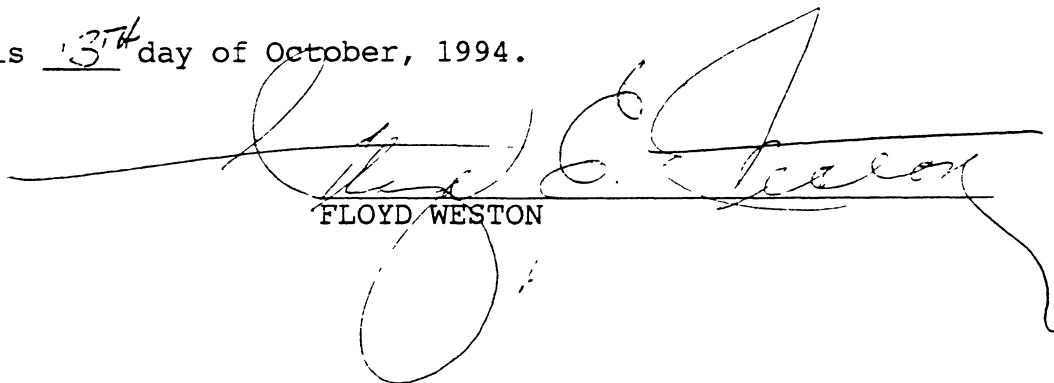
6. In any event, I first was required to obtain the approval of the Board of Directors of the corporate Defendants, before this amount could be disbursed in accordance with the standard operating procedures thereof, and this approval had not yet been received at the time of the unknown deadline.

7. I personally informed agents for the Plaintiff over the telephone that this was the status of the settlement agreement, and that I was awaiting Board approval. I further informed agents for the Plaintiff that the Defendants were still willing to pay the \$7,500.00 amount, but agents for the Plaintiff refused to accept said amount.

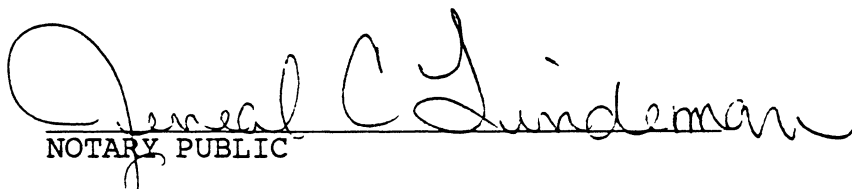
8. Therefore, in the event that this settlement agreement and the \$7,500.00 amount is no longer acceptable to the Court, I have instructed my counsel to request that a trial date be scheduled in order that this matter may be heard, and so that I may have my day in court.

FURTHER AFFIANT SAYETH NAUGHT:

DATED this 13th day of October, 1994.

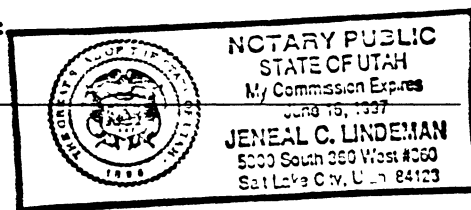

FLOYD WESTON

On this 13th day of October, 1994, personally appeared before me FLOYD WESTON, known to me as the person named in and who executed this Affidavit and acknowledged that said Affidavit was read and was understood by said person and was executed as the free act and deed of said person.


NOTARY PUBLIC

My Commission Expires:

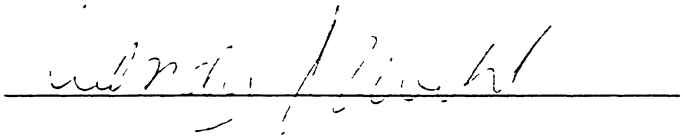
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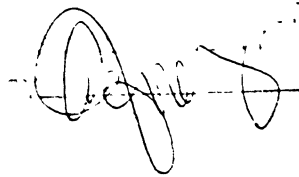
MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing, with postage prepaid thereon, on this 13 day of October, 1994, to the following:

Joseph C. Rust
KESLER & RUST
2000 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111
Attorney for Plaintiff



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



IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH

GULL LABORATORIES, INC.,)
a Utah corporation,)

Plaintiff,)

vs.)

