

1996

Michael W. Strand and Lois L. Strand, husband and wife; B.I. Associates, Inc., a Utah corporation; M and 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 : Brief of Appellant

Utah Court of Appeals

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IN THE COURT OF APPEALS

.A10  
DOCKET NO. 960046-CA

STATE OF UTAH

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

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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JED

APR 30 1996

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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## JURISDICTION

Jurisdiction is conferred on the Utah Supreme Court pursuant Article XIII, Section 3 of the Constitution of the State of Utah and pursuant to Utah Code Ann. § 78-2-2(3)(i). The Utah Court of Appeals has no original appellate jurisdiction from the District Courts under Utah Code Ann. § 78-2a-3(2). The Supreme Court has exercised its discretion to transfer this case to the Court of Appeals pursuant to Utah Code Ann. § 78-2-2(4) and the Court of Appeals has jurisdiction in this case pursuant to § 78-2a-3(2)(h).

## STATEMENT OF THE ISSUES

I. Whether the trial court violated Plaintiffs' substantive due process rights when it failed to analyze the relevant elements to determine whether to dismiss Plaintiffs' cause of action with prejudice. The appellate court reviews the decision of the trial court as a question of law and gives no deference to the decision of the trial court, reviewing for correctness. State v. Vijil, 784 P.2d 1130 (Utah 1989); Mountain Fuel Supply Co. v. Salt Lake City Corp., 752 P.2d 884, 887 (Utah 1988).

II. Whether the trial court abused its discretion by dismissing Plaintiffs' cause of action for failure to prosecute. A trial court's determination to dismiss for failure to prosecute is reviewed under the abuse of discretion standard. Hartford Leasing Co. v. State, 888 P.2d 694 (Utah App. 1994). An appellate court will not interfere with the trial court's decision unless the trial court abused its discretion and there is a likelihood that prejudice has occurred. Charlie Brown Construction Co. v. Leisure

Sports, Inc., 740 P.2d 1368 (Utah App. 1987); Department of Social Services v. Romero, 609 P.2d 1323 (Utah 1980).

### **STATEMENT OF THE CASE**

#### **A. Nature of the Case**

Plaintiffs brought this action against Defendants to immediately regain possession of Plaintiffs' accounting records which were inappropriately held by Defendants. Plaintiffs also alleged tortious interference with business relationship, damage to Plaintiffs' ongoing businesses because of the deprivation of the records, accounting malpractice, breach of fiduciary duty, and punitive damages. Defendants' Answer alleged that the records had been returned pursuant to an agreement between counsel and denied the other allegations.

#### **B. Course of Proceedings**

Discovery was undertaken and several attorneys made appearances for both parties. A motion by Plaintiffs to consolidate this action with another pending action common to the parties was denied. Plaintiffs designated their expert and lay witnesses pursuant to the Scheduling Order of May 19, 1993. Defendants failed to designate any witnesses. Plaintiffs filed a motion to amend their complaint, which motion remains outstanding. Trial was set for January 4, 1993, but later stricken by consent of the parties and the judge.

A scheduling conference, held September 27, 1994, was continued without date by the court on the stipulation of the



parties. At this scheduling conference, Roger Sandack, attorney for Defendants, indicated that he would likely withdraw. Judge Rokich determined that it would be inappropriate to enter a scheduling order when counsel for Defendants was changing. Judge Rokich indicated that he would take no further action on the case until substitute counsel was named.

Substitute counsel for Defendants made his appearance on May 31, 1995, and filed a Motion to Dismiss with Prejudice under Rule 41(b) along with his Notice of Appearance. Plaintiffs responded to the Motion to Dismiss and after hearings, memoranda, and objections, Defendants' Motion to Dismiss was granted. Roger Sandack did not withdraw until July 3, 1995.

### **C. Disposition of the Trial Court**

The Trial Court, the Honorable William B. Bohling, District Judge, presiding, granted Defendants' Motion to Dismiss on October 23, 1995, and entered Findings of Fact and Conclusions of Law on the same date. Notice of Appeal was filed on November 20, 1995 and the Docketing Statement was filed on December 11, 1995.

### **STATEMENT OF THE FACTS**

On June 9, 1993, a scheduling hearing was conducted by the Honorable John A. Rokich. R. 91. At that hearing, Judge Rokich scheduled a pre-trial conference for November 30, 1993, scheduled a five day trial beginning January 4, 1994, and set the deadlines for designating expert and lay witnesses. R. 92. Plaintiffs filed their designation of expert witnesses on August 27, 1993, R. 98-9,

and named their lay witnesses on September 30, 1993. R. 100-03. Defendants filed no list of witnesses.

Between the June 9, 1993 Scheduling Conference and the November 30, 1993 Pre-trial Conference, Plaintiffs undertook discovery, issued subpoenas, and took record depositions. R.105-116. On November 17, 1993, Plaintiff filed a Motion to Amend the Complaint, R. 117, an Amended Complaint, R. 118, and a Memorandum of Points and Authorities in Support of the Motion to Amend the Complaint. R. 127-128. At the November 30, 1993 Pre-trial Conference, Judge Rokich and counsel for the parties agreed that the trial scheduled for January 4, 1994 should be stricken and continued without date. R. 147.

A scheduling conference was held on September 27, 1994. At that hearing Defendant's attorney, Roger Sandack, informed the court that he would withdraw as counsel for Defendants. Affidavit of Judge Rokich, R. 306-07, Addendum 3. Judge Rokich continued the scheduling conference, without date, so that Mr. Sandack could be replaced without jeopardizing any scheduling established by the court. Id. Based on the disclosures of Mr. Sandack, Judge Rokich determined that it would be inappropriate to enter a scheduling order when Defense counsel was changing. Id. Judge Rokich intended to enter a scheduling order only after Defendant's new counsel had been designated. Id. He also intended to take no further action in relation to this case until substitute counsel for Defendants made an appearance. Id. Judge Rokich retired and his caseload was assumed by Judge Bohling.

On June 2, 1995, Defendant's new counsel, Michael L. Deamer, simultaneously filed his Notice of Entry of Appearance of Counsel, R. 183-84, and Notice to Dismiss with Prejudice Under Rule 41(b). R. 185-86. Roger Sandack withdrew as counsel for Defendants on July 3, 1995. R. 248-9. Judge Bohling heard arguments on the Motion to Dismiss on August 14, 1995, R. 334-41, and October 23, 1995, R. 342-53, and entered Findings of Fact and Conclusions of Law, R. 317-20, and entered an Order of Dismissal with Prejudice on October 23, 1995. R. 321-23. The Notice of Appeal was filed November 20, 1995. R. 328-29.

