

1996

Michael W. Strand and Lois L. Strand, et al. v.
Leland Martineau and Martineau and Company, et
al. : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

MICHAEL W. STRAND and LOIS L.	:	
STRAND, et al.,	:	
	:	
Plaintiffs/Appellants,	:	Case No. 960046-CA
	:	
v.	:	Priority 15
	:	
LELAND MARTINEAU and	:	
MARTINEAU & COMPANY, et al.,	:	
	:	
Defendants/Appellees.	:	

BRIEF OF THE APPELLEES

On Appeal from the Third Judicial District Court
of Salt Lake County, Utah

Honorable William B. Bohling
District Court Judge

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JURISDICTION OF COURT

The jurisdiction of the Utah Court of Appeals is not disputed. Jurisdiction is vested in this court pursuant to U.C.A. § 78-2-2(4) and § 78-2a-3(2)(k).

ISSUES PRESENTED FOR REVIEW

1. Did the court abuse its discretion in dismissing an action that has been pending for over 14 years? The standard of review is whether the record indicates that the trial court clearly abused its discretion in dismissing the action. See Argument Point I set forth herein.

STATEMENT OF THE CASE

The Third Judicial District Court granted Defendant Martineau's Motion to Dismiss with prejudice and on the merits for Strands' failure to prosecute pursuant to Rule 41(b) of the Utah Rules of Civil Procedure with each side to bear its own attorneys' fees, court costs and expenses.

STATEMENT OF FACTS¹

Plaintiffs filed this action in June of 1981 and the matter has been pending for over 14 years. The Affidavits of Daniel Jackson and Ralph Petty, attorneys for Strands², characterize this action as a "malpractice claim" against Martineau. R131-133, 164-167, 148-149. The acts giving rise to the alleged malpractice began in approximately April of 1975. See Complaint

¹ All references to the record are designated R with page number following. The "000" page numbers have been omitted for convenience.

² Appellants are referred to collectively as "Strands" in this Brief.

at R3, paragraphs 3 and 4. The principal Plaintiff, Michael W. Strand, is currently in a federal correctional institution in Texas. R242.³

Previous Trial Settings: This action was originally scheduled for a trial date of December 6, 1982. R38-39. Daniel Jackson, counsel for Strands, appeared on November 23, 1982 and requested a continuance of the trial date, which trial setting was vacated. R40. On November 25, 1987, Martineau filed a Motion for an expedited trial date. R66-67. The written notice on the hearing for an expedited trial indicated that the Motion would be heard before the Honorable Scott Daniels on December 4, 1987. R68-69. The record is devoid of any ruling on that motion or that the motion was withdrawn. The record also shows that no trial was ever held. A scheduling order on June 9, 1993 (R92) set the next trial date on January 4, 1994. R91-92. The January 4, 1994 trial date was stricken by counsel and continued without date. R147. No where in the record does it indicate that Strands ever certified the case for trial.

Dismissals: The court, on several occasions, ordered the parties to show cause why the matter should not be dismissed for failure to prosecute. The first OTSC appears in the record on April 8, 1991. R71. Said Order to Show Cause was continued for 30 days. R73. The case was ultimately dismissed by the court on September 23, 1991. Strands filed an Ex Parte Motion to Set Aside the Dismissal two (2) years later on May 4, 1993. R74-83. The court

³ This fact is taken from a letter from Appellants' counsel, Ralph C. Petty, to Roger Sandack dated October 29, 1993. Both Appellants' and Appellees' counsel, in their arguments before the court on August 14, 1995 (R336 and R339), refer to the fact that Michael Strand is in a federal penitentiary and likely will remain there and not be available for a trial.

on April 29, 1993 set aside the dismissal of September 23, 1991. R84. The court set another Order to Show Cause hearing for failure to prosecute on August 17, 1994. R176-178. A scheduling conference for September 27, 1994 was continued without date on stipulation of the parties. R182. At the time of the present dismissal of the action, no trial date was set.