FLOYD E. WESTON dba METABOLIC)
RESEARCH INSTITUTE and)
FORMULA TECHNOLOGY, INC.,)
a Nevada corporation,)

Defendants.)

REPLY AFFIDAVIT
OF B. RAY ZOLL

Civil No. 930900564 CV

Judge Richard H. Moffat

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

I, B. RAY ZOLL, being first duly sworn under oath depose
and say:

1. I am of adult years and competent to make this Affidavit for said purposes. All the statements hereinafter set forth within this Affidavit are made by me on the basis of my personal and direct knowledge of the matters to which said statements pertain. If called as a witness by a court of competent jurisdiction, I am able to and shall testify as to each and all of said matters in the manner heretofore set forth in this Affidavit.

2. I am a citizen of the United States and a resident of Salt Lake County, State of Utah over the age of 18 years.

3. I am the attorney of record for the Defendants in the above-entitled matter and therefore I have direct involvement and personal knowledge pertaining to the facts leading up to, and subsequent to, the Plaintiff's Motion for Reinstatement of Summary Judgment.

4. Joseph C. Rust, in his Affidavit dated October 17, 1994, stated that, during the course of a telephone conversation which he had with me on October 4, 1994:

Mr. Zoll informed affiant that although defendants had not paid the money by October 3, 1994, that they were still desirous to do so but would not be able to make the payment

of \$7,500.00 until the following Monday, October 10. However, this is a mischaracterization of what I actually said during that conversation.

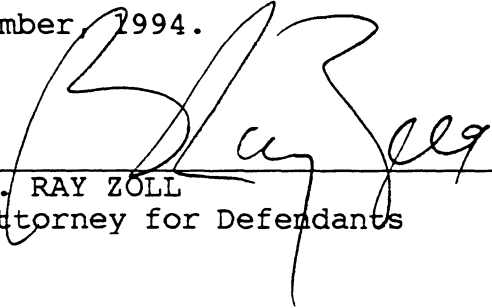
5. I explained to Mr. Rust, during that October 4, 1994 telephone conference, that Defendant Floyd Weston would need to receive the approval of the board of directors of the corporate Defendant, Formula Technology. I also explained at that time that my client, Defendant Floyd Weston, had misunderstood the outcome of the settlement conference, and was unaware of the October 4, 1994 deadline for payment of the settlement amount.

6. Furthermore, no mention was made at that time relative to a reinstatement of the Plaintiff's Motion for Summary Judgment, or to any other form of default proceedings. I then stated that we would still pay the \$7,500.00 to settle the matter by Monday, October 10, 1994, or go to trial. Mr. Rust refused to accept the arrangements, but stated that our client had to call his client.

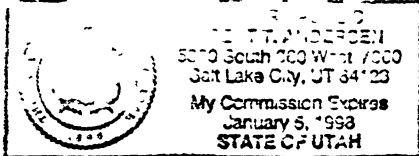
7. Mr. Rust has been apprised throughout of the situation and of the reasons for nonpayment of the settlement amount by the Defendants.


FURTHER AFFIANT SAYETH NAUGHT:

DATED this 2 day of November, 1994.


B. RAY ZOLL
Attorney for Defendants

On this 2 day of November, 1994, personally appeared before me B. RAY ZOLL, known to me as the person named in and who executed this Affidavit and acknowledged that said Affidavit was read and was understood by said person and was executed as the free act and deed of said person.




NOTARY PUBLIC

My Commission Expires:

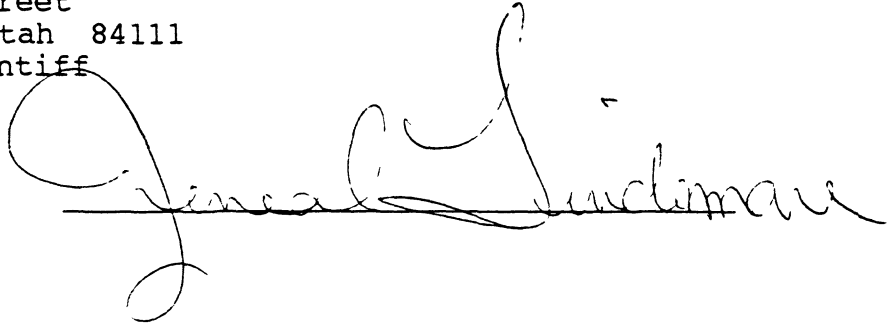
Residing At:

S.L.C.