#### **SUMMARY OF ARGUMENTS**

Due process is a constitutionally guaranteed protection for all citizens. Procedural due process requires that every individual receive notice and an opportunity for a hearing on all pending issues. Substantive due process requires judges to consider relevant factors in reaching their decisions, thus protecting against arbitrariness and abuses of discretion. The trial court failed to consider the relevant factors in making its decision to dismiss Plaintiffs' cause of action with prejudice, focusing only on the actions of Plaintiffs, rather than on the actions of both parties and the prejudice resulting from a dismissal. The appropriate exercise of discretion requires the disciplined examination of the relevant factors, weighted in conjunction with each other. Having failed to consider the relevant factors, Plaintiffs' substantive due process rights have been violated, and the case should be reversed and remanded to the

trial court.

Westinghouse sets forth five specific considerations that must be reviewed by the court before ruling on a motion to dismiss. These considerations are (1) the conduct of both parties, (2) the opportunity each party has had to move the case forward, (3) what each party did to move the case forward, (4) what difficulty or prejudice was caused to the opposing party, and most importantly, (5) whether injustice may result from the dismissal. The trial court failed to consider these elements before dismissing Plaintiffs cause of action, which constitutes an abuse of discretion.

An additional factor in Westinghouse requires a "justifiable excuse" for the delay. On November 30, 1993, the Defendants requested that the trial be continued, the parties agreed to continuance, and Judge Rokich gave his blessing. At the September 27, 1994 scheduling conference, Defendants informed the court that their counsel would withdraw and they would name substitute counsel. Judge Rokich ruled that no action would be taken on the case until Defendants named their successor attorney. Defendants chose to wait nine months before designating their new counsel. Defendants, therefore, directly caused or consented to delays of over 19 months. The Defendants' actions constitute the justifiable excuse for the actions of Plaintiffs.

Plaintiffs adhered to the court's scheduling order by designating its witnesses. Defendants never designated any witnesses. Plaintiffs conducted discovery, held records

depositions, issued subpoenas duces tecum, and filed a Motion to Amend Complaint. Defendants did nothing to move the case forward and now complain of the delay that they themselves created. The totality of the circumstances justify the reversal of the dismissal.

## **ARGUMENT**

### **POINT I**

#### **THE TRIAL COURT VIOLATED PLAINTIFF'S SUBSTANTIVE DUE PROCESS RIGHTS BY NOT ANALYZING EACH ELEMENT OF THE APPLICABLE STANDARD BEFORE DISMISSING PLAINTIFFS' CAUSE OF ACTION WITH PREJUDICE**

Article 1, §11 of the Utah Constitution provides:

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this state, by himself or counsel, any civil cause to which he is a party.

This provision is commonly referred to as the "open courts provision", which guarantees the citizens of Utah access to the courts of this State and a judicial procedure that is based on fairness and equality. See, Berry v. Beech Aircraft Corp., 717 P.2d 670 (Utah 1995). Judicial interpretation of the open courts provision finds that it embodies substantive due process rights and freedom from arbitrary judicial rulings that deprive individual claimants of the right of access to the courts. See, Lee v. Gaufin, 867 P.2d 572 (Utah 1993) (Justice Zimmerman concurring opinion). While most due process cases concern the procedural due process requirements of notice and an opportunity to be heard,

substantive due process concerns the content of the rules that specify when a right can be lost or impaired. Wells v. Children's Aid Soc., 681 P.2d 199 (Utah 1984). Questions that trigger substantive due process concerns can arise in the context of a hearing where the procedural formalities of notice and opportunity to be heard are observed but the ultimate decision is arbitrary, capricious or fundamentally unfair. See, State v. Parker, 872 P.2d 1041, 1948 (Utah Ct. App. 1994). As this court observed in Parker:

. . . While notice and an opportunity to be heard must be observed in order to meet the requirements of procedural due process, . . . the opportunity to be fairly heard is just one of the requisites of due process. . . . By limiting due process protection to simply notice and a hearing, the dissent construes the concept of due process too narrowly. "The purpose of due process is to prevent fundamental unfairness." . . .

Furthermore, although seldom utilized, "[s]ubstantive due process guarantees that no person shall be deprived of . . . property for arbitrary reasons." [citations omitted]

As recognized in Utah, the open courts provision and the concept of substantive due process embodied therein protects claimants against arbitrary government action whether that action is taken by the legislature or the judiciary. See, Berry v. Beech Aircraft Corp., 717 P.2d at 670, 675 ("Both [section 11 and the due process clause of Article 1, Section 7] act to restrict the powers of both the courts and the legislature.") Arbitrary judicial action may occur when the courts fail to follow their precedent and standards in rendering their decisions. Precedent creates substantive law and the failure of the trial court to consider the factors set forth in the substantive law allows arbitrary and

capricious decisions. To avoid an arbitrary decision, this Court reviews the dismissal of an action for failure to prosecute by the "abuse of discretion" standard.

The abuse of discretion standard focuses on the way courts analyze and render their decisions. The cases that examine the abuse of discretion standard uniformly require that courts analyze the relevant factors before a decision is rendered. In the area of alimony, this Court in Willey v. Willey, 866 P.2d 547, 550 (Utah App. 1993), stated:

. . . [T]hree factors . . . **must** be considered in fixing a reasonable alimony award:

[1] the financial conditions and needs of the [spouse seeking support];

[2] the ability of the [spouse seeking support] to produce a sufficient income for [himself or] herself; and

[3] the ability of the [payor spouse] to provide support.

Jones [v. Jones], 700 P.2d [1072,] 1075 [(Utah 1985)].

**"Failure to consider the Jones factors in fashioning an alimony award constitutes an abuse of discretion."** Bell [v. Bell], 810 P.2d [489,] 492 [(Utah App. 1991)] (citations omitted) Thus, **"the trial court must make sufficiently detailed findings on each factor to enable a reviewing court to ensure that the trial court's discretionary determination was rationally based upon" the three Jones factors. Id.** (citations omitted). **"If sufficient findings are not made, we must reverse** unless the record is clear and uncontroverted such as to allow us to apply the Jones factors as a matter of law on appeal." Id. (Citation omitted) [Emphasis added].

The pertinent factors must be considered by the trial court before a decision can be rendered. Failure to consider the relevant factors as set forth in the appellate opinions is an abuse of

discretion. The trial court's findings must be sufficiently detailed on each factor to ensure that its determination is based upon the analysis of relevant factors. If sufficient findings are not made, the case must be reversed and remanded.

