

2008

Lonnie Paulos et al v. All My Sons Moving and Storage; Sand B Storage, John Siddoway, John Does 1 through 10 : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

LONNIE PAULOS et al,

Plaintiff/Appellant,

vs.

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

Defendants/Appellees

**BRIEF OF PLAINTIFF/APPELLANT
LONNIE PAULOS**

Appeal No. 20080196
Lower Court No. 060903698

BRIEF OF APPELLANT

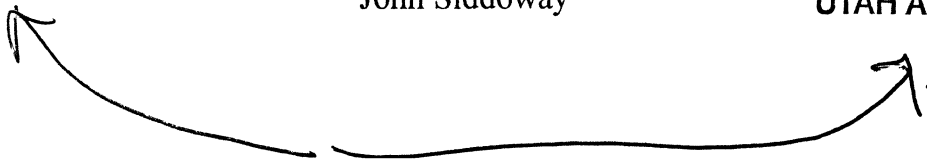
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UTAH APPELLATE COURTS

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ORAL ARGUMENT REQUESTED

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STATEMENT SHOWING JURISDICTION

This Court has jurisdiction pursuant to Section 78-2a-(3)(2)(h) U.C.A. (1953), as amended governing appeals transferred from the Supreme Court to the Court of Appeals.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Did Trial Court Exceed or Abuse Its Discretion In Dismissing the Action?

Standard of review: The Court of Appeals, in deciding whether a dismissal of the action was appropriate, can review whether the Trial Court erred in applying the relevant law, and can reach the merits of the underlying judgment from which relief was sought to determine whether the District Court abused it's discretion.

Appeal Preservation: Appellant raised this issue in Motion to Set Aside (R. 474-475)

II. Did Trial Court Exceed or Abuse Its Discretion In Denying the Motion To Set Aside?

Standard of Review: The Court of Appeals reviews the Trial Court's decision to deny a Motion to Dismiss under an abuse of discretion standard. Further, the Court of Appeals will disturb a Trial Court's ruling if there has been an error in regard to the law.

Appeal Preservation: Appellant raised this issue in Motion to Set Aside. (R. 474-475)

III. Did Trial Court Err or Abuse Its Discretion In Denying the Motion For A New Trial?

Standard of Review: The Court of Appeals reviews the denial of a Motion for a New Trial under an abuse of discretion standard. Further, the Court of Appeals will disturb a Trial Court's ruling if there has been an error in regard to the law.

Appeal Preservation: Appellant raised this issue in Motion for a New Trial. (R. 594-595)

IV. Did Trial Court Err or Abuse Its Discretion in Awarding Attorney's Fees?

Standard of Review: The Court of Appeals reviews the Trial Court's decision to award attorney's fees as a question of law that is reviewed for correctness and under an abuse of discretion standard as to the amount awarded.

Appeal Preservation: Appellant raised this issue in Objection to Attorney's

Fees; Motion to Set Aside and in Motion for a New Trial (R. 474-475 & 594-595)

STATUTES AND RULES

U.C.A. 78-27-56(1)

(1) In civil actions, the court shall award reasonable attorney's fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith

Rule 60(b) of the Utah Rules of Civil Procedure

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), or (3), not more than 3 months after the judgment, order, or proceeding was entered or taken. A motion under this Subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Rule 59(a)(7) of the Utah Rules of Civil Procedure

(a) Grounds. Subject to the provisions of Rule 61, a new trial may be granted to all or any of the parties and one all or part of the issues, for any of the following causes; provided, however, that on a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment:

. . . .

(7) Error in law

Rule 41(b) of the Utah Rules of Civil Procedure

(b) Involuntary Dismissal; For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a Defendant may move for dismissal of an action or of any claim against him

Utah Supreme Court Rules of Professional Practice, Chapter 23, Standards of Professionalism and Civility

Preamble. A lawyer's conduct should be characterized at all times by personal courtesy and professional integrity in the fullest sense of those terms. In fulfilling a duty to represent a client vigorously as lawyers, we must be mindful of our obligations to the administration of justice, which is a truth-seeking process designed to resolve human and societal problems in a rational, peaceful, and efficient manner. We must remain committed to the rule of law as the foundation for a just and peaceful society.

. . . .

We expect judges and lawyers will make mutual and firm commitments to these standards.

Paragraph 14. Lawyers shall advise their clients that they reserve the right to determine whether to grant accommodations to other counsel in all

matters not directly affecting the merits of the cause or prejudicing the client's rights, such as extensions of time, continuances, adjournments, and admissions of facts.

Paragraph 15. If other counsel requires a scheduling change, lawyers shall cooperate in making any reasonable adjustments.

STATEMENT OF CASE

Nature of the Case: The Plaintiff filed an action against the Defendants alleging theft and conversion of Plaintiff's personal property with damages exceeding \$300,000.00. A trial was scheduled for October 15-17, 2007 and then continued to November 5-7, 2008. Plaintiff and his counsel believed the trial started on November 6, 2007 and did not appear on November 5, 2007. The trial Court dismissed the action with prejudice and granted attorneys fees.

Course of Proceedings: The Plaintiffs filed their complaint on March 3, 2006. (R. 1-13). The Court signed an Amended Attorney Planning Meeting Report and Scheduling Order on May 31, 2006. (R. 49-52). Defendants filed a Motion for Summary Judgment (R. 173-175) on January 10, 2007, which was denied by the Court on June 26, 2007. (R. 338-344). After all time periods had expired under said Scheduling Order, the Court scheduled a jury trial for October 15-17, 2007. Due to a conflict with the Utah Senior Games wherein Plaintiff's counsel was a participant, Plaintiff filed a Motion to Continue the Trial on June 27, 2007. (R. 345-346).

On August 20, 2007 a hearing was held with the Court and Plaintiff's Motion to Continue was granted without objection and a jury trial was scheduled on the Court's docket sheet (Addendum A) for November 5, 6 & 8, 2007 and then corrected on the docket sheet to November 5, 6 & 7, 2007. No written notices as to the dates of the trial were sent by either the Court or any counsel.

The three-day trial began on Monday, November 5, 2007, but neither the Plaintiff nor his counsel were present and the Court dismissed the action with prejudice and awarded attorneys fees. (T. 3-4). An Order of dismissal was signed November 7, 2007; (R. 460-471) Plaintiff filed on November 8, 2008 a Motion to Set Aside the Order of Dismissal and Memorandum in support thereof (R. 474-475) and Objections to proposed orders and attorneys fees. (R. 512-513). Plaintiff also filed Objections to S&B's attorney's fees on November 15, 2007. (R. 568-569). On January 8, 2008 the Court denied Plaintiff's Motion to Set Aside and Objections to attorney's fees and signed the two judgments for attorney's fees. (R. 582-589). Plaintiff then filed a Motion for a New Trial and Memorandum in support thereof on January 11, 2008 (R. 594-615) which was denied on the 26th of February, 2008. Plaintiff filed his appeal on February 29th, 2008.

Disposition Below: The Trial Court dismissed the action with prejudice and entered two judgments for attorney's fees that greatly exceeded the amounts awarded at

the trial on November 5, 2008. The Trial Court made no findings and further denied the Motion to Set Aside and the Motion for a New Trial.

STATEMENT OF FACTS

1. The Plaintiffs filed an action against the Defendants for theft and conversion of over \$300,000.00 worth of personal property belonging to the Plaintiffs. After the completion of all discovery and applicable cut-off dates the matter was ready for trial. (R. 1-13).

2. On the 18th day of June, 2007, a Scheduling Conference was held before the Court wherein a Jury Trial was scheduled for October 15, 16 and 17, 2007. (R. 336-337).

3. On the 27th day of June, 2007, Plaintiff filed a Motion to Continue the Trial due to a conflict of Plaintiff's counsel participating in the Utah Senior Games. (R.345-346).

4. The Motion to Continue was heard on the 20th day of August, 2007, and at said hearing the Court suggested alternative dates for the trial. At said hearing Randy Ludlow, counsel for the Defendants, S & B Storage, indicated he had a conflict with November 5, 6 and 7 since he was going with his wife to Chicago on the 4th, 5th and 6th of November, 2007. However, Mr. Ludlow withdrew his objection. Thereafter, a discussion was held between the Court and the attorneys in regard to settling the case and the potential litigation against the insurance company. The hearing concluded without any specific

statements made as to the exact dates of the trial although, based upon Mr Ludlow's withdrawal of his objection to the dates of November 5, 6 and 7, 2007, it was apparently assumed by the Court and the attorneys that the trial was rescheduled for November 5, 6 and 7, 2007. (R. 375).

5. A Minute Entry was entered on the docket on the 20th of August, 2007 scheduling a Jury Trial for November 5th, November 7th and November 8th. 2007. Said Minute Entry was corrected on said date and an entry was made that the Jury Trial was scheduled for November 5th, 6th and 7th, 2007. (Addendum A).

6. Neither the Court nor any of the attorneys prepared a Notice of the Trial, no order was prepared or served in regard to the new trial date, nor was a notice served on any of the parties through their attorneys as to the new trial date.

7. Plaintiff's counsel was under the impression that the Trial was scheduled for November 6th, 7th and 8th, 2007 because he already had a different trial scheduled for the 5th of November, 2007 written in his calendar. He wrote the dates of November 6, 7 & 8, 2007 on his calendar for the trial in the above matter. Plaintiff's counsel's calendar is attached as Exhibit "B" to his affidavit. (Addendum B). Immediately after the hearing held on the 20th of August 2007, Plaintiff's counsel dictated a letter, which was sent to his client, Lonnie Paulos, on the 22nd of August 2007 indicating that the trial was scheduled for November 6th, 7th, and 8th, 2007. A copy of the letter is attached as Exhibit "H" to his

affidavit. (Addendum B).

8. Plaintiff's counsel's trial scheduled for Monday, November 5, 2007, was before the Honorable Thomas Kay in the Second Judicial District Court in Bountiful, Utah, and a copy of that Notice of Trial was attached as Exhibit "C" to his affidavit. (Addendum B).

9. Even though discovery had been closed for some time, Plaintiff's counsel accommodated the request of Defendant, All My Sons', to conduct two additional depositions that were held in August and September 2007. (R. 347-349, 366-368). In the last part of October 2007, counsel for the Defendant, All My Sons, requested another accommodation in regard to one of its witnesses, an investigating police officer, who could not attend the trial. Again, Plaintiff's counsel agreed to allow said witness' deposition to be admitted at the trial. Conversely, when Plaintiff's counsel requested a similar accommodation in regard to the potential non-appearance at trial of one of Plaintiff's witnesses, Rhonda Jones, Defendants' counsel refused. On the 24th of October, 2007, Plaintiff's counsel, on behalf of the Plaintiff, filed a Motion to Admit the Deposition of Rhonda Jones along with a Memorandum in Support Thereof, the Affidavit of Richard S. Nemelka, and a proposed Order. (R. 411-418). All of said pleadings indicated that the trial was scheduled for November 6th through 8th of 2007 and were mailed to the attorneys for both Defendants.

10. On the 29th of October 2007, the Court signed an Order (R. 417-418) to admit

the Deposition of Rhonda Jones and said Order specifically stated, in paragraph 1, “That the deposition of Rhonda Jones on April 30, 2007, shall be admitted into evidence to be *used during the trial scheduled for November 6-8, 2007, in the above-entitled matter.*” (Addendum C)(emphasis added).

11. Plaintiff’s counsel prepared Subpoenas and served the same upon witnesses all indicating that the trial was scheduled to begin on the 6th of November 2007. A copy of one Subpoena was attached as Exhibit “F” to his affidavit. (Addendum B)

12. Stephen D. Spencer, counsel for the Defendant, All My Sons Moving and Storage, also filed various Subpoenas indicating that the trial was scheduled for November 6th and 7th of 2007. Said pleadings are attached as Exhibit “G” to the above referenced affidavit. (R. 497-498 and Addendum B).

13. That on or about the 2nd of November 2007, Plaintiff’s counsel had a conversation with Stephen D. Spencer, attorney for the Defendant, All My Sons Moving and Storage, where it was discussed whether or not the trial was a Jury Trial or a Bench Trial. Plaintiff’s counsel specifically stated to Mr. Spencer that he believed it was a Bench Trial and that the Trial was to begin on Tuesday, the 6th of November 2007. Mr. Spencer indicated that he thought the Trial was scheduled for Monday, the 5th of November, 2007; however, Plaintiff’s counsel specifically stated to Mr. Spencer that was inaccurate and, in fact, the Trial was scheduled to begin on Tuesday, the 6th of November,

2007 and would not have been scheduled on the 5th of November, 2007 for the reason that Plaintiff's counsel had to be in attendance at another trial before Judge Kay in the Second District Court which began at 8:30 a.m. on the 5th of November, 2007. (R. 493-494 and Addendum B). Plaintiff's counsel did not review Mr. Spencer's trial brief and no one from his office advised him that Mr. Spencer had called saying the trial was on the 5th.