Discovery Opportunities: During the 14 years that the case was pending, at least four separate sets of Plaintiffs' Interrogatories and Requests for Production of Documents were served. R22-24, R46, R89, R104, R175. In his Answer filed in 1982, Martineau claimed he had turned over all of the accounting records. R32-34.⁴ The deposition of Martineau was taken on August 26, 1982. R30. Martineau certified he had answered Plaintiffs' Second Request for Admissions and Interrogatories. R47-48. Martineau certified he had answered Plaintiffs' Third Set of Interrogatories and Request for Production of Documents on August 21, 1987. R64-65. On August 24, 1993, some six (6) years later, Martineau "re-served" Strands with Martineau's answers to Plaintiffs' Third Set of Interrogatories and Request for Production of Documents. R95. On October 29, 1993, Strands served a Fourth Set of Interrogatories and Request for Production of Documents on Martineau. R107. Said Fourth Set of Interrogatories sought inter alia photocopies of the preceding sets of Interrogatories again. R206. Martineau did not file answers or responses to said Fourth Set of Interrogatories. Strands had not filed any motion to compel discovery on the Fourth Set of

⁴ In fact, Martineau returned all original canceled checks, statements, records and ledgers in 1981. Before returning all accounting records to Strands, Martineau made photocopies of all records and documents. The total number photocopied was over 16,000. Martineau sued the Strands and their new CPA firm for the cost of photocopying and obtained a judgment in approximately 1982. Strands paid the judgment in full that same year.

Interrogatories until Martineau moved to dismiss for failure to prosecute 18 months later on May 31, 1995. R340. Strands' Motion to Strike Answer for lack of response to the Fourth Set of Interrogatories was filed on June 12, 1995. R195. Martineau filed a sworn affidavit on June 20, 1995 in response to Strands' Motion to Strike Answer claiming that all records and documents in his possession and control have been produced to Plaintiffs' counsel on several occasions. R224-226. Martineau also filed a sworn affidavit on May 30, 1995 denying the material allegations of Plaintiffs' Complaint and asserting that in his opinion the issues in the action were stale and credible witnesses could not be located. R191-192. Said Affidavit was never refuted by counter-affidavit but Strands moved to strike said Affidavit as lacking foundation and containing unfounded conclusions (R199-200), which motion was denied. R321-322.

Current Disposition: The court on August 14, 1995, heard Martineau's Motion to Dismiss for Failure to Prosecute (R335) and in dismissing the action stated that this case was ". . . a case that cries out for dismissal for want of prosecution." R340, lines 12 and 13. Strands filed various objections to the Findings of Fact and Conclusions of Law and an amended Motion to Set Aside the Dismissal and to Reinstate Plaintiffs' Action. R260, R273, R253, R285. Said amended Motion was supported by the Affidavit of Judge John A. Rokich dated August 28, 1995. R306-307. The court again for the second time heard oral arguments on the entire matter on October 23, 1995. R316. The court denied all of Plaintiffs' Motions and signed and executed the Findings of Fact and Conclusions of Law and Order dismissing the action with prejudice and on the merits for failure to prosecute. Strands filed this appeal.

SUMMARY OF ARGUMENT

The appellate court should not reverse the decision of the district court unless the record plainly demonstrates that the trial court clearly abused its discretion in granting a dismissal with prejudice under Rule 41(b). The record discloses that Strands have never certified the case for trial in the last 14 years. The court has set numerous Order to Show Cause hearings for failure to prosecute and, at one time, dismissed the case. The burden is on Strands to move the case forward. There is no basis for "excusable neglect" of Strands given the facts from the record. During this same period of time, Martineau responded to several sets of Interrogatories and Requests for Production of Documents and submitted himself to a deposition in 1982. Martineau's Motions for an expedited trial in 1987 were denied. At the time the dismissal was granted by the court, there was no date for a trial. Given all the facts and circumstances, reasonable minds would agree that the district court did not abuse its discretion in dismissing Strands' action.

ARGUMENT

POINT I.

THE APPROPRIATE STANDARD OF REVIEW IS CLEAR ABUSE OF DISCRETION.

Strands' action was dismissed under Rule 41(b) of the Utah Rules of Civil Procedure which provides in relevant part:

"Involuntary dismissal; Effect thereof. For the failure of the plaintiff to prosecute or to comply with these rules or any order of the court, a defendant may move for dismissal of an action or

of any claim against him. . . . Unless the court in its order for dismissal other specifies, a dismissal under this subdivision or any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue or for lack of an indispensable party, operates as an adjudication upon the merits."