Analyzing the relevant factors before rendering a decision is the protection against arbitrary and capricious decisions and the guarantee of effective review. If a court fails to consider the relevant factors and make detailed findings based on those factors, the appellate court cannot review the trial court's decision and the case must be reversed and remanded. The Utah Supreme Court in Dixie State Bank v. Bracken, 764 P.2d 985, 991 (Utah 1988) stated:

. . . [W]e hold that if reasonable fees are recoverable by contract or statute **and the trial court considers all pertinent factors and determines in the exercise of its sound discretion** that a specific sum is a reasonable fee, it is a mistake of law to award less than that amount. Stated another way, **the trial court has broad discretion in determining what constitutes a reasonable fee, and we will consider that determination against an abuse-of-discretion standard.** However, once the trial court makes that determination in the exercise of its sound discretion, it commits legal error if it awards less than the reasonable fee to which the successful litigant is entitled.

. . . Such an award would constitute an abuse of discretion because the factors mentioned by the trial court in discounting the fee, as outlined by Justice Howe, are without support in the record or are otherwise inappropriate. [Emphasis added].

Regardless of the decision being made, the pertinent factors must be considered for the court to exercise its sound discretion. If the judgment is based upon factors not supported in the record or inappropriately considered, the court has abused its discretion.

In the criminal law, sentencing requires the court to balance



the aggravating and the mitigating circumstances before sentencing a convict. In State v. Nuttall, 861 P.2d 454, 456 (Utah App. 1993), this Court stated:

A sentence will not be overturned on appeal unless the trial court has abused its discretion, **failed to consider all legally relevant factors**, or imposed a sentence that exceeds legally prescribed limits. . . . [T]he supreme court stated that an "abuse of discretion may be manifest if the actions of the judge in sentencing were 'inherently unfair' or if the judge imposed a 'clearly excessive' sentence. [Emphasis added].

Failure of the trial court to consider all legally relevant factors constitutes an abuse of discretion and requires reversal of that court's decision.

In Ute-Cal Land Development Corp. v. Sather, 605 P.2d 1240 (Utah 1980), the Supreme Court stated:

The general rule which this Court follows is the judgment of the trial court will not be reversed unless it is shown the discretion exercised has been abused. In arriving at his conclusion the trial judge considered several factors relevant to the amount and composition of the jury award. The trial court's decision was not arbitrary or capricious and, therefore, this Court will not alter it.

The trial court's decision in Ute-Cal was not arbitrary, capricious, or an abuse of discretion because the court considered the relevant factors before making its decision.

In the context of the present case, the Utah Supreme Court has stated that the trial court's discretion in dismissing a pending action must be balanced against the higher priority of affording a claimant an opportunity to be heard and the need to do justice. See, Westinghouse Electric Supply Co. v. Paul Larsen Contractor, Inc., 544 P.2d 876, 879 (Utah 1975). In Westinghouse, the Court

stated that there is more to consider in determining if a dismissal for failure to prosecute is proper than merely the amount of time elapsed since the suit was filed. Id. at 879. Those additional factors include; (1) the conduct of both parties; (2) the opportunity each party has had 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. Id.

The Findings and Conclusions entered by the trial court evidence that the decision to dismiss Plaintiffs' complaint was based exclusively upon the court's determination that the Plaintiffs had not pressed forward with the prosecution of the case. In addition to the trial court's failure to analyze the facts against the Westinghouse factors, the trial court's myopic focus upon the Plaintiffs' actions constitutes a violation of Plaintiffs' substantive due process rights because it failed to even consider the factors necessary to render a decision. Having failed to consider the Westinghouse factors, the trial court's decision is a clear abuse of discretion. The trial court's refusal to consider the actions of the Defendants, including their request and consent to the continuation of the trial and failure to name replacement counsel for nine months, renders its decision contrary to both the Westinghouse directive and any general notion of fundamental fairness.

This case was scheduled for trial on January 4, 1994. R. 91.

At the November 30, 1993 Pretrial Hearing, Defendants sought a continuance because they were unprepared to go forward with the trial. The trial was continued without date. At the September 27, 1994 Scheduling Conference, Defendants' attorney, Roger Sandack represented that he would be replaced by subsequent counsel and therefore, would not be Defendants' trial counsel. But for the actions of Defendants, this case would have been tried before Judge Rokich in January, 1994. The trial court ignored Defendants' conduct and the delay of almost nineteen months it caused. Rather than focus on the factors necessary in deciding a motion to dismiss: the conduct of both parties, the opportunity of each party to move the case forward, the actions taken by each party to move the case forward, and the prejudice to each party, as required by Westinghouse, the trial court focused exclusively upon the actions of Plaintiffs. In so doing, the court breached Plaintiffs' substantive due process rights. The trial court's refusal to consider and weigh the Defendants' contribution to the delay in prosecution of this case constitutes a failure to adequately consider material, relevant factors and causes the trial court's exercise of discretion to be arbitrary and capricious. See, Ute-Cal Land Development Corp. v. Sather, 605 P.2d 1240 (Utah 1980).

As previously stated by the Utah Supreme Court, the clear language of Article 1, §11 and the substantive due process rights embodied therein guarantee access to the courts and a judicial procedure that is based on fairness and equality. Berry v. Beech Aircraft Corp., 717 P.2d 670, 675 (Utah 1985). The factors set

forth in Westinghouse reflect this same concern for equality in the court's consideration of each parties' conduct in relation to judicial delays. The trial court's single minded focus upon the actions of the Plaintiffs arbitrarily conflicts with the Westinghouse directive and the due process considerations embodied in Section 11. Therefore, the trial court's decision to dismiss Plaintiffs' case constitutes an arbitrary decision rendered in violation of Plaintiffs' constitutional due process rights. The trial court's decision, therefore, should be reversed and remanded.

**POINT II**  
**THE TRIAL COURT ABUSED ITS DISCRETION IN**  
**DISMISSING PLAINTIFFS' ACTION WHEN THE COURT**  
**FAILED TO APPLY THE WESTINGHOUSE STANDARD**

The trial court erred in dismissing Plaintiffs' claims with prejudice without specifically considering necessary elements in making that decision. The Findings of Fact and Conclusions of Law fail to address any of the specific requirements the trial court must consider in acting upon the issue. The court ignored the relevant factors which are elemental to the ruling of dismissal, which are set forth in Rule 41 of the Utah Rules of Civil Procedure and interpreted in Westinghouse Electric Supply Co. v. Paul Larsen Contractor, Inc., 544 P.2d 876, 879 (Utah 1975). The Westinghouse elements are set forth in Maxfield v. Rushton, 779 P.2d 237 (Utah App. 1989), as follows:

A court's discretion, however, must be balanced against a higher priority: to "afford disputants an opportunity to be heard and to do justice between them." Westinghouse Elec. Supply Co., 544 P.2d [876] at 879. Thus, there is more to consider in determining if a dismissal for failure to prosecute is proper than merely

the amount of time elapsed since the suit was filed. Id. The factors which we consider may include the following: (1) The conduct of both parties; (2) the opportunity each party has had 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. K.L.C. Inc. v. McLean, 656 P.2d 986, 988 (Utah 1982); Utah Oil Co. v. Harris, 565 P.2d 1135, 1137 (Utah 1977). [Emphasis added].

