

1996

MICHAEL W. STRAND and LOIS L. STRAND,  
husband and wife; B.I. ASSOCIATES, INC., a Utah  
corporation; M & L INVESTMENT, a  
Partnership; and OVERLAND OIL FIELD  
CONSTRUCTION, INC., a Wyoming  
corporation v. LELAND MARTINEAU and J.  
BRENT KARTCHNER, individually; and  
MARTINEAU AND COMPANY, a Partnership, :  
Reply Brief

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Daniel W. Jackson; Attorney for Appellants; Ralph C. Petty; Attorney for Appellants.

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IN THE COURT OF APPEALS

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STATE OF UTAH

DOCKET NO. 960046-CA

MICHAEL W. STRAND and LOIS L.  
STRAND, husband and wife; B.I.  
ASSOCIATES, INC., a Utah  
corporation; M & L INVESTMENT,  
a Partnership; and OVERLAND  
OIL FIELD CONSTRUCTION, INC.,  
a Wyoming corporation

Plaintiffs,

v.

LELAND MARTINEAU and J. BRENT  
KARTCHNER, individually; and  
MARTINEAU AND COMPANY, a  
Partnership,

Defendants.

Case No. 960046-CA

Priority No. 15

## REPLY BRIEF OF APPELLANTS

Appeal from Dismissal  
Entered in the Third Judicial District Court  
for Salt Lake County, State of Utah

Honorable William B. Bohling  
District Court Judge

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JUL - 2 1996

APPEALS

IN THE COURT OF APPEALS

STATE OF UTAH

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MICHAEL W. STRAND and LOIS L.	:	
STRAND, husband and wife; B.I.	:	Case No. 960046-CA
ASSOCIATES, INC., a Utah	:	
corporation; M & L INVESTMENT,	:	
a Partnership; and OVERLAND	:	
OIL FIELD CONSTRUCTION, INC.,	:	
a Wyoming corporation	:	
	:	
Plaintiffs,	:	
	:	
v.	:	Priority No. 15
	:	
LELAND MARTINEAU and J. BRENT	:	
KARTCHNER, individually; and	:	
MARTINEAU AND COMPANY, a	:	
Partnership,	:	
	:	
Defendants.	:	

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Appeal from Dismissal  
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## SUMMARY OF ARGUMENTS

Due process is a constitutionally guaranteed protection for all citizens. Substantive due process requires that relevant legal principles be considered when making a judicial decision. When relevant legal factors are ignored, an abuse of discretion occurs resulting in a violation of a party's due process rights. The trial court's failure to consider the Westinghouse factors before dismissing the present action constitutes an abuse of discretion and a denial of plaintiffs' substantive due process rights.

The final delay in the present case was caused by Defendants' request that the scheduled trial be continued to allow new counsel to appear for Defendants. But for the request to substitute attorneys, the case would have been tried in January, 1994. Defendants caused the last delay and have relied on that delay for their Motion to Dismiss for Failure to Prosecute. The trial court's dismissal rewards the defendants for their delay tactics.

Plaintiffs have suffered a great injustice by this dismissal. Defendants committed accounting malpractice and cost Plaintiffs their fortune. Plaintiffs have been victimized not only by the practices of Defendants, but also by the dismissal which has stripped Plaintiffs of their opportunity for renumeration. Plaintiffs are entitled to the opportunity for a trial so that justice may be done between the parties.

## **ARGUMENT**

### **POINT I PLAINTIFFS' DUE PROCESS RIGHTS WERE VIOLATED BY THE IMPROPER DISMISSAL OF ITS ACTION**

In Plaintiffs' Brief on Appeal, they established a violation of their substantive due process rights when the trial court failed to consider the elements of Westinghouse Electric Supply Company Co. v. Paul Larsen Contractor, Inc., 544 P.2d 876, 879 (Utah, 1975), before dismissing Plaintiffs' cause of action with prejudice. Plaintiffs' due process rights demand the consideration of each element of Westinghouse in order to protect against a dismissal for arbitrary and capricious reasons. State v. Parker, 872 P.2d 1041 (Utah App. 1994). When the trial court fails to consider the relevant elements established by judicial precedent, arbitrary and capricious decisions and abuses of discretion result. Jones v. Jones, 700 P.2d 1072 (Utah 1985). In the present case, the trial court abused its discretion in failing to specifically consider the Westinghouse elements for dismissal. This failure constitutes a violation of Plaintiffs' substantive due process rights. The trial court's decision, therefore, should be reversed and the matter remanded.