The word "may" in the rule and the import of Rule 41 gives the trial court discretion in which to grant the relief prayed for. See generally: Boyle v. National Union Fire Insurance Company, 866 P.2d 595 (Ct. App. 1993). In State v. Pena, 869 P.2d 932 (Utah 1994), the Supreme Court examined the standard of review for abuse of discretion cases. The court in noting that the term "abuse of discretion" has no tight meaning stated:

"The helpful metaphor Professor Rosenberg uses in describing these degrees of discretion is that of a pasture. To the extent that a trial judge's pasture is small because he or she is fenced in closely by the appellate courts and given little room to roam in applying a stated legal principle to facts, the operative standard of review approximates what can be described as "de novo." That is the appellate court closely and regularly redetermines the legal effect of specific facts. But to the extent that the pasture is large, the trial judge has considerable freedom in applying a legal principle to the facts, freedom to make the decisions which appellate judges might not make themselves ab initio but will not reverse - in effect, creating the freedom to be wrong without incurring reversal. Only when the trial judge crosses an existing fence or when the appellate court feels comfortable in more closely defining the law by fencing off a part of the pasture previously available does the trial judge's decision exceed the broad discretion granted.

As can be imagined, the real amount of pasture permitted a trial judge will vary depending on the legal issue, although the terminology we use to describe the operative standard of review does not begin to reflect the many shades of this variance. The best we can do is to recognize that such a spectrum of discretion exists and that the closeness of appellate review of the application

of law to fact actually runs the entire length of the spectrum."
At pages 937-938.

A more extensive discussion of judicial discretion is set forth in Rosenberg, Judicial Discretion of The Trial Court Viewed From Above, 22 Syracuse Law Review 635 (1971); Hofer, Standards of Review - Looking Beyond The Labels, 74 Marquette Law Review 231 (1991).

In Thompson Ditch v. Jackson, 29 U.2d 259, 508 P.2d 528 (1973), the Supreme Court concluded that in order to reverse a district court's dismissal for an abuse of discretion, the record must "plainly show that the court abused their discretion." In Charlie Brown Construction Company v. Leisure Sports Incorporated, 740 P.2d 1368 (Ct. App. Utah 1987) cert. den. 765 P.2d 1277 (Utah 1987), this court held that in the application of the "abuse of discretion" standard:

"Dismissal for failure to prosecute is a decision within the broad discretion of the trial court. This court will not interfere with that decision unless it clearly appears that the court has abused its discretion and that there is a likelihood an injustice has been wrought." At page 1370. (Emphasis added.)

In Maxfield v. Rushton, 779 P.2d 237 (Ct. App. Utah 1989) cert. den. 789 P.2d 33 (Utah 1989), this court also stated:

"Consequently, a lower court's dismissal of a case under Rule 41(b) will not be disturbed on appeal unless it is clear from the record that it has abused its discretion." At page 239. (Emphasis added.)

In Lawrence v. Bamberger Railroad Company, 282 P.2d 335, 3 U.2d 247 (Utah 1955), the Supreme Court in 1955 stated:

"When the court has made findings and entered judgment thereon as was done here, then it is our duty to review the evidence in the light most favorable to the findings, and they must be allowed to stand if reasonable minds could agree with them. Likewise every reasonable intendment ought to be indulged in favor of the validity and correctness of the judgment under review and it will not be disturbed unless the appellant meets his burden of affirmatively showing error." At page 337.

Martineau submits that the applicable standard of review by this court is that it must appear from the record that the district court clearly abused its broad discretionary powers in dismissing Plaintiffs' action which had pending for over 14 years.

POINT II.

THE RECORD DEMONSTRATES THAT THE COURT DID NOT ABUSE ITS DISCRETION IN DISMISSING PLAINTIFFS' ACTION.

Strands commenced a legal action against Martineau alleging among other things malpractice in the preparation, analysis and presentation of financial statements based upon records belonging to Strands. See Complaint, paragraphs 3 and 4. Said acts of malpractice allegedly took place from 1975 to 1981. Strands' action was commenced in June of 1981 and has been pending for over 14 years before the Third District Court dismissed said action with prejudice and on its merits for Plaintiffs' failure to prosecute. Although Strands assert various theories for legal recovery, Strands' counsel has characterized the present action as a "malpractice action." R131-133, 164-167, 148-149. The applicable statute of limitations for professional malpractice is set forth in U.C.A. § 78-12-25 as four years. It is interesting to note that at the time the present action was dismissed by Judge Bohling 14 years after it had