A fair analysis of these criteria and the facts, especially the Affidavit of Judge John A. Rokich, R. 306, Addendum 3, compel this Court to reverse the trial court's dismissal.

#### **A. Conduct of Both Parties**

On June 9, 1993, the Court entered a Scheduling Order setting the trial for January 4, 1994. R. 92. The Scheduling Order required Plaintiffs to designate their expert witnesses by August 31, 1993 and lay witnesses by September 30, 1993. Id. Plaintiffs submitted their expert witness list on August 31, 1993, R. 98, and lay witness list on September 30, 1993. R. 103. The Scheduling Order required the Defendants to file their expert and lay witness list on September 30, 1993. R. 92. Defendants failed to file any list of witnesses.

In October, 1993, Plaintiffs conducted discovery in record depositions, R. 105, served Interrogatories and Requests for Production of Documents on Defendants, R. 107, and prepared the case for trial. In November, 1993, Plaintiffs moved to amend their Complaint in order to simplify and focus the issues. At the November 30, 1993 Pretrial Hearing, Judge Rokich continued the trial at the request of the Defendants and with the consent of the

parties, agreeing that this was the proper determination. R. 306-7, Addendum 3. In December, 1993, Plaintiffs answered Defendants' Second Set of Interrogatories. R. 175.

Defendants failed to participate in the action by failing to designate their witnesses or answer Plaintiffs' discovery. At the status hearing in September, 1994, both parties and Judge Rokich agreed to continue the status hearing without date after Defendants indicated a likely change of counsel. On learning that a change of counsel was anticipated, Judge Rokich felt ". . . it would be inappropriate to enter a scheduling order when counsel for Defendants was changing." Affidavit of Judge John A. Rokich, ¶ 6, R. 306, Addendum 3. Judge Rokich did not intend to schedule the case for trial until substitute counsel for Defendants had been designated. Id. Plaintiffs' counsel relied on Judge Rokich's scheduling rulings and awaited the notice of appearance of new counsel.

Defendants' new counsel simultaneously filed a Notice of Appearance of Counsel and a Motion to Dismiss on June 2, 1995. The filing of the Motion to Dismiss completely disregarded Judge Rokich's rulings on scheduling. The delay created between the scheduling hearing in September, 1994, and the May, 1995, Motion to Dismiss was entirely due to the Defendants' failure to name substitute counsel. Plaintiffs' reliance on Judge Rokich's rulings was reasonable. The Plaintiffs should not lose their cause of action because they relied on the rulings of the court. The dismissal penalizes Plaintiffs for complying with Judge Rokich's

ruling to allow the entry of new counsel before entering a scheduling order. This Court should defer to the rulings of Judge Rokich to allow the scheduling order to be entered and give the parties their day in court.

The Supreme Court disfavors the ambush approach of Defendants in their filing of the Motion to Dismiss. In Johnson v. Firebrand, Inc., 571 P.2d 1368, 1370 (Utah 1977), the Court stated:

The conduct of the parties cannot be readily explained, and in view of the fact that new counsel caused the case to be activated, it seems that the court abused its discretion in dismissing the case on a motion to dismiss that was filed at the same time as the answer.

Although Plaintiffs' case has been pending for some time, the latest delay was directly caused by Defendants' failure to name replacement counsel. In following Judge Rokich's scheduling ruling, Plaintiffs could not move the case forward until Defendants' replacement counsel had been named. As a result, it is an abuse of discretion for the court to dismiss Plaintiffs' cause of action when the motion to dismiss was filed at the same time as the Notice of Appearance of Counsel.

Defendants caused the delay. They failed to designate witnesses and failed to participate in discovery by failing to answer Plaintiffs' discovery requests. They requested the trial be continued. They failed to replace their counsel for several months. When Defendants finally named substitute counsel, he filed the Motion to Dismiss for Failure to Prosecute in defiance of Judge Rokich's ruling. R. 305-6. The conduct of Defendants was to delay and to deceive. The conduct of the Plaintiffs was to cooperate and

to move the case forward. The case should not be dismissed when virtually every action to move the case forward was accomplished by the Plaintiffs.

#### **B. The Opportunity of Each Party to Move the Case Forward**

Both parties had the opportunity to move the case forward. Only Plaintiffs, however, actually moved the case forward by conducting discovery, designating expert and lay witnesses, responding to Defendants' discovery, taking records depositions, issuing Subpoenas Duces Tecum, and focusing the issues with a Motion to Amend the Complaint. Defendants had the same opportunity, but failed to name witnesses or respond to Plaintiffs' discovery. In fact, it appears that Defendants intentionally tried to delay the proceedings by seeking to continue the trial, substitute counsel, obtaining a ruling from Judge Rokich that the case would not proceed until new counsel was designated, waiting nine months to name replacement counsel, and filing a Motion to Dismiss at the same time as replacement counsel was named. Both parties had the opportunity to go forward, but only Plaintiffs moved the case forward, while Defendants sought only to delay.

The Utah Supreme Court has consistently held that when all litigants have the power to pursue and advance an action, it is error to dismiss with prejudice the claim of either party. The Court stated:

. . . [T]his court has . . . held that where all of the litigants had power to obtain relief and failed to do so, it is error to dismiss with prejudice. None of the defendants requested a re-setting of either a pre-trial conference or trial as was mandated by the court



previously when the pre-trial was suspended by reason of settlement negotiations.

Utah Oil Co. v. Harris, 565 P.2d 1135, 1137 (Utah 1977). Defendants did not request a pretrial conference or trial, but sought to continue the trial and suspend the proceedings in order to name substitute counsel. Since the parties had the power to obtain relief, it was error to dismiss Plaintiffs cause of action with prejudice.

