

2008

Lonnie Paulos; Advanced Orthopedics and Sports Medicine, L.L.C. v. All My Sons : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

LONNIE PAULOS; ADVANCED
ORTHOPEDICS & SPORTS MEDICINE
L.L.C.,

Plaintiffs/Appellants,

v.

ALL MY SONS MOVING AND STORAGE;
S&B STORAGE; JOHN SIDDOWAY;
JOHN DOES 1-10,

Defendants/Appellees.

Case No. 20080196-CA

Dist. Ct. Case No. 060903698

BRIEF OF APPELLEES

APPEAL FROM ORDER OF DISMISSAL AND ORDER
AWARDING ATTORNEY FEES, A DENIAL OF A MOTION
TO SET ASIDE, AND A DENIAL OF A MOTION FOR A
NEW TRIAL OR TO ALTER OR AMEND THE JUDGMENT
IN THE THIRD JUDICIAL DISTRICT COURT IN AND
FOR SALT LAKE COUNTY, THE HONORABLE STEPHEN
L.HENRIOD, PRESIDING

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APPELLATE COURTS

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TABLE OF CONTENTS

Table of Authorities	iv
Jurisdictional Statement	1
Issues and Standard of Review	1
Constitutional or Statutory Provisions	2
Statement of the Case	2
Summary of Argument	9
Argument	10
I. <u>THIS COURT LACKS JURISDICTION TO HEAR THE APPEALS OF THE LOWER COURT'S ORDER DISMISSING THE ACTION, THE DENIAL OF PLAINTIFFS' MOTION FOR A NEW TRIAL AND THE AWARD OF ATTORNEY FEES; THE COURT SHOULD DISMISS THE APPEAL OF THESE ISSUES</u>	10
II. <u>THIS COURT SHOULD AFFIRM THE LOWER COURT'S ORDER DISMISSING THE ACTION, THE DENIAL OF PLAINTIFFS' MOTION TO SET ASIDE, THE DENIAL OF PLAINTIFFS' MOTION FOR A NEW TRIAL, AND THE AWARD OF ATTORNEY FEES BECAUSE PLAINTIFFS HAVE FAILED TO MARSHAL THE EVIDENCE IN SUPPORT OF THE TRIAL COURT'S RULING</u>	18
III. <u>THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DISMISSING THE ACTION, DENYING PLAINTIFFS' MOTION TO SET ASIDE, DENYING PLAINTIFFS' MOTION FOR A NEW TRIAL, OR IN AWARDING ATTORNEY FEES</u>	19
A. <i>The trial court's dismissal of the action and its denial of the motion for a new trial were within its discretion</i>	20
B. <i>The trial court's denial of the motion to set aside was within its discretion</i>	29
C. <i>The award for attorney fees was within the trial court's discretion</i>	32
Conclusion	35

Proof of Service	37
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Addendum

Order from Trial	A-1
Judgment (John Siddoway)	A-4
Judgment (All My Sons)	A-7
Order on Plaintiffs' Motion to Set Aside	A-10
Ruling	A-13

TABLE OF AUTHORITIES

CASES

<u>Airkem Intermountain, Inc. v. Parker</u> , 513 P.2d 429 (1973)	30
<u>Amica Mut. Ins. Co. v. Schettler</u> , 768 P.2d 950 (Utah App. 1989)	12, 14, 16, 17
<u>Bank Trust Co. v. Griffin</u> , 963 So. 2d 106 (Ala. 2007)	12
<u>Barnard v. Wassermann</u> , 855 P.2d 243 (Utah 1993)	32, 33-34
<u>Boyce v. Boyce</u> , 609 P.2d 928 (Utah 1980)	31
<u>Chen v. Stewart</u> , 2004 UT 82, 100 P.3d 1177	18
<u>Child v. Gonda</u> , 972 P.2d 425, (Utah 1999)	20
<u>Code v. Utah Dept. of Health</u> , 2006 UT App. 113, 133 P.3d 438 ..	14
<u>Deschamps v. Pulley</u> , 784 P.2d 471 (Utah App. 1989)	25
<u>Elam v. South Carolina Dept. of Transp.</u> , 602 S.E.2d 772 (S.C. 2004)	13
<u>Fackrell v. Fackrell</u> , 740 P.2d 1318 (Utah 1987)	12
<u>Fisher v. Bybee</u> , 2004 UT 92, 104 P.3d 1198	30
<u>Franklin Covey Client Sales v. Melvin</u> , 2000 UT App. 110, 2 P.3d 451	11
<u>Gardiner & Gardiner Builders v. Swapp</u> , 656 P.2d 429 (Utah 1982)	25
<u>Gassaway v. Patty</u> , 604 S.W.2d 60 (Tenn. App. Ct. 1980)	13
<u>Griffith v. Griffith</u> , 1999 UT 78, 985 P.2d 255	32, 34
<u>Harris v. IES Assocs.</u> , 2003 UT App. 112, 69 P.3d 297	14
<u>Horton v. Gem State Mut. of Utah</u> , 794 P.2d 847 (Utah App. 1990)	19
<u>Katz v. Pierce</u> , 732 P. 2d 92 (Utah 1986)	30-31

<u>Kaufman v. Oregonian Pub. Co.</u> , 245 P.2d 237 (Or. 1952)	12-13
<u>Maverik Country Stores v. Industrial Commission</u> , 860 P.2d 944 (Utah App. 1993)	14
<u>Maxfield v. Rushton</u> , 779 P.2d 237 (Utah App. 1989)	24, 34
<u>Menzies v. Galetka</u> , 2006 UT 81, 150 P.3d 480	1, 30
<u>Mollett v. Trustmark Ins. Co.</u> , 134 S.W.3d 621 (Ky. Ct. App. 2003)	12
<u>Pratt v. Nelson</u> , 2007 UT 41, 164 P.3d 366	26
<u>Promax Development Corp. v. Raile</u> , 2000 UT 4, 988 P.2d 254	11, 15
<u>Richardson v. Grand Central Corp.</u> , 572 P.2d 395 (Utah 1977) ...	16
<u>Ring v. Industrial Commission</u> , 744 P.2d 602 (Utah App. 1987) ..	16
<u>Rohan v. Boseman</u> , 2002 UT App. 109, 46 P.3d 753 ..	1, 2, 20-21, 24
<u>Russell v. Martell</u> , 681 P. 2d 1193 (Utah 1984)	25, 31
<u>Sears v. Sears</u> , 422 N.E.2d 610 (Ill. App. 1981)	12
<u>Serrato v. Utah Transit Auth.</u> , 2000 UT App. 299, 13 P.3d 616 ..	11
<u>Smith v. Fairfax Realty</u> , 2003 UT 41, 82 P.3d 1064	1
<u>State v. Sloan</u> , 2003 UT App. 170, 72 P.3d 138	19
<u>State v. Wulffenstein</u> , 560 P.2d 331 (Utah 1977)	30
<u>State ex rel. Douglas v. Bible Baptist Church of Lincoln</u> , 353 N.W.2d 20 (Neb. 1984)	12
<u>United Park v. Stichting Mayflower</u> , 2006 UT 35, 140 P.3d 1200	18, 19
<u>Venable v. Haislip</u> , 721 F.2d 297 (10th Cir. 1983)	12
<u>Von Hake v. Thomas</u> , 858 P.2d 193 (Utah App. 1993)	25
<u>Walker v. Carlson</u> , 740 P.2d 1372, 1375 (Utah App. 1987)	25

<u>Warren v. Dixon Ranch Co.</u> , 260 P.2d 741 (Utah 1953)	31
<u>Watkiss & Campbell v. FOA & Sons</u> , 808 P.2d 1061 (Utah 1991)	13-14
<u>Wenzoski v. Central Banking System, Inc.</u> , 736 P.2d 753 (Cal. 1987)	12
<u>Westinghouse Electric Supply Co. v. Paul W. Larsen Contractor, Inc.</u> , 544 P.2d 876, (Utah 1975)	20

STATUTES AND RULES

Utah Code Ann. §78A-4-103	1
Utah Code Ann. §78A-2-201	32
Utah Code Ann. §78A-2-218	32
Utah R. App. P. 3	11
Utah R. App. P. 4	11, 12
Utah R. App. P. 10	11
Utah R. App. P. 11	4, 19
Utah R. App. P. 24	18, 19
Utah R. Civ. P. 54	14
Utah R. Civ. P. 58A	14
Utah R. Civ. P. 59	12, 13, 15, 17
Utah R. Civ. P. 60	13, 14, 15, 17, 30
Utah Code Jud. Admin. 14-301	28-29

OTHER SOURCES

<u>Black's Law Dictionary</u> (Abr. 6th ed. 1991)	15
West's Legal Thesaurus & Dictionary (1985)	21

JURISDICTIONAL STATEMENT

Jurisdiction is proper in the Utah Court of Appeals pursuant to Utah Code Ann. §78A-4-103.

ISSUES AND STANDARD OF REVIEW

Appellants have raised four issues on appeal:

I. Whether the district court's dismissal of Plaintiffs' action is within its discretion when Plaintiffs moved for and received a continuance over the objections of Defendants, had notice of the dates of trial, and failed to appear at the trial.

A trial court's dismissal of an action with prejudice for failure to prosecute is reviewed for abuse of discretion. Rohan v. Boseman, 2002 UT App. 109, ¶ 15, 46 P.3d 753.

II. Whether the district court's denial of a motion to set aside under Rule 60(b) of the Utah Rules of Civil Procedure was within its discretion.

A trial court's denial of a motion to set aside is reviewed for abuse of discretion. Menzies v. Galetka, 2006 UT 81, ¶ 54, 150 P.3d 480.

