

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

U S WEST COMMUNICATIONS, INC., a) 1 CA-TX 01-0008
Colorado corporation, now known as)
QWEST COMMUNICATIONS,)
)
) DEPARTMENT T
Plaintiff-Appellant,)
)
v.)
) **MEMORANDUM DECISION**
) (Not for Publication -
ARIZONA DEPARTMENT OF REVENUE, an) Rule 28, Arizona Rules
Agency of the State of Arizona; and) of Civil Appellate
APACHE, COCHISE, COCONINO, GILA,) Procedure)
GRAHAM, GREENLEE, LA PAZ, MARICOPA,)
MOHAVE, NAVAJO, PIMA, PINAL, SANTA)
CRUZ, YAVAPAI and YUMA COUNTIES,)
Political Subdivisions of the State of)
Arizona,)
)
Defendants-Appellees.)
) **FILED 05-28-02**

Appeal from the Arizona Tax Court

Cause No. TX 96-000519

The Honorable Jeffrey S. Cates, Judge

AFFIRMED

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By Paul J. Mooney
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By Frank Boucek, III, Assistant Attorney General
Attorneys for Appellees

S U L T, Judge

¶1 Qwest Communications appeals from an order denying its
Motion for Relief from Judgment on Mandate brought pursuant to Rule

60(c)(1), (2) and (6), Arizona Rules of Civil Procedure. Qwest presents these issues:

1. Whether Qwest was entitled to reopen the judgment under Rule 60(c)(6) because it never had its day in court to litigate its Uniformity Clause and Equal Protection discrimination claims?
2. Whether Qwest was entitled to reopen the judgment under Rule 60(c)(1) to litigate these claims because it had failed to do so in the prior proceedings due to excusable neglect?
3. Whether Qwest was entitled to reopen the judgment under Rule 60(c)(2) to litigate these claims because it was in possession of newly discovered evidence?

BACKGROUND

¶2 Qwest initially brought this action against appellees seeking a refund of ad valorem taxes paid on its class three property in Arizona for tax year 1996. In Count One of its complaint, it contended that the Arizona Department of Revenue had erroneously established the value of its class three property for that year under Arizona Revised Statutes ("A.R.S.") sections 42-793(A)(1) and 42-793.01, when it should have valued such property under the more advantageous provisions of former A.R.S. § 42-793(A)(2).¹ In Count Two, Qwest contended that appellees' errone

¹ Former A.R.S. §§ 42-793 and 42-793.01 were repealed effective January 1, 1999, and replaced by A.R.S. §§ 42-14401 through 42-14404. 1997 Ariz. Sess. Laws Ch. 150, §§ 9, 172; amended by 1998 Ariz. Sess. Laws Ch. 220, §§ 4 and 5, eff. Jan. 1, 1999. The new provisions have eliminated the former statutes' differing valuation methods for property of telecommunications
(continued...)

ous interpretation and application of the subject statutes as described in Count One differentially valued the same or similar equipment of local exchange carriers and long distance carriers in violation of Article IX, Section 1 ("the Uniformity Clause") of the Arizona Constitution, the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, and the latter's state analogue, Article II, Section 13 of the Arizona Constitution.

¶3 Qwest moved for summary judgment on its claim that appellees had misinterpreted former A.R.S. § 42-793(A)(2) in declining to value Qwest's class three property in accordance with its special provisions. While the motion was ostensibly based on the allegations of Count One of the complaint, Qwest asserted as one of its supporting arguments that appellees' interpretation of § 42-793(A)(2) should be rejected because this interpretation resulted in prohibited discrimination in violation of the requirements of the Uniformity Clause. Qwest argued, "the Department may not deny to U S WEST the application of the statutory valuation formula which the Department routinely applies to all other Legal Class Three telecommunications property."

¶4 Appellees responded and cross-moved for summary judgment. In part VII of their motion, appellees addressed the Count Two discrimination claim by extensively arguing that their interpreta-

¹(...continued)
companies according to whether or not they provided local telecommunications services.

tion of the governing statutes did not violate either the Uniformity Clause or the Equal Protection Clause. Appellees also provided an affidavit from a revenue department employee that purported to factually demonstrate that no discrimination occurred in the valuation of Qwest's property.

¶5 Qwest's combined response to appellees' cross-motion and reply in support of its motion did not controvert this affidavit or present any other specific factual material supporting its discrimination claim. However, Qwest did make some general factual assertions about the nature of its property and in part V of the pleading, it argued that appellees' interpretation of the subject statutes would violate the Uniformity Clause. This argument relied in part on *In Re America West Airlines, Inc.*, 179 Ariz. 528, 880 P.2d 1074 (1994), and urged the court to follow that case because, as Qwest asserted, it was factually similar to this case.