The complaining party's lack of diligence in moving the case forward also precludes the dismissal. The Utah Supreme Court stated in Westinghouse Electric Supply v. Paul W. Larsen Contractor, Inc., 544 P.2d 876, 879 (Utah 1977):

. . . [W]e are not impressed that the defendants themselves were overly diligent or manifest any particular haste in getting the pretrial discovery procedures completed and on with the trial.

The Supreme Court also stated:

. . . The important fact is that the defendant himself did nothing to move the case forward, but appears to have been quite contented to let it lie dormant until it was reactivated by the plaintiff.

In accord with the view of the trial court, we are not impressed with either fairness or propriety in one party sitting silently by for a long period of time, then attempting to blame the other party for the delay . . .

Department of Social Services v. Romero, 609 P.2d 1323, 1324 (1980).

. . . [I]t is obvious that plaintiffs' lack of diligence in prosecuting over 16 months was reasonably excusable in light of the settlement efforts and had defendants been anxious to proceed they need only have taken such affirmative step themselves. Also, no prejudice to defendants' position is evident while serious injustice may well exist as result of the dismissal.

Utah Oil Co. v. Harris, 565 P.2d 1135, 1137 (Utah 1977). The Plaintiffs' delay is reasonably excusable in light of Defendants' continuance of the trial, their representation that substitute counsel would be named and Judge Rokich's ruling that no action be taken in the case until replacement counsel is named. Affidavit of Judge Rokich, ¶ 6, R. 307. The delay of Defendants in continuing the trial and naming substitute counsel caused an eighteen month delay in the proceedings, November 30, 1993 to May, 1995. If Defendants were so intent on moving the case forward, they could have taken affirmative steps themselves by requesting a trial setting, designating witnesses, and answering discovery. Because the Defendants failed to take any constructive step to advance the case forward, it was error for the trial court to dismiss Plaintiffs' action with prejudice.

Defendants had the opportunity to move the case forward. They might not have moved to strike the January 4, 1994 trial date at the November 30, 1993 pretrial. They might have named their substitute counsel immediately instead of waiting nine months, from the scheduling conference in September, 1994 until filing the Motion to Dismiss in May, 1995. Defendants might easily have responded to the outstanding discovery instead of prolonging the proceedings by neglecting to respond. Defendants might have designated their witnesses and prepared for trial. They did not. Defendants agreed to or exclusively caused an eighteen month delay between November, 1993, when the trial date was stricken, and May, 1995, when Defendants filed the Motion to Dismiss. Defendants were

content to allow time to pass and then use the passage of time to condemn the Plaintiffs and seek a dismissal.

**C. What Each Party Did to Move the Case Forward**

Plaintiffs moved this case forward by naming their witnesses, issuing Interrogatories and Requests for Production of Documents, answering Defendants' Interrogatories, conducting records depositions, serving Subpoenas Duces Tecum, and seeking to amend the Complaint. Defendants took no steps to name their witnesses or respond to Plaintiffs' discovery. Defendants failed to name their substitute counsel as promised at the September, 1994 status conference until the Motion to Dismiss was filed in May, 1995. With the exception of the deposition of Michael Strand, Plaintiffs were prepared to try the case. Plaintiffs have documentation of Defendants' malpractice, for which sanctions were imposed by the State Division of Licensing. That documentation does not grow stale, as the Defendants allege, nor do the records of the State relating to its sanction and suspension of Defendants for their acts.

The Utah Supreme Court has repeatedly held that it is error to dismiss an action with prejudice when all litigants had the opportunity to move the case forward but failed to do so. Utah Oil Co. v. Harris, 565 P.2d 1135, 1137 (Utah 1977); Westinghouse Electric Supply v. Paul W. Larsen Contractor, Inc., 544 P.2d 876, 879 (Utah 1977); Department of Social Services v. Romero, 609 P.2d 1323, 1324 (1980). In Crystal Lime & Cement Co. v. Robbins, 8 Utah 2d 389, 393, 335 P.2d 624 (1959), the case was dormant from June 5,

1950 until May 28, 1958, when a motion to dismiss for lack of prosecution was filed. The Court stated:

. . . Since any party to this action could have obtained the relief to which it was entitled at any time it wanted but both parties chose to dally for a number of years, it is an abuse of discretion for the court to grant respondents' motion to dismiss with prejudice.

See also, Johnson v. Firebrand, Inc., 571 P.2d 1368 (Utah 1977).

Since both parties had an opportunity to move the case forward, it is an abuse of discretion for this action to be dismissed with prejudice.

When the court makes a ruling, it is reasonable for the parties to rely on that ruling without risking a dismissal of their claims. In Polk v. Ivers, 561 P.2d 1075, 1076 (Utah 1977), the Supreme Court set aside a dismissal for failure to prosecute because the parties failed to receive notice of the new trial date. The Court stated:

We conclude, after a review of the entire record in this matter, including the District Court's failure to notify the attorneys of the new trial date after the hearing on December 15, 1975, that it was an abuse of discretion to order a dismissal of this action for failure to prosecute when measured by the principles announced in Westinghouse v. Larsen, . . .

In the case at bar, the court did not contribute to the delay, but ruled that no further proceedings would take place before Defendants named their new counsel. Plaintiffs complied with the court's ruling and took no further action until Defendants named their counsel. When naming their attorney, Defendants also filed the motion to dismiss for failure to prosecute. The grant of that motion constitutes an abuse of discretion under the totality of the

circumstances, the justifiable excuse of Plaintiffs, and the principles set forth in Westinghouse.

**D. What Difficulty or Prejudice was Caused to Defendants**

Defendants' only allegation of difficulty or prejudice resulting from the delay in bringing this action to trial is that the issues are "stale" and that witnesses cannot be found. Defendants have never explained the actual effect, if any, of their conclusion that the issues were "stale". Likewise, Defendants never named the witnesses they sought but could not find. Defendants have failed to disclose any of their witnesses, despite the court order requiring disclosure. Their claim that some witnesses cannot be found, therefore, seems particularly hollow. The difficulty or prejudice alleged by Defendants is unsubstantiated and without foundation. Defendants have simply not been prejudiced or injured as a result of any delays which are, in fact, a direct result of the Defendants' own acts.

The Utah Supreme Court in Klinger v. Kightly, 791 P.2d 868 (Utah 1990), analyzed the issue of staleness and balanced it against the potential prejudice to the parties. The Court stated:

. . . as signor on the survey certificate he is responsible for its content, is still actively engaged in the practice of surveying, and is available for testimony.

Utilizing the balancing test and being conscious of the purposes of the statute of limitations, we hold that under the facts of this case the evidence is not so stale or remote as to outweigh the prejudice to defendants of having their claim barred by the statute of limitations.