14. Later, on the 2nd of November 2007, in response to the conversation with Mr. Spencer, Plaintiff's counsel had a conversation with Lyn MacLeod, Judge Henroid's Clerk. The conversation concerned whether the Trial was a jury or bench trial, wherein it was agreed that the Trial was a Bench Trial since no request had ever been made for a jury trial and no fee had been paid. Apparently, the Court had made a mistake in scheduling a jury trial. At the beginning of said conversation between Plaintiff's counsel and Lyn MacLeod, Plaintiff's counsel indicated that he was calling in regard to the Paulos Trial that was scheduled for next Tuesday (November 6, 2007) and that there was a question as to whether or not the trial was a Jury Trial or a Bench Trial. Lyn MacLeod did not correct Plaintiff's counsel as to whether or not the trial was to begin on Tuesday, the 6th of November and Plaintiff's counsel continued to believe that the trial was scheduled to begin on the 6th of November, 2007. (R. 476-498 and Addendum B).

15. Plaintiff's counsel, on or about the 30th of October 2007, was advised that Judge Henroid has signed the Order to admit the Deposition of Rhonda Jones that, again,

indicated that the trial was scheduled for November 6-8, 2007. This information was conveyed to Plaintiff on said date. A copy of the proposed Order to admit was sent to the Plaintiff on the 23rd of October 2007 along with the Motion and affidavit of his counsel. Plaintiff, Lonnie Paulos relied upon the Order of the Court dated October 29, 2008, the Motion and Affidavit referred to above, and the correspondence and communications he received from his attorney in believing that the trial would start on November 6, 2007 and not on the 5th. (Affidavit of Lonnie Paulos R. 521-523).

16. The Plaintiff, Lonnie Paulos, was always of the understanding that the trial was scheduled to begin on the 6th of November 2007 and, in fact, had re-arranged his work schedule so that he could be in Utah on the evening of November 5, 2007. Mr. Paulos had scheduled his airline travel to leave Houston, Texas, in the afternoon of November 5, 2007. He was on his way to the airport when Plaintiff's counsel contacted him at approximately 12:30 p.m. on the 5th of November 2007, and indicated to Mr. Paulos that the Court had dismissed the action due to their non-appearance that morning and there would not be a Trial on the 6th and 7th. Based thereon, Mr. Paulos did not use his purchased ticket to fly to Salt Lake. (R.521-523).

17. Plaintiff's counsel had also scheduled all of Plaintiffs' witnesses to appear on Tuesday, the 6th of November 2007. (Addendum B).

18. Plaintiff's counsel's office also arranged for an interpreter to be present on

Tuesday, the 6th of November 2007, for one of Plaintiffs' witnesses. Plaintiff's counsel's office also arranged to have Plaintiff's counsel's wife to be present on the 6th of November 2007 to read the deposition of Ronda Jones. (Affidavit of Jayne Nemelka R. 524-526).

19. Plaintiff's counsel had numerous conversations with his client, Lonnie Paulos, and witnesses in preparation for the trial and advised all witnesses that the trial was scheduled to begin on the 6th of November 2007. (Addendum B).

20. In August 2007 and the few months prior to the trial in November 2007, Plaintiff's counsel had other problems in regard to his short-term memory. His mistake in assuming on the 20th of August 2007, that the trial was scheduled for November 6th, 7th and 8th 2007 was an honest mistake. Plaintiff's counsel did not intentionally write down the wrong dates on his calendar or intentionally not appear at the trial on the 5th of November 2007 since he was involved in another trial on said date and time. (Addendum B).

22. The Plaintiff, Lonnie Paulos received a letter dated August 22, 2007 from his counsel indicating the trial was scheduled for November 6, 7 & 8, 2007. During the time period from August 20, 2007 through November 5, 2007, Plaintiff had numerous conversations with his counsel and witnesses and it was always understood that the trial would begin on November 6, 2007. (R.521-523).

23. Although counsel for both Defendants knew around October 24, 2007 that Plaintiff and Plaintiff's counsel believed that the trial was starting on November 6, 2007, neither counsel contacted Plaintiff's counsel nor the Court in regard to the known mistake. Further, the Court also knew on October 29th, 2007 when it signed the Order that Plaintiff and Plaintiff's counsel believed the trial was November 6-8, 2007, but the Court also did not inform Plaintiff's counsel of his apparent mistake. Then at the trial on November 5, 2007, knowing that Plaintiff's counsel was involved in another trial, and that he was not going to be at the trial, both counsel for the Defendants requested that the Court dismiss the action with prejudice and award them attorney's fees, which the Court did.

SUMMARY OF ARGUMENT

I. The Trial Court Abused or Exceeded Its Discretion In Dismissing the Action.

The Plaintiff respectfully argues that the Trial Court abused its discretion in dismissing the action with prejudice when a more reasonable option would have been to start the trial the next day and assess attorney's fees for the appearances on the 5th of November 2007.

II. The Trial Court Abused or Exceeded Its Discretion In Failing to Grant the Motion to Set Aside.

The Plaintiff met all of the requirements of Rule 60(b)(1) to show an honest mistake had been made justifying setting aside the Order of dismissal and award of attorney's fees. Further, under Rule 60(b)(6) the fact that counsel for both Defendants' knew that Plaintiff's counsel had made a mistake as to the correct trial date and failed to inform the court or Plaintiff's counsel constitutes another reason justifying relief from the Order of dismissal and award of fees. The Motion to Set Aside should have been granted.

III. The Trial Court Erred or Abused Its Discretion in Failing to Grant the Motion for a New Trial.

The Trial Court erred in denying the Motion for a New Trial when there were irregularities in the proceedings and scheduling of the trial. Further, it was an abuse of discretion to deny said Motion when the Court knew that a mistake had been made prior to the trial and that counsel for the Plaintiff was in another trial and that there were still two days left calendared for the trial which would not have prevented the Plaintiff from having a trial.

IV. The Trial Court Erred and Abused Its Discretion in Awarding Defendants All of Their Attorney's Fees.

The Trial Court erred when it awarded the Defendants all of their attorneys' fees upon granting the dismissal, when the Defendants would not have been entitled to any attorneys' fees under U.C.A. 78-27-56 had they prevailed at the trial. The trial court erred when it made no findings as to why it awarded all of Defendants' attorney's fees. At the time of trial, the Defendants only requested fees for their attorney's preparation and appearances at the trial. Further, the trial could have been held the next two days to eliminate the loss of preparation. Lastly, the trial court found that the action was not without merit.

ARGUMENT

I. The Trial Court Abused or Exceeded Its Discretion in Dismissing the Action.

In deciding whether dismissal of the action was appropriate, the above Court can review whether trial court erred in applying relevant law, and can reach merits to determine whether trial court abused its discretion. *Searle v. Searle*, 2001 UT App 367, ¶13. Although the motion to dismiss made by Defendants' counsel on the day of trial was not noted as such, it most likely was a motion for involuntary dismissal under Rule 41(b). Plaintiff does not dispute the trial court's discretion under said rule to dismiss an action with prejudice for failure to prosecute. However, when there is a reasonable and justifiable excuse for not being present at the trial, then the trial court's discretion "must

be balanced against the priority of affording disputants an opportunity to be heard and to do justice between them.” Maxfield v. Rushton, 779 P.2d 237, 239 (Utah Ct. App. 1989). Plaintiff further acknowledges that it is his burden to offer “a reasonable excuse for his lack of diligence” in not being present at the first day of trial. Meadow Fresh Farms v. Utah State Univ., 813 P.2d 1216, 1218 (Utah Ct. App. 1991).

One issue then is whether the Plaintiff had a reasonable and justifiable excuse for not being present on the 5th of November 2007. The following are Plaintiff’s reasonable excuses for not being present on the first day of trial:

1. The Plaintiff received the letter dated August 22, 2007 from his counsel indicating that the trial was scheduled for November 6-8, 2007.
2. From August 20, 2007 through November 5, 2007 Plaintiff had numerous conversations with his counsel and witnesses in preparation for trial where it was indicated that the first day of trial was November 6th, 2007.
3. Plaintiff rearranged his work and interview schedules so he could be present at the trial on the 6th of November 2007, and purchased his plane tickets to arrive in the afternoon of November 5th, 2007. Otherwise, Plaintiff would have made traveling arrangements for the 4th of November 2007 rather than the 5th of November 2007 to accommodate for the actual trial date.
4. Plaintiff never received any notice from the Court or other counsel through his counsel that the trial was to start on November 5th, 2007.

5. On about October 23, 2007 Plaintiff received the Motion to Admit Rhonda Jones' deposition, the Affidavit of his counsel, and the proposed Order admitting the aforesaid deposition, all of which indicated the trial was November 6-8, 2007.

6. On October 30, 2007, Plaintiff was advised that the Court signed the Order admitting Rhonda Jones' deposition and relied upon the language therein which indicated the trial was November 6-8, 2007.

7. Plaintiff was prepared to testify on the 6th of November 2007 and had advised his witnesses to be present on said date. The only reason that he and his witnesses were not present on the 6th of November 2007 was due to the Court dismissing the action on the 5th of November 2007.

8. Plaintiff had received copies of Subpoenas served by both the Defendant and by his counsel that indicated the trial was starting on the 6th of November 2007.

9. Plaintiff knew that his counsel had another trial in Bountiful, Utah on Monday, the 5th of November 2007.

10. Had the Plaintiff known that the trial started on the 5th of November 2007, he and his witnesses would have been present at the trial on the 5th of November 2007.

The Plaintiff was very diligent in reviewing the pleadings, correspondence and communications that he received in determining that the trial started on the 6th of November 2007. There really wasn't anything else he could have done to discover the mistake that had been made and he had no control over what his counsel, the Defendants'

counsel, or trial court did or did not do and was therefore prevented from appearing on the 5th of November, 2007 by circumstances over which he had no control. He was entitled to rely upon the October 29, 2007 Order signed by the trial court that specifically indicated that the trial would start on the 6th.

Plaintiff's counsel's mistake, which the trial court found was an honest mistake and not intentional, (R. 643) should not have been the basis to dismiss the action with prejudice when there was a more reasonable, just, and fair solution. There were three days scheduled for the trial and that amount of time had already been reduced by Plaintiff's counsel accommodating Defendant, All My Sons' counsel's request to enter the deposition of a Murray police officer since he could not be present at the trial. The trial time was further reduced by the trial court's Order of October 29, 2007 allowing Rhonda Jones' deposition to be admitted since she would not be present. Therefore, counsel for the Defendants could have requested that the trial court start the trial on the 6th since they knew of Plaintiff's counsel's mistake since October, 23rd, 2007. However, it would have been appropriate to award attorney's fees for their appearance on the 5th. This would not have prejudiced the Defendants except for the one-day delay.

In Rohan v. Boseman, 2000 UT App 109, ¶28, the above court considered the following factors in determining whether the trial court exceeded its discretion in dismissing an action with prejudice when the plaintiff was not ready to proceed with the trial on the first day of trial:

(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.

There is no dispute regarding the conduct of parties, the Plaintiff and the Defendants. In light of this, the first factor in Rohan, “the conduct of both parties” would also include their counsel. Individually, they all relied upon their counsel and the trial court’s directives. There is also no dispute that Plaintiff’s counsel had a “senior moment” and made a mistake in calendaring. However, Plaintiff respectfully submits that the conduct of both counsel for the Defendants contributed to the confusion as to the trial dates. Both counsel for the Defendants knew as of October 23, 2007 that Plaintiff and his counsel honestly believed that the trial was scheduled for November 6-8, 2007, and yet did nothing to bring that mistake to the trial court’s attention or to Plaintiff’s counsel’s attention. It is true that Stephen Spencer, counsel for Defendant, All My Sons, had a conversation on the 2nd of November 2007 with Plaintiff’s counsel as to whether the trial was a jury or bench trial. However, in response to Mr. Spencer’s belief that the trial started on the 5th, Plaintiff’s counsel specifically stated to Mr. Spencer that

Mr. Spencer was inaccurate and , in fact, the trial was scheduled to begin on Tuesday, the 6th and would not have been scheduled on the 5th for the reason that counsel for the Plaintiff had to be in attendance at another trial before Judge Kay in the Second District Court which began at 8:30 am on the 5th of November, 2007.

(Affidavit of Richard S. Nemelka R. 476-498). On the same day the conversation took place with Mr. Spencer, counsel for the Plaintiff contacted the court to verify that it was a bench trial starting on the 6th. Plaintiff's counsel stated to Judge Henroid's clerk, "that he was calling in regard to the Paulos trial that was scheduled for next Tuesday (November 6th, 2007) and that there was a question as to whether or not the trial was a jury trial or a bench trial." The judge's clerk acknowledged that it was a bench trial, but did not disagree with or correct Plaintiff's counsel's statement that the trial was scheduled to start on the 6th. Therefore, it was reasonable for Plaintiff's counsel to continue to believe that the trial was scheduled to start on the 6th and not the 5th as Mr. Spencer believed. It was Friday afternoon and Plaintiff's counsel was preparing for the other trial scheduled for the 5th and did not review the trial brief of Mr. Spencer or notice that it stated the trial started on the 5th. Further, no one in his office advised him that Mr. Spencer had called saying the trial was on the 5th. He had reviewed the signed October 29, 2007 Order which indicated the trial started on the 6th and continued to believe he was all right in handling both trials.