III. Whether the district court's denial of Plaintiffs' motion for a new trial under Rule 59 of the Utah Rules of Civil Procedure was within its discretion.

A trial court's denial of a motion for a new trial is reviewed for abuse of discretion. Smith v. Fairfax Realty, 2003 UT 41, ¶ 25, 82 P.3d 1064.

IV. Whether the district court's award of attorney fees based on its inherent powers was within its discretion.

A trial court's award of attorney fees is reviewed for abuse of discretion. See Rohan, 2002 UT 109, at ¶ 34-35.

CONSTITUTIONAL OR STATUTORY PROVISIONS

There are no constitutional provisions, statutes, ordinances, rules, or regulations whose interpretation is determinative of or of central importance to this appeal.

STATEMENT OF THE CASE

This appeal stems from an action filed by Plaintiffs claiming damages against Defendants for negligence and conversion of Plaintiffs' property (R. at 1-13). The complaint was filed on March 3, 2006. The parties completed their initial pleadings and a Rule 26 scheduling order was entered by the district court on May 31, 2006 (R. at 49-50). The order set a fact discovery deadline of November 6, 2006 (R. at 50). This date was later extended to February 28, 2007 (R. at 217, 223-25).

As part of their discovery, Defendant John Siddoway's counsel, Randy Ludlow sought to depose Plaintiff Lonnie Paulos and his assistant and agent, Rhonda Jones (R. at 226-27, 228-29). Plaintiffs moved for a protective order against these depositions, claiming that Plaintiffs' counsel, Richard Nemelka, had a conflict and that the deposition should be conducted

telephonically because both witnesses relocated to Houston, Texas during the pendency of the action (R. at 230-34). Mr. Ludlow responded that the original dates had been set up with Mr. Nemelka previous to the notices of deposition being filed and that Mr. Nemelka was already informed that a telephonic deposition would be unacceptable (R. at 235-37). Plaintiffs' motion was set for hearing on March 19, 2007 (R.249-51). Plaintiffs sought to continue the hearing (R. at 252-53), but the district court held the hearing as scheduled. Mr. Nemelka failed to appear at that hearing or to send anyone in his place (R. at 274). Plaintiffs' motion was denied and Lonnie Paulos was ordered to appear in Salt Lake City for a deposition and to produce Rhonda Jones as well (R. at 274, 283-85). Plaintiffs moved to set the order aside (R. at 279-80) but their motion was denied (R. at 281-82).

Meanwhile, Defendant All My Sons moved for summary judgment on January 10, 2007 (R. at 173-75). Plaintiffs, over a month after their response was due, filed for an extension of time to file their memorandum in opposition, citing the fact that the depositions of Lonnie Paulos and Rhonda Jones, which they sought to get a protective order against, had not yet been conducted (R. at 254-55). Plaintiffs finally filed their memorandum in opposition on May 15, 2007 (R. at 290-313).

The matter came before the district court for a scheduling conference, and there the court determined based on the representation of the parties that the trial would take three days. (R. at †).¹ The number of witnesses and amount of evidence that the parties proposed to offer also supported the conclusion that a three-day trial was required (R. at †, 336-37). Therefore, the court set the trial for October 15, 16, and 17, 2008 (R. at †, 336-37). On June 27, Plaintiffs moved to continue the trial dates, as Mr. Nemelka was scheduled to play golf at the Utah Senior Games in St. George during the time of trial (R. at 345-46). Defendant All My Sons submitted a written opposition to this motion, arguing that postponing the date of trial would prejudice them in a separate case pending between All My Sons

1. Plaintiffs have failed to obtain the transcript of the scheduling conference of June 18, 2007 and the hearing of August 20, 2007. Because of this failure, and because Rule 11(e)(2) of the Utah Rules of Appellate Procedure do not obligate Defendants to correct this failure, Defendants are forced to rely on their own recollections of what occurred at the hearing. References to occurrences taking place at that hearing will be marked with the dagger symbol (†). Secondary references to the hearing contained in other portions of the record will also be referred to when available.

and its former shareholders that was contingent on the outcome of the present action (R. at 362-65, 541-50).

Plaintiffs' motion to continue was heard by the district court on August 20, 2008. The court confirmed that three days would be needed for trial (R. at †). Mr. Ludlow opposed Plaintiffs' motion at that time, as the next available date for trial was during a conference in Chicago involving Mr. Ludlow's wife that Mr. Ludlow planned to attend, and that the next date that the court had available for trial would be in 2008. (R. at †, 643-44). Mr. Ludlow informed the Court that continuing the trial into 2008 was not acceptable under numerous issues, and he dropped his objection and agreed to forego the conference when Mr. Nemelka indicated that Plaintiffs would not oppose continuing the trial until 2008 (R. at †, 477, 644). The district court granted Plaintiffs' motion and continued the trial to November 5, 6, and 7, 2007 (R. at 375). All counsel were at the hearing, and the dates were agreed to by all parties in open court (R. at †, 375). Defendant All My Sons' counsel, Stephen Spencer, made a statement on the record after the court's decision that it was important to Defendant that no further continuances should be granted, as putting on Defendant's evidence at the trial would require the service of several subpoenas to persons who had no incentive to be there

and would not be easily persuaded to accommodate their schedules more than once (R. at †, 552).

Both parties prepared for trial. Mr. Nemelka sent a trial subpoena to Jerry Erkelens (R. at 422), and successfully moved for the admission of Rhonda Jones' deposition into evidence in lieu of her testimony (R. at 483-84). Mr. Ludlow sent a trial subpoena to Judy Hicks (R. at 419). Mr. Spencer sent trial subpoenas to Officers Aaron Jones and Mike Obrey (R. at 379, 381, 385), Rob Herrera (R. at 389), Marko Muñoz (R. at 394), Alfredo Villegas Muñoz (R. at 402), and Hector Pineda (R. at 407).

Apparently, Mr. Nemelka misremembered the date of trial. Mr. Nemelka calendared the dates of trial as November 6, 7, and 8, 2007 (R. at 478), rather than the actual dates of November 5, 6, and 7, 2007. He also told his client that the trial was on the incorrect dates (R. at 480, 492, 522). Mr. Nemelka further filed a proposed order admitting a deposition in lieu of witness testimony that contained the incorrect dates and was later signed by the district court (R. at 483-84). Plaintiffs' trial subpoena also indicated that the witness should appear on November 6, 2008 (R. at 422).

Defendants also submitted several documents that indicated the dates of trial. Defendant John Siddoway's subpoena indicated that the witness should appear November 5, 6, and 7, 2007 (R. at

419). Defendant All My Sons subpoenas indicated that the witnesses would be required on November 6 and 7, 2007, as they were not needed during the presentation of Plaintiffs' case-in-chief (R. at 379, 381, 385, 389, 394, 402, 407). On November 2, Mr. Spencer hand-delivered a copy of Defendant's Trial Brief to Mr. Nemelka, which listed the dates of trial as November 5, 6, and 7 (R. at 430, 537).

Mr. Spencer and Mr. Nemelka also had a conversation regarding the dates of trial. On October 31, 2007, Mr. Spencer called Mr. Nemelka to inquire as to jury instructions (R. at 479, 537). During that conversation, Mr. Spencer indicated that the trial began Monday the 5th, and Mr. Nemelka responded that trial began Tuesday the 6th (R. at 479, 537). Mr. Spencer confirmed the date on XChange and telephoned Mr. Nemelka's office to tell him that he was mistaken as to the dates, and left a message with Mr. Nemelka's receptionist to that effect (R. at 537). Meanwhile, Mr. Nemelka contacted the district court to inquire as to whether the trial was set for a jury, but did not inquire as to the date of trial (R. at 479-80). Mr. Spencer, when he hand-delivered his trial brief to Mr. Nemelka on November 2, 2007, told Mr. Nemelka that the trial was to commence on November 5, 2007 and that he should check the trial date (R. at 537).

On the morning of November 5, 2007, Mr. Ludlow, Mr. Siddoway, and Mr. Spencer were at the court (R. at 673). Neither Mr. Nemelka nor Plaintiffs were in attendance (R. at 673). The district court attempted to locate Mr. Nemelka and discovered that Mr. Nemelka was trying a case in Bountiful (R. at 673). Mr. Ludlow and Mr. Spencer noted that they had both spent considerable time and money preparing for trial (R. at 673), and they moved that the court dismiss the action and award attorney fees, which the court granted (R. at 446, 469-71, 673). The written order dismissing the action and awarding attorney fees upon affidavit was entered as per Rule 58A on November 7, 2007 (R. at 469-71). Defendants filed an affidavit of costs and attorney fees (R. at 454-68, 499-511), and judgment was entered against Plaintiffs on January 9, 2008 (R. at 584-86, 597-89).

Plaintiffs filed a Rule 60(b) motion to set aside the order of dismissal and the award for attorney fees on November 8, 2007 (R. at 474-75). The court entered a minute entry denying this motion on January 7, 2008 (R. at 582-83) and entered an order as per Rule 58A on January 30, 2008, which found that (1) Plaintiffs failed to show that they exercised reasonable care in ascertaining the trial date, (2) the award of attorney fees was justified under the authority of the court to control proceedings in front of it, and (3) that the attorney fees were reasonable charges for necessary work (R. at 637-39).