In response to the Plaintiffs' substantive due process arguments, Defendants make only one unsubstantiated statement in their brief:

. . . For Strands to argue their substantive due process rights have been violated . . . , ignores the fact that the Strands themselves have not been diligent in trying the matter. Strands, through their inaction,

have waived their own substantive due process rights as will be shown hereafter.

Defendants never again refer to the due process arguments of Plaintiffs, and provide no authority for this alleged "waiver" of their due process rights.

The Tenth Circuit Court of Appeals has stated that "courts indulge every presumption against the waiver of fundamental constitutional rights." Pitts v. Board of Education of U.S.D., 869 F.2d 555, 557 (10th Cir. 1989) (quoting from United States v. Williamson, 806 F.2d 216, 219 (10th Cir. 1986)). And, while due process rights may be waived, the waiver must be an intentional relinquishment or abandonment of a known right. See Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938).

To avoid any perception that Plaintiffs waived their constitutional rights in the present case, Plaintiffs asked the trial court to reconsider its prior decision and expressly asked that court to recognize and protect their substantive due process rights in the second hearing. Thus, far from relinquishing those rights, Plaintiffs took affirmative action to protect their substantive due process rights. Unfortunately, the trial court simply ignored the Plaintiffs' rights and entered the dismissal.

The fact that the trial court failed to consider and weigh the relevant factors at the conclusion of the second hearing constitutes a clear violation of Plaintiffs' constitutional rights. Nothing that Plaintiffs did or said could possibly be considered as a voluntary and knowing waiver or relinquishment of those rights.



## POINT II

### THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO APPLY THE WESTINGHOUSE STANDARD IN DISMISSING PLAINTIFF'S ACTION

The trial court erred in dismissing Plaintiff's claims with prejudice without specifically considering the necessary elements in making that decision. The necessary elements of Westinghouse Electric Supply Co. v. Paul Larsen Contractor, Inc., 544 P.2d 876, 879 (Utah 1975), as set forth in Maxfield v. Rushton, 779 P.2d 237 (Utah App. 1989), are:

The factors which we consider may include the following: (1) the conduct of both parties; (2) the opportunity each party has to move the case forward; (3) what each of the parties has done to move the case forward; (4) what difficulty or prejudice may have been caused to the other side; and (5) most important, whether injustice may result from the dismissal.

When considering these factors, along with the Affidavit of Judge Rokich and the fact that the trial was continued at the request of Defendants, the dismissal with prejudice was a clear abuse of discretion.

#### A. CONDUCT OF BOTH PARTIES

In footnote 5, Defendants assert that the continuance was the suggestion of Judge Rokich. This is a complete misreading of the Affidavit of Judge Rokich. R. 306-307. In that affidavit Judge Rokich states:

5. At the September 17, 1994 scheduling conference between the Court and the above-mentioned parties, Defendants' counsel, Roger Sandack, indicated that he would be replaced by subsequent counsel and would not be

the attorney representing the Defendants at the time of trial.

6. Based on the disclosures of Mr. Sandack and the consent of Mr. Petty, Affiant [Judge John A. Rokich] determined that it would be inappropriate to enter a scheduling order when counsel for Defendants was changing. Affiant [Judge Rokich] intended to set a schedule for the completion of this action after Defendants' new counsel had been designated. Affiant [Judge Rokich] intended to take no further action in regard to this case until substitute counsel for Defendants was designated.