Id. at 872. See also, Sevey v. Security Title Co., 902 P.2d 629

(Utah 1995). While this case admittedly deals with the statute of limitations, its analysis of the "staleness" issue is useful. Those responsible for the accounting product are still actively involved in the accounting industry and are available to testify. When this Court compares the dismissal's prejudicial effect on Plaintiffs in contrast to the hardship or prejudice to Defendants, the Plaintiffs' claim is not so stale and remote as to justify the dismissal.

#### **E. Whether Injustice will Result from the Dismissal**

The Utah Supreme Court called the last consideration in the Westinghouse test the "most important": whether injustice may result from the dismissal. Plaintiffs clearly suffer injustice as a result of the Court's decision. Plaintiffs have a valid and valuable cause of action which is lost with the dismissal. Plaintiffs will never have their day in court to air their grievances nor recover damages for the intentional malpractice of Defendants. Plaintiffs are prejudiced because they reasonably relied, to their detriment, on the rulings of Judge Rokich and the agreements of the Defendants and the Court to continue the case without a trial setting. Plaintiffs are also prejudiced because they lose their substantial investment of time and attorney's fees in this cause of action and their injuries caused at the hands of Defendants' malpractice will go uncompensated.

Injustice will result not only to Plaintiffs, who lose a sound and valuable cause of action, but also to Plaintiffs' counsel, who faces a claim of malpractice due to the dismissal. Was it

malpractice for Plaintiff's counsel to rely on the rulings of Judge Rokich and agreements with Defendants to continue the case without a trial setting? Was it unreasonable for Plaintiffs' counsel to rely on the representations that Defense counsel would be substituted and that until the substitution, it was inappropriate to set a trial date? Was it a breach of the standard of care for Plaintiff's counsel to fail to schedule the out of town deposition of Michael Strand before Defendants had named the attorney who would represent them at trial? In a time when the Courts and the Bar stress the need for civility between the parties, is it unreasonable for Plaintiffs' counsel to seek to accommodate Defense counsel in relation to the scheduling? The Court's dismissal of this action flies in the face of civility and cooperation. And now, because of new counsel and a new court, Plaintiffs may lose their cause of action because their counsel relied on those policies and the expressed rulings of Judge Rokich. This is unfair, a harsh result without warning, and contrary to the principles of civility and judicial discretion.

The law abhors a forfeiture. The Utah Supreme Court in Madsen v. Anderson, 667 P.2d 44 (Utah 1983), has stated:

. . . The undesirability of such a result is well-stated by the legal maxim that "the law abhors forfeiture." E.g., SAS Partnership v. Schafer, Mont., 653 P.2d 834, 837 (1982); Eisele v. Kowal, 11 Ariz. App. 468, 471, 465 P.2d 605, 608 (1970).

Because forfeitures are usually harsh, we have disfavored them in cases where the notice to the buyer of the impending forfeiture is uncertain as to the performance demanded, or misleads the buyer into thinking that the forfeiture provision will not be strictly enforced. See First Security Bank v. Maxwell, Utah, 659

P.2d 1078 (1983); Grow v. Marwick Development, Inc., Utah, 621 P.2d 1249 (1980). Cf. Wingets, Inc. v. Bitters, 28 Utah 2d 231, 500 P.2d 1007 (1972) (terms of the forfeiture provision must be clear and unambiguous).

The decision of the Court to dismiss the Plaintiffs' Complaint, with prejudice, constitutes a forfeiture without reasonable notice. Similar to the situation in Madsen, Plaintiffs' counsel did not know of an impending risk of dismissal or forfeiture of the cause of action because of the rulings of Judge Rokich and the agreements between the parties and the Court. Plaintiffs were active in preparing for trial and had all the preparations completed with the exception of the deposition of Michael Strand and the documents requested from Defendants.

Forfeitures are harsh. Dismissals are harsh. It is appropriate that short of dismissing the action completely, especially in light of the injustice to Plaintiffs and their counsel, that the trial court consider other options to move the case forward and remedy Defendants' alleged prejudice and difficulty. The trial court could have set a strict schedule and expedited the trial. The court could have ordered that Plaintiffs bear the expense of locating witnesses which Defendants claim are "lost". But in light of Judge Rokich's ruling and the agreements of the parties, totally dismissing Plaintiffs' Complaint with prejudice is unduly harsh and an abuse of discretion.

Plaintiffs simply seek to have this Court recognize and embrace the higher priority in the use of its discretion, to afford disputants an opportunity to be heard and to do justice between them. Justice requires that the Court reinstate Plaintiffs' cause



of action and allow the case to be heard on the merits.

The Utah Supreme Court stated in Westinghouse Electric Supply v. Paul W. Larsen Contractor, Inc., 544 P.2d 876, 879 (Utah 1977):

. . . it is indeed commendable to handle cases with dispatch and to move calendars with expedition in order to keep them up to date. **But it is even more important to keep in mind that the very reason for the existence of courts is to afford disputants an opportunity to be heard and to do justice between them. In conformity with that principle the courts generally tend to favor granting relief from default judgment where there is any reasonable excuse, unless it will result in substantial prejudice or injustice to the adverse party.**

It is our conclusion that **the trial court failed to give proper weight to the higher priority; and that under the circumstances described herein, the order of dismissal (with prejudice) was an abuse of discretion.** [Emphasis added].

Although the trial court sought to relieve its calendar of an old case, it ignored the previous rulings of the court, the relative positions of the parties, the delay caused by Defendants, and the prejudice wrought on Plaintiffs by dismissing their cause of action. The record reflects no prejudice or injustice which reversing the dismissal would impose on Defendants. The trial court has failed to give the proper weight to the higher priority of allowing cases to be heard and determined on their merits. The dismissal, therefore, should be overturned.

#### CONCLUSION

Due process is a constitutionally guaranteed protection, affording not only notice and an opportunity for hearing, but also requiring judges to consider relevant factors in reaching their decisions, to protect against arbitrary and capricious decisions

that abuse discretion. The trial court failed to consider the Westinghouse factors in making its decision to dismiss Plaintiffs' cause of action with prejudice, but focused exclusively on Plaintiffs' actions. The failure to consider the relevant factors in reaching a decision is an abuse of discretion. Having failed to consider the relevant factors in making its decision, the trial court violated Plaintiffs' substantive due process rights. Based on that violation, the case should be reversed and remanded to the trial court.