Plaintiffs filed another post-trial motion, this time a motion for new trial under Rule 59, on January 11, 2008 (R. at 594-95). The pleading contained virtually identical arguments to Plaintiffs' previous motion to set aside (Compare R. at 514-20 with R. at 596-615). Plaintiffs also moved to stay enforcement of the judgment (R. at 590-91). The court again denied Plaintiffs' motion, entering a ruling as per Rule 58A on February 26, 2008 (R.642-47). In that ruling, the court explained that because Mr. Nemelka was at the hearing where the date of trial was set, other parties had made significant sacrifices to accommodate Mr. Nemelka's schedule, Mr. Spencer had informed him personally of the date of trial, and that the trial could not have been reasonably rescheduled, there was no irregularity of proceedings or abuse of discretion that would satisfy the requirements of Rule 59 (R. at 642-47). Plaintiffs filed a notice of appeal on February 29, 2008 (R. at 659-60).

SUMMARY OF ARGUMENT

Plaintiffs' appeal fails for three reasons: this court lacks jurisdiction, Plaintiffs have failed to marshal the evidence, and the trial court was within its discretion. Three of Plaintiffs' four issues on appeal are not properly before the Court because Plaintiffs' motion for a new trial was a successive post-judgment motion that did not toll the time to appeal under the Utah Rules of Appellate Procedure. Also,

Plaintiffs have failed to marshal the evidence supporting the trial court's orders. The failure of the appealing party to marshal the evidence means that a trial court must conclude that the trial court's orders are supported by substantial evidence and not an abuse of discretion. Finally, the trial court acted within its discretion in all of its orders. Plaintiffs' conduct in pursuing the litigation manifested delay and reckless scheduling practices, as well as a lack of reasonable care in ascertaining the correct date for trial. Balanced against prejudice to Defendants, it is clear that the trial court was within its discretion in dismissing the action, denying Plaintiffs' motions, and awarding attorney fees.

ARGUMENT

- I. THIS COURT LACKS JURISDICTION TO HEAR THE APPEALS OF THE LOWER COURT'S ORDER DISMISSING THE ACTION, THE DENIAL OF PLAINTIFFS' MOTION FOR A NEW TRIAL AND THE AWARD OF ATTORNEY FEES; THE COURT SHOULD DISMISS THE APPEAL OF THESE ISSUES.

Defendants ask the Court to dismiss issues I, III, and IV for lack of jurisdiction.² Under the Utah Rules of Appellate

2. Defendants note that they filed a motion for summary disposition with substantially similar arguments on April 1, 2008. While the Court denied Defendant's motion in an order dated April 15, 2008, the order provided no analysis for why the motion was denied. Defendants submit that the most likely reason

Procedure, an order may only be appealed if it is a final order, Utah R. App. P. 3, and if a notice of appeal is filed within thirty days of the date of the order. Utah R. App. P. 4. The appellate court has no jurisdiction to review an order that has not been timely appealed. Serrato v. Utah Transit Auth., 2000 UT App. 299, ¶ 7, 13 P.3d 616. A subsequent appealable order is separate and does not give the court jurisdiction to decide the merits of previous final orders. See Franklin Covey Client Sales v. Melvin, 2000 UT App. 110, ¶19, 2 P.3d 451 (holding that an appeal on a denial of a motion to set aside under 60(b) of the Utah Rules of Civil Procedure does not give the court jurisdiction to reach the merits of the underlying judgment).

The time for a judgment that includes attorney fees and costs runs from the day a judgment for a sum certain has been entered. Promax Development Corp. v. Raile, 2000 UT 4, ¶15, 998 P.2d 254. Therefore, an appeal from the order of dismissal and

for the denial was that the motion purported to dispose of less than all the issues appealed by Plaintiff, and so would be formally insufficient under Rule 10 of the Utah Rules of Appellate Procedure. At any rate, the denial does not appear to analyze the merits of Defendants' motion, and so the jurisdiction of issues I, III, and IV should be reviewed by this Court.

the judgments for attorney fees and costs must have been filed by February 8, 2008, unless the time was tolled by the appropriate filing of one of five post-judgment motions: a Rule 24 or 59 motion for a new trial, a 50(b) motion for judgment, a rule 59 motion to amend the judgment, or a Rule 52 motion to amend or make additional findings of fact. Utah R. App. P. 4(b). If this motion is improperly brought, it does not toll the time for appeal. Fackrell v. Fackrell, 740 P.2d 1318, 1319 (Utah 1987).

Plaintiffs' Rule 59 motion was an improper second post-judgment motion and so does not toll the time for filing an appeal under Rule 4 of the Utah Rules of Appellate Procedure. Once a post-judgment motion has been filed and decided by the trial court, a second post-judgment motion for relief is improper and so does not toll the time for appeal. Amica Mut. Ins. Co. v. Schettler, 768 P.2d 950, 969 (Utah App. 1989). This is a well-settled rule, recognized by federal and state courts. See, e.g., Venable v. Haislip, 721 F.2d 297, 299 (10th Cir. 1983); Bank Trust Co. v. Griffin, 963 So. 2d 106, 109 (Ala. 2007); Wenzoski v. Central Banking System, Inc., 736 P.2d 753 (Cal. 1987); Sears v. Sears, 422 N.E.2d 610, 612 (Ill. App. 1981); Mollett v. Trustmark Ins. Co., 134 S.W.3d 621, 623 (Ky. Ct. App. 2003); State ex rel. Douglas v. Bible Baptist Church of Lincoln, 353 N.W.2d 20 (Neb. 1984); Kaufman v. Oregonian Pub.

Co., 245 P.2d 237 (Or. 1952); Elam v. South Carolina Dept. of Transp., 602 S.E.2d 772 (S.C. 2004); Gassaway v. Patty, 604 S.W.2d 60 (Tenn. App. Ct. 1980).

In this case, Plaintiffs filed a 60(b) motion to set aside the judgment on November 8, 2007. The filing and denial of this motion prevented any successive post-judgment motions from tolling the time for appeal. Thus, the Rule 59 motion for a new trial or to amend the judgment did not toll the time for appeal; the deadline for filing a notice of appeal challenging the order of November 7, 2007 and the judgment for attorney fees and costs that was entered by the Court clerk on January 9, 2008 was February 8, 2008.³

Plaintiffs have argued previously that the rule against successive post-judgment motions does not apply to this case because Plaintiffs' 60(b) motion was filed before the judgment date of January 8, 2008. This argument misses the point of the rule. The purpose of the rule against successive post-judgment motions is to promote the finality of judgments and to force a litigant to present all of its arguments at once. Watkiss &

³ A motion to set aside the order under Rule 60(b) does not toll the time for filing an appeal. Utah R. App. P. 4(b); Watkiss & Campbell v. FOA & SON, 808 P.2d 1061, 1068 (Utah 1991) (Stewart, J., Dissenting).

Campbell v. FOA & Sons, 808 P.2d 1061, 1064 (Utah 1991); Maverik Country Stores v. Industrial Commission, 860 P.2d 944, 951 nn.

9-10 (Utah App. 1993); Amica, 768 P.2d at 969. There is no basis for allowing a litigant to engage in tactics after the decision but before the entry of judgment when those same tactics are prohibited after the entry of judgment. There is nothing about a written entry under Rule 58A that would change the policy basis behind the rule. Under Plaintiffs' interpretation, any litigant could make two motions for relief from the judgment so long as they file one of them before the written entry of judgment.

Allowing for jurisdiction in this case would open a gaping loophole in the policy against successive post-judgment motions.

Also, Plaintiffs' argument is incorrect on its facts; Plaintiffs' Rule 60(b) motion was filed subsequent to judgment in this case. Plaintiffs' 60(b) motion was filed after the order of November 7, 2007, which was a judgment for purposes of Rule 54. An order is final and appealable if the order determines the substantive rights of the parties and terminates the litigation.

Code v. Utah Dept. of Health, 2006 UT App. 113, ¶3, 133 P.3d 438; Harris v. IES Assocs., 2003 UT App. 112, ¶56, 69 P.3d 297.

The order of November 7 struck the pleadings of the Plaintiffs, dismissed the action with prejudice, and ordered Plaintiffs to pay Defendants' attorney's fees. The order was therefore a final determination of the substantive rights of the parties and a

declaration of the endpoint of the litigation. While the effective date of the judgment is January 9 for reasons of judicial economy, see Promax, 2000 UT 4, at ¶15, it is obvious that Plaintiffs could have appealed from the order of November 7. Hence, the 60(b) motion filed November 8 is a post-judgment motion.

Third, whether a motion is a post-judgment motion is determined by the relief requested, not by the time at which the motion was filed. A post-judgment motion, of which Rule 59 and 60(b) are two classic examples, seeks relief from a final judgment or order of the court. Black's Law Dictionary does not define a post-judgment motion, but defines its synonym, post-trial motion, as a "[g]eneric term to describe those motions which are permitted after trial such as motion for new trial and motion for relief from judgment." Black's Law Dictionary 809 (Abr. 6th ed. 1991). Thus, even if Rule 60(b) were read to allow motions to set aside an interlocutory order (as Plaintiffs have suggested in the past), Plaintiffs' 60(b) motion does not ask for that type of relief. Plaintiffs sought relief not from an interlocutory order, but from an order disposing of the litigation. Whether that order was filed before or after the judgment for attorney fees was entered, the motion is a post-judgment motion in nature.

Fourth, attempting to distinguish this case from Amica by saying the motions were made under different rules of civil procedure also fails to apprehend the policy behind the rule prohibiting successive post-judgment motions. A party must bring forward all of its claims for relief at once. As this Court has noted in a different context, a party is "entitled to 'one bite of the apple' That opportunity cannot be expanded into a multi-course buffet by such devices as reconsiderations or supplemental filings after a motion for review has been denied" Ring v. Industrial Commission, 744 P.2d 602, 604 (Utah App. 1987).