Defense counsel requested or suggested the continuance of the January 4, 1994 trial because of his alleged intent to withdraw. Despite his representations to the trial court, Mr. Sandack did not withdraw from this case until after the Motion to Dismiss had been filed some ten months later.<sup>1</sup> Therefore, the critical delay that resulted in the case not being tried was caused by Defense counsel's representations to the trial court and his failure to withdraw in a timely manner. This delay cannot be attributed to Plaintiffs.<sup>2</sup>

For Defendants to argue that they are not responsible for the continuation of the January 4, 1994 trial date and the ensuing delay defies reason. In filing the Motion to Dismiss for Failure

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<sup>1</sup> The Defendants state that ". . . Martineau's previous counsel, Roger Sandack, responded and appeared at all hearings and did not withdraw until July 1995". [emphasis in original]. Brief of Appellees, p. 14. Defendants' new counsel, Michael L. Deamer appeared on June 2, 1995 and filed the Motion to Dismiss at the same time he filed his Notice of Appearance of Counsel. R. 183-186.

<sup>2</sup> In addition, Defendants failed to designate their expert and lay witnesses despite the Court Order of June 9, 1993. Having failed to name any witnesses, it is obvious that Defendants never intended to try this matter and they used every effort to delay and continue the trial date.

to Prosecute prior to Mr. Sandack's withdrawal, Defendants sought to be rewarded for Mr. Sandack's misstatements to the trial court and Defendants' own delay tactics. This Court should not allow this result to stand. "The ancient and honored maxim [is] that no one should benefit from his own wrong . . . ." Prudential Federal Savings and Loan Association v. William L. Pereira and Associates, 16 Utah 2d 365, 401 P.2d 439 (Utah 1965). The trial court's dismissal, which has rewarded Defendants for their delay tactics, should be reversed and the matter remanded for a trial on the merits.

**B. THE OPPORTUNITY OF EACH PARTY TO MOVE THE CASE FORWARD.**

Defendants assert that no action was taken by Plaintiffs to move this case forward. However, Defendants can not deny that but for Mr. Sandack's representation to the court in September, 1994, this case would have been tried in January, 1994 and the Motion to Dismiss would never have been heard or decided.

Defendants argue that they attempted to move the case forward. However, the postponement of the trial resulted directly from the representation of Defendants' counsel that new counsel would be substituted. Because this postponement stopped the trial from going forward, all actions preceding the September pretrial are essentially irrelevant. Had the request to substitute counsel not

been made, the trial would have been held in January, 1994.<sup>3</sup>

In the past, this Court has not tolerated one party sitting silently for a period of time and then attempting to blame the other party for delay. Department of Social Services v. Romero, 609 P.2d 1323, 1324 (Utah 1980), Westinghouse Electric Supply Co. v. Paul W. Larsen Contractors, Inc., 544 P.2d 876, 879 (Utah 1977). Any delay from the September pretrial until the June 2, 1995 Motion to Dismiss, was exclusively caused by the Defendants. Defendants requested time to change counsel, allowed time to pass, failed to name substitute counsel, and then used this passage of time as a reason to seek dismissal of the case. Defendants simply should not benefit from their own actions and misrepresentations.

**C. WHAT EACH PARTY DID TO MOVE THE CASE FORWARD.**

Defendants' Brief fails to address this specific issue. It must therefore be assumed that the position of the Plaintiffs is adopted by acquiescence. Plaintiffs moved this case forward to the point of scheduling the trial of the matter and attending the September pretrial held before Judge Rokich. Defendants averted this scheduled trial by claiming that counsel would be substituted.

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<sup>3</sup> Plaintiff's Motion to Amend the Complaint was considered at the pre-trial conference, at which time the Court continued the trial setting at the request of Defendants to change attorneys. Since Judge Rokich ". . . intended to take no further action in relation to this case until substitute counsel for the Defendants was designated", Affidavit of Judge Rokich, R. 306-307, the court did not rule on the Motion to Amend, which remains pending.

forthcoming, counsel for Defendants did not withdraw until after Defendants filed their Motion to Dismiss for Failure to Prosecute. Defendants are simply attempting to take advantage of and benefit from their own delays.