Plaintiff respectfully submits that his counsel was diligent in verifying that the trial started on the 6th based upon the following:

1. Plaintiff's counsel's calendar indicated the 6th. (R. 478).
2. Plaintiff's counsel's correspondence and communications with Plaintiff verified the 6th. (R.476-498).

3. The Subpoenas he served and those served by Defendant, All My Sons, verified the 6th. (R.476-498).

4. Plaintiff's counsel's Affidavit, the Motion and Order he prepared to admit Rhonda Jones' deposition verified the 6th. (R. 411-418).

5. The October 29, 2007 Order verified the 6th. (R. 417-418).

6. His conversation with Judge Henroid's clerk verified the 6th. (R. 479-480).

7. The lack of any written notice from the other attorneys or the trial court that the trial was scheduled for the 5th and not the 6th. (R. 1-656).

8. The lack of any communications from the other attorneys from October 23, 2007 to November 2, 2007 that his Affidavit, Motion, and Order were wrong in stating the trial started on the 6th.

9. The trial on the 5th in a different court that Plaintiff's counsel had to handle. (R. 493-494).

In conjunction with the foregoing, the Preamble of the Utah Supreme Court Rules, Chapter 23, Standards of Professionalism and Civility states

A lawyer's conduct should be characterized at all times by personal courtesy and professional integrity in the fullest sense of those terms. In fulfilling a duty to represent a client vigorously as lawyers, we must be mindful of our obligations to the administration of justice, which is a truth-seeking process designed to resolve human and societal problems in a rational, peaceful, and efficient manner. We must remain committed to the rule of law as the foundation for a just and peaceful society.

. . .

We expect judges and lawyers will make mutual and firm commitments to these standards.

Utah S. Ct. R., ch. 23, Preamble. Similarly, paragraph 14 states that “[l]awyers shall advise their clients that they reserve the right to determine whether to grant accommodations to other counsel in all matters not directly affecting the merits of the cause or prejudicing the client’s rights, such as extensions of time, continuances, adjournments, and admissions of facts.” Utah S. Ct. R., ch. 23, ¶14. Furthermore, paragraph 15 states that “[i]f other counsel requires a scheduling change, lawyers shall cooperate in making any reasonable adjustments.” Id. at ¶15. In the present case, Plaintiff’s counsel accommodated Defendant, All My Sons’ counsel for requests to take additional depositions of witnesses after the time for discovery had expired under the Scheduling Order. Plaintiff’s counsel allowed two additional depositions to be taken. Plaintiff’s counsel also accommodated the Defendants in allowing the deposition of the Murray Police officer to be admitted at trial without requiring a motion.

Over the past thirty-three years, Plaintiff’s counsel and probably most other attorneys have had numerous opportunities to comply with the intent of the above Standards of Professionalism and Civility. When other attorneys including both of Defendants’ counsel, Mr. Ludlow and Mr. Spencer, have made mistakes in calendaring hearings and trials and have failed to appear, accommodations have been made. Plaintiff’s counsel and other attorneys he has dealt with the past have accommodated other attorneys including Mr. Ludlow and Mr. Spencer and allowed continuances and

adjournments until the other attorney could be present at the hearing or trial. Plaintiff's counsel has not entered a default upon a party that was represented by an attorney when that attorney was late or absent. Plaintiff's counsel recalls other past cases where either Mr. Ludlow or Mr. Spencer was opposing counsel, wherein Plaintiff's counsel continued a hearing because they did not appear due to their mistake in calendaring. Plaintiff's counsel also recalls numerous experiences with judges, including judges now on the Utah Court of Appeals and the Utah Supreme Court, wherein they have accommodated attorneys who failed to appear at a trial or hearing by continuing the same rather than entering a default or dismissal. Furthermore, Plaintiff's counsel accommodated Defendants' counsel for the additional depositions after the time for discovery had terminated under the scheduling Order. In allowing the accommodations, Plaintiff's counsel was adhering to the professional courtesies as stated in the Standards of Professionalism and Civility. Plaintiff is not attempting to excuse the mistake of his counsel, but requests that the above court consider the conduct of all counsel and parties to determine if the trial court exceeded its discretion in dismissing with prejudice.

If either of the Defendants' counsel had requested that the trial be continued one day to accommodate Plaintiff's counsel's mistake, it would not have prejudiced their client's rights since the trial would have allowed them to present all of their evidence and have the court enter a fair decision. Plaintiff's counsel would have had to pay the Defendants' attorney's fees and the Defendants' costs to appear for the 5th of November

2007, but all of the preparation for trial would have still been required to proceed with the trial on the 6th. The trial court discussed this accommodation in its Ruling of February 28, 2008 (R. 642-647, p.4). However, the trial court failed to consider the reduction of trial time by Plaintiff's accommodations as to the number of witnesses and the Order of October 29, 2007. Also, the court did not consider its authority to limit the Plaintiff's case-in-chief to one day as a better solution than dismissing with prejudice and wasting the two additional days of trial. Plaintiff's counsel has had numerous judges in the past limit his client's case-in-chief or the other parties case-in-chief based upon various circumstances, including, attorneys wasting the court's time due to inappropriate examination or cross-examination, failure of the attorneys to be on time, or due to the court's schedule. A recent example of the courts discretion to accommodate trial dates occurred in December 2007 in the Third District Court. Richard S. Nemelka, his client, and witnesses were present at court and ready to proceed with a trial scheduled before Judge Leslie Lewis and reassigned to Judge Dennis Fuchs. The court declined to hear the trial due to the Court's mistake as to the amount of time necessary for the trial and continued the same. Regardless, the trial in the present case could have been finished in the two remaining days because of the reduction of witnesses and the time restraints imposed by the trial court and would not have prejudiced the parties in any regard.

The next two Rohan factors, (2) & (3), in determining whether the trial court exceeded its discretion, i.e., "the opportunity each party has had to move the case

forward” and “what each of the parties has done to move the case forward” have been satisfied in this case. The trial court extended the cut-off date for fact discovery from November 6, 2006 to 28th of February 2007 to allow additional depositions by both parties. A request for a trial setting was filed May 16, 2007 after discovery was completed even though Defendants’ Motion for Summary Judgment was still pending. The trial originally scheduled for October 15-17, 2007 was continued three weeks to November 5-7, 2007 only because of Plaintiff’s counsel’s conflict. The trial scheduled on the 5th could have been postponed only for one day to accommodate Plaintiff’s counsel’s mistake.

The next factor, (4) “what difficulty or prejudice may have been caused to the other side . . .” is vastly different in this case as compared to Rohan wherein greater difficulty and prejudice was caused for the other side. In the present case, a postponement of the trial for one day would not have prejudiced the Defendants except for their appearance on the 5th for which Plaintiff’s counsel was willing to pay. The Defendants’ witnesses were not subpoenaed to appear until the 6th of November 2007 and accommodations could have been made for them to testify on the 6th. The preparation for trial by Defendants’ counsel would not be effected by a one-day delay in the trial.

The court in Rohan determined the last factor and the most important to be “whether injustice may result from the dismissal.” This factor is critical to the Plaintiff herein. Not only was the Plaintiff assessed over \$29,000.00 in attorneys’ fees (which

would be paid by his counsel), but his claim for over \$300,000.00 for his stolen personal property was dismissed with prejudice. Unlike Rohan, where the court found that he had ample opportunity to litigate his case, the Plaintiff here did not have ample opportunity to litigate his case; he was afforded no time in court whatsoever to present the issues of this case at trial. There is no question that the Plaintiff, Defendants, and the trial court were delayed one day in starting the trial due to Plaintiff's counsel's mistake, but Plaintiff and his witnesses were ready to begin the trial on the 6th of November 2007. Both the Defendants and the trial court had calendared the 6th and 7th of November, 2007 as trial days. Further, unlike Rohan, neither the Plaintiff nor his counsel acted in bad faith or were dilatory. This was an honest, unintentional, mistake, which was confirmed by the trial court in its ruling on February 26, 2008. (R. 642-647). Furthermore, the Utah Supreme Court in Westinghouse Elec. Supply Co. v. Paul W. Larsen Contractor, Inc., 544 P.2d 876,879, in determining a case involving a dismissal for failure to prosecute, stated that

It is indeed commendable to handle cases with dispatch and to move calendars with expedition in order to keep them up to date. But it is even more important to keep in mind that the very reason for the existence of courts is to afford disputants an opportunity to be heard and to do justice between them.

Plaintiff respectfully submits that the trial court exceeded its discretion in dismissing his case with prejudice and the same should be reversed so Plaintiff may have his "opportunity to be heard" and to have justice rendered.

II. The Trial Court Abused or Exceeded Its Discretion in Failing to Grant the Motion to Set Aside.

Rule 60(b)(1) of the Utah Rules of Civil Procedure allows the trial court to set aside an order or judgment if there has been a mistake or excusable neglect and the motion is timely filed. Plaintiff filed his Motion to Set Aside and Memorandum in Support on November 8, 2007 just three days after the trial court dismissed his action and awarded attorney's fees. (R. 474-475, 514-520). The Plaintiff's mistakes and excusable neglect were relying upon his counsel's prepared pleadings, correspondence and communications as to the date of trial and upon the trial court October 29, 2007 Order. The Plaintiff's counsel made this major mistake. Therefore, the issue is what consequence the Plaintiff should suffer for his counsel's mistake. In McKean v. Mountain View Memorial Estates, 411 P.2d 129, 130-131 (Utah 1960), where an attorney was late for the trial, the court stated,

The purpose of a default judgment is to conclude litigation when a defendant fails to plead or otherwise defend an action. In such circumstances its use is practical and salutary. However, it was never intended to be used as a means of disciplining attorneys who may be derelict in the performance of their duties. *If such a course were followed it may do a grave injustice to the client by punishing him rather than the attorney who has done the wrong.*

(emphasis added). This rule of law should be applied in the present case and the Plaintiff

should not have been so severely punished due to his counsel's mistake, and as in McKean, the trial court should have granted the Motion to Set Side.

The Minute Entry dated January 7, 2008 (R. 582-583) denying Plaintiff's Motion to Set Aside, Plaintiff's objections to the award of attorneys fees, and the subsequent entry of the judgments of the 9th of January, 2008 were extremely prejudicial to the Plaintiff and his attorney, Richard S. Nemelka. The foregoing appear to have been entered under a misunderstanding of the facts and contrary to law. In Menzies v. Galetka, 2006 UT 81, ¶63, in regard to a Rule 60(b) motion the Utah Supreme Court stated the following:

Rule 60(b) is an equitable rule designed to balance the competing interests of finality and fairness. *See Lund v. Brown*, 2000 UT 75, ¶ 10, 11 P.3d 277; *Laub v. S. Cent. Utah Tel. Ass'n.*, 657 P.2d 1304, 1306 (Utah 1982). In balancing these competing interests, the district court must consider all of the attendant circumstances. *See Katz v. Pierce*, 732 P.2d 92, 93 n. 2 (Utah 1986); *Heath v. Mower*, 597 P.2d 855, 858 (Utah 1979); *Olsen v. Cummings*, 565 P.2d 1123, 1124 (Utah 1977). Because of the equitable nature of the rule, a district court has broad discretion to rule on a 60(b) motion. *Lund*, 2000 UT 75, ¶¶ 9-10, 11 P.3d 277. However, this discretion is tempered by the fact that the rule is designed to be remedial and must be liberally applied. *Id.* ¶ 10; *see also Cmty. Dental Servs. v. Tani*, 282 F.3d 1164, 1169-70 (9th Cir.2002) (discussing rule 60(b)(6) of the Federal Rules of Civil Procedure). "[J]udgment by default is an extreme measure and a case should, whenever possible, be decided on the merits." *Tani*, 282 F.3d at 1170 (citation and internal quotation marks omitted); *see also State Dept. of Soc. Servs. v. Musselman*, 667 P.2d 1053, 1055 (Utah 1983) (same). Accordingly, a district court "should be generally indulgent toward" vacating default judgments, *Katz*, 732 P.2d at 93, and must "incline towards granting relief in a doubtful case to the end that the party may have a hearing." *Lund*, 2000 UT 75, ¶ 10, 11 P.3d 277 (citations and internal quotation marks omitted). Thus, "it is quite uniformly regarded as an abuse of discretion to refuse to vacate a default judgment where there is a reasonable justification or excuse for the . . . failure . . . and timely application

is made to set it aside." *Id.* ¶ 11 (citations and internal quotation marks omitted).

The Utah Supreme Court also stated in Lund v. Brown, 2000 UT 75, ¶11, "Thus, while we review the trial court's decision in the instant case for abuse of discretion, we emphasize that the court's discretion is not unlimited." As stated above in the previous argument, there was a reasonable justification for the mistake made by Plaintiffs attorney and the Plaintiff was justified in relying upon his counsel and the trial court Order of October 29, 2007. Therefore, the trial court exceeded and abused its discretion by failing to grant the Motion to Set a Side when the Plaintiff has alleged sufficient grounds in his Affidavit and the Affidavits of others. (R. 499-511, 521-523, 524-526).