Finally, the law-of-the-case doctrine would independently defeat jurisdiction in this case. The law-of-the-case doctrine dictates that the parties should avoid relitigating the same proposition in the same case. Richardson v. Grand Central Corp., 572 P.2d 395, 397 (Utah 1977). A motion that seeks to relitigate a proposition already ruled upon by the same court is improper. Amica, 768 P.2d at 969. In the present case, Plaintiffs' motion for a new trial is nearly identical in substance to its motion to set aside the judgment. Both motions rest mainly on one argument: that the acts of Plaintiffs' Attorney were reasonable and an "honest mistake" (compare Plaintiffs' Memorandum in Support of its Motion for New Trial ¶¶3-8 (R.597-602), with

Plaintiffs' Memorandum in Support of its Motion to Set Aside
¶¶6-8 (R.516-17).⁴

Plaintiffs clearly had an opportunity to make any and all arguments attacking the judgment. That they failed to do so is not grounds for making these arguments later. This is clearly a case where Plaintiffs' successive post-judgment motions have "unjustifiably prolong[ed] the life of a lawsuit." Amica, 768 P.2d at 969. Plaintiffs' Rule 59 motion is therefore improper, meaning it did not toll the time for appeal, and the ruling denying it should not be reviewable. This Court should dismiss the Plaintiffs' appeals of the order to dismiss, the denial of

4. To the extent there are other arguments in the Rule 59 motion that are not in the Rule 60(b) motion, it is further proof that Plaintiffs should have brought a motion for a new trial in the first instance. The grounds for relief are much broader in a Rule 59 motion than in a Rule 60(b), likely broad enough to encompass any basis for relief under Rule 60(b). Hence, the two rules work in tandem: a motion for new trial can offer relief for a broad range of reasons; however, it is only available for ten days after the entry of the judgment. Rule 60(b) allows relief for fewer reasons, but it is available for three months after the judgment or even longer, depending on the grounds for setting aside the judgment.

the motion for a new trial, and the award of attorney fees for lack of jurisdiction.

II. THIS COURT SHOULD AFFIRM THE LOWER COURT'S ORDER DISMISSING THE ACTION, THE DENIAL OF PLAINTIFFS' MOTION TO SET ASIDE, THE DENIAL OF PLAINTIFFS' MOTION FOR A NEW TRIAL, AND THE AWARD OF ATTORNEY FEES BECAUSE PLAINTIFFS HAVE FAILED TO MARSHAL THE EVIDENCE IN SUPPORT OF THE TRIAL COURT'S RULING.

Plaintiffs have failed to marshal the evidence supporting the trial court's ruling as required by Rule 24(a)(9) of the Utah Rules of Appellate Procedure. Rule 24(a)(9) requires that "a party challenging a fact finding must first marshal all record evidence that supports the challenged finding." This standard applies not only to an explicit finding of fact, but also to the review of a fact-sensitive determination of a lower court that is reviewed for abuse of discretion. United Park v. Stichting Mayflower, 2006 UT 35, ¶ 25, 140 P.3d 1200; Chen v. Stewart, 2004 UT 82, ¶ 20, 100 P.3d 1177. To properly marshal the evidence, a party is required to

"temporarily remove its own prejudices and fully embrace the adversary's position"; he or she must play the "devil's advocate." In so doing, appellants must present the evidence in a light most favorable to the trial court and not attempt to construe the evidence in a light favorable to their case.

Chen, 2004 UT 82, at ¶ 78. If a party fails to marshal the evidence, the appellate court assumes that the evidence supports the trial court's findings and has grounds to affirm the trial court's findings on that basis. Id. at ¶ 80.

Plaintiffs' brief does not meet this requirement with respect to any of the issues it appeals. Plaintiffs' brief does not attempt to list the facts underlying the lower court's orders. Plaintiffs' brief does not even include the orders it appeals from, as required by Rule 24(a)(11)(C).

Plaintiffs have also failed to request the transcript for the hearing of August 20, 2007, in spite of referring to this hearing several times in its brief. An appellant is responsible to obtain all transcripts that are relevant to a fact-intensive determination by a lower court. Utah R. App. P. 11(e)(2). The failure of an appellant to request these transcripts leaves the Court with no choice but to conclude that the record supports the lower court's determination. See Horton v. Gem State Mut. of Utah, 794 P.2d 847, 849 (Utah App. 1990).

These omissions leave Defendants and the Court "to bear the expense and time of performing the critical task of marshaling the evidence. This is unfair, inefficient, and unacceptable." United Park, 2006 UT 35, at 26. This Court should therefore rely on Plaintiffs' failure to marshal to affirm the lower court's rulings. Because of this unfairness, the Court should also award Defendants' reasonable attorney fees for failure to adequately brief as per State v. Sloan, 2003 UT App. 170, 72 P.3d 138.

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DISMISSING THE ACTION, DENYING PLAINTIFFS' MOTION TO SET ASIDE,

DENYING PLAINTIFFS' MOTION FOR A NEW TRIAL, OR IN AWARDING ATTORNEY FEES.

A. *The trial court's dismissal of the action and its denial of the motion for a new trial was within its discretion.*

The trial court's dismissal for failure to prosecute is reviewed for abuse of discretion. Rohan, 2002 UT 109 at ¶ 28. In addition, the question of whether the denial of Plaintiffs' motion for a new trial constituted abuse of discretion is reviewed by looking at whether the order that the Plaintiffs sought to retry under rule 59 constituted an abuse of discretion itself. See Child v. Gonda, 972 P.2d 425, 429-30 (Utah 1999) Defendants will therefore examine these issues in tandem.

A court has wide discretion to dismiss an action for failure to prosecute "if a party fails to move forward according to the rules and the directions of the court, without justifiable excuse." Westinghouse Electric Supply Co. v. Paul W. Larsen Contractor, Inc., 544 P.2d 876, 878-79 (Utah 1975). "The party challenging the dismissal bears the burden of offering a reasonable excuse for his or her lack of diligence." Rohan, 2002 UT 109 at ¶28. In reviewing whether the trial court has abused its discretion in dismissing an action for failure to prosecute, the appellate court should consider the following factors: (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.

Under these factors, the trial court was well within its discretion to order an involuntary dismissal for failure to prosecute. In looking at factors 1 through 3, the court could reasonably conclude that the Plaintiffs' conduct to this point justified the dismissal. Plaintiffs' failure to appear at trial the morning of November 5 was due to a lack of diligence on their part and not reasonable under the circumstances. "Due Diligence" has been described as "the prudence and effort that is ordinarily used by a reasonable person under the circumstances." West's Legal Thesaurus & Dictionary 261 (1985). Plaintiffs' conduct does not meet that standard. Mr. Nemelka was at the proceedings the day the trial date was set. He had access to the docket and court calendar via the internet. Mr. Nemelka was **actually told** by Mr. Spencer that trial started on the 5th. Mr. Nemelka received Mr. Spencer's Trial Brief on November 2, 2007. Mr. Nemelka admits that he was told by Stephen Spencer that the trial was scheduled November 5-7. Upon being put on notice that he is mistaken about the date of a trial, a reasonable attorney would double-check the calendar. Additionally, Mr. Spencer called Mr. Nemelka's office to confirm that the trial began on November 5, and confirmed it in writing

through his trial brief, handed to Mr. Nemelka on November 2. Under the circumstances, the reasonable person or attorney would conclude that he should question and then verify his recollection. Plaintiffs failed to act with due diligence and therefore they had no justifiable excuse for missing the trial.

When looked at in the context of the entire proceedings, Plaintiffs' failure to appear at the morning of November 5 becomes all the more inexcusable. Plaintiffs' conduct during the course of the pre-trial proceedings could reasonably be interpreted as a pattern of delay, obstruction, and reckless scheduling practices. Mr. Nemelka originally agreed to a date for the depositions of Mr. Paulos and Ms. Jones, then sought to change the date because he had another appointment. Mr. Nemelka scheduled a hearing to stop the depositions from moving forward, then moved to continue that hearing because of a scheduling conflict. When the court failed to grant the continuance, rather than send someone in his place, Mr. Nemelka simply failed to show up. Meanwhile, Plaintiffs delayed their response to Defendants' motion for summary judgment because the depositions of Mr. Paulos and Ms. Jones, which they had sought to quash, had not yet taken place. In the context of Plaintiffs' multiple delays, failures to appear, and multiple double bookings of their schedule, the failure to appear at trial may have been the point at which the trial court concluded that by not dismissing

the case would constitute a failure of the court to manage the proceedings of the court and prejudice to the Defendants.

Moreover, Plaintiffs' failure to appear and previous delays cannot be laid at the feet of Defendants. Defendants attempted to obtain the depositions of Mr. Paulos and Ms. Jones before the discovery cutoff date. While there was confusion due to a change of counsel and two separate attorneys for Defendants each pursuing their own strategies, Defendants sought through dispositive motions and motions for trial dates to move the proceedings along. That is to be expected because Defendants had the most to lose from the delay, as explained below. Mr. Spencer declared on the record during the hearing of August 20 that any further delay would prejudice his client's ability to put on its case. Mr. Ludlow sacrificed his trip to Chicago to avoid further delay. Defendants acted with diligence in putting this case to trial.

As to the fourth factor, it is clear that Defendants would have suffered prejudice if the court had acquiesced in allowing Plaintiffs to set another trial date. Defendants have incurred considerable expense in defending this action. Plaintiffs caused delay in failing to complete discovery prior to the original discovery cut-off; by moving for a continuance of the original trial date in October 2007 over Defendants' opposition; and by failing to appear at the trial as scheduled on November 5, 2007.