been filed, the applicable statute of limitations could have run four to five consecutive times. The purpose behind any statute of limitations is to permit finality to claims and disputes between the parties, to keep evidence fresh and conserve resources. Currier v. Holden, 862 P.2d 1357 (Ct. App. Utah 1993). Statutory limitations are designed to prevent surprises through revival of claims allowed to slumber until evidence is lost, memories have faded, and witnesses have disappeared. Bowen v. New York, 476 U.S. 467, 106 S. Ct. 2022, 90 L.ed 2d 462 (1986); also to suppress stale and fraudulent claims while fresh evidence is available to rebut them. Horton v. Goldminer's Daughter, 785 P.2d 1087, 1091 (Utah 1989). For Strands to argue their substantive due process rights have been violated (Appellants' Brief, beginning at page 7), ignores the fact that 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. It is also interesting to note that if a trial were scheduled at the present time, Appellant Michael Strand would likely not be present as he is currently in a federal penitentiary in Texas. R242.

A. THE BURDEN IS ON PLAINTIFF TO PROSECUTE ITS CIVIL ACTION.

Rule 41(b) of the Utah Rules of Civil Procedure makes it clear that a defendant may move to dismiss a civil action for "plaintiff's failure to prosecute." In Charlie Brown Construction v. Leisure Sports Incorporated, *supra*, the court reiterated the general rule in the State of Utah:

"The burden is upon the plaintiff to prosecute a case in due course without unusual or unreasonable delay. Plaintiffs are required 'to prosecute their claims with due diligence or accept the penalty of dismissal.'" At page 370.

In Charlie Brown, plaintiffs abused their opportunity to be heard in court through dilatory conduct. In Meadowfresh Farms v. Utah State University, 813 P.2d 1216, 1218 (Ct. App. Utah 1991), the court again reaffirmed the general rule that the burden is on the plaintiff to prosecute a case in due course without unusual or unreasonable delay. In Meadowfresh, the court recognized that a district court has authority to dismiss an action sua sponte or upon the motion of an affected party. In fact, Rule 4-103 of the Utah Code of Judicial Administration requires that if a certificate of readiness for trial has not been served and filed within 180 days of the filing date, and absent a showing of good cause, the court is required to dismiss the case without prejudice for lack of prosecution. Rule 4-103 was originally adopted in 1990 and amended in 1993 and 1994. Since Strands' case has been pending continuously since 1981, the district court could have and should have dismissed Strands' case anytime after the adoption of Rule 4-103 in January of 1990. Furthermore, Strands acknowledge that the burden is on them to move the case forward. R345, lines 15-17.

B. STRANDS' CLAIM OF TRIAL COURT ABUSE OF DISCRETION UNDER WESTINGHOUSE STANDARDS FAILS ON THE FACTS. Strands in their Brief beginning at page 14 claim that the trial court somehow abused its discretion by failing to apply the Westinghouse standards to show "excusable neglect." These standards include: (1) length of time, (2) conduct of both parties, (3) opportunity of each party to move case forward, (4) what each party did to move the case forward and the amount of difficulty or prejudice that may have been caused to the other side, and (5) whether injustice may result from the dismissal.

Westinghouse Electric Supply Company v. Paul W. Larsen Contractor, Inc., 544 P.2d 876 (Utah 1975). We consider each of the elements separately:

(1) Length of Time. The Westinghouse court included "the length of time elapsed to determine the propriety of a dismissal for failure to prosecute" as an element in considering a dismissal for failure to prosecute. Westinghouse, at page 879; Meadowfresh Farms, Ibid, at page 1219. The alleged acts of malpractice occurred nearly 20 years ago beginning in 1975. The length of time the present case has been pending in court is over 14 years as of the date Judge Bohling originally dismissed Plaintiffs' complaint. It has now been nearly 15 years considering the time this matter has been on appeal. In Meadowfresh Farms, Ibid, the court concluded:

"Defendants in this case are prejudiced by the passage of time. After ten years, it is reasonable to assume the facts are stale. Many of the potential witnesses may have moved out of state and/or their recollection of the circumstances and events may have dimmed." At page 1220.

Martineau filed an unrefuted affidavit that credible witnesses could not be located and that in his opinion the issues and action was stale as it related to events that occurred nearly 20 years earlier.