¶6 The tax court granted summary judgment to Qwest, but this court reversed on appeal. *U.S. West Communications, Inc. v. Arizona Department of Revenue*, 193 Ariz. 319, 972 P.2d 652 (App. 1998). In part (E) of the opening brief, appellees (appellants in the previous appeal) again argued extensively that the subject statutes, as interpreted by appellees, did not result in any discrimination prohibited by either the Equal Protection or the Uniformity Clause. Qwest responded in parts (5) and (6) of its brief that the interpretation given the statutes by appellees

clearly led to a Uniformity Clause violation. In reply, appellees attempted to demonstrate that Qwest's argument's underpinnings were factually unsupported.

¶7 In the resulting opinion from this court, we first analyzed the statutes and adopted the Department's interpretation of former A.R.S. §§ 42-793(A) and 42-793.01. *Id.* at 321-23, ¶¶ 9-16, 972 P.2d at 654-56. Having done so, it then became necessary to address Qwest's contention, first made in Count Two of its complaint and repeated in the summary judgment proceedings and on appeal, that the Department's interpretation resulted in a Uniformity Clause violation. *Id.* at 323, ¶ 17, 972 P.2d at 656. We observed that the evidence on which Qwest relied for its position did not demonstrate that the property with which Qwest provided intraLATA long distance service was the same as or similar to that used by interexchange long distance carriers to provide interLATA long distance service. *Id.* at 324, ¶ 19, 972 P.2d at 657. We also observed that under *In re America West Airlines, Inc.*, 179 Ariz. 528, 533 n.4, 880 P.2d 1074, 1079 n.4 (1994), the Uniformity Clause is not violated by differential taxation of distinct properties unless their nature, use, utility, and productivity are the same. *U.S. West*, 193 Ariz. at 324, ¶ 20, 972 P.2d at 657. We concluded:

Here, the record does not support a conclusion that all factors are the same. Not only is the nature of the industries different, but the class 3 property is put to a different

use. By law U.S. West cannot use its class 3 property for the same purposes as do the interexchange carriers. US West can only use its class 3 property to provide intraLATA long distance service while other telecommunications companies use their class 3 property to provide interLATA long distance service.

. . .

U.S. West fails to present specific evidence to show unconstitutionality. The record contains mere generalizations about similarities between the purpose and use of U.S. West's intraLATA property and the purpose and use of other long-distance carriers' interLATA property. Further, the record contains next to nothing about those properties' comparative physical attributes and productivity. US West fails to demonstrate that the use of A.R.S. sections 42-793 and -793.01 in this case violated Arizona Constitution Article 9, Section 1.

Id. at 324, ¶¶ 20-21, 972 P.2d at 657.

¶8 We denied Qwest's subsequent motion for reconsideration which requested a remand to the tax court for further proceedings. Qwest alleged in the motion that we had "erroneously assumed that US WEST had an opportunity to present all of its evidence of discrimination below, which it did not." Qwest thereafter filed a petition for review by the Arizona Supreme Court, asserting, in part, that this court's opinion "improperly deprives US WEST of an opportunity to prove its claim of discrimination vis-a-vis other Class 3 telecommunications property." The supreme court denied review.

¶9 After the mandate issued from this court, the tax court entered judgment. Qwest then filed a motion for relief from the judgment under Rule 60(c)(1), excusable neglect, 60(c)(2), newly-discovered evidence, and 60(c)(6), the "catch-all" provision. After briefing and argument, the tax court denied the motion. The court determined that Qwest's failure to present evidence of discrimination in response to the Department's cross-motion for summary judgment was a strategy decision made by its trial counsel and did not result from excusable neglect. The court further determined that Qwest had failed to show that its new evidence could not through due diligence have been discovered in time to move for a new trial under Rule 59(d), as required by Rule 60(c)(2). The court finally rejected Qwest's Rule 60(c)(6) argument that it had never had its day in court on its discrimination claim, stating:

U S West's failure to fully argue or pursue discovery on both the de jure and de facto discrimination issues is not sufficient reason to set aside the judgment in this case. Rule 60(c) was intended to provide relief from mistakes or errors, which occur despite the parties' diligent efforts to comply with the civil rules of procedure. See McAuliffe, Daniel J., ARIZONA CIVIL RULES HANDBOOK 531 (2000). Granting U S West relief from the judgment, if followed in other cases, would allow a party to set aside a judgment to relitigate issues which it did not fully address or simply forgot to address at trial or in its motion practice.