Allowing the trial to go forward would have required Defendants to subpoena all trial witnesses again. As was explained by Mr. Spencer in the hearing of August 20, Defendants may not be able to locate all of their witnesses a second time. Another trial scheduling would require more trial preparation to again review the file and numerous deposition transcripts at length and in detail. Finally, and most importantly, there is a suit involving Defendant All My Sons that depends on the outcome in this case. Further delay not only prejudices that Defendant in the present action, but also in the Delaware action.

Finally, the question of whether injustice would result in the dismissal of the action is an equitable determination of whether a party whose case is dismissed "had ample opportunity to litigate his case but abused such opportunity." Rohan, 2002 UT 109 at ¶32; see also Maxfield v. Rushton, 779 P.2d 237, 240 (Utah App. 1989) (concluding that the litigant "had ample opportunity" to litigate his case, but abused the judicial process and so the dismissal was justified). As in the aforementioned cases, Plaintiffs, had they exercised reasonable care in determining the trial dates, would have had their opportunity to litigate their case. The court had accommodated their schedule several times with impunity. But for Plaintiffs' inability to adhere to the schedule of the court, they would have been able to litigate their case. The review of the factors

shows that the trial court was within its discretion in dismissing the action.

Plaintiffs make several arguments in their brief as to why the motion to dismiss was an abuse of discretion. Defendants will discuss each one in the following paragraphs, citing to their location within Plaintiffs' opening brief.

Plaintiffs argue that the clients reasonably relied on the representations of Mr. Nemelka and thus exercised reasonable care in ascertaining the date of trial (Pls. Br. 20-21, 34-35). They further argue that the clients are not responsible for what their counsel did or did not do (Pls. Br. 21-22), and that the trial court's sanctions would punish the clients rather than the attorney (pls. br. 31-32). This argument is without basis in law. An attorney is an agent of the client, and the attorney's lack of diligence is imputed to the client. Walker v. Carlson, 740 P.2d 1372, 1375 (Utah App. 1987); see also Russell v. Martell, 681 P.2d 1193, 1195 (Utah 1984); Gardiner & Gardiner Builders v. Swapp, 656 P.2d 429, 430 (Utah 1982); Von Hake v. Thomas, 858 P.2d 193, 194 n.3 (Utah App. 1993); Deschamps v. Pulley, 784 P.2d 471, 474 n.2 (Utah App. 1989). Whether the clients were diligent is not the determinative issue of this appeal; the issue is whether Mr. Nemelka exercised reasonable care and due diligence in ascertaining the dates of trial such that his mistake was reasonable. Also, clients get punished for

the negligence of their attorneys all the time. There is also a remedy for the clients in this circumstance—a malpractice lawsuit.

Plaintiffs argue that they were justified in relying on an order, drafted by Plaintiffs' counsel and signed by the Court that included the incorrect dates for trial (Pls. Br. 21, 25, 33-34). First, Mr. Nemelka does not claim that he actually relied upon this order. The record evidence seems to indicate that he did not. Second, because the date was not material to the order and thus cannot be construed as a ratification or endorsement of Mr. Nemelka's mistake. As the court said in its ruling (R.644), the order was not a scheduling order and did not actually cause confusion. Finally, the order cannot be construed as an argument for estoppel as Plaintiffs' counsel wrote the order himself. Plaintiffs are trying to claim detrimental reliance on what were essentially his counsel's own words, and take advantage of a mistake that Plaintiffs invited the court to make. To allow Plaintiffs to do this is contrary to the law. Cf. Pratt v. Nelson, 2007 UT 41, ¶¶ 14-24, 164 P.3d 366 (Explaining the invited error doctrine). At most, this is evidence that Plaintiffs and their counsel were honestly mistaken about the date, an argument that Plaintiffs raise in their brief (Pls. Br. 22, 23, 30). However, the relevant question is not whether they

were honestly mistaken, but whether they were reasonably mistaken.

Plaintiffs argue that because the trial subpoenas sent by Defendant were for the dates of November 6 & 7, 2007, it is therefore reasonable for Plaintiffs to conclude that the trial was to begin on November 6 (Pls. Br. 23, 25). Defendant All My Sons subpoenaed witnesses for those dates because it anticipated that Plaintiffs' case-in-chief would fill the first day. If Mr. Nemelka actually relied upon Defendant's Subpoenas in determining the actual dates of the trial, he should have been equally curious as to why the Defendant only listed that the trial lasted two days. The dates on the subpoenas should have raised doubts as to Plaintiffs' recollection rather than placating those doubts. In addition, Mr. Ludlow's subpoenas should have raised further doubts as to whether Mr. Nemelka remembered the trial dates correctly, as he subpoenaed a witness for November 5, 6, and 7.

Plaintiffs argue that their mistake in the calendaring was there for Defendants and the Court to see and that no one explicitly informed them that they were mistaken (Pls. Br. 23-25, 35). This argument implies that the other parties had a duty to discover Plaintiffs' mistake and correct it for them. That conclusion is without foundation and absurd. Plaintiffs never claim that the Court or another party affirmatively

misrepresented the date of the trial. Plaintiffs do not claim that they conducted any research regarding the date or asked a direct question about the date. Plaintiffs do not claim that a method of ascertaining the correct date was unavailable or even inconvenient. Plaintiffs affirm in the record below that Mr. Spencer actually informed Mr. Nemelka that he may have been mistaken about the dates. Additionally, if Plaintiffs are arguing that each document where the incorrect date was used should have brought Plaintiffs' mistaken belief to the notice of the court and other parties, then it is at least equally true that every instance where the correct date was used on the pleadings (such as the subpoenas submitted by Mr. Ludlow and the trial brief submitted by Mr. Spencer) was an instance that Plaintiffs were put on notice that they were mistaken about the correct dates. Since no other party had a duty to discover Plaintiffs' mistaken belief and Plaintiffs had a duty to act with due diligence in discovering the date, this is just further reason why Plaintiffs did not act with due diligence.

Plaintiffs' argument regarding professional courtesy is also unavailing (Pls. Br. 25-27). As explained above, Plaintiffs' failure to appear on November 5 was not a one-time event, but rather a larger pattern of recklessness in scheduling. While an attorney should "cooperate in making any reasonable adjustments" for a party's failure to appear once

because of a scheduling mistake, Utah Code Jud. Admin. 14-301 (15), when it happens again and again, adjustments for that party's schedule are no longer reasonable, and a reasonable court or opposing counsel should no longer tolerate the delay.

Finally, Plaintiffs argue that the appropriate remedy for their failure to appear was to conduct the trial in two days (pls. br. 22, 27-30), and that the introduction of deposition testimony rather than actual testimony would make it possible for a trial to be conducted in two days (pls. br. 28). Plaintiffs do not explain how they come to this conclusion, in light of the fact that there would have been at least 12 witnesses proposed to testify. The introduction of two depositions in lieu of testimony would still not likely allow the trial to be finished in two days. Certainly the lower court did not think so, and there is no evidence offered by Plaintiffs that would contradict the trial court's discretion on this point. It is highly unlikely that the trial would have been able to finish in two days without prejudice to Defendants, and therefore, the trial court acted within its discretion in dismissing the action.

B. *The trial court's denial of the motion to set aside was within its discretion.*

The trial court was also within its discretion in denying Plaintiffs' motion to set aside the order of dismissal under

60(b)(1). The Utah Supreme Court has referred to the provisions of 60(b)(1) as "unintentional conduct," Fisher v. Bybee, 2004 UT 92, ¶ 12, 104 P.3d 1198, and applied to all of them the same standard: "if the attorney exercised 'due diligence' defined as conduct that is consistent with the manner in which a reasonably prudent attorney under similar circumstances would have acted, a judgment may be set aside under 60(b)(1)," Menzies, 2006 UT 81 at ¶ 72; see also Airkem Intermountain, Inc. v. Parker, 513 P.2d 429, 431 (1973) (To demonstrate that the default was due to excusable neglect, "[t]he movant must show that he has used due diligence and that he was prevented from appearing by circumstances over which he had no control."); State v. Wulffenstein, 560 P.2d 331, 335 (Utah 1977) ("For [the Supreme Court of Utah] to deem the refusal of the lower court to vacate a valid judgment an abuse of discretion, public policy demands more than a mere statement that a person did not have his day in court when full opportunity for a fair hearing was afforded to him."). Also, in exercising its discretion to grant or deny a motion to set aside, a district court should "balance the equities on a case-by-case basis, including such considerations as the preference to allow the presentation of all claims and defenses, any delay or unfairness of a party's conduct, the need for finality of judgments, and the respective hardships in denying or granting relief." Katz v. Pierce, 732 P. 2d 92, 93

n.2 (Utah 1986); See Russell v. Martell, 681 P. 2d 1193; Boyce v. Boyce, 609 P. 2d at 931; Warren v. Dixon Ranch Co., 260 P. 2d 741 (Utah 1953).⁵

As was shown previously, Plaintiffs' mistake did not constitute excusable neglect because they did not exercise due diligence. Mr. Nemelka did nothing to confirm the correct dates of trial, even when put on notice by Mr. Spencer. Mr. Nemelka was not presented with any circumstance over which he had no control but rather chose to ignore the fact that he had again over-scheduled himself. Mr. Nemelka then ignored the information furnished to him by Mr. Spencer and failed to make reasonable inquiry about the trial schedule. In addition, Defendants would

5. The rationale for this rule is given in Boyce:

The difficulty facing the trial court upon a motion to vacate the judgment lies in the fact that a compromise between two valid considerations must be selected. A rule which would permit the re-opening of cases previously decided because of error or ignorance during the progress of the trial would in a large measure vitiate the effects of res judicata and create a hardship to the successful litigant in causing him to prosecute his action more than once . . . ; on the other hand, the court is anxious to protect the losing party who has not had the opportunity to present his claim or defense. Discretion must be exercised in furtherance of justice and the court will incline toward granting relief in a doubtful case to the end that the party may have a hearing. However, the movant must show that he has used due diligence and that he was prevented from appearing by circumstances over which he had no control.