(2) Conduct of Both Parties. A review of the court file shows that the original trial date of December 6, 1982 was stricken by Strands' counsel, Daniel Jackson, when he requested a continuance. R40. There were several Order to Show Cause hearings scheduled. The first one appears of record on April 8, 1991 (R71) and was continued for 30 days (R73). The case was ultimately dismissed by the court on

September 21, 1991, but Plaintiffs filed an ex parte motion to set aside the dismissal two (2) years later in May of 1993. The court set aside the 1991 dismissal in 1993. R84. Another Order to Show Cause hearing was scheduled for failure to prosecute on August 17, 1994, which was continued to September 27, 1994. A trial was set for January 4, 1994 but was stricken by counsel and continued without date.⁵ R147.

What is significant from the record is that Martineau, through his attorneys, filed a Motion for an Expedited Trial Date, together with the Motion to Consolidate this action with another pending action. This Motion for Expedited Trial Date was filed nearly nine (9) years ago on November 25, 1987. R66-67. A notice on the hearing for an expedited trial date indicated that the motions would be heard before the Honorable Scott Daniels, District Court Judge, on December 4, 1987. R68-69. The record does not contain any minute entry or order signed by the judge ruling on the motions. Nothing in the record shows that the motions were withdrawn. It is, however, apparent that no trial date was ever scheduled nor was any trial ever held in this matter. The record also shows that during the 14 years the case was pending, Martineau responded to three different sets of Interrogatories and Requests for Production of Documents. In his Answer filed in 1982, Martineau stated he had turned over the accounting records.⁶ R32-34. In fact, in August of 1993, Martineau "re-

⁵ Martineau's former attorney did not move for or request a continuance but only agreed at the court's suggestion that the matter be continued. Affidavit of Rokich of August 28, 1995. R306-307.

⁶ See Footnote 4, supra.

served" Strands with Martineau's answers to Plaintiffs' Third Set of Interrogatories and Requests for Production of Documents. In October of 1993, Strands served a Fourth Set of Interrogatories and Request for Production of Documents. R107. A reading of said Fourth Set of Interrogatories shows that Strands again are asking for production of the former sets of interrogatories and documents previously produced on several occasions. R206.

The index to the court record in the court file shows that Strands never certified this case for trial at any point in time. That should be weighed with Martineau's Motion for an Expedited Trial in 1987 which was not granted. Martineau's deposition was also taken on August 26, 1982. R30. It is unreasonable and unfair to assume that because Martineau himself did not certify the case for trial or that the various OTSC hearing or trial dates were continued by stipulation of counsel, that Plaintiffs are somehow relieved of their burden to prosecute the case with diligence. Even in combination, the effect of alleged adverse consequences of dismissal and Defendants' inactivity before the Motion to Dismiss for five (5) years, did not prevent the court from properly dismissing an action. Country Meadows Convalescent Center v. Utah Department of Health, 851 P.2d 1212 (Ct. App. Utah 1993). There is nothing in the record that Strands can point to that demonstrates that Martineau obstructed or anyway prevented the matter from being tried. Strands in their Brief argue strenuously regarding the vacation of the January 4, 1994 trial date as justification for their failure to prosecute the case. Whether or not this is true, at best it only offers an explanation

for the last couple of years. What about the preceding 12 years when no action was taken by Strands? The record is clear that Martineau's previous counsel, Roger Sandack, responded and appeared at all hearings and did not withdraw until July of 1995. At all times, Martineau was represented by counsel who appeared and participated in proceedings. Martineau's previous counsel never moved for nor requested a continuance of the January 4, 1994 trial.

(3) The Opportunity of Each Party to Move the Case Forward. In this regard, Strands filed a Fourth Set of Interrogatories and Request for Production of Documents in October of 1993. At no time prior to Martineau's Motion to Dismiss for failure to prosecute in May of 1995 did Strands seek to compel discovery by motion or otherwise. In fact, Strands only filed a motion regarding the outstanding discovery nearly 18 months later on June 12, 1995 in an effort to prevent the dismissal motion. R195. Martineau, in his Memorandum in Opposition to the Motion to Strike Answer at R219, submits that Rule 11 of the Utah Rules of Civil Procedure has been violated. Rule 11, in relevant part, provides:

" . . . The signature of an attorney or party constitutes a certification by him that he has read the pleading, motion or other paper; that to the best of his knowledge and information and belief after reasonable inquiry, it is well grounded in fact and is warranted by existing law . . . and that it is not interposed for any improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation." (Emphasis added.)