The Westinghouse requirements must be considered by the court before ruling on a motion to dismiss. In addition to the five considerations set forth in Westinghouse, it also requires a "justifiable excuse" for the delay. Plaintiffs' justification for the delay is Defendants' request to continue the trial and Judge Rokich's ruling that no action would be taken in relation to the case until Defendants' substitute counsel was named, coupled with Defendants' nine month delay in naming that counsel. Defendants, therefore, directly caused or consented to delays of over eighteen months. The Defendants' actions constitute the justifiable excuse for the actions of Plaintiffs.

Plaintiffs adhered to the court's scheduling order by designating its witnesses. Defendants never named any witnesses. Plaintiffs conducted discovery, held records depositions, issued subpoenas duces tecum, and filed a Motion to Amend Complaint to move the case forward. Defendants did nothing to move the case forward and now complain of the delay they created. The totality

of the circumstances justify the reversal of the dismissal and remand to the trial court.

DATED this 30 day of April, 1996.

  
Ralph C. Petty

**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 30 day of April, 1996.

  
Ralph C. Petty

#### **ADDENDUM**

1. Order of Dismissal with Prejudice
2. Findings of Fact and Conclusions of Law
3. Affidavit of Judge John A. Rokich
4. Notice of Appeal

**ADDENDUM 1**

Order of Dismissal with Prejudice

MICHAEL L. DEAMER - NO. 844  
RANDLE, DEAMER, ZARR & LEE, P.C.  
Attorneys for Defendants Leland Martineau and  
Martineau & Company  
139 East South Temple, #330  
Salt Lake City, UT 84111-1169  
Telephone: (801) 531-0441  
Fax: (801) 531-0444

**FILED DISTRICT COURT**  
Third Judicial District

**OCT 23 1995**

SALT LAKE COUNTY  
By   
Deputy Clerk

---

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

---

MICHAEL W. STRAND and LOIS L. STRAND,	:	ORDER OF DISMISSAL WITH PREJUDICE
	:	
Plaintiffs,	:	
	:	
v.	:	
	:	Civil No. 810905200-CV
LELAND MARTINEAU, et al.	:	
	:	Judge William B. Bohling
Defendants.	:	

---

Based upon the Findings of Fact and Conclusions of Law concurrently entered herewith and good cause appearing, now, therefore

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendants' Motion to Dismiss with prejudice and on the merits be and the same is hereby granted and the above-entitled action, including the Amended Complaint and all causes of action, be and the same are

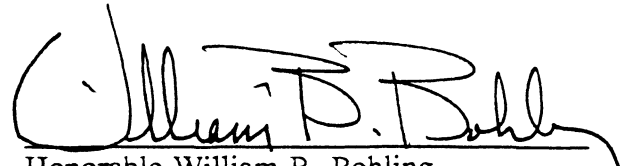
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hereby dismissed with prejudice and on the merits, each party to bear its own attorneys' fees, court costs and expenses.

Plaintiffs Motions to Strike Answer and Enter Default Judgment and to Strike the Affidavit of Leland Martineau are hereby denied.

DATED this <sup>October</sup>~~August~~ 23 day of ~~August~~, 1995.

BY THE COURT:

  
Honorable William B. Bohling  
District Court Judge

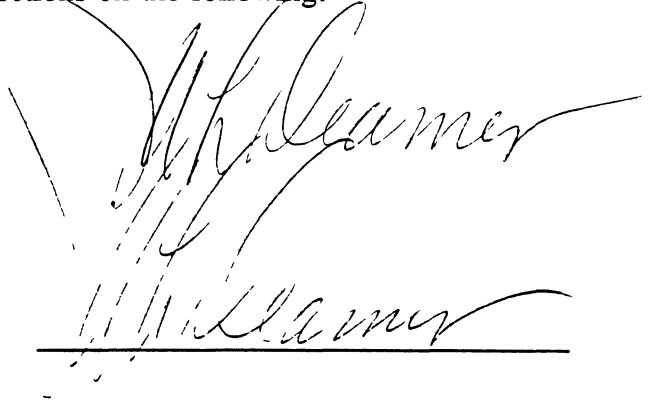
APPROVED AS TO FORM:

\_\_\_\_\_  
Ralph C. Petty  
Attorneys for Defendants

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing ORDER OF DISMISSAL WITH PREJUDICE, this 23 day of August, 1995, postage prepaid, and reserved following consideration of Plaintiffs' objections on the following:

Ralph C. Petty  
Attorneys for Plaintiffs  
1000 Boston Building  
9 Exchange Place  
Salt Lake City UT 84111

A handwritten signature in cursive script, appearing to read "W. H. Leamer", is written over a horizontal line. The signature is written in dark ink and is somewhat stylized.

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## **ADDENDUM 2**

Findings of Fact and Conclusions of Law

MICHAEL L. DEAMER - NO. 844  
RANDLE, DEAMER, ZARR & LEE, P.C.  
Attorneys for Defendants Leland Martineau and  
Martineau & Company  
139 East South Temple, #330  
Salt Lake City, UT 84111-1169  
Telephone: (801) 531-0441  
Fax: (801) 531-0444

**FILED DISTRICT COURT**  
Third Judicial District

**OCT 23 1995**

SALT LAKE COUNTY  
By W. C. Bohling Deputy Clerk

---

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

---

MICHAEL W. STRAND and LOIS L. STRAND,	:	<b>FINDINGS OF FACT AND</b>
	:	<b>CONCLUSIONS OF LAW</b>
Plaintiffs,	:	
	:	
v.	:	
	:	Civil No. 810905200-CV
LELAND MARTINEAU, et al.	:	
	:	Judge William B. Bohling
Defendants.	:	

---

Defendants' Motion to Dismiss for Failure to Prosecute and Plaintiffs' Motions to Strike Answer and Enter Default Judgment and to Strike Affidavit of Leland Martineau came on for hearing before the above-entitled court pursuant to notice before the Honorable William B. Bohling at his courtroom in Salt Lake City, Utah on Monday, August 14, 1995 with Ralph C. Petty appearing on behalf of Plaintiffs and Michael L. Deamer appearing on behalf of

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Defendants and the court having heard argument of counsel, having reviewed the memorandums of law and affidavits and being fully advised in the premises, now enters its

### **FINDINGS OF FACT**

1. Plaintiffs' action was originally filed in June of 1981. Plaintiffs' Complaint has been amended at least once but the matter is not presently certified for trial nor has the court set a date for trial.

2. Except for status conferences, the last action taken in this matter was in December of 1993.

3. Plaintiffs claim that they have outstanding discovery requests filed in approximately October of 1993 which Defendants deny. Plaintiffs have not filed a motion to compel discovery or taken any other action regarding the outstanding discovery requests.