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing, with postage prepaid thereon, on this 3rd day of November, 1994, to the following:

Joseph C. Rust
KESLER & RUST
2000 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111
Attorney for Plaintiff

A handwritten signature in cursive script, reading "Gerald Lindman", written over a horizontal line.

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IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH

GULL LABORATORIES, INC.,)	
a Utah corporation,)	
)	Civil No. 930500564CV
Plaintiff,)	
)	
vs.)	<u>HEARING ON MOTION</u>
)	<u>TO SET ASIDE JUDGMENT</u>
FLOYD E. WESTON dba)	
METABOLIC RESEARCH)	
INSTITUTE and FORMULA)	(<u>Videotape Proceedings</u>)
TECHNOLOGY, a Nevada)	
corporation,)	
)	
Defendants.)	

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BE IT REMEMBERED that on the 27th day of January,
1995, commencing at the hour of 4:07 p.m., the above-
entitled matter came on for hearing before the HONORABLE
RONALD O. HYDE, sitting as Judge in the above-named Court
for the purpose of this cause, and that the following
videotape proceedings were had.

A P P E A R A N C E S

For the Plaintiff:	JOSEPH C. RUST Attorney at Law Kesler & Rust 2000 Beneficial Life Tower 36 South State Street Salt Lake City, Utah 84111
For the Defendants:	B. RAY ZOLL Attorney at Law Zoll & Branch 5300 South 360 West Suite 360 Salt Lake City, Utah 84123

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1 looks like--we had that debate that we took out of the order
2 that it would be Judge Rigtrup would get it, and that could
3 be easily construed to make it look like that means you
4 wanted it.

5 And so we don't have a clear, definitive position
6 for the clerks to look at to say how we get it in front of
7 Judge Rigtrup.

8 THE COURT: I think all you'd have to do
9 is suggest to the clerk that the Judge suggested maybe
10 Rigtrup ought to hear it and suggested you talk to him.
11 Have you tried to talk to him personally?

12 MR. ZOLL: I--yes. And he won't--he
13 won't talk ex parte to me, Judge.

14 THE COURT: Well, the two of you then.

15 MR. ZOLL: I'd be glad to walk over
16 there right now and ask the Judge or get him on the phone,
17 because both Counsel and I--this counsel, of course, we
18 asked him and he said that he wouldn't--at least my office
19 asked Mr. Rust, and he said no, that he wanted to have the
20 matter heard before this Court, and--

21 MR. RUST: I--

22 THE COURT: Just a second.

23 MR. RUST: Your Honor, I have never had
24 that conversation with anyone from his office.

25 MR. ZOLL: No. I understand that my--

1 my--my receptionist said, just even today, that we--that
2 since we knew it was Judge Hyde that already had made this--
3 what we felt this recommendation was, that--and I think it
4 was Kathy that was on--involved on that, and she said both
5 counsel have to stipulate and all--and it was Kathy that
6 spoke with Mr. Rust today and he suggested that he would not
7 stipulate.

8 MR. RUST: Your Honor, may I just speak
9 to that?

10 THE COURT: Well, that was in response
11 to a call that you made to Kathy?

12 MR. ZOLL: Yes.

13 THE COURT: You called?

14 MR. ZOLL: That's correct.

15 MR. RUST: Your Honor, may I just speak
16 on this--this issue of Judges. As the Court notes, we have
17 been before a number of different judges in this particular
18 case, and for the reasons that we're all aware of. But I
19 might note that when we went before Judge Hanson, this was
20 Mr. Zoll's motion to continue the trial, and I was told that
21 that was going to be heard before Judge Hanson, and we went
22 there, and Judge Hanson sharply criticized us for assuming
23 to be able to, even by stipulation, go see him.