From judgment entered in accordance with the tax court's ruling, Qwest timely appealed.

ANALYSIS

The Rule 60(c)(6) Claim

¶10 To obtain relief under Rule 60(c)(6), Qwest must show extraordinary circumstances of hardship or injustice and that relief under another subsection of Rule 60(c) is not available. *McKernan v. Dupont*, 192 Ariz. 550, 554, ¶ 16, 968 P.2d 623, 627 (App. 1998). To establish extraordinary injustice or hardship, Qwest argues that the tax court's ruling precluded Qwest from ever having its day in court on its discrimination claim. Qwest asserts that this court's former opinion "only rejected U S WEST's contention that the Department's interpretation of the relevant statutes constituted *de jure* discrimination," and that the court "never reached U S WEST's separate claim of *de facto* discrimination. . . ."

¶11 The record simply does not support Qwest's contention. At the commencement of the case, Count Two of Qwest's complaint challenged as a violation of the Uniformity and Equal Protection Clauses the alleged "disparate tax treatment of telecommunications companies all of which are providing the same or similar services utilizing the same or similar equipment to the disadvantage of one telecommunications company. . . ." While Qwest now asserts that in its motion for summary judgment it addressed only Count One, the

statutory interpretation question, that motion nevertheless included a discrimination argument. Qwest argued that appellees could not constitutionally deny it the benefit of a statutory valuation method for its class three telecommunications property that the Department applied to all other such property.

¶12 More importantly, appellees filed a cross-motion for summary judgment on the entire complaint, arguing in part that there was no discrimination from their interpretation and application of the statutes and that Qwest was being treated like all other similarly situated and similarly classed taxpayers. In its combined response to the cross-motion and reply in support of its motion, Qwest neither offered specific factual evidence in support of its discrimination claim nor asked the tax court for additional time to marshal evidence to respond. It did, however, respond to the discrimination discussion in appellees' cross-motion by arguing that a violation of the Uniformity Clause would result from adopting appellees' interpretation. At no time did Qwest indicate that it believed its discrimination claim consisted of discrete *de jure* and *de facto* components or that the motion and cross-motion did not implicate the latter.

¶13 On the appeal from the tax court's grant of Qwest's motion and denial of appellees' cross-motion, it is apparent that this court believed Qwest's entire discrimination claim was before us. This is the clear sense gained from a re-reading of the

parties' briefs in that appeal and explains the following statement in the opinion for which there otherwise would have been no purpose:

U S WEST fails to present specific evidence to show unconstitutionality. The record contains mere generalizations about similarities between the purpose and use of U.S. WEST's intraLATA property and the purpose and use of other long-distance carriers' interLATA property.

U.S. West, 193 Ariz. at 324, ¶ 21, 972 P.2d at 657.

¶14 We conclude that the record demonstrates that Qwest clearly had an adequate opportunity to present what it describes as its *de facto* discrimination claim. Even if the claim could be said not to have been raised by Qwest's motion, Qwest was clearly put on notice by appellees' cross-motion that the discrimination claim, with all its components, was being challenged by appellees. If Qwest was to litigate the *de facto* component at all, that was the time. It failed to do so, however, and that failure cannot now justify a finding of the extraordinary hardship or injustice contemplated by Rule 60(c)(6). The tax court correctly denied Qwest's motion on this basis.²

² For the first time on this appeal, Qwest also contends that failure to reopen the *de facto* discrimination issue would "foster poor judicial policy and penalize litigants for exercising prudence and judicial economy." We do not consider this contention other than to note that it is inapposite to the circumstances of this case as revealed by the record.

Excusable Neglect

¶15 To obtain relief under Rule 60(c)(1), the movant must demonstrate not only that he was neglectful but that there was a reasonable excuse therefor. *Daou v. Harris*, 139 Ariz. 353, 359, 678 P.2d 934, 940 (1984). By raising this argument, Qwest in effect concedes that it did have the opportunity to fully litigate all aspects of its discrimination claim but neglected to do so for reasons that should excuse its failure.

¶16 Qwest begins by pointing out that on three earlier occasions Tax Court Judge William J. Schafer III had adopted another taxpayer's interpretation of former A.R.S. § 42-793 and rejected the one advanced by appellees in this case. Therefore, Qwest reasonably believed that its motion, arguing the same interpretation that had been successful previously, would quite likely be granted, obviating the need to marshal the evidence necessary to support the discrimination claim. Moreover, Qwest continues, it reasonably believed that in the unlikely event its motion was not successful, it would have the opportunity to then litigate its discrimination claim. Therefore, Qwest concludes, it would have been imprudent at that time to commence the costly discovery that would be necessary to enable it to prove that claim.