The only explanation given by court in its Minute Entry dated January 7, 2008 for denying the Motion to Set Aside is that the "Plaintiff fails to articulate any reason which would satisfy the requirements of Rule 60(b)." Contrary to the Minute Entry, the following are the reasons that were articulated by Plaintiff in the Affidavits and Memorandum (R. 476-498, 521-523, 524-526) filed in support of the Motion to Set Aside that satisfied the requirements of Rule 60(b):

1. The Plaintiff relied upon the Order of the court dated October 29, 2007, which indicated the trial was scheduled for November 6-8, 2007. (R. 521-523). In the case of Fisher v. Bybee, 2004 UT 92, ¶12, the Utah Appellate Court stated that the "other forms of unintentional conduct that rule 60(b)(1) deems eligible to be considered as grounds to set aside a judgment-inadvertence, surprise, and excusable neglect-are aptly

suit to describe circumstances which might befall counsel or parties.” Neither the Plaintiff nor his attorney intentionally failed to appear at the trial and said conduct should be considered as grounds to set aside an order of dismissal.

In Airkem International v. Parker, 513 P.2d 429, 431 (Utah 1973), the court discusses due diligence of a party as a means to make sure they will be present in court. Contrary to Airkem, here the Plaintiff performed due diligence. Plaintiff was in constant contact with his counsel as to the date of the trial. Plaintiff reviewed the Order of the court stating the trial was scheduled for November 6-8, 2007. Plaintiff made plans to attend the trial by rearranging his work schedule, obtained tickets to fly to Utah for the assumed trial dates, and participated in making sure his witnesses would be present at the trial on the 6th of November 2007. (R. 521-523). The Plaintiff’s conduct is exactly opposite of the conduct of the Defendant in the Airkem case and supports Plaintiff’s position that his non-appearance at the first day of trial was not intentional but was due to inadvertence, excusable neglect, and circumstances over which the Plaintiff had no control. The Appellate Court went on in Airkem to discuss the balancing of the two considerations for the Trial Court in setting aside a judgment when a party has not had his opportunity to present his case. Under this balancing of the equities of sorts, the court determines the prejudicial effect on the parties bound by judgment. See Id. In accordance with the balancing test in Airkem, the Plaintiff has established that he used due diligence to determine when the trial started, which is a prominent factor that must be present to

vacate a judgment. *Id.* Furthermore, the Defendants' opposing memorandum to the Motion to Set Aside, (R.551-567) states that "due diligence" is described as "the prudence and effort that is ordinarily used by a reasonable person under the circumstances." The Plaintiff's reliance upon the Order of the Court, his communications with his counsel, his contact with his witnesses and arrangements for travel are more than what a reasonable person under similar circumstances would ordinarily use.

2. No written notice as to the exact trial date was sent to any of the parties or their counsel by the court, and none of the attorneys filed with the court a notice of the trial or served said notice on the other attorneys. Therefore, the only notice of the trial that the Plaintiff had was based on his communications with his counsel and the Order of the court. (R. 521-523, 476-498). The Plaintiff had reasonable justification to believe that the trial started on November 6, 2007, which constitutes a reasonable excuse for the Plaintiff failing to appear on the 5th.

3. Another reason articulated by Plaintiff in his Motion to Set Aside was that the attorney for the Defendant, All My Sons, had notice on the 2nd of November 2007 that counsel for the Plaintiff had another all-day trial scheduled for the 5th of November 2007. Defendant, All My Sons', counsel also was made aware that Plaintiff's counsel's trial was in another court and that Plaintiff's counsel was not planning on the trial in this matter to begin until Tuesday the 6th. Further, both Defendants' counsel knew on October 23, 2007 of Plaintiff's counsel's mistake. The court also knew on the 2nd of November 2007 that

counsel for the Plaintiff believed the trial was to start on the 6th. (Affidavit of Richard S. Nemelka, R. 476-498). There were also additional reasons articulated in Plaintiff's Motion and Memorandum (R. 514-520) that justified granting said Motion that the lower court failed to include when rendering its decision.

Although cases from other jurisdictions are not binding on the above Court, they may be considered as persuasive authority. The Court of Appeals of Louisiana in Fidelity Acceptance Corporation v. Brown, 382 So.2d 1007, 1010 (La.App. 1980), stated that

it is an abuse of discretion to dismiss suit, with prejudice, on basis of plaintiff's failure to appear on scheduled trial date . . . and record was devoid of any meaningful fact other than explanation of plaintiff's counsel that failure to appear and proceed with merits was due to clerical error in his office.

Similarly, the Pennsylvania Supreme Court in Shin v. Brennan, 764 A.2d 609, 612 (Pa. Super. Ct. 2000) stated that

while the trial court had the power to dismiss arbitration appeal for Defendants' counsel's failure to attend the pretrial conference, other sanctions, including fines, attorney's fees and contempt, rather than dismissal, were the appropriate means of punishing counsel's behavior, where counsel's nonappearance was inadvertent in that he failed to note conference on his calendar.

The punishment should have been directed to Plaintiff's counsel and not the Plaintiff and his Motion to Set Aside should have been granted in light of the equitable notions of fair justice.

III. The Trial Court Erred or Abused Its Discretion in Failing to Grant the Motion for a New Trial.

Rule 59(1) of the Utah Rules of Civil Procedure allows the court to grant a new trial or to amend the judgment if there was an “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.” Rule 59(7) allows a new trial if there has been an “error of law.” Plaintiff submits that he was entitled to a new trial under both provisions of Rule 59 of the Utah Rules of Civil Procedure.

The dismissal of the action was based on an irregularity in the proceedings as well as being an abuse of discretion. The amount of over \$29,000.00 of attorney’s fees awarded for all of Defendants’ fees incurred during the entire litigation was excessive and an error of law. When Plaintiff’s counsel learned during the noon recess of his trial on the 5th of his mistake of not scheduling the trial correctly, he immediately communicated with the court. Plaintiff’s counsel inquired if the trial could in fact start on the 6th but was advised that the court had dismissed the action with prejudice and there would be no trial on the 6th. Since the trial was scheduled for three days, there would not have been an unbearable hardship to the court or Defendants’ counsel to continue the trial for one day so that Plaintiff and his counsel could have been present. There are numerous reasons as to why no hardship would have occurred stated in the previous arguments above. Plaintiff respectfully submits that all of the above stated facts constitute an irregularity in

the proceedings justifying the trial court granting the new trial.

Plaintiff respectfully submits to the above court that there was an irregularity in the Order entered by the trial court on October 29, 2007, as to the trial dates and under Rule 59(1) a new trial may be granted due to an irregularity in an order of the trial court. Plaintiff respectfully submits that the trial court abused its discretion, as argued above, in dismissing the action with prejudice and awarding such a large amount of attorney's fees, which appears to be excessive, based upon the sanctions available to the court for Plaintiff's counsel's mistake. Again, under Rule 59(1) the court has the discretion to grant a new trial if there has been an abuse of discretion preventing the Plaintiff from having a fair trial or any trial.

The Order entered by the Court from the trial of November 5th, 2007 indicates that the court granted the attorney's fees based on U.C.A. 78-27-56. However, there has never been a finding by the Court that this matter was without merit or brought in bad faith. The Defendants filed a Motion for Summary Judgment (R. 173-175) alleging that there was no merit to Plaintiff's case but the trial court denied said Motion (R. 338-344) and scheduled a trial. Specifically, the Court stated in its order denying summary judgment that, "[f]act finders may make reasonable inferences, and here the truck's presence and activity between truck and storage unit supports the reasonable inference of All My Sons' connection, either intentional or negligent, to the unauthorized removal and use of Plaintiff's property." (R. 340, p. 3). The Court then states that in regards to "John

Siddoway's alleged facilitation of the thieves' access, Defendant curiously suggests that the claim relies on hearsay filtered through Lonnie Paulos, but this ignores the proposition's clear support from Rhonda Jones's deposition." (R. 343, p. 6).

It seems apparent the Court concluded in its order that the Plaintiff had at least a sufficient meritorious claim to proceed to trial and allow the trier-of-fact to determine the outcome. (R. 343). "A claim is without merit, for purposes of determining whether attorney fees are owed under statute providing for attorney fees award in an action without merit if claim is frivolous, is of little weight or importance having no basis in law or fact, or clearly lacks a legal basis for recovery." Wardley Better Homes and Garden v. Cannon, 2002 UT 99, ¶30. Again, it would appear to be the law of this case based on the trial court's ruling that plaintiff's claims in deed had merit and were not brought in bad faith.

"In regards to an award of attorney fees, to find that a party acted without good faith, the trial court is required to find that he; (1) lacked an honest belief in the propriety of the activities in question; or (2) intended to take unconscionable advantage of others; or (3) intended to or acted with the knowledge that the activities in question would hinder, delay or defraud others." Rohan v. Boseman, 2000 UT App 109, ¶39. Again, based on the Court's Ruling in this matter, the Plaintiff did not act in bad faith in bringing this litigation, but in fact had been damaged well over \$300,000.00 from the theft of his property. Further, the trial court stated in the ruling on February 26, 2008 (R. 642-647)

that all of the problems were caused by a honest and unintentional mistake by Plaintiff's counsel and no bad faith was involved.

However, the trial court does have inherent power to assess attorney's fees as sanctions to enforce compliance with its rules. In Barnard v. Wasserman, 855 P.2d 243 (Utah 1993), Brian Barnard, an attorney, contested an award of \$430.00 against him individually for making a mistake. The Utah Supreme Court stated, "[a]s we suggested in In re Evans, courts of general jurisdiction, such as the district court in this case, 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." Id. at 249. The trial court in the present case did not articulate the basis for awarding all of the Defendants' attorney's fees incurred throughout the entire litigation of over \$29,000.00. Plaintiff contends that the rule of law stated in Barnard would not support such an award against the Plaintiff, especially when the Plaintiff was free from any action that thwarted the trial court going forward with the trial. An award of fees against Plaintiff's counsel for the costs incurred for the appearance on the 5th of November 2007, however, would have been appropriate and within the scope of Barnard.

Plaintiff, based upon the above, respectfully submits that the trial court erred as a matter of law in awarding attorney fees of over \$29,000.00 and under Rule 59(7) Plaintiff should have been granted a new trial. Plaintiff's counsel also submits to the above court

that the failure of the Plaintiff and his counsel to appear at the first day of the trial was due to Plaintiff's counsel's mistake and Plaintiff should not be so severely penalized thereby.

IV. The Trial Court Erred and Abused Its Discretion in Awarding Attorney's Fees.

Had the trial court allowed the trial to proceed and had the Defendants prevailed, they would not have been entitled to an award of attorney's fees since there was no contract between the parties allowing fees and there were no statutory provisions entitling the prevailing party to an award of fees. *Rohan v. Boseman*, 2000 UT App 109, ¶34; *Jensen v. Bowcutt*, 892 P.2d 1053, 1058 (Utah Ct. App. 1995). As argued above, there was no basis to award fees under U.C.A. 78-27-56 either. Therefore, the only basis for an award of attorney's fees would be under the trial courts inherent powers as stated above. However, neither of the Defendants requested nor did the trial court find that attorney's fees were appropriate to be awarded under said inherent power.

In the trial court's Order from Trial, (R. 469-471) the trial court awarded fees under U.C.A. 78-27-56 although there was no finding that the litigation was without merit and brought in bad faith, in fact the contrary was true. As stated above, the Defendants allege in their Motion for Summary Judgment and Memorandum, (R.173-184) and their

Motion for Attorney's Fees (R. 170-172) that the action was without merit and not brought in good faith and requested fees under U.C.A. 78-27-56. However, the trial court denied said Motions and specifically stated that, "[f]act-finders may make reasonable inferences, and here the truck's presence and activity between truck and storage unit supports the reasonable inference of All My sons' connection either intentional or negligent, to the unauthorized removal and use of Plaintiff's property." (Page 3 & 4 in Order Denying Defendants' Motion For Summary Judgment) (R. 338-344). More importantly the trial court in its Ruling of February 28, 2008 states that "[t]he Court has made no ruling that the Plaintiff's case is without merit." (R. 642-647, ¶4).

Therefore, the trial court erred as a matter of law in awarding attorney's fees under U.C.A. 78-27-56. Specifically, the court denied attorney's fees in its Order Denying the Motion for Summary Judgment, acknowledged that the case has merit in its Ruling of February 28, 2008, and failed to make any additional findings of lack of merit and bad faith. In conjunction, a finding of "bad faith" under Section 78-27-56 requires a specific finding of intent related to that allegation. *See Faust v. KAI Technologies*, 2000 UT 82, ¶16.

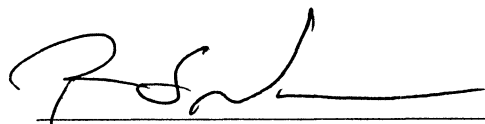
If it is assumed that the trial court awarded the fees under its inherent power, then there was an abuse of discretion in awarding all of the attorney's fees incurred by the Defendants rather than the fees incurred as a direct result of Plaintiff's counsel's mistake.