24 And--and very frankly, as I understand the system,
25 that--that it is up to the clerk of Judge Moffat's Court how

1 THE CLERK: Well, he is there, but
2 apparently, he doesn't have anybody there right now.

3 THE COURT: What does that mean?

4 THE CLERK: That she's gone to talk to
5 him to see if (inaudible).

6 (Inaudible) Judge Hyde, would you mind talking to
7 Judge Rigtrup?

8 THE COURT: Have you got him on the
9 phone?

10 THE CLERK: I do, and I don't understand
11 the things here enough to--just do (inaudible)

12 THE COURT: Judge Rigtrup? Fine, fine,
13 Grant.

14 I've got a case over here that I reinstated the
15 judgment on based on a hearing that was held in your Court
16 on the motion.

17 A motion has been raised to set aside my
18 reinstatement and part of the basis of it is what went on in
19 your hearing, I just went on a cold record.

20 I have suggested to Counsel that the motion to set
21 it aside should probably be heard by you, if you're willing
22 to hear it. Oh, this is--it's a motion now to set aside the
23 reinstatement of the default based on--yeah, which I did
24 based on your record, and the basis of it, basically would
25 be, I suppose, what went on in your Court at the time that

1 the order was granted.

2 I really didn't. That's about right. Now, he's
3 made a motion to set that aside, but the basis of the motion
4 now is basically on what went on in yours, not on what went
5 on in mine.

6 Yeah. My--my ruling was based on my
7 interpretation of the record as to what you said, and it's--

8 Well, all right. Let me take whatever I can.

9 Yeah. You--do you actually have any recollection of it or--

10 Well, where you stand is basically about the only
11 way you're going to get before him is if I vacated my
12 ruling, just back the whole thing off and let him hear it,
13 and I don't particularly think that's warranted on the
14 record.

15 MR. ZOLL: Then could I just make my
16 argument to your Honor?

17 THE COURT: Yeah. I think we'd better
18 go forward with him.

19 Go ahead.

20 MR. ZOLL: All right. Let me first
21 state, I--I appreciate here being here, represent the
22 interest of Mr. Floyd Weston, who's seated here with us
23 today, Judge.

24 We have--we do have complete confidence that the
25 Court, when you see the facts and the whole procedure

1 outlined here, that your Honor will be able to see, I
2 believe, a couple of nuances that--that kind of make this
3 case, we think in fair play, lean in our favor.

4 As your Honor is well aware, this is a Rule 60(b)
5 motion. 60(b) is not one you always like to bring, because
6 that means you're in trouble, and in this particular case,
7 we know this makes your Honor a Court of equity.

8 And if I could refresh your memory, Judge, I know
9 you know it well; Rule 60(b) says that when we make the
10 motion upon terms that are just, the Court may, in the
11 furtherance of justice, relieve a party or his legal
12 representative from a final judgment relating to mistake,
13 inadvertence, excusable neglect or Paragraph 7, any other
14 reason justifying relief from operation of the judgment.

15 There's no question that this Court is in--now
16 sits in a court of fairness, analyzing the facts and the
17 situation and the procedure that's happened, to make a
18 discretionary decision. And it is discretionary.

19 I cite the case of United Factors vs. T.C.
20 Associates, 445 P.2d 766, that says it must be stressed that
21 it's within the discretion of the trial court to determine
22 whether the stipulation should be vacated.

23 And that's what we really have here, Judge, is a
24 stipulation, and that stipulation then embodies the areas of
25 contract law; offer, acceptance, consideration, mutual

1 wanted--

2 MR. RUST: No, no, all I--

3 THE COURT: All I'm saying--

4 MR. RUST: --said--

5 THE COURT: All I'm saying is that his
6 motion for the entry of judgment based on your failure to
7 comply with your agreement--

8 MR. RUST: Is denied then?

9 THE COURT: No. No. I'm backing off
10 the ruling I made on it, and you send that motion over to
11 Judge Rigtrup, where you are from day one.