Boyce, 609 P.2d at 931.

have suffered prejudice by setting aside the order, as was illustrated above. The trial court was well within its discretion in denying the motion to set aside.

C. *The award for attorney fees was within the trial court's discretion.*

It is well established that district courts have the inherent power to impose sanctions upon a parties or attorneys who "by their conduct thwart the court's scheduling and movement of cases through the court." Barnard v. Wassermann, 855 P.2d 243, 249 (Utah 1993); See Griffith v. Griffith, 1999 UT 78, ¶¶ 12-14, 985 P.2d 255. This power is pursuant to the statutory authority given to courts to control proceedings before them. See Utah Code Ann. §§ 78A-2-201 & -218. A court awarding these sanctions must make findings of fact that the nature of Plaintiffs' conduct warranted the sanction, that the legal services performed by the Defendants were necessary, that the time devoted to the service was reasonable, and that the hourly rate charged was reasonable. Griffith, 1999 UT 78 at ¶ 14.

The conduct exhibited by Plaintiffs' counsel justifies entering a default judgment and awarding attorney's fees to the Defendants. Plaintiffs' conduct shows a clear disregard for the schedule of the court and recklessness in conducting the litigation. As illustrated above, Plaintiffs' lack of due diligence in ascertaining the correct trial date, along with

their delay-causing conduct before trial, including failure to appear at their own hearings, repeated motions for continuance, and obstructionist tactics in discovery, justify the award of attorney fees for the whole of the litigation. While the Court could merely reschedule the trial and award costs and attorney's fees for the Defendants' preparation for trial, it would not fully compensate the Defendants for the prejudice suffered by the multiple delays, nor would it adequately sanction Plaintiffs for the multiple delays and recklessness in conducting the litigation to this point. The court's original award is an adequate measure to make the Defendants whole and is well within the Court's discretion.

Plaintiffs argue that awarding attorney fees for the entirety of the action constituted an error of law (pls. br. 37, 40). However, Plaintiffs cite no case law to support this conclusion. In addition, Plaintiffs admit to the power of the court to award fees under its inherent authority. What Plaintiffs are contesting is not whether the court has the authority to award attorney fees, but whether the court has the authority to award the amount of fees that it did. That is a question of the lower court's discretion, not a question of law. Also, Defendants assert that the trial court's inherent power to award attorney fees is co-extensive with a trial court's motion to dismiss under Rule 41(d). Compare Barnard, 855 P.2d at 249

("[c]ourts of general jurisdiction . . . , possess certain inherent power to impose monetary sanctions on attorneys who by their conduct thwart the court's scheduling and movement of cases through the court"), with Maxfield, 779 P.2d at 239 ([The authority to dismiss an action for want of prosecution] is an "inherent power" governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases."). If the lower court has inherent authority to entirely dismiss an action entirely, then it must have the authority to award attorney fees for the entirety of that action.

Plaintiffs also argue that the attorney fees were not supported by findings (pls. br. 38) and that there was specifically no finding of bad faith. A court awarding attorney fees under its inherent powers must make findings of fact that the nature of Plaintiffs' conduct warranted the sanction, that the legal services performed by the Defendants were necessary, that the time devoted to the service was reasonable, and that the hourly rate charged was reasonable. Griffith, 1999 UT 78 at ¶ 14. This was done in the order denying Plaintiffs' motion to set aside (R. at 637-39). No finding of bad faith is necessary to award attorney fees under the court's inherent power.

Finally, Plaintiffs argue that the amount of the award was excessive (Pls. Br. 38). However, they give no record evidence

that would support that conclusion, nor do they marshal the evidence that would support the conclusion. The court does not have sufficient evidence to review this question. Also, as argued above, Defendants were harmed not only by Plaintiffs' failure to appear, but also by their recklessness throughout the course of the litigation. There is sufficient evidence in the record for the trial court to believe this, and so it is within the discretion of the trial court to award fees for the entirety of the litigation.

CONCLUSION

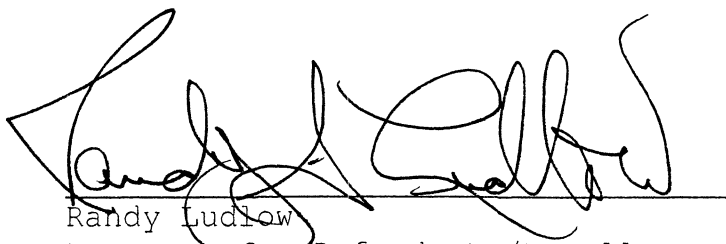
This court has no jurisdiction to hear the appeal of the dismissal of the action, the denial of Plaintiffs' motion for a new trial, or the award of attorney fees. In addition, the Plaintiffs have failed to marshal or to provide an adequate record on appeal, so this Court must accept the conclusions of the trial court as correct. Finally, the record evidence shows that the trial court was within its discretion in dismissing the action, denying Plaintiffs' motions to set aside and for a new trial, and the award of attorney fees. This court should affirm the judgment of the trial court and award Defendants their reasonable attorney fees for Plaintiffs' failure to adequately brief the issues on appeal.

RESPECTFULLY SUBMITTED this 31st day of July, 2008.

/s/

Nathan Whittaker
Attorney for Defendant/Appellee
All My Sons Moving & Storage

RESPECTFULLY SUBMITTED this 31st day of July, 2008.

A handwritten signature in black ink, appearing to read "Randy Ludlow", is written over a horizontal line.

Randy Ludlow
Attorney for Defendants/Appellees
S&B Storage; John Siddoway

CERTIFICATE OF MAILING

I hereby certify that I am an employee or partner of Day
Shell & Liljenquist L.C., and that caused a true and correct
copy of the foregoing **BRIEF OF APPELLEE** to be placed in the
United States Mail, first class, postage prepaid, to the
following:

UTAH COURT OF APPEALS [ORIGINAL PLUS 7 COPIES]
450 S. STATE ST.
PO BOX 140210
SALT LAKE CITY, UT 84114-0120

RICHARD S. NEMELKA [2 COPIES]
STEPHEN S. NEMELKA
6806 S. 1300 E.
SALT LAKE CITY, UT 84121

DATED this 31st day of July, 2008.


/s/
Nathan Whittaker

ADDENDUM

Randy S. Ludlow #2011
Attorney for Defendant,
Jon Siddoway, dba S & B Storage
185 South State Street, Suite 208
Salt Lake City, Utah 84111
Telephone: (801) 531-1300
Fax: (801) 328-0173

FILED DISTRICT COURT
Third Judicial District

NOV 07 2007

SALT LAKE COUNTY
By  Deputy Clerk

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

LONNIE PAULOS and ADVANCED	:	
ORTHOPEDICS and SPORTS MEDICINE	:	ORDER From TRIAL
LLC., a Utah Corporation,	:	(November 5, 2007)
	:	
Plaintiff,	:	
vs.	:	
	:	
ALL MY SONS MOVING AND	:	Case No. 060903698
STORAGE, business entity, JOHN DOE,	:	Judge Stephen L. Henriod
doing business as All My Sons Moving and	:	
Storage, and S & B STORAGE, a business	:	
entity, and JOHN SIDDOWAY, doing	:	
business as S & B Storage, and JOHN	:	
DOES 1-10,	:	
	:	
Defendant.	:	

The above entitled matter came on for trial before the Honorable Stephen L. Henriod, Judge of the above entitled Court on the 5th day of November, 2007. Neither plaintiffs nor their counsel, Richard Nemelka, were present. Randy S. Ludlow was present on behalf of the defendant, Jon Siddoway, who was present, and Stephen Spencer was present on behalf of the

defendant, All My Sons Moving and Storage. The Court had attempted to locate the plaintiffs' counsel, Richard Nemelka, and was informed that he was in Bountiful, Utah, attending to another matter. The Court had previously rescheduled the trial in order to accommodate the request of Mr. Nemelka to attend an event in St. George, Utah. All counsel were personally present in Court when the matter was scheduled for the trial to be held November 5-7, 2007 and all counsel had agreed to the date and time for trial. Mr. Stephen Spencer had represented to the Court that he personally had contacted Mr. Nemelka's office to make sure that Mr. Nemelka would know that the trial was to commence on November 5, 2007 and further had informed Mr. Nemelka of the trial date when Mr. Nemelka was hand-delivered a copy of Mr. Spencer's Trial Brief. The Court records clearly reflect that the appropriate date was given in the Court Notice. The Court having found that the defendants have had to prepare for a three-day trial, which has caused them, and to the Court, a significant inconvenience as well as a waste of Court and attorney resources; the defendants have continuously alleged that this matter was without merit and have requested attorneys' fees pursuant to Utah Code Ann. Section 78-27-56, which the Court deems appropriate, given the history of this action; further, the Court deems as further appropriate that the sanctions to be entered in this matter are to include all attorneys' fees and costs as have been incurred by the defendants in this matter;

Now, based upon the above and good cause appearing herein,

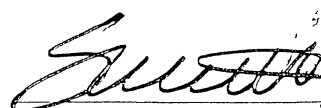
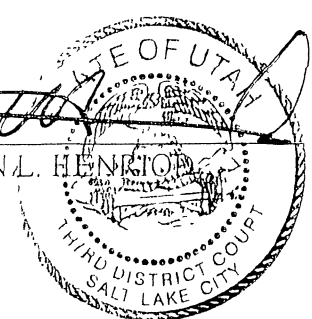
IT IS HEREBY ORDERED AS FOLLOWS:

1. The Plaintiffs' pleadings are stricken and their claims against the Defendants are dismissed with prejudice.
2. The Defendants are awarded their costs and attorneys' fees as judgment against

the Plaintiffs, jointly and severally, upon submission of an affidavit and corresponding Order for the same.