¶17 We agree that Qwest reasonably could have predicted that Judge Schafer would interpret the governing statutes in this case the same way as he had before. However, Qwest could not reasonably

assume that the appellate courts would ultimately do the same. Thus, Qwest's asserted belief that it would either win on its motion or would have another opportunity in the future to gather and present evidence on its discrimination claim was simply not reasonable. The tax court was well within its discretion in determining that Qwest's decision not to take steps to discover and present evidence of discrimination was not excusable neglect.

¶18 The cases on which Qwest relies do not change this result. In *Bridgeway Corporation v. Citibank, N.A.*, 132 F.Supp.2d 297 (S.D.N.Y. 2001), the trial court had initially granted summary judgment for the defendant pursuant to a judgment from another jurisdiction, thus precluding the plaintiff from presenting the merits of his case. Here, Qwest had an opportunity to present its discrimination claim, but simply decided not to pursue it. In *Corning Glass Works v. Sumitomo Electric U.S.A., Inc.*, 683 F.Supp. 979 (S.D.N.Y. 1988), relief was granted because a comment from the trial court had led the plaintiff to believe that he did not need to introduce evidence of the defendant's willfulness until the damages phase of a bifurcated trial. Here, in contrast, the tax court took no action that might have influenced Qwest to decide to forgo presenting evidence of discrimination.

Newly Discovered Evidence

¶19 When Qwest filed its Rule 60(c) motion, it described its newly discovered evidence as follows:

U S WEST has discovered that inter-exchange long distance carriers such as AT&T were providing the same local (intra-LATA) long distance services as U S WEST, and were using identical property to provide those services prior to U S WEST's 1996 property tax valuation. In spite of this, the property used by U S WEST to provide those services was taxed at a higher rate under A.R.S. § 42-793(A)(1) than was identical property used by the long distance carriers.

. . . .

U S WEST has learned that other inter-exchange carriers were actually competing head-to-head with U S WEST in the intra-LATA long distance market by means of a technique known as "dial around." . . . Evidence of this practice came to light as a direct result of deregulation hearings at the ACC following the passage of the Telecommunications Act of 1996.

Qwest did not submit documentation of such evidence with its Rule 60(c) motion or in its reply to appellees' response. Qwest also did not specify when it had become aware of this evidence.

¶20 In their response, appellees pointed out that in a disclosure statement dated March 29, 1999, in Qwest's tax discrimination action against appellees for the 1997 through 1999 tax years, Qwest had stated:

[After December 20, 1994,] [n]umerous companies filed applications for certificates of convenience and necessity . . . to provide intraLATA long distance services in U S WEST's territory. On December 20, 1995, the ACC issued certificates to AT&T and MCI to provide intraLATA toll services in U S WEST's territory. The ACC subsequently issued a certificate to Sprint to provide intraLATA toll services in U S WEST's territory. As of May

31, 1996, U S WEST had already lost 30% of the intraLATA toll marketplace to its competitors.

¶21 Rule 60(c)(2) allows relief from a final judgment due to "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(d)." Obviously, if the record shows that the information was in fact known in time for inclusion in a new trial motion, due diligence and time of discovery are not even in issue. Here, the tax court entered judgment on this court's mandate on April 7, 1999 and a timely motion for new trial could have been filed on or before April 22, 1999. Qwest's disclosure statement quoted above indicates that as of March 29, 1999, it was aware of at least some of the information it claims as "newly discovered evidence." Thus, as to that evidence, it simply does not qualify as such.

¶22 Further, the record strongly suggests that Qwest's "newly discovered evidence" had been known in the industry and was discoverable by Qwest throughout the pendency of this litigation upon the exercise of due diligence. We therefore agree with the tax court's ultimate conclusion that Qwest was not entitled to relief under Rule 60(c)(2) because the evidence it sought to now utilize did not qualify as newly discovered.

CONCLUSION

¶23 We have reviewed the tax court's ruling for an abuse of discretion. See *LaPrade v. LaPrade*, 189 Ariz. 243, 247, 941 P.2d

1268, 1272 (1997). We find none. The tax court order denying relief is therefore affirmed.

James B. Sult, Judge

CONCURRING:

John C. Gemmill, Presiding Judge

Jefferson L. Lankford, Judge