1995

Gull Laboratories, Inc., a Utah Corporation v. Floyd E. Weston dba Metabolic Reserach Institute and Formula Technology, a Nevada Corporation : Petition for Rehearing

Utah Court of Appeals

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

IN THE UTAH COURT OF APPEALS

GULL LABORATORIES, INC., a Utah Corporation, Plaintiff and Appellant, vs FLOYD E. WESTON dba METABOLIC RESEARCH INSTITUTE and FORMULA TECHNOLOGY, a Nevada Corporation, Defendant and Appellees.	CASE NO. 950481-CA PRIORITY NO. 15 930900564 CV

PETITION FOR REHEARING

Petition for Rehearing of a Memorandum Decision filed March 7, 1996.

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IN THE UTAH COURT OF APPEALS

GULL LABORATORIES, INC., a Utah Corporation,	:	CASE NO. 950481-CA
Plaintiff and Appellant,	:	PRIORITY NO. 15
vs	:	
FLOYD E. WESTON dba METABOLIC RESEARCH INSTITUTE and FORMULA TECHNOLOGY, a Nevada Corporation,	:	930900564 CV
Defendant and Appellees.	:	

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PETITION FOR REHEARING

Pursuant to Rule 35(c) of the Utah Rules of Appellate Procedure, Appellee is submitting this Petition for Rehearing of the Memorandum Decision filed on March 7, 1996. This Petition for Rehearing is made in good faith and not for purposes of delay.

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.

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. 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.

3. 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.

4. Mr. Zoll described the material terms to the agreement to Mr. Weston at that time. However, Weston misunderstood Zoll relative to the conditional October 3, 1994 deadline, and believed that the stipulation would not be binding until and 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.

5. 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, nor was a copy of a proposed Order approved as to form by Mr. Zoll as Judge Rigtrup had required.

6. 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.

7. Appellee never had the opportunity to review the proposed Order until after the October 3rd deadline.

8. Mr. Rust claims to have mailed a proposed draft of the Order to Mr. Zoll on September 22nd, but Mr. Zoll never received it.

9. On September 28th, 1994, Judge Rigtrup signed the Order even though Mr. Zoll did not approve as the Order to form.

10. 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.

11. 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' time request or for oral argument, made in accordance with Rule 4-501(3)(b), Utah Code of Judicial Administration.

12. The Defendant then filed a Motion for Relief from the Summary Judgment, pursuant to Rule 60(b), Utah Code of Judicial Administration.

13. 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. 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.

14. On or about February 27, 1995, this matter came before Judge Rigtrup for oral argument. 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, by allowing Appellee additional time to pay the $7,500.00.

ARGUMENT

I. The Order was not valid because Mr. Zoll did not "approve it as to form" as required by Judge Rigtrup.

Appellee never had the opportunity to approve as to form the proposed Order submitted by Appellant before it was signed by Judge Rigtrup. According to the Stipulation that was agreed to by the parties and by the Court, Appellant's counsel, Mr. Rust, was to prepare a draft of a proposed order for Mr. Zoll's review before being submitted to the Judge for signature. However, instead of delivering a copy to Mr. Zoll, Mr. Rust simply submitted it to the Court for signature. Since Mr. Zoll never had the opportunity to approve as to form the Stipulation, it was not valid as submitted to Judge Rigtrup.

II. Appellee never had the opportunity to object to the Order

The Stipulation and ensuing Order was submitted to the court in violation of Rule 4-504 of the Code of Judicial Administration. According to Rule 4-504(2) of the Code of Judicial Administration, copies of "orders shall be served upon opposing counsel before being presented to the court for signature unless the court otherwise orders. Notice of objections shall be submitted to the

court and counsel within five days after service." 4-504(2) Code of Judicial Administration.

In the Memorandum Decision entered on March 7, 1996, the Utah Court of Appeals ruled that "Weston had ample time to object to the stipulation and ensuing order." This, however, is not true because October 3, the day on which Appellee was required to pay Appellant $7,500.00, came before the expiration of time allowed by law to object to the Order.

Mr. Zoll had until October 5th to object to the Order which came after the October 3rd date of performance pursuant to the Order. According, to Rule 4-504(2), Mr. Zoll had five days during which to object to the Order after it was signed by the court. Judge Rigtrup signed the Order on September 28, 1994. The Order required that Appellee pay Appellant $7,500 no later than October 3rd. However, Appellee had at least until October 5, not counting three additional days of mailing, to object. Five days from September 28, 1994 for purposes of filing an objection, with the additional two days over the weekend, is October 5th. Since performance under the Order on October 3rd came before the expiration of the allowed time to object, Appellee did not have ample time to object. Therefore, the Utah Court of Appeals incorrectly ruled that "Weston had ample time" to object because he

did not have the time allowed by Rule 4-504 of the Code of Judicial Administration.

III. The trial court did not abuse its discretion in altering the terms of the stipulation.

The trial court did not abuse its discretion in altering the terms of the stipulation to allow Appellee additional time to pay the $7,500 to Appellant. According to Utah law, the trial court has broad discretion to set aside a stipulation. In United Factors v. T.C. Associates, Inc., the Utah Supreme Court held that relief from stipulations may be granted by the trial court if there is an equivalent showing necessary to set aside a contract in equity, such as mistake of law or fact. United Factors v. T.C. Associates, Inc., 445 P.2d 766, (Utah 1968). The Court further ruled that "it must be stressed that it was within the discretion of the trial court to determine whether the stipulation should be vacated." Id.

As in United Factors, Judge Rigtrup determined, based on his own fact finding and within his own discretion, that the stipulation should be vacated. Judge Rigtrup was well aware of the inability for Appellees to make a timely objection to the order because the time for performance came before the expiration of the time to object to the Order, as outlined above. Judge Rigtrup also knew that given the unusual circumstances in which the stipulation

was negotiated created ample opportunity for Appellee Weston to be mistaken about the terms of the Stipulation.

These mistakes occurred because Mr. Zoll had to communicate with Weston on a telephone in the jury room. Mr. Rust had the benefit of his clients being present in the courtroom while Mr. Zoll did not. As a result of the unusual nature of these proceedings, Weston misunderstood the terms of the Stipulation. Judge Rigtrup recognized these misunderstandings and referred to them as "excusable neglect." Judge Rigtrup as the fact finder, had the best opportunity to determine these facts and set aside the Stipulation based on principles of equity.

In the Memorandum Decision filed March 7, 1996 by the Utah Court of Appeals, there is no indication of abuse of discretion by the trial court with respect to setting aside the stipulation. Accordingly, the Appellate Court's decision to reverse the trial court without a showing of an abuse of discretion is inappropriate.

CONCLUSION

In summary, the Utah Court of Appeals should grant Appellee's Petition for Rehearing because the trial court's ruling should not have been reversed. The trial court's initial ruling was correct for the following reasons: (1) Mr. Zoll never had the opportunity to approve as to form the Order as was originally agreed to; (2) Appellee did not have ample time to object to the Order because the

time for performance required by the Order came before the expiration of the time to object; and (3) the trial court did not abuse its discretion in altering the terms of the Stipulation.

DATED this 4th day of March, 1996.

ZOLL AND BRANCH

B. Ray Zoll
Attorney for Appellees

CERTIFICATE OF MAILING

I, B. Ray Zoll, hereby certify that I mailed the foregoing Petition for Rehearing on this 21st day of March, 1996 to:

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B. Ray Zoll