The court should weigh Plaintiffs' dilatory action in pursuing its outstanding discovery request against anything that Martineau's previous counsel may have done in stipulating to a continuance of the last trial setting. See Footnote 5.

Strands filed a Motion to Amend their Complaint in November of 1993 (R117) which Martineau opposed. R142-146. Strands never noticed their Motion for a hearing nor submitted it for a decision. Strands have had Martineau's deposition since August 26, 1982. It cannot be said that the record plainly and clearly shows that the court abused its discretion in weighing this factor against Strands.

(4) What Difficulty or Prejudice may have been Caused to the Other Side?

Clearly the dismissal of the case for failure to prosecute is "finality" subject only to an appeal. This did not greatly prejudiced or disadvantage Strands since their first listed Plaintiff, Michael W. Strand, is in a federal penal institution in Texas and is not available for a trial if one were scheduled right now. Strands have waived their right to claim that they have unfairly suffered difficulty or been prejudiced by limping along for nearly 14 years.

(5) Does Injustice Result from the Dismissal. It seems clear to Martineau that a tremendous injustice has been done to him during the 14 years this matter has been pending. It is likely that Martineau has had to list the pending litigation against him on every loan application he has ever made in the last 14 years and has been required to make full disclosure of the malpractice action to all his creditors. It is likely that Martineau also has been required to disclose to any malpractice insurance

carriers the pendency of the malpractice action for over 14 years which may or may not have affected the premiums he pays for insurance. Needless to say, attorneys' fees and costs are continually incurred during the pendency of the action which, in fairness, ought to be reimbursed to Martineau because of Strands' failure to ever bring the matter to trial or to an ultimate determination. Martineau claims his own due process rights under the Utah and U.S. Constitution are violated by the 14 year hiatus. Martineau filed a sworn affidavit before the district court that credible witnesses could not be located. He cannot even remember who the witnesses are. In his affidavit, he stated in his opinion the issues are stale. Nobody can remember exactly what the issues are.

Martineau submits that the action of the district court was not "unreasonable or arbitrary" under the circumstances. In applying the "abuse of discretion" standard it requires that the record plainly and clearly demonstrate that the district court was arbitrary and capricious. The record does not show this. To the contrary, the record shows that Martineau cooperated by providing responses to all discovery requests. Martineau himself moved for an expedited trial in 1987 which was not granted. The district court dismissed the case on at least one previous occasion in 1991 and set aside the dismissal in 1993. The court scheduled numerous Order to Show Cause hearings. Strands never certified the matter for trial. The principal plaintiff is in a federal penitentiary and is not available for trial. From that record, it cannot in good faith be argued that the district court was arbitrary and capricious. If the court is not arbitrary

and capricious, then how can Strands' claim that the injustice to them by dismissing the case is any greater than the injustice to Martineau by continuing the case?

It is highly offensive that Judge Rokich would file an affidavit after the district court had granted its initial ruling dismissing the action on August 14, 1995. Strands objected to the Findings of Facts and Conclusions of Law and filed a Motion and Amended Motion to Set Aside the Dismissal supported by Judge Rokich's affidavit of August 28, 1995. The court granted oral arguments again on the entire matter a second time on October 23, 1995. R316. How can Strands claim this is unjust when they had two separate hearings to argue against dismissal and lost at both hearings before the district court?

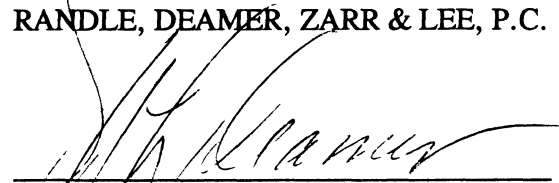
The record clearly indicates there is no basis for "excusable neglect" for Strands' failure to pursue its action. The record also clearly reflects that reasonable minds would agree that this case should be dismissed. The court's dismissal was not an abuse of discretion or violation of any legally protected or preserved rights of Strands.

CONCLUSION

The decision of the district court should be affirmed in all respects upholding the dismissal with prejudice and on the merits.

RESPECTFULLY SUBMITTED this 30 day of May, 1996.

RANDLE, DEAMER, ZARR & LEE, P.C.



Michael L. Deamer
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CERTIFICATE OF MAILING

I hereby certify that I mailed two (2) true and correct copies of the foregoing BRIEF
OF THE APPELLEE, this 31 day of May, 1996, postage prepaid, to the following:

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