12 MR. ZOLL: All right.

13 MR. RUST: May I have this much then for
14 our protection, your Honor? That the--that the \$35,000
15 letter of credit still remains to protect us against an
16 eventual judgment?

17 THE COURT: If it--you--yeah, I'll make
18 that part of it; you agree to leave that in in case Judge
19 Rigtrup rules the same way. Do you agree to that?

20 You're going to have to face Judge Rigtrup--

21 MR. WESTON: If that's what Judge Hyde
22 wants. I'd rather just leave 7,500 in, but--

23 THE COURT: No. Well, I'm not making a
24 ruling on this 7,500. I'm going to let Rigtrup do it.

25 MR. WESTON: Okay. If that's what you

1 want, then--

2 MR. ZOLL: I think, your Honor, we'd
3 just like to say that we--we submit that we'll do it the way
4 you suggested, that it's to not--that we rescind the ruling
5 and the motion then will be opened up to--

6 THE COURT: The record--for the record,
7 I am rescinding my ruling on his motion to enter judgment
8 and refer that motion over to Rigtrup.

9 The bond that you've issued, that you have, will
10 stay there in case it ends up that--in the same direction,
11 for the protection of that party. I think--I'm not just
12 going to flat out--I haven't really changed my mind on it,
13 but I think in all fairness, it probably ought to go back to
14 the one that did it.

15 MR. ZOLL: All right. That is fair.
16 Thank you, Judge. We'll leave the bond in place, we'll, I
17 guess Mr.--should I do the order?

18 THE COURT: What you've got to argue to
19 him now is basically the same motion that was brought in
20 here, that--on the entry of judgment.

21 MR. RUST: Which will be my motion now?

22 THE COURT: Which is your motion.

23 MR. RUST: All right.

24 THE COURT: I hope that disposes of it.

25 Here's your--

1 MR. ZOLL: Thank you, your Honor.

2 THE COURT: --to rectify it. And I'm

3 sorry for all the confusion, but I don't know what else to

4 do with it.

5 MR. ZOLL: Just for--for--for moving

6 this matter along, normally, we would have to have some kind

7 of a motion to sub--a notice to submit and so forth; is it

8 permissible to have Kathy arrange with Judge Rigtrup's clerk

9 to get that on the calendar as soon as possible?

10 THE COURT: Certainly permissible with me

11 and he said, in effect when I was talking to him, if I--in

12 order to avoid all the procedure problems, that's about the

13 only way that it ought to be done, and that's--I'm kind of

14 following--

15 MR. ZOLL: And we'll get it--

16 THE COURT: --frankly, kind of following

17 his suggestion.

18 MR. ZOLL: We'll get it calendared the

19 standard way, I don't have my calendar with me, to know

20 what's a good--what we can do, I mean, I have to--

21 THE COURT: Well, don't put this off very

22 long, 'cause--

23 MR. ZOLL: I won't. I have a trial with

24 Judge Bohling starting Tuesday that goes that week and then

25 I've got another week-long trial with Judge--

1 THE COURT: Well, it isn't going to take
2 you long to--to get together and get yourself a hearing date
3 on it.

4 MR. ZOLL: It won't.

5 THE COURT: I don't know what his
6 calendar is or anything, but--

7 MR. ZOLL: Thank you, your Honor.
8 Appreciate it.

9 THE COURT: All right.

10 (Whereupon, this hearing was concluded.)
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IN THE THIRD JUDICIAL DISTRICT COURT FOR
SALT LAKE COUNTY, STATE OF UTAH

* * *

COPY

GULL LABORATORIES, INC.,)
Plaintiff,)
-vs-)
FLOYD E. WESTON, et al.,)
Defendants.)

Case No. 930900564
BENCH DECISION, 2-27-95

BE IT REMEMBERED that on the 27th day
of February, 1995, at 10:00 o'clock a.m., this cause
came on for hearing before the HONORABLE KENNETH
RIGTRUP, District Court, without a jury in the Salt
Lake County Courthouse, Salt Lake City, Utah.