ENTERED this 7 day of November, 2007.

BY THE COURT:

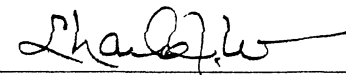

JUDGE STEPHEN L. HENRIOT


CERTIFICATE OF SERVICE

I hereby certify on the 5th day of November, 2007, a true and correct copy was mailed in the United States Mail, postage prepaid, of the foregoing **ORDER From TRIAL (November 5, 2007)** to the following:

RICHARD S. NEMELKA
STEPHEN R. NEMELKA
6806 South 1300 East
Salt Lake City, Utah 84121

Stephen D. Spencer
45 East Vine Street
Murray, Utah 84107



SHARLA J. WEAVER
Legal Assistant

11/11/07

Jan 8 08 14:56

CLERK
COUNTY
FRK

Randy S. Ludlow #2011
Attorney for Defendant,
Jon Siddoway, dba S & B Storage
185 South State Street, Suite 208
Salt Lake City, Utah 84111
Telephone: (801) 531-1300
Fax: (801) 328-0173

ENTERED IN REGISTRY
OF JUDGMENTS
DATE 01/09/08

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

LONNIE PAULOS and ADVANCED	:	
ORTHOPEDICS and SPORTS MEDICINE	:	JUDGEMENT
LLC., a Utah Corporation,	:	(on behalf of Jon Siddoway)
	:	
Plaintiffs,	:	
vs.	:	
	:	
ALL MY SONS MOVING AND	:	Case No. 060903698
STORAGE, business entity, JOHN DOE,	:	Judge Stephen L. Henriod
doing business as All My Sons Moving and	:	
Storage, and S & B STORAGE, a business	:	
entity, and JON SIDDOWAY, doing	:	
business as S & B Storage, and JOHN	:	
DOES I-10,	:	
	:	
Defendants.	:	

The above entitled matter came on for trial before the Honorable Stephen L. Henriod, Judge of the above entitled Court on the 5th day of November, 2007. Neither plaintiffs nor their counsel, Richard Nemelka, were present. Randy S. Ludlow was present on behalf of the defendant, Jon Siddoway, who was present, and Stephen Spencer was present on behalf of the

SIDDOWAY J - Judgement (on behalf of Jon Siddoway)

Judgment (on behalf of Jon Siddoway) @J



A-4

JD26131322

pages:

524

defendant, All My Sons Moving and Storage. The Court having found that the defendants have had to prepare for a three-day trial, which has caused them, and to the Court a significant inconvenience as well as a waste of Court and attorney resources, the defendants have continuously alleged that this matter was without merit and have requested attorneys' fees pursuant to Utah Code Ann. Section 78-27-56, which the Court deems appropriate, given the history of this action, further, the Court having determined also that the sanctions to be entered in this matter are to include all attorneys' fees and costs as have been incurred by the defendants in this matter, the Court having reviewed the Affidavit of Attorney's Fees and Costs as submitted by Randy S. Ludlow and having found that the same are reasonable, just, and within the community standard for like work and services;

Now, based upon the above and good cause appearing herein,

IT IS HEREBY ORDERED AS FOLLOWS.

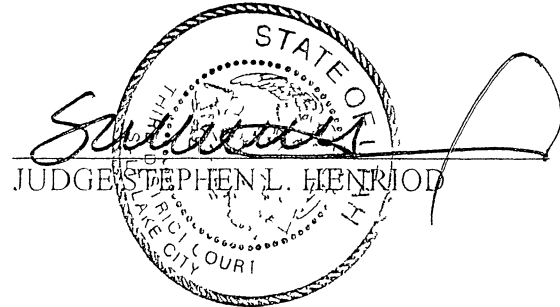
1. The Defendant, Jon Siddoway dba as S & B Storage is awarded judgement against the Plaintiffs, Lonnie Paulos and Advanced Orthopedic and Sports Medicine LLC, jointly and severally, for his attorney's fees incurred by him in this matter in the amount of \$11,314.00

2. The Defendant, Jon Siddoway dba as S & B Storage is also awarded his costs
/
/
/ (Intentionally left blank)
/
/
/

incurred by him against the Plaintiffs, Lonnie Paulos and Advanced Orthopedic and Sports
Medicine LLC, jointly and severally, in the amount of \$738 41

ENTERED this 8 day of January, 2008

BY THE COURT

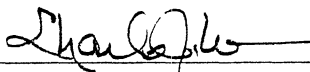


CERTIFICATE OF SERVICE

I hereby certify on the 8th day of November, 2007, a true and correct copy was
mailed in the United States Mail, postage prepaid, of the foregoing **JUDGEMENT** (on behalf of
Jon Siddoway) to the following.

RICHARD S. NEMELKA
STEPHEN R. NEMELKA
6806 South 1300 East
Salt Lake City, Utah 84121

Stephen D. Spencer
45 East Vine Street
Murray, Utah 84107



SHARLA J. WEAVER
Legal Assistant

Stephen D. Spencer (8913)
DAY SHELL & LILJENQUIST, L.C.
Attorney for Defendant (All My Sons Moving and Storage)
45 East Vine Street
Murray, UT 84107
Telephone: (801) 262-6800

Handwritten notes:
WLF
JUL 11
80:01:13
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1-1-11

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

LONNIE PAULOS and ADVANCED
ORTHOPEDICS and SPORTS MEDICINE
LLC., a Utah Corporation,

Plaintiff,

v.

ALL MY SONS MOVING AND STORAGE,
a business entity, JOHN DOE, doing business
as All My Sons Moving and Storage, and
S & B STORAGE, a business entity, and
JOHN SIDDOWAY, doing business as S & B
Storage, and JOHN DOES 1-10

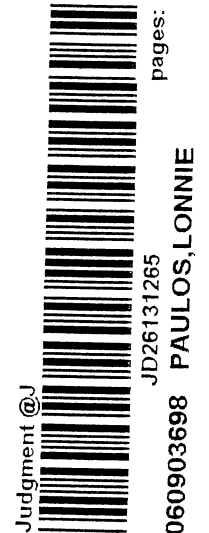
Defendants.

JUDGMENT

ENTERED IN REGISTRY
OF JUDGMENTS
DATE 07/09/08

Cases No. 060903698

Judge Stephen L. Henriod



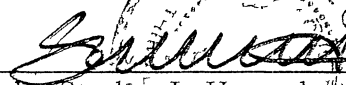
THIS MATTER came for a bench trial on November 5, 2007, the Honorable Stephen L. Henriod presiding, whereupon Plaintiffs' complaint was stricken and attorney's fees and costs were awarded to defendant All My Sons Moving and Storage as more fully set forth in the Order arising from that date. The Court, having ordered that defendant All My Sons Moving and Storage should be awarded its attorney's fees and costs; having reviewed the Affidavit of Attorney's Fees and Costs provided by counsel for All My Sons Moving and Storage; and having held that the attorney's fees and costs are reasonable under the circumstances, hereby enters JUDGMENT against the Plaintiffs as follows:

1. Defendant All My Sons Moving and Storage is granted JUDGMENT in the amount of \$16,973.60 against the Plaintiffs, jointly and severally, including: Lonnie Paulos; Advanced Orthopedics; and Utah Sports Medicine LLC.

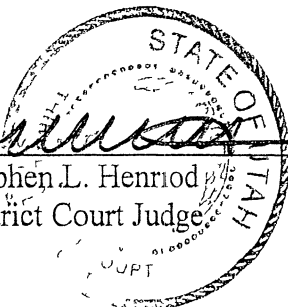
2. Defendant All My Sons Moving and Storage shall file a partial or complete satisfaction of judgment as provided by the Utah Rules of Civil Procedure upon payment or collection of amounts owed.

DONE this 8 day of January, 2008.

BY THE COURT:



Judge Stephen L. Henriod
Third District Court Judge



SEAL:

CERTIFICATE OF SERVICE


I hereby certify that I am an employee or partner of Day Shell & Liljenquist L.C. and that I caused a true and correct copy of the foregoing JUDGMENT, to the following:

Richard R. Nemelka
NEMELKA & NEMELKA
6806 South 1300 East
Salt Lake City, UT 84121

Randy S. Ludlow
185 S. State St. #208
SLC, UT 84111

Court; client

ON this 5 day of November, 2007.

A handwritten signature in black ink, appearing to read 'Nathan Whittaker', is written over a horizontal line.

Nathan Whittaker
Paralegal for Stephen D. Spencer

FILED
DISTRICT COURT
08 Feb 2007 11:07
THIRD JUDICIAL DISTRICT
SALT LAKE COUNTY
BY: LYN
CLERK

Stephen D. Spencer (8913)
DAY SHELL & LILJENQUIST, L.C.
Attorney for Defendant (All My Sons Moving and Storage)
45 East Vine Street
Murray, UT 84107
Telephone: (801) 262-6800

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

LONNIE PAULOS and ADVANCED
ORTHOPEDICS and SPORTS MEDICINE
LLC., a Utah Corporation,

Plaintiff,

v.

ALL MY SONS MOVING AND STORAGE,
a business entity, JOHN DOE, doing business
as All My Sons Moving and Storage, and
S & B STORAGE, a business entity, and
JOHN SIDDOWAY, doing business as S & B
Storage, and JOHN DOES 1-10

Defendants.