**D. WHAT DIFFICULTY OR PREJUDICE WAS CAUSED TO DEFENDANTS.**

Defendants claim that because of the passage of time Plaintiffs have waived their claims of difficulty or prejudice as a result of the dismissal. However, the Supreme Court in Westinghouse did not hold that the enumerated factors could be waived by the passage of time. Despite the allegations of delay, the Supreme Court named the factors that must be considered in every case of dismissal for failure to prosecute. Furthermore, Defendants site no authority for their alleged waiver. In Living Scriptures, Inc. v. Kudlik, 890 P.2d 7, 9 (Utah App. 1995), the Court of Appeals sets forth the elements of waiver:

The elements of waiver consist of: "(1) an existing right, benefit, or advantage; (2) knowledge of the existence of that right, benefit, or advantage; and (3) an intention to relinquish the right, benefit, or advantage." (citation omitted)

The record is devoid of any intent by Plaintiffs to waive their rights. Clearly Plaintiffs had no "intention" to relinquish their claims against Defendants. There is no basis to presume that Plaintiffs waived any of their substantive rights.<sup>4</sup>

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<sup>4</sup> Defendants make much of Mr. Strand's incarceration. However, Mr. Strand does not forfeit his rights as a citizen of the United States and the State of Utah simply because he may not attend the trial or is incarcerated. Mr. Strand's deposition can be taken and entered into the record. In addition, the other

**E. WHETHER INJUSTICE WILL RESULT FROM THE DISMISSAL.**

Great injustice occurred to Plaintiffs as a result of the dismissal because they suffered significant damages as a result of Defendants' accounting malpractice. Defendants double and triple charged Plaintiffs for work performed, misappropriated funds from Plaintiffs' checking accounts, filed improper tax returns, and caused the destruction of profitable businesses. The Utah Supreme Court called the injustice suffered by the dismissed party the "most important" of all the Westinghouse factors. The injustice suffered by Plaintiffs as a result of Defendants' malpractice is now compounded by the dismissal. Plaintiffs are entitled to have their day in court to receive compensation for the intentional and negligent acts of Defendants.

Again, instead of directly confronting the injustice suffered by Plaintiffs as a result of the dismissal, Defendants focus on their own alleged injustice of disclosing the pending malpractice action and attorney's fees. Not only is Defendants' argument concerning disclosure and attorney's fees irrelevant, but based entirely on speculation. The record is devoid of any facts reflecting Defendants' disclosure of the malpractice action or any

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Plaintiffs are available to attend the trial. Defendants simply seek to cast aspersion on Plaintiffs because of Mr. Strand's situation. The Court should easily see through this blatant and inappropriate tactic.

resulting effect. The record contains no facts concerning the payment of attorney's fees. The malpractice insurer is likely to have covered the attorney's fees in any event.

Defendants are offended that Judge Rokich would file an Affidavit in opposition to the dismissal. This offense arises out of Defendants' abhorrence to the truth. Judge Rokich's Affidavit establishes that the case would have been tried in January, 1994 but for Roger Sandack's request to withdraw. Judge Rokich presided over the September pretrial hearing, when the January 4, 1994 trial date was stricken. He obviously believes that an injustice is being wrought upon the Plaintiffs by the dismissal. Judge Rokich ruled that if counsel was being changed, it would be inappropriate for the trial to go forward.

In fact, Judge Rokich determined that there should be no further action in relation to the case until substitute counsel for Defendants had been designated. R. 306-307. Because the continuance of the scheduled trial and the subsequent delay was caused by Defendants, it is inappropriate for the Plaintiffs to be punished by the dismissal of the action.

#### CONCLUSION


Due process rights cannot be waived without an intentional relinquishment of the known right. The record reflects no waiver of Plaintiffs' rights. The trial court failed to consider the factors of Westinghouse and rendered an unreasoned, arbitrary

decision. Plaintiffs are entitled to have their day in court to pursue their claims against Defendants.

Defendants requested that the trial date be stricken so that new counsel could take over the defense. But for the request to substitute counsel, the case would have been tried in January, 1994. Despite the representation that counsel would withdraw, no withdrawal took place until Defendants' new counsel filed a Motion to Dismiss some ten months later. The Defendants' should not be rewarded with a dismissal of Plaintiffs' claims based on their own misrepresentations to the trial court and delays in the proceedings.