A P P E A R A N C E S:

For the Plaintiff: JOSEPH C. RUST
Attorney at Law

For the Defendant: B. RAY ZOLL
Attorney at Law

CAT by: CARLTON S. WAY, CSR, RPR

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1 I will grant you conditional relief under
2 Rule 65(b) on the condition that by 5:00 p.m. on
3 March the -- March the 10th, 1995, you tender a cash
4 or its equivalent -- that's either cash or money
5 order or cashier's check or whatever -- \$7,500 plus
6 ten-percent interest from October 3, 1995; plus
7 \$1,500 attorney's fees; plus any cost incurred by
8 Plaintiffs in pursuing execution on the outstanding
9 judgment that was entered.

10 If those conditions are not met, the
11 Order entered by Judge Hyde on October 8th, 1995, is
12 to be reinstated.

13 Are there any questions? Is there any
14 lack of clarity in the Court's ruling.

15 MR. RUST: For clarification, Your Honor,
16 does the Court find any excusable neglect on the part
17 of Mr. Zoll?

18 THE COURT: I'm not going to make a
19 finding on that.

20 MR. ZOLL: For clarification, Your Honor,
21 would the ten-percent interest include the \$1,500
22 from the --

23 THE COURT: Ten-percent interest on the
24 \$7,500 from October 3, 1995, until paid.

25 In addition to that, as a condition of

1 granting your relief, I am awarding \$1,500 to
2 Mr. Rust for fees.

3 You've created a whole new volume since
4 you started arguing about this. And any costs
5 incurred in pursuing execution.

6 MR. ZOLL: I understand.

7 MR. RUST: I might note for the Court,
8 Your Honor, that we have incurred more than \$1,500 in
9 attorney's fees --

10 THE COURT: I understand.

11 MR. RUST: -- from that date to the
12 present.

13 THE COURT: If I could have gotten the
14 two of you to me instead of Judge Hyde and got you to
15 focus on that one narrow issue, we would have saved
16 fees for Mr. Weston, and the corporate client would
17 have saved fees for you, Mr. Rust.

18 And I haven't had an affidavit or
19 whatever, but I have reviewed Volume 2, completely
20 and gone back to the back part of Volume 1 so I think
21 I am generally focused on all that's gone on since.

22 And, unfortunately, I had even written
23 half of a 4501 Ruling responding to the notice to
24 submit. And then I go back downstairs and get the
25 updating paper work and find that Judge Hyde had

1 already ruled. So I tore up my good work and threw
2 it in the wastebasket.

3 So I have reviewed it very carefully.

4 MR. RUST: Thank you.

5 MR. ZOLL: Thank you, Your Honor.

6 THE COURT: The only real basis of my
7 ruling is that although the Court recognizes and
8 realizes the clients ought to be bound by the actions
9 of their attorney, I think you've created part of the
10 problem, Mr. Zoll. And it was clear and unmistakable
11 in my mind. Part of the problem was that I pushed
12 you -- the notice was clear in my mind that there was
13 a settlement conference, but there was also a pending
14 motion. And I said we are going to start talking.
15 But I did it from the bench. I said: "We are going
16 to talk about settlement," and I had you going back
17 and forth between here and the telephone. And I will
18 accept as true what Mr. Weston has said in his
19 Affidavit and afford him the benefit of excusable
20 neglect.

21 MR. RUST: Would you like me to prepare
22 an order, Your Honor?

23 THE COURT: Will you prepare an order?

24 MR. RUST: Yes.

25 THE COURT: We will be in recess.

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MR. RUST: Thank you, Your Honor.

MR. ZOLL: Thank you.

(Hearing adjourned.)

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REPORTER'S CERTIFICATE

STATE OF UTAH)
)
County of SALT LAKE) ss.

I, CARLTON S. WAY, CSR, do hereby certify
that I am a Certified Shorthand Reporter and a Notary
Public in and for the State of Utah;

That I took down the proceedings aforesaid at
the time and place therein named and thereafter
reduced the same to print by means of computer-aided
transcription (CAT) under my direction and control;

I further certify that I have no interest in
the event of this action.

WITNESS MY HAND AND SEAL this the 10th day of
March, 1995.

(Signature)

CARLTON S. WAY, CSR, RPR