Both counsel for both Defendants only requested fees at trial for their preparation for trial. (T. 4). For the trial court to award all of the attorney's fees incurred is contrary to the bounds of the court's authority to "to control proceedings before it . . . and a means of controlling the conduct of attorneys" Barnard at 249. Therefore, under an abuse of discretion standard the award of all of the attorney's fees should be reversed.

CONCLUSION

The Trial Court's decisions, Order of Dismissal, and Judgments for attorneys' fees should be reversed and this matter remanded to the Trial Court for trial.

DATED this 30 day of June, 2008.

A handwritten signature in black ink, appearing to read "R. S. Nemelka", written over a horizontal line.

Richard S. Nemelka
Attorney for Respondent/Appellant

CERTIFICATE OF MAILING

This is to certify that I mailed a true and correct copy of the foregoing **BRIEF OF PLAINTIFF/APPELLANT** this 30 day of June, 2008, postage prepaid and addressed as follows:

Stephen D. Spencer
DAY SHELL & LILJENQUIST
45 East Vine Street
Murray, Utah 84107

Randy Ludlow
Attorney at Law
185 South State Street, Suite 208
Salt Lake City, Utah 84111



ADDENDUM A

3RD DISTRICT COURT - SALT LAKE
SALT LAKE COUNTY, STATE OF UTAH

LONNIE PAULOS vs. ALL MY SONS MOVING AND STORAGE

CASE NUMBER 060903698 Contracts

CURRENT ASSIGNED JUDGE
MICHELE CHRISTIANSEN

PARTIES

Plaintiff - LONNIE PAULOS
Represented by: RICHARD S NEMELKA

Defendant - ALL MY SONS MOVING AND STORAGE
Represented by: STEPHEN D SPENCER

Defendant - JOHN DOE

Defendant - S & B STORAGE
Represented by: RANDY S LUDLOW

Defendant - JOHN DOES 1 - 10

Defendant - JOHN SIDDOWAY
Represented by: RANDY S LUDLOW

Plaintiff - ADVANCED ORTHOPEDICS AND SPORT
Represented by: RICHARD S NEMELKA

ACCOUNT SUMMARY

TOTAL REVENUE	Amount Due:	371.00
	Amount Paid:	371.00
	Credit:	0.00
	Balance:	0.00

REVENUE DETAIL - TYPE: COMPLAINT 10K-MORE

	Amount Due:	155.00
	Amount Paid:	155.00
	Amount Credit:	0.00
	Balance:	0.00

REVENUE DETAIL - TYPE: AUDIO TAPE COPY

	Amount Due:	10.00
	Amount Paid:	10.00
	Amount Credit:	0.00
	Balance:	0.00

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CASE NUMBER 060903698 Contracts

REVENUE DETAIL - TYPE: APPEAL

Amount Due:	205.00
Amount Paid:	205.00
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: COPY FEE

Amount Due:	1.00
Amount Paid:	1.00
Amount Credit:	0.00
Balance:	0.00

CASE NOTE

PROCEEDINGS

03-03-06 Case filed
03-03-06 Judge STEPHEN L HENRIOD assigned.
03-03-06 Filed: Complaint 10K-MORE
03-03-06 Fee Account created Total Due: 155.00
03-03-06 COMPLAINT 10K-MORE Payment Received: 155.00
 Note: Code Description: COMPLAINT 10K-MORE
03-20-06 Filed return: 20 day summons served Hector Pineda-RA
 Party Served: ALL MY SONS MOVING AND STORAGE,
 Service Type: Personal
 Service Date: March 08, 2006
03-27-06 Filed: Answer
 ALL MY SONS MOVING AND STORAGE

04-04-06 Filed: Rule 30(b)(6) Subpoena Duces Tecum (Murray City Recorder
 Office)
04-13-06 Filed return: 20 day summons
 Party Served: SIDDOWAY, JOHN
 Service Type: Personal
 Service Date: April 11, 2006
04-13-06 Filed return: 20 day summons served Jon Siddoway-RA
 Party Served: S & B STORAGE
 Service Type: Personal
 Service Date: April 11, 2006
04-18-06 Filed: Answer of
 S & B STORAGE
 JOHN SIDDOWAY

04-28-06 Filed: Certificate of Service of Defendant's Rule 26(a) (1)
 Initial Disclosures
05-15-06 Filed: Certificate of Service of Plaintiff's Rule 26(a) (1)
 Initial Disclosures

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CASE NUMBER 060903698 Contracts

05-17-06 Filed: Certificate of Service (Initial Disclosures)
05-19-06 Filed: Certificate of Service (First Set of Requests for Admission and Interrogatories to Plaintiff)
05-26-06 Filed: Certificate of Service of Notice of Rule 34 Inspection
06-01-06 Filed order: Amended Attorney Planning Meeting Report And Scheduling Order
Judge STEPHEN L HENRIOD
Signed May 31, 2006
06-14-06 Filed: Certificate of Service (Answers to Defendants Request for Admissions)
06-16-06 Filed: Verified Motion For Temporary Restraining Order
06-16-06 TEMP RESTRAIN ORDER scheduled on June 26, 2006 at 03:00 PM in Fourth Floor - W47 with Judge HENRIOD.
06-20-06 Filed: Notice of Hearing
06-22-06 Filed: Memorandum in Opposition to Plaintiff's Motion for Temporary Restraining Order
06-26-06 Minute Entry - Minutes for Temp Restrain Order
Judge: STEPHEN L HENRIOD
Clerk: lynm
PRESENT

Defendant(s): S & B STORAGE
Plaintiff's Attorney(s): RICHARD S NEMELKA
Defendant's Attorney(s): HEATHER L THUET
Audio
Tape Number: 41 Tape Count: 255

HEARING

TAPE: 41 COUNT: 255
Counsel for both parties present.
On record the parties argued before the court. The court ruled that the Defendant's Motion for A Temporary Restraining Order to restrain the eviction is granted. The defendant is ordered to move out the bio hazard and clean up storage shed immediately.
06-29-06 Filed: Certificate of Service (Answers to Defendant's All My Sons Moving and Storage Interrogatories)
07-10-06 Filed: Objection to Defendants Proposed Order
08-07-06 Filed: Notice of Withdrawal of Counsel (Phillip S Ferguson, Heather L Thuet)
08-15-06 Filed order: Amended Temporary Restraining Order
Judge STEPHEN L HENRIOD
Signed August 15, 2006
08-17-06 Filed: Notice to Appoint
10-13-06 Filed: Notice of Deposition
10-13-06 Filed: Subpoena Duces Tecum-Murray City Corporation
11-02-06 Filed: Notice of Appearance of Counsel (Randy Ludlow)

CASE NUMBER 060903698 Contracts

11-13-06 Filed: Certificate of Service (Request for Admissions to Plaintiff and First Set of Interrogatories and Request for Production of Documents)
11-28-06 Filed: Notice of Deposition (Marko Munoz)
12-13-06 Filed: Notice of Continuance of Deposition
12-21-06 Filed: Answers to Request for Admissions
12-22-06 Filed: Subpoena-Marko Munoz (served Hector Pineoa) on return
01-04-07 Filed: Motion to Withdraw Answers to Request for Admissions and Memorandum in Support Thereof
01-04-07 Filed: Motion to Strike First Set of Interrogatories to Plaintiff and Request for Admissions and Memorandum in Support Thereof
01-08-07 Filed: Motion for Protective Order and Request for Expedited Ruling
01-08-07 Filed: Request for Ruling on Expedited Motion
01-09-07 LAW AND MOTION scheduled on January 12, 2007 at 08:30 AM in Fourth Floor - W47 with Judge HENRIOD.
01-10-07 Filed: Motion for Attorney's Fees
01-10-07 Filed: Motion for Summary Judgment
01-10-07 Filed: Affidavit of Hector Pineda in support of Motion for Summary Judgment
01-10-07 Filed: Memorandum in Support of Motion for Summary Judgment
01-12-07 Minute Entry - Minutes for Law and Motion
Judge: STEPHEN L HENRIOD
Clerk: lynn
PRESENT

Plaintiff's Attorney(s): RICHARD S NEMELKA
Defendant's Attorney(s): RANDY S LUDLOW
STEPHEN D SPENCER

Audio

Tape Number: 58 Tape Count: 843

HEARING

TAPE: 58 COUNT: 843

On record the Defendant's Motion for a Protective Order is argued by Mr. Ludlow. The court orders the discovery extended to 2/28/07.

01-17-07 Filed: Letter from DepomaxMerit
01-18-07 Filed: Certificate of Service (Answers to Defendant's First Set of Interrogatories)
01-29-07 Filed: Notice of deposition (Marko Munoz)
01-29-07 Filed order: Order
Judge STEPHEN L HENRIOD
Signed January 29, 2007
01-30-07 Filed: Notice of Deposition-Lonnie Paulos
01-30-07 Filed: Notice of Deposition-Rhonda Jones

02-06-07 Filed: Motion for a Protective Order
02-14-07 Filed: Response to Plaintiff's Motion for Protective Order
02-23-07 Filed: Request for Hearing on Plaintiff's Motion for Protective Order
02-28-07 Filed: Response to Request for Hearing
02-28-07 MOTION FOR PROTECTIVE ORDER scheduled on March 19, 2007 at 02:30 PM in Fourth Floor - W47 with Judge HENRIOD.
02-28-07 Notice - NOTICE for Case 060903698 ID 11030758
MOTION FOR PROTECTIVE ORDER is scheduled.
Date: 03/19/2007
Time: 02:30 p.m.
Location: Fourth Floor - W47
THIRD DISTRICT COURT
450 SOUTH STATE STREET
SLC, UT 84114-1860
Before Judge: STEPHEN L HENRIOD
03-08-07 Filed: Motion to Continue
03-14-07 Filed: Motion for an Extension to Respond to Motion for Summary Judgment
03-15-07 Filed: Request to Submit for Decision (Motion for Attorney's Fees)
03-15-07 Filed: Affidavit of Attorney's Fees
03-15-07 Filed: Request to Submit for Decision (Motion for Summary Judgment)
03-19-07 Filed: Objection to Request to Submit for Decision (Defendant's Motion for Summary Judgment)
03-19-07 Filed: Notice to Submit (Motion for an Extension to Respond to Motion for Summary Judgment)
03-19-07 Minute Entry - Minutes for Law and Motion
Judge: STEPHEN L HENRIOD
Clerk: lynn
PRESENT

Defendant's Attorney(s): RANDY S LUDLOW
STEPHEN D SPENCER

Audio

Tape Number: 64 Tape Count: 239

HEARING

TAPE: 64 COUNT: 239

On record the counsel for All My Sons and S&B Storage are present. Mr. Nemelka is not present. The court orders Mr. Ludlow to prepare the Order for the Deposition and offer Mr. Nemelka 3 dates to choose from and they (Paulos) must pay costs of travel here for the deposition.

03-30-07 Filed: Notice of Deposition (Rhonda Jones)

03-30-07 Filed: Notice of Deposition (Lonnie Paulos)
04-02-07 Filed: Motion to Set Aside Order from hearing on March 19, 2007
04-03-07 Minute Entry - MOTION TO SET ASIDE ORDER FROM HEARING O
Judge: STEPHEN L HENRIOD
The court reviewed the Plaintiff's Motion to Set Aside Order from
Hearing on March 19, 2007 and denied it.

Dated this _____ day of
_____, 20____

Judge STEPHEN L HENRIOD

04-03-07 Filed order: Order (From Hearing on March 19, 2007 in re
Protective Order)
Judge STEPHEN L HENRIOD
Signed April 02, 2007
04-06-07 Filed: Response to Motion to Set aside Order from Hearing Held
on March 19, 2007
04-30-07 Filed: ReNotice of Location in Re Depositions
05-15-07 Filed: Memorandum in Opposition to Defendant, All My Sons
Motion for Summary Judgment
05-16-07 Filed: Request for Trial Setting
05-21-07 Filed: Reply Memorandum (Motion for Summary Judgment)
05-21-07 Filed: Notice to Submit for Decision (Motion for Summary
Judgment)
05-22-07 Notice - NOTICE for Case 060903698 ID 11111802
SCHEDULING CONF is scheduled.
Date: 06/18/2007
Time: 09:00 a.m.
Location: Fourth Floor - W47
THIRD DISTRICT COURT
450 SOUTH STATE STREET
SLC, UT 84114-1860
Before Judge: STEPHEN L HENRIOD
05-22-07 SCHEDULING CONF scheduled on June 18, 2007 at 09:00 AM in
Fourth Floor - W47 with Judge HENRIOD.
06-18-07 Minute Entry - Minutes for Law and Motion
Judge: STEPHEN L HENRIOD
Clerk: lynn
TELEPHONE CONFERENCE
PRESENT

Plaintiff's Attorney(s): RICHARD S NEMELKA
Defendant's Attorney(s): RANDY S LUDLOW
STEPHEN D SPENCER

MOTION TO CONTINUE is scheduled.

Date: 08/20/2007

Time: 08:45 a.m.