4. Defendants have denied the material allegations of Plaintiffs' Amended Complaint by Affidavit and there has been no counter-affidavit filed by Plaintiffs in response thereto.

5. Plaintiffs have not met their burden to go forward with the litigation and certify the matter for trial within a reasonable period of time.

6. Plaintiff Michael Strand is presently in a Texas penitentiary and will be for a few more years and, therefore, is unable to be present for any trial of the above-entitled matter.

7. It appears to the court that the issues are stale, witnesses cannot be identified, and it would be in the best interest of justice to dismiss the above-entitled action with prejudice on the merits under Rule 41(b) of the Utah Rules of Civil Procedure.

### CONCLUSIONS OF LAW

1. Plaintiffs have not met their burden to prosecute the above-entitled action with due diligence and without unusual or unreasonable delay.

2. Plaintiffs have not, with reasonable diligence, pursued their outstanding discovery requests.

3. The Affidavit of Leland Martineau set forth upon information and belief is sufficient under Rule 602 of the Utah Rules of Evidence and shall not be stricken.

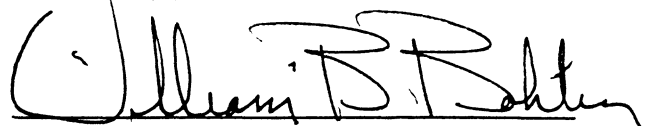
4. Plaintiffs' failure to pursue litigation that has been pending for over 14 years with no action except for status conferences taken on the matter since December of 1993 is sufficient basis for dismissal of the above-entitled action with prejudice on the merits, pursuant to Rule 41(b) of the Utah Rules of Civil Procedure.

5. No attorneys' fees and costs are awarded.

6. Defendants' Motion should be granted and Plaintiffs' Motions denied.

DATED this 23 day of <sup>October</sup>~~August~~, 1995.

BY THE COURT:

  
Honorable William B. Bohling  
District Court Judge

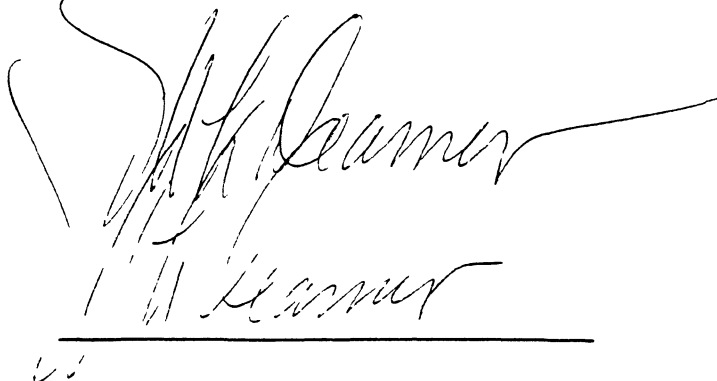
APPROVED AS TO FORM:

\_\_\_\_\_  
Ralph C. Petty  
Attorneys for Plaintiffs

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing FINDINGS OF FACT AND CONCLUSIONS OF LAW, this 23 day of August, 1995, postage prepaid, and re-served following consideration of Plaintiffs' objections on the following:

Ralph C. Petty  
Attorneys for Plaintiffs  
1000 Boston Building  
9 Exchange Place  
Salt Lake City UT 84111



Mark Deamer

---

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**ADDENDUM 3**

Affidavit of Judge John A. Rokich

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Ralph C. Petty #2595  
Attorney for Plaintiff  
1000 Boston Building  
9 Exchange Place  
Salt Lake City, Utah 84111  
Telephone (801) 531-6686

FILED  
DISTRICT COURT

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*M. J. J.*  
IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY  
STATE OF UTAH

MICHAEL W. STRAND, et al.,  
Plaintiffs,  
v.

LELAND MARTINEAU, et al.,  
Defendants.

AFFIDAVIT OF JOHN A. ROKICH  
IN SUPPORT OF THE MOTION TO  
SET ASIDE DISMISSAL AND  
REINSTATE PLAINTIFF'S ACTION

Case No. 810905200CV

Judge William B. Bohling

County of Tooele )  
State of Utah ) ss.

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

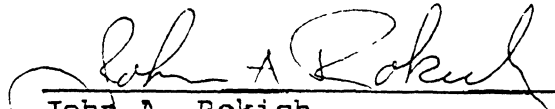
1. Affiant is a member of the Utah Bar in good standing.
2. Affiant is familiar with and has personal knowledge of the statements set forth in this Affidavit.
3. Affiant was the judge assigned to the above entitled matter when it came before Affiant pursuant to a scheduling conference, on September 17, 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.

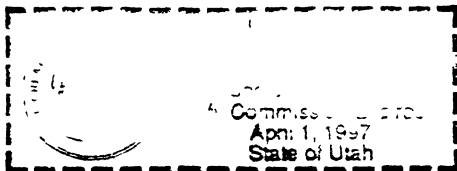
6. Based on the disclosures of Mr. Sandack, and the consent of Mr. Petty, Affiant determined that it would be inappropriate to enter a scheduling order when counsel for Defendants was changing. Affiant intended to set a schedule for the completion of this action after Defendants' new counsel had been 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.

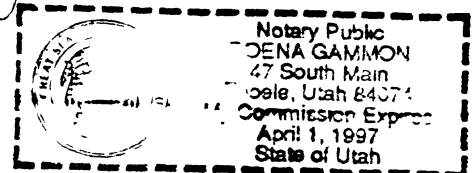


  
Notary Public residing at  
Tocole, Utah

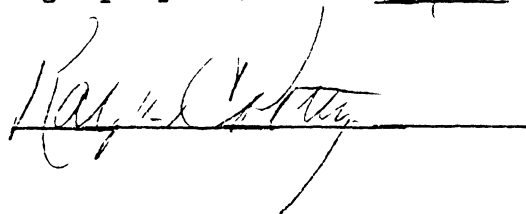
My Commission Expires:

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.



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TOTAL P. 03



**ADDENDUM 4**

Notice of Appeal

4000017 <sup>2nd</sup> (300)  
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DISTRICT COURT  
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AT


MICHAEL W. STRAND, et al.,  
Plaintiffs,  
  
v.  
  
LELAND MARTINEAU, et al.,  
Defendants.

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NOTICE OF APPEAL  
  
  
  
  
  
Case No. 810905200CV  
  
Judge William B. Bohling

DATED this 20 day of November, 1995.

November, 1995.

  
\_\_\_\_\_  
Ralph C. Petty

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 20 day of November, 1995.



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