This Court should afford the parties an opportunity to be heard and do justice between them by reversing the dismissal by reversing the trial court's dismissal of and remanding the matter for a trial on the merits.

RESPECTFULLY SUBMITTED this 2nd day of July, 1996.

  
Daniel W. Jackson

#### MAILING CERTIFICATE

I certify that I caused to be mailed a true and correct copy of the foregoing to Michael L. Deamer, 139 East South Temple #330, Salt Lake City, Utah 84111-1169, postage prepaid, this 2nd day of July, 1996.





**ADDENDUM**

1. Affidavit of Judge John A. Rokich

**ADDENDUM A**

Affidavit of Judge John A. Rokich

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FILED  
 DISTRICT COURT  
 55 SEP -6 AM 8:36

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

MICHAEL W. STRAND, et al.,	:	AFFIDAVIT OF JOHN A. ROKICH
Plaintiffs,	:	IN SUPPORT OF THE MOTION TO
v.	:	SET ASIDE DISMISSAL AND
LELAND MARTINEAU, et al.,	:	REINSTATE PLAINTIFF'S ACTION
Defendants.	:	
	:	Case No. 810905200CV
	:	Judge William B. Bohling

County of Tooele            )  
                                   ) ss.  
 State of Utah                )

John A. Rokich, being duly sworn upon oath deposes and says:

1. Affiant is a member of the Utah Bar in good standing.  
 2. Affiant is familiar with and has personal knowledge of the statements set forth in this Affidavit.

3. Affiant was the judge assigned to the above entitled matter when it came before Affiant pursuant to a scheduling conference, on September 17, 1994.

4. Affiant is competent to testify, and if called to testify, his testimony would establish the facts averred in this Affidavit.

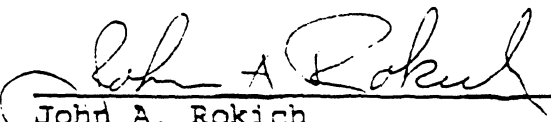
5. At the September 17, 1994 scheduling conference between the Court and the above mentioned parties, Defendants' counsel, Roger Sandack, indicated that he would be replaced by subsequent counsel and would not be the attorney representing the defendants

at the time of trial.

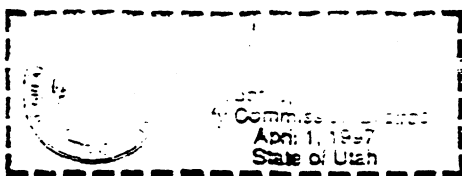
6. Based on the disclosures of Mr. Sandack, and the consent of Mr. Petty, Affiant determined that it would be inappropriate to enter a scheduling order when counsel for Defendants was changing. Affiant intended to set a schedule for the completion of this action after Defendants' new counsel had been designated. Affiant intended to take no further action in relation to this case until substitute counsel for Defendants was designated.


7. A trial had been scheduled in this case for January, 1994. At a pretrial hearing for the trial, the parties, with Affiant's consent, agreed to continue the trial, without date.

DATED this 28 day of August, 1995.

  
John A. Rokich

Subscribed and sworn before me this 28 day of August, 1995.

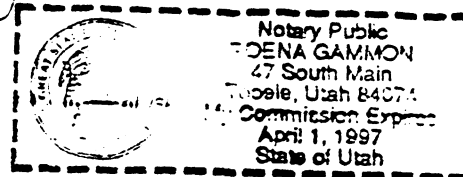


  
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Tocoele, Utah

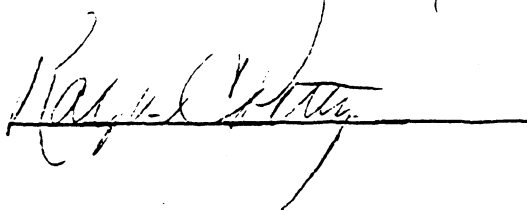
My Commission Expires:

April 1, 1997

# MAILING CERTIFICATE



I certify that I caused to be mailed a true and correct copy of the foregoing to Michael L. Deamer, 139 East South Temple # 330, Salt Lake City, Utah 84111, postage prepaid, this 29 day of August, 1995.



000307

TOTAL P.03