Location: Fourth Floor - W47

THIRD DISTRICT COURT

450 SOUTH STATE STREET

SLC, UT 84114-1860

Before Judge: STEPHEN L HENRIOD

08-13-07 Filed: Opposition to Motion to Continue Trial

08-20-07 Filed: Notice of Deposition (Officer Aaron Jones, Officer Mike Obrey)

08-20-07 Filed: Subpoena-Mike Obrey

08-20-07 Filed: Subpoena-Aaron Jones

08-20-07 JURY TRIAL Cancelled.

08-20-07 JURY TRIAL scheduled on November 05, 2007 at 09:00 AM in Fourth Floor - W47 with Judge HENRIOD.

08-20-07 JURY TRIAL scheduled on November 07, 2007 at 09:00 AM in Fourth Floor - W47 with Judge HENRIOD.

08-20-07 JURY TRIAL scheduled on November 08, 2007 at 09:00 AM in Fourth Floor - W47 with Judge HENRIOD.

08-20-07 JURY TRIAL Cancelled.

Reason: Correct Calendar

08-20-07 JURY TRIAL scheduled on November 05, 2007 at 09:00 AM in Fourth Floor - W47 with Judge HENRIOD.

08-20-07 JURY TRIAL scheduled on November 06, 2007 at 09:00 AM in Fourth Floor - W47 with Judge HENRIOD.

08-20-07 JURY TRIAL scheduled on November 07, 2007 at 09:00 AM in Fourth Floor - W47 with Judge HENRIOD.

08-20-07 Minute Entry - Minutes for Law and Motion

Judge: STEPHEN L HENRIOD

Clerk: lynn

PRESENT

Plaintiff's Attorney(s): RICHARD S NEMELKA

Defendant's Attorney(s): RANDY S LUDLOW

STEPHEN D SPENCER

Audio

Tape Number: 76 Tape Count: 903

HEARING

TAPE: 76 COUNT: 903

On record the Plaintiff's Motion to Continue trial was granted without objection. A new trial date is set.

09-06-07 Filed: Notice of Service of Subpoena-

09-10-07 Filed: Acceptance of Service of Subpoena-Frank Nakamura on

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behalf of Aaron Jones and Mike Obrey

09-18-07 Filed: Subpoena-Rob Herrera on return

10-03-07 Filed: Subpoena-Marko A Munoz- on return
 10-03-07 Filed: Notice of Service of Subpoena-Alfredo Villegas Munoz
 10-15-07 Filed: Subpoena-Alfredo Villegas Munoz on return
 10-19-07 Filed: Acceptance of Service of Subpoena -Hector Pineda
 10-23-07 Filed: Notice to Submit for Decision (Plaintiff's Motion to Admit the Deposition of Rhonda Jones)
 10-24-07 Filed: Motion to Admit the Deposition of Rhonda Jones and Memorandum in Support Thereof
 Filed by: NEMELKA, RICHARD S
 10-24-07 Filed: affidavit of Richard S Nemelka
 10-29-07 Filed order: Order To Admit The Deposition of Rhonda Jones
 Judge STEPHEN L HENRIOD
 Signed October 26, 2007
 10-31-07 Filed: Subpoena-Judy Hick on return
 11-01-07 Filed: Subpoena-Jerry Erkelens on return
 11-01-07 Filed: Request for Hearing (Plaintiff's Motion to Admit Deposition of Rhonda Jones)
 11-02-07 BENCH TRIAL scheduled on November 05, 2007 at 09:00 AM in Fourth Floor - W47 with Judge HENRIOD.
 11-02-07 JURY TRIAL Cancelled.
 11-02-07 BENCH TRIAL scheduled on November 06, 2007 at 09:00 AM in Fourth Floor - W47 with Judge HENRIOD.
 11-02-07 JURY TRIAL Cancelled.
 Reason: Correct Calendar
 11-02-07 BENCH TRIAL scheduled on November 07, 2007 at 09:00 AM in Fourth Floor - W47 with Judge HENRIOD.
 11-02-07 JURY TRIAL Cancelled.
 Reason: Correct Calendar
 11-02-07 Filed: Defendant's Trial Brief
 11-05-07 Minute Entry - Minutes for Bench Trial
 Judge: STEPHEN L HENRIOD
 Clerk: lynm
 PRESENT

Defendant(s): JOHN SIDDOWAY
 Defendant's Attorney(s): RANDY S LUDLOW
 STEPHEN D SPENCER

Audio
 Tape Number: 82 Tape Count: 93849

TRIAL

TAPE: 82 COUNT: 93849

On record Mr. Nemelka did not appear. His office finally called and stated Mr. Nemelka was in trial in Bountiful and had it

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CASE NUMBER 060903698 Contracts

calendared for tomorrow. The Defendant's Motion to Dismiss and for attorney fees is granted with prejudice. Mr. Ludlow to prepare order.

11-05-07 Filed: Defendant's Brief On Respondeat Superior Issues
 11-05-07 Case Disposition is Dismissed
 Disposition Judge is STEPHEN L HENRIOD
 11-05-07 BENCH TRIAL Cancelled.
 Reason: Correct Calendar
 11-05-07 BENCH TRIAL Cancelled.
 Reason: Correct Calendar
 11-05-07 Case Disposition is Dismsd w prejudice
 Disposition Judge is STEPHEN L HENRIOD
 11-06-07 Fee Account created Total Due: 10.00
 11-06-07 AUDIO TAPE COPY Payment Received: 10.00
 11-06-07 Filed: Request For Recording by Mr. Nemelka (completed)
 11-07-07 Filed: Affidavit of Attorney's Fees and Costs
 11-07-07 Filed order: Order from Trial (November 5, 2007)
 Judge STEPHEN L HENRIOD
 Signed November 07, 2007
 11-08-07 Filed: Objection to Proposed Orders Attorneys' Fees
 11-08-07 Filed: Motion to Set Aside Order of Dismissal
 Filed by: NEMELKA, RICHARD S
 11-08-07 Filed: Affidavit of Richard S Nemelka
 11-08-07 Filed: Affidavit of Attorney's Fees and Costs
 11-08-07 Filed: Objections to Proposed Orders Attorney's Fees
 11-08-07 Filed: Memorandum in Support of Motion to Set Aside Order of
 Dismissal of November 5, 2007
 11-09-07 Filed: Affidavit of Lonnie Paulos
 11-09-07 Filed: Affidavit of Jayne Nemelka
 11-15-07 Filed: Objection to S&B Attorney Fees
 11-19-07 Filed: Reply in Opposition to Set Aside Dismissal
 11-19-07 Filed: Affidavit of Defendant's Attorney
 11-19-07 Filed: Memorandum in Opposition to Motion to Set Aside Order of
 dismissal
 11-27-07 Filed: Reply to Objection to S&B's Attorney's Fees
 11-27-07 Filed: Notice to Submit for Decision (Objection to Proposed
 Orders Attorneys' Fees)
 11-28-07 Filed: Reply Memorandum in Support of Motion to Set Aside Order
 of Dismissal of November 5, 2007
 11-28-07 Filed: Notice to Submit for Decision (Motion to Set Aside the
 Order of Dismissal)
 01-08-08 Filed order: Minute Entry (Motion to Set Aside Order of
 Dismissal)
 Judge STEPHEN L HENRIOD
 Signed January 07, 2008
 01-08-08 Filed order: Judgment (on behalf of Jon Siddoway)
 Judge STEPHEN L HENRIOD
 Signed January 08, 2008
 01-09-08 Judgment #1 Entered

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CASE NUMBER 060903698 Contracts

Debtor: ADVANCED ORTHOPEDICS AND SPORT
 Creditor: ALL MY SONS MOVING AND STORAGE
 Debtor: LONNIE PAULOS
 16,973.60 Total Judgment

6/12/2008

16,973.60 Judgment Grand Total

01-09-08 Filed judgment: Judgment @J
 Judge STEPHEN L HENRIOD
 Signed January 08, 2008

01-09-08 Judgment #2 Entered
 Debtor: ADVANCED ORTHOPEDICS AND SPORT
 Creditor: JOHN SIDDOWAY
 Debtor: LONNIE PAULOS
 11,314.00 Attorneys Fees
 738.41 Costs
 12,052.41 Judgment Grand Total

01-09-08 Filed judgment: Judgment (on behalf of Jon Siddoway) @J
 Judge STEPHEN L HENRIOD
 Signed January 08, 2008

01-11-08 Filed: Motion to Stay Judgment Pending Disposition of Motion
 for New trial

01-11-08 Filed: Memorandum in Support of Motion to Stay Judgment Under
 Rule 62

01-11-08 Filed: Motion for New Trial or to Amend Judgment Under Rule 59

01-18-08 Filed: Objection to Order on Plaintiff's Motion to Set aside

01-22-08 Filed: Response to Motion for New Trial and Memorandum

01-24-08 Filed: Reply to Plaintiff's Objection to Defendant's Proposed
 Order

01-24-08 Filed: Memorandum in Opposition to Motion to Stay Judgment

01-24-08 Filed: Memorandum in Opposition to Motion for New Trial

01-29-08 Filed: Reply Memorandum of Plaintiff in support of Motion for
 New Trial

01-29-08 Filed: Notice to Submit (Motion for New Trial)

02-01-08 Filed order: Order On Plaintiff's Motion to Set Aside Dismissal
 and Plaintiff's Objection To Attorney's Fees
 Judge STEPHEN L HENRIOD
 Signed January 30, 2008

02-02-08 Filed: Notice to Submit (Motion to Stay Judgment Pending
 Disposition)

02-26-08 Filed order: Ruling (Motion to Set Aside (Denied))
 Judge STEPHEN L HENRIOD
 Signed February 21, 2008

02-29-08 Filed: Motion to Stay Judgment Pending Disposition of Appeal

02-29-08 Filed: Memorandum in Support of Motion to Stay Judgment Under
 Rule 62

02-29-08 Filed: Supersedeas Bond With Undertaking for Personal Bond

02-29-08 Filed: Notice of Appeal

02-29-08 Fee Account created Total Due: 205.00

02-29-08 APPEAL Payment Received: 205.00

Note: Code Description: APPEAL

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CASE NUMBER 060903698 Contracts

03-04-08 Note: Certified copy of Notice of Appeal forwarded to the Utah
 Court of Appeals

03-13-08 Filed: Supreme Court of Utah - Order - Twenty days from the
 date of this order, this matter will be transferred to the Utah
 Court of Appeals for disposition. - 20080196-SC

03-13-08 Filed: Supreme Court of Utah - Letter to Counsel - The notice of appeal has been filed. The case number is 20080196 and should be indicated on future filings and correspondence. - 20080196-SC

03-18-08 Fee Account created Total Due: 1.00

03-18-08 COPY FEE Payment Received: 1.00

Note: 5.00 cash tendered. 4 change given.

03-19-08 Filed: Notice to Submit (Motion for a Stay pending Appeal)

04-04-08 Filed: Utah Court of Appeals - Letter to Counsel - This case has been assigned to the Court of Appeals. The case number will remain the same, with a -CA after the number. - 20080196-CA

04-28-08 Note: Certified copy of Request for Transcript forwarded to the Utah Court of Appeals.

04-30-08 Judge MICHELE CHRISTIANSEN assigned.

05-19-08 Filed: Transcript of Bench Trial dated 11-5-07, Carolyn Erickson, CCT

05-19-08 Filed: Notice of Filing Transcript of Bench Trial dated 11-5-07, Carolyn Erickson, CCT

05-21-08 Note: INDEXED

05-21-08 Note: Certified copy of Record Index forwarded to the Utah Court of Appeals.

05-30-08 Filed: Objection to Bond and Stay of Execution

06-06-08 Filed: Request to Submit for Decision Plaintiff's Motion to Stay

06-06-08 Filed: Verified Response to Objection to Stay

ADDENDUM B

RICHARD S. NEMELKA #2396
STEPHEN R. NEMELKA #9239
NEMELKA & NEMELKA
6806 South 1300 East
Salt Lake City, Utah 84121
Telephone: (801) 568-9191
Fax: (801) 568-9196

FILED
DISTRICT COURT
07 NOV -8 AM 11:45
THIRD JUDICIAL DISTRICT
SALT LAKE COUNTY
BY Mc
DEPUTY CLERK

Attorney for Plaintiffs

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

LONIE PAULOS and ADVANCED
ORTHOPEDICS and SPORTS
MEDICINE, LLC, a Utah Corporation,

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.

**AFFIDAVIT OF
RICHARD S. NEMELKA**

Civil No. 060903698
Judge Stephen Henroid

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

Richard S. Nemelka, being first duly sworn upon his oath hereby deposes and
states as follows:

1. That he is the attorney for the Plaintiffs in the above-entitled matter and has
personal knowledge as to the facts alleged herein and is competent to testify to the same.

2. On the 8th day of June, 2007, a Scheduling Conference was held before the Court wherein a Jury Trial was scheduled for October 15, 16 and 17, 2007.

3. On the 27th day of June, 2007, affiant filed a Motion to Continue the Trial on behalf of the Plaintiffs.

4. The Motion to Continue was heard on the 20th day of August, 2007, and at said hearing the Court suggested the following three alternative dates for the trial:

(a) November 5, 6 and 7, 2007

(b) October 29, 30 and 31, 2007

(c) Next year in 2008.