ORDER ON PLAINTIFF'S MOTION
TO SET ASIDE DISMISSAL AND
PLAINTIFF'S OBJECTION TO
ATTORNEY'S FEES

Cases No. 060903698

Judge Stephen L. Henriod

IN THIS MATTER, Plaintiffs have filed a Rule 60(b) Motion to set aside the Court's Order of Dismissal signed November 7, 2006. Plaintiffs also object to the attorney's fees submitted by counsel for Defendant S&B Storage. The parties have submitted supporting and opposing memoranda and properly noticed the matter pursuant to Rule 7 of the Utah Rules of Civil Procedure. The Court, having reviewed the motion and the file in this matter, hereby makes findings and orders as follows:

1. Plaintiffs have failed to show that they exercised ~~due diligence~~ ^{reasonable care} in ascertaining the trial date such that the order dismissing their complaint should be set aside under Rule 60(b)(1) of the Utah

Rules of Civil Procedure, nor have they pleaded facts sufficient to set aside the order dismissing the complaint under any other subsection of Rule 60(b) of the Utah Rules of Civil Procedure. Plaintiffs' motion is therefore DENIED.

2. It is just and reasonable to award attorney's fees pursuant to this Court's authority to control proceedings before it under Utah Code Ann. §§ 78-7-5 & -17, to compensate Defendants for Plaintiffs' ~~multiple delays and recklessness~~ in conducting this litigation. *SMB*

3. The legal services performed by the Defendants were necessary, and the time devoted to the services and the hourly rate charged were reasonable.

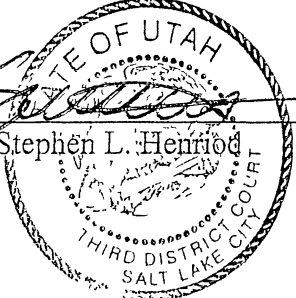
4. Plaintiffs' objection to Defendant S&B Storage's attorney's fees fails to articulate a reason for their objection and therefore is OVERRULED.

DATED this 30 day of January, 2008.

BY THE COURT:

[Signature]

Judge Stephen L. Henriod

The seal is circular with a double-lined border. The outer ring contains the text "STATE OF UTAH" at the top and "SALT LAKE CITY" at the bottom. Inside the ring, the text "THIRD DISTRICT COURT" is written in a smaller circle. The center of the seal features a stylized mountain range and a sun.

CERTIFICATE OF SERVICE

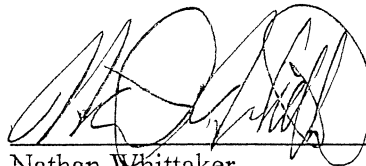
I hereby certify that I am an employee or partner of Day Shell & Liljenquist L.C. and that I caused a true and correct copy of the foregoing ORDER to be placed in the United States Mail, first class, postage prepaid, to the following:

Richard R. Nemelka
NEMELKA & NEMELKA
6806 South 1300 East
Salt Lake City, UT 84121

Randy S. Ludlow
185 S. State St. #208
SLC, UT 84111

Court; client

ON this 10 day of January, 2008.

A handwritten signature in black ink, appearing to read 'Nathan Whittaker', is written over a horizontal line.

Nathan Whittaker
Paralegal to Stephen D. Spencer

FEB 26 2008

By _____ SALT LAKE COUNTY
Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

LONIE PAULOS and ADVANCED : RULING
ORTHOPEDICS and SPORTS MEDICINE,
LLC, a Utah corporation, : CASE NO. 0609903698

Plaintiffs, :

vs. :

ALL MY SONS MOVING AND STORAGE, a :
business entity, JOHN DOE, doing
business as All My Sons Moving and :
Storage, and S&B STORAGE, a
business entity, and JOHN SIDDOWAY, :
doing business as S&B STORAGE, and
JOHN DOES 1-10, :

Defendants. :

Plaintiffs' Motion for New Trial comes before the Court pursuant to
Notice to Submit, dated January 25, 2008.

This Court denied the plaintiffs' Motion to Set Aside pursuant to
Rule 60(b) by Minute Entry, dated January 7, 2008.

Plaintiffs filed a Motion for New Trial on January 11, 2008. The
reasons submitted in support of said Motion are:

1 The Court's award of Judgment to the defendants, including
attorney's fees, is prejudicial to the plaintiff and his attorney.

2 The failure of the plaintiff to appear in court for trial on November 5, 2007, was due to an honest mistake of Mr. Nemelka.

3 The Court made a mistake and signed the October 26, 2007, Order prepared by Mr. Nemelka indicating that trial was scheduled for November 6-8, 2007.

4 Plaintiff restates his argument that the Court's decision should have been set aside pursuant to Rule 60(b) of the Utah Rules of Civil Procedure.

Mr. Nemelka and the plaintiff state that their conduct in not appearing at trial on November 5, 2007, was unintentional.

There has been no allegation by anyone that the failure of the plaintiff and counsel to be ready for trial at the time it was scheduled was intentional, or that it was in bad faith. The Court has made no ruling that the plaintiff's case is without merit. The fact is that trial was set August 20, 2007, in open court with Mr. Nemelka, Mr. Spencer and Mr. Ludlow present. It was set for November 5, 6, and 7, 2007. The reason that trial was set on that date was that Mr. Nemelka had filed a Motion asking for a new date from the previously set trial date of October 15, so that he could attend and participate in the Utah ~~Summer~~ ^{Senior} Games in St. George, Utah, on the October date. The November 5

date was not a good date for Mr. Ludlow, who had to cancel his attendance at a continuing legal education conference in order to be at trial, which he did, rather than have trial set in 2008 which was the alternative.

The Order of October 26, 2007, which was prepared by Mr. Nemelka and which he says the Court signed by mistake, does refer to trial commencing on November 6, but this Order was not and never purported to be a Scheduling Order, instead it was an Order allowing the plaintiff to present evidence through deposition, rather than having a witness present for trial. In the best of all worlds, Mr. Nemelka's error of stating that the trial was to commence on November 6 should have been corrected, but that Order did not create confusion, nor did it change the trial date which had been set for November 5.

On November 5, 2007, Mr. Spencer and Mr. Ludlow, their clients and witnesses appeared, ready for trial at 9:00 a.m., at which time we commenced a search for Mr. Nemelka and his client, and found out after contacting his office that he was involved in trial in Bountiful, and we learned that he had mistakenly believed trial was supposed to commence on November 6. On the 5th in court, Mr. Spencer stated that he had had a conversation with Mr. Nemelka the prior week in which he had informed

Mr. Nemelka that the trial was going to start on November 5 rather than November 6, and that Mr. Nemelka's belief that trial would start November 6 was mistaken.

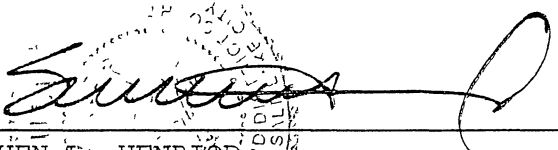
Mr. Nemelka argues at length that the Court could have started trial on November 6 with only relatively minor inconvenience to any of the parties. What he doesn't say is that the dates November 5, 6 and 7 were arrived at as the only three-day period the Court could accommodate before sometime well into 2008, and that a three-day trial started on November 6 could not have been completed that week. It would have had to be interrupted and couldn't have been finished for weeks. The Court had matters set November 8 and 9 which couldn't be moved. Mr. Nemelka was aware of this.

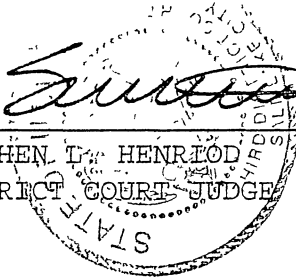
The only provision of Rule 59 which is relied upon by the plaintiff and which could possibly apply to this Motion is Rule 59(a)(1): "Irregularity in the proceedings of the court...or any order of the court, or abuse of discretion by which either party was prevented from having a fair trial." There was no such irregularity in proceedings or Court Order, and the plaintiffs' Motion for New Trial is denied, as is the plaintiffs' Motion for an Order Staying the Judgment Pending Disposition of Motion for New Trial. I have known and respected Mr.

Nemelka for more than 30 years and empathize with his and the plaintiff's situation, but there is no legal basis to grant his Motion for a New Trial.

This is the final Order of the Court, no further Order need be prepared by counsel.

Dated this 21 day of February, 2008.


STEPHEN T. HENRED
DISTRICT COURT JUDGE



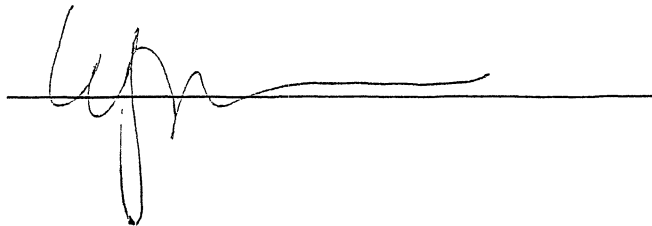
MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Ruling, to the following, this 24 day of February, 2008:

Richard S. Nemelka
Stephen R. Nemelka
Attorneys for Plaintiffs
6806 South 1300 East
Salt Lake City, Utah 84121

Stephen D. Spencer
Attorney for Defendant All My Sons Moving
45 E. Vine Street
Murray, Utah 84107

Randy S. Ludlow
Attorney for Defendant Siddoway
185 S. State Street, Suite 208
Salt Lake City, Utah 84111

A handwritten signature in black ink, appearing to be 'Ludlow', is written over a horizontal line.