5. At the hearing held on the 20th of August, 2007, Randy Ludlow, counsel for the Defendants, S & B Storage, indicated he had a conflict with November 5, 6 and 7 since he was going with his wife to Chicago on the 4th, 5th and 6th of November, 2007. However, Mr. Ludlow withdrew his objection when affiant indicated that he was fine with doing the trial next year and indicated to the Court that he would cancel his trip to Chicago. Thereafter, a discussion was held between the Court and the attorneys in regard to settling the case and the potential litigation against the insurance company. The hearing concluded without any specific statements made as to the exact dates of the trial although, based upon Mr. Ludlow's withdrawal of his objection to the dates of November 5, 6 and 7, 2007, it was apparently assumed by the Court and the attorneys that the trial was rescheduled for November 5, 6 and 7, 2007.

6. A Minute Entry was entered on the docket on the 20th of August, 2007 scheduling a Jury Trial for November 5th, November 7th and November 8th, 2007. Said Minute Entry was corrected on said date and an entry was made that the Jury Trial was

scheduled for November 5th, 6th and 7th, 2007. A copy of the docket sheet is attached hereto.

7. Neither the Court nor any of the attorneys prepared a Notice of the Continuance of the Trial and no notice was served on any of the parties through their attorneys.

8. Apparently when affiant returned to his office he was under the impression that the Trial was scheduled for November 6th, 7th and 8th, 2007, and wrote said dates on his calendar. His calendar is attached hereto as Exhibit "B" and incorporated herein by reference.

9. Counsel for the Plaintiffs already had a Trial scheduled for Monday, November 5, 2007, before the Honorable Thomas Kay in the Second Judicial District Court in Bountiful, Utah, and a copy of the Notice of Trial is attached hereto as Exhibit "C" along with affiant's calendar for Monday, November 5, 2007. On approximately the 24th of October, 2007, affiant on behalf of the Plaintiffs, filed a Motion to Admit the Deposition of Rhonda Jones along with a Memorandum in Support Thereof, the Affidavit of Richard S. Nemelka, and a proposed Order. Said pleadings are attached hereto as Exhibit "D" and incorporated herein by reference. All of the pleadings filed by Richard S. Nemelka indicated that the trial was scheduled for November 6th through 8th of 2007 and were mailed to both attorneys for the Defendants.

10. On the 29th of October, 2007, the Court signed an Order to admit the Deposition of Rhonda Jones and said Order specifically stated, in paragraph 1, "That the deposition of Rhonda Jones on April 30, 2007, shall be admitted into evidence to be used

during the trial scheduled for November 6-8, 2007, in the above-entitled matter.” A copy of the Order is attached hereto as Exhibit “E” and incorporated herein by reference.

11. Affiant prepared Subpoenas and served the same upon witnesses all indicating that the trial was scheduled to begin on the 6th of November, 2007. A copy of one Subpoena is attached hereto as Exhibit “F” and incorporated herein by reference.

12. Stephen D. Spencer, counsel for the Defendant, All My Sons Moving and Storage, also filed various Subpoenas indicating that the trial was scheduled for November 6th and 7th of 2007. Said pleadings are attached hereto as Exhibit “G” and incorporated herein by reference.

13. That on or about the 2nd of November 2007 affiant had a conversation with Stephen D. Spencer, attorney for the Defendant, All My Sons Moving and Storage, where it was discussed whether or not the trial was a Jury Trial or a Bench Trial. Affiant specifically stated to Mr. Spencer that he believed it was a Bench Trial and that the Trial was to begin on Tuesday, the 6th of November, 2007. Mr. Spencer indicated that he thought the Trial was scheduled for Monday, the 5th of November, 2007; however, affiant specifically stated to Mr. Spencer that was inaccurate and, in fact, the Trial was scheduled to begin on Tuesday, the 6th of November, 2007 and would not have been scheduled on the 5th of November, 2007 for the reason that affiant had to be in attendance at another trial before Judge Kay in the Second District Court which began at 8:30 a.m. on the 5th of November, 2007.

14. Further, on the 2nd of November, 2007, affiant had a conversation with Lyn MacLeod, Judge Henroid’s Clerk, wherein it was agreed that the Trial would be a Bench Trial. At the beginning of said conversation between affiant and Lyn MacLeod, affiant

indicated that he was calling in regard to the Paulos Trial that was scheduled for next Tuesday (November 6, 2007) and that there was a question as to whether or not the trial was a Jury Trial or a Bench Trial. There was no discussion between affiant and Lyn MacLeod in regard to whether or not the trial was to begin on Monday, the 5th of November or Tuesday, the 6th of November and affiant continued to believe that the trial was scheduled to begin on the 6th of November, 2007.

15. Affiant, on or about the 30th of October, 2007, was advised that Judge Henroid has signed the Order to admit the Deposition of Rhonda Jones which, again, indicated that the trial was scheduled for November 6-8, 2007.

16. Immediately after the hearing held on the 20th of August, 2007, affiant dictated a letter which was sent to his client, Lonnie Paulos, on the 22nd of August, 2007 indicating that the trial was scheduled for November 6th, 7th, and 8th, 2007. A copy of the letter is attached hereto as Exhibit "H" and incorporated herein by reference.

17. That the Plaintiff, Lonnie Paulos, was always of the understanding that the trial was scheduled to begin on the 6th of November, 2007 and, in fact, had re-arranged his work schedule so that he could be in Utah on the evening of November 5, 2007. Mr. Paulos had scheduled his airline travel to leave Houston, Texas, in the afternoon of November 5, 2007, and was on his way to the airport when he was contacted by affiant at approximately 12:30 p.m. on the 5th of November, 2007 wherein affiant indicated to Mr. Paulos that the Court had dismissed the action.

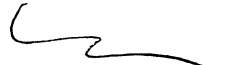
18. Affiant had also scheduled all of Plaintiffs' witnesses to appear on Tuesday, the 6th of November, 2007.

19. Affiant's office had also arranged for an interpreter to be present on Tuesday, the 6th of November, 2007, to act as an interpreter for one of Plaintiffs' witnesses, as well as advising another individual to be present on the 6th of November, 2007 to read the deposition of Ronda Jones.

20. Affiant had numerous conversations with his client, Lonnie Paulos, and witnesses in preparation for the trial and affiant advised all witnesses that the trial was scheduled to begin on the 6th of November, 2007.

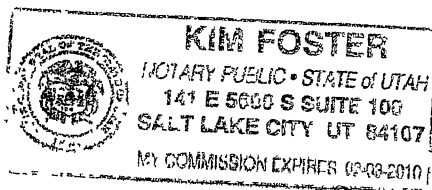
21. In the last few months affiant has had other problems in regard to his short term memory. Affiant is not offering an excuse for his mistake in regard to assuming on the 20th of August, 2007, that the trial was scheduled for November 6th, 7th and 8th; however, affiant did not intentionally write down the wrong dates or intentionally not appear at the trial on the 5th of November, 2007 since he was involved in another trial on said date and time.


DATED this 8 day of November, 2007.



RICHARD S. NEMELKA
Attorney for Plaintiffs

SUBSCRIBED AND SWORN to before me this 8 day of November, 2007.





NOTARY PUBLIC
Residing in Salt Lake County, Utah

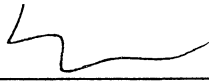
02/03/20.0

CERTIFICATE OF MAILING

I hereby certify that I mailed a copy of the foregoing Affidavit to the following,
postage prepaid, this 8 day of November, 2007:

Stephen D. Spencer
DAY SHELL & LILJENQUIST
45 East Vine Street
Murray, Utah 84107


Randy Ludlow
Attorney at Law
185 South State Street, Suite 208
Salt Lake City, Utah 84111



RICHARD S. NEMELKA #2396
STEPHEN R. NEMELKA #9239
NEMELKA & NEMELKA
6806 South 1300 East
Salt Lake City, Utah 84121
Telephone: (801) 568-9191
Fax: (801) 568-9196

FILED DISTRICT COURT
Third Judicial District

OCT 29 2007

SALT LAKE COUNTY
By 
Deputy Clerk

Attorneys for Plaintiff

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

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

Plaintiff,

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.

**ORDER TO ADMIT
THE DEPOSITION OF
RHONDA JONES**

Civil No: 060903698


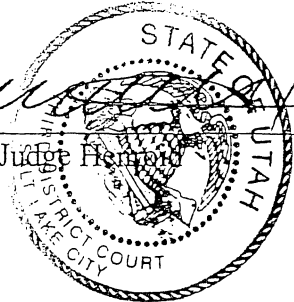
Judge: Stephen Henroid

Based upon the Motion to Admit the Deposition of Rhonda Jones and Memorandum in
Support Thereof of the Plaintiff, and good cause appearing therefore IT IS HEREBY
ORDERED, DECREED, AND ADJUDGED AS FOLLOWS:

1. That the Deposition of Rhonda Jones on April 30, 2007 shall be admitted into evidence to be used during the trial scheduled for November 6-8, 2007 in the above-entitled matter.

DATED this 14 day of October, 2007.

BY THE COURT:

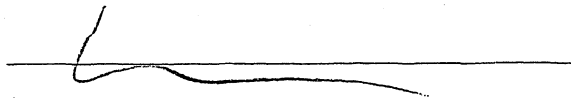

Honorab[e] Judge Hemmick


CERTIFICATE OF MAILING

I certify that a true and correct copy of the foregoing **ORDER TO ADMIT THE DEPOSITION OF RHONDA JONES** was mailed, postage prepaid, this 23 day of OCTOBER, 2007, to:

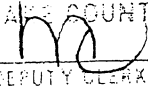
Stephen D. Spencer
DAY SHELL & LILJENQUIST
45 East Vine Street
Murray, Utah 84107

Randy Ludlow
Attorney at Law
185 South State Street, Suite 208
Salt Lake City, Utah 84111



RICHARD S. NEMELKA #2396
STEPHEN R. NEMELKA #9239
NEMELKA & NEMELKA
6806 South 1300 East
Salt Lake City, Utah 84121
Telephone: (801) 568-9191
Fax: (801) 568-9196

Attorneys for Plaintiff

FILED
DISTRICT CLERK
2007 OCT 24 PM 3:36
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 LLC., a Utah Corporation,**

Plaintiff,

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.

**AFFIDAVIT OF
RICHARD S. NEMELKA**

Civil No: 060903698

Judge: Stephen Henroid

STATE OF UTAH)

COUNTY OF SALT LAKE)


Richard S. Nemelka, being first duly sworn upon his oath, hereby deposes and states as follows:

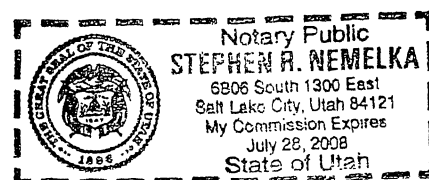
1. That he is the attorney for the Plaintiff, Lonnie Paulos, in the above-entitled matter and has personal knowledge of the facts alleged and is competent to testify to the same.
2. That he knows that Rhonda Jones is allegedly residing in Houston, Texas.
3. That he has personally attempted to locate Rhonda Jones by telephone and through her alleged address located in Houston, Texas to no avail.
4. The he has attempted to serve her legal pleadings at her address in Houston, Texas but said pleadings were returned and sent a second time to another process server.
5. That he has not colluded with Rhonda Jones, nor his client to procure her absence from the trial scheduled for November 6-8, 2007 in the above-entitled matter.
6. That sometime after her deposition on April 30, 2007, her employed with Dr. Paulos and Baylor University was terminated.

DATED this 23 day of October, 2007.


RICHARD S. NEMELKA

SUBSCRIBED AND SWORN to before me this 23 day of October, 2007.


Notary Public and Seal



CERTIFICATE OF MAILING

I certify that a true and correct copy of the foregoing **AFFIDAVIT OF RICHARD S. NEMELKA** was mailed, postage prepaid, this 23 day of OCTOBER, 2007, to:

Stephen D. Spencer
DAY SHELL & LILJENQUIST
45 East Vine Street
Murray, Utah 84107

Randy Ludlow
Attorney at Law
185 South State Street, Suite 208
Salt Lake City, Utah 84111



RICHARD S. NEMELKA #2396
STEPHEN R. NEMELKA #9239
NEMELKA & NEMELKA
6806 South 1300 East
Salt Lake City, Utah 84121
Telephone: (801) 568-9191
Fax: (801) 568-9196

Attorneys for Plaintiff

FILED
JUDICIAL DISTRICT COURT
2007 OCT 24 PM 3:38
SALT LAKE COUNTY
BY [Signature]
DEPUTY CLERK

11-5

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

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

Plaintiff,

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.

**MOTION TO ADMIT THE
DEPOSITION OF RHONDA
JONES AND MEMORANDUM IN
SUPPORT THEREOF**

Civil No: 060903698

Judge: Stephen Henroid

MOTION

Plaintiff, by and through their attorney, Richard S. Nemelka, respectfully moves this court to admit the Deposition of Rhonda Jones taken on April 30, 2007 in lieu of her appearance for direct examination in the trial scheduled for November 6-8, 2007. Plaintiff hereby submits the following Memorandum in support of his Motion:

MEMORANDUM IN SUPPORT

FACTS

1. Rhonda Jones resides somewhere in Houston, Texas. Aff. Richard S. Nemelka ¶ 2 (Oct. 23, 2007).

2. Plaintiff and his attorney, Richard S. Nemelka, have been unable to contact or locate Rhonda Jones for service of subpoena. *Id.* at ¶¶ 3-4.

3. Plaintiff and his attorney, have used due diligence in an attempt to locate Rhonda Jones. *Id.*

4. Neither the Plaintiff, nor his attorney, used any colluded efforts to procure the absence of Rhonda Jones. *Id.* at ¶ 5.

ARGUMENT

5. Pursuant to Rule 32(a)(3)(B) and (D) of the Utah Rules of Civil Procedure, the court has the discretion to use the deposition of a witness in lieu of their testimony if they cannot be located under the jurisdiction of this court to be served a subpoena. The deponent, Rhonda Jones, allegedly resides in Houston, Texas which is a greater distance than 100 miles from the place of trial. Aff. Richard S. Nemelka ¶ 2 (Oct. 23, 2007). Additionally, Richard S. Nemelka has specifically stated that there has been no collusion to procure Rhonda Jones' absence as a witness. *Id.* at ¶ 5. Rhonda Jones is simply unavailable to procure her attendance by subpoena.

6. Similarly, the Court of Appeals of Utah has specifically allowed the deposition of a potential witness to be admitted for evidentiary purposes when the deponent cannot be located through due diligence. *Evans ex rel. Evans v. Langston*, 2007 UT App 240, ¶¶14-16, 166 P.3d 621. As long as no collusion is involved to procure the absence of the deponent and the deponent is greater than 100 miles from the court of jurisdiction, the court has the ability to admit

the deposition in lieu of direct examination. *Id.* at ¶¶14-16. Additionally, Plaintiff, by and through his attorney, Richard S. Nemelka, performed due diligence in attempting to locate Rhonda Jones. Aff. Richard S. Nemelka ¶¶3-4 (Oct. 23, 2007).

7. This Court should allow the deposition of Rhonda Jones to be admitted in lieu of direct examination; she cannot be located though due diligence, she is not within a 100 mile jurisdictional radius of this Court, nor has there been any collusion by any party to procure the absence of the deponent. Therefore, admittance of the Deposition of Rhonda Jones on April 30, 2007 is appropriate.

DATED this 23 day of October, 2007.



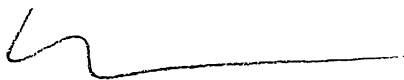
RICHARD S. NEMELKA
Attorney for Plaintiff

CERTIFICATE OF MAILING

I certify that a true and correct copy of the foregoing **MOTION TO ADMIT THE DEPOSITION OF RHONDA JONES AND MEMORANDUM IN SUPPORT THEREOF** was mailed, postage prepaid, this 23 day of OCTOBER, 2007, to:

Stephen D. Spencer
DAY SHELL & LILJENQUIST
45 East Vine Street
Murray, Utah 84107

Randy Ludlow
Attorney at Law
185 South State Street, Suite 208
Salt Lake City, Utah 84111



3RD DISTRICT COURT - SALT LAKE
SALT LAKE COUNTY, STATE OF UTAH

LONNIE PAULOS Et al, : MINUTES
Plaintiff, : LAW AND MOTION
 :
 :
vs. : Case No: 060903698 CN
 :
ALL MY SONS MOVING AND STORAGE
Et al, : Judge: STEPHEN L HENRIOD
Defendant. : Date: August 20, 2007

Clerk: lynm

PRESENT

Plaintiff's Attorney(s): RICHARD S NEMELKA
Defendant's Attorney(s): RANDY S LUDLOW
STEPHEN D SPENCER

Audio

Tape Number: 76 Tape Count: 903

HEARING

TAPE: 76 COUNT: 903

On record the Plaintiff's Motion to Continue trial was granted
without objection. A new trial date is set.

Nov 5, 6 & 7, 2007

Nemelka & Nemelka
Attorneys at Law

Richard S. Nemelka
Stephen R. Nemelka
Rhett B. Nemelka*
*Also Admitted in Montana

Carl J. Nemelka
1935-1988
Joseph N. Nemelka Jr.
1949-1999

August 22, 2007

Lonnie Paulos M.D.
3805 Meadow Lake Lane
Houston, Texas 77027

Re: Paulos vs. All My Sons

Dear Lonnie:

We had a scheduling hearing before Judge Henriod this morning and he rescheduled the trial for November the 6th, 7th and 8th, 2007. We will need to get together the week prior thereto to prepare for the same. If you have any questions, please give me a call.

Respectfully,



Richard S. Nemelka

RSN:sdb
Enclosure

RICHARD S. NEMELKA #2396
STEPHEN R. NEMELKA #9239
NEMELKA & NEMELKA
6806 South 1300 East
Salt Lake City, Utah 84121
Telephone: (801) 568-9191
Fax: (801) 568-9196

IN THE SECOND JUDICIAL DISTRICT COURT OF DAVIS COUNTY

STATE OF UTAH

KATHLEEN C. MARK,	NOTICE OF TRIAL
Petitioner,	
RICKIE D. MARK,	Civil No.: 064701186DA
Respondent	Judge: Thomas Kay
	Commissioner: David S. Dillon

Notice is hereby given that the Trial in the above-entitled matter is hereby scheduled for Monday, the 5th of November, 2007, at 8:30 a.m. before the Honorable Thomas Kay of the above-entitled Court at his Courtroom at the Courts Building, 805 South Main Street Bountiful, Utah. The parties shall exchange witness and exhibits list on or before Monday the 29th of October, 2007.

DATED this the 16 day of August, 2007.


NEMELKA & NEMELKA


Richard S. Nemelka

CERTIFICATE OF MAILING

This is to certify that I mailed a true and correct copy of the foregoing Notice of Trial this
16 day of August, 2007, postage prepaid and addressed as follows:

John Cummings
Attorney at Law
3856 Washington Blvd.
Ogden, Utah 84403



6

Tuesday
November
2007

7:00	
7:30	
8:00	
8:30	
9:00	CPA 1
9:30	
10:00	Prison
10:30	
11:00	
11:30	
12:00	
12:30	
1:00	
1:30	
2:00	2:15 Courtroom 8 Trial
2:30	AD Trial
3:00	TAC
3:30	
4:00	
4:30	
5:00	

5

November
2007

7:00	
7:30	
8:00	
8:30	MARK Trial
9:00	BFL
9:30	Pretinal
10:00	Elbury Conf (Continue)
10:30	
11:00	
11:30	
12:00	
12:30	
1:00	
1:30	
2:00	
2:30	STATE V. Kim Chen
3:00	Order 2007
3:30	
4:00	
4:30	
5:00	

Floor - W47 with Judge HENRIOD.
-20-07 JURY TRIAL scheduled on November 08, 2007 at 09:00 AM in Fourth
Floor - W47 with Judge HENRIOD.
-20-07 JURY TRIAL Cancelled.
Reason: Correct Calendar
-20-07 JURY TRIAL scheduled on November 05, 2007 at 09:00 AM in Fourth
Floor - W47 with Judge HENRIOD.
-20-07 JURY TRIAL scheduled on November 06, 2007 at 09:00 AM in Fourth
Floor - W47 with Judge HENRIOD.
-20-07 JURY TRIAL scheduled on November 07, 2007 at 09:00 AM in Fourth
Floor - W47 with Judge HENRIOD.
-20-07 Minute Entry - Minutes for Law and Motion
Judge: STEPHEN L HENRIOD
Clerk: lynm
PRESENT

Plaintiff's Attorney(s): RICHARD S NEMELKA
Defendant's Attorney(s): RANDY S LUDLOW
STEPHEN D SPENCER

Audio

Tape Number: 76 Tape Count: 903

HEARING

TAPE: 76 COUNT: 903

On record the Plaintiff's Motion to Continue trial was granted
without objection. A new trial date is set.

-06-07 Filed: Notice of Service of Subpoena-
-10-07 Filed: Acceptance of Service of Subpoena-Frank Nakamura on
behalf of Aaron Jones and Mike Obrey
-18-07 Filed: Subpoena-Rob Herrera on return
-03-07 Filed: Subpoena-Marko A Munoz- on return
-03-07 Filed: Notice of Service of Subpoena-Alfredo Villegas Munoz
-15-07 Filed: Subpoena-Alfredo Villegas Munoz on return
-19-07 Filed: Acceptance of Service of Subpoena -Hector Pineda
-23-07 Filed: Notice to Submit for Decision (Plaintiff's Motion to
Admit the Deposition of Rhonda Jones)
-24-07 Filed: Motion to Admit the Deposition of Rhonda Jones and
Memorandum in Support Thereof
Filed by: NEMELKA, RICHARD S
-24-07 Filed: affidavit of Richard S Nemelka
-29-07 Filed order: Order To Admit The Deposition of Rhonda Jones
Judge STEPHEN L HENRIOD
Signed October 26, 2007
-31-07 Filed: Subpoena-Judy Hick on return
-01-07 Filed: Subpoena-Jerry Erkelens on return
-01-07 Filed: Request for Hearing (Plaintiff's Motion to Admit

RICHARD S. NEMELKA #2396
STEPHEN R. NEMELKA #9239
NEMELKA & NEMELKA
6806 South 1300 East
Salt Lake City, Utah 84121
Telephone: (801) 568-9191
Fax: (801) 568-9196

Attorneys for Plaintiff

UPON Jerry Erkelens
AT 919 E. First Ave, SLC
ON THE 29 DAY OF Oct 2007
BY [Signature]

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

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

Plaintiff,

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.

SUBPOENA

Civil No: 060903698

Judge: Stephen Henroid

TO: JERRY ERKELENS
919 E. FIRST AVENUE
SLC, UT 84103

YOU ARE REQUIRED:

☒ to appear in the above-named Court at the place, date and time specified below to testify in the above case.

Date
10/06/07

Time
9:00 a.m.

Place
450 S. State Street
Salt Lake City, Utah 84102

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.

**ACCEPTANCE OF SERVICE OF
SUBPOENA**

Cases No. 060903698

Judge Stephen L. Henriod

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

Frank Nakamura
I, ~~Hector Pineda~~, hereby accept service of the subpoena to appear at the trial now
scheduled for November 6 and 7, 2007, in the above captioned matter, on behalf of Officers
Aaron Jones and Mike Obrey.

DATED this 6 day of September, 2007.

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.

SUBPOENA

Cases No. 060903698

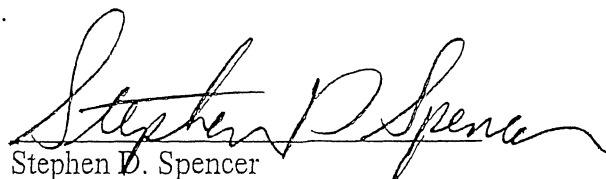
Judge Stephen L. Henriod

THE STATE OF UTAH SENDS GREETINGS TO:

Officer Mike Obrey
Murray Police Department
5025 S. State St.
Murray, UT 84107

WE COMMAND YOU, that all singular business and excuses being laid aside, you appear and attend before the Third Judicial District Court in and for Salt Lake County, State of Utah, at a hearing to be held on the **6th and 7th days of November, 2007, at 9:00 a.m.**, Fourth Floor - Room W47, 450 South State Street, Salt Lake City, Utah, then and there to testify in the above-entitled action now pending in said District Court on the part of the Defendant. See attached Addendum "A" Notice to Persons Served with a Subpoena.

DATED this 5 day of September, 2007.



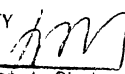
Stephen D. Spencer
Attorney for Petitioner and
Officer of this Court

ADDENDUM C

RICHARD S. NEMELKA #2396
STEPHEN R. NEMELKA #9239
NEMELKA & NEMELKA
6806 South 1300 East
Salt Lake City, Utah 84121
Telephone: (801) 568-9191
Fax: (801) 568-9196

FILED DISTRICT COURT
Third Judicial District

OCT 29 2007

SALT LAKE COUNTY
By 
Deputy Clerk

Attorneys for Plaintiff

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

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

Plaintiff,

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.

**ORDER TO ADMIT
THE DEPOSITION OF
RHONDA JONES**

Civil No: 060903698


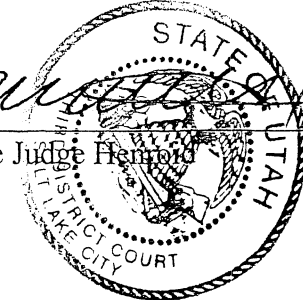
Judge: Stephen Henroid

Based upon the Motion to Admit the Deposition of Rhonda Jones and Memorandum in
Support Thereof of the Plaintiff, and good cause appearing therefore IT IS HEREBY
ORDERED, DECREED, AND ADJUDGED AS FOLLOWS:

1. That the Deposition of Rhonda Jones on April 30, 2007 shall be admitted into evidence to be used during the trial scheduled for November 6-8, 2007 in the above-entitled matter.

DATED this 14 day of October, 2007.

BY THE COURT:


Honorable Judge Hemphill


CERTIFICATE OF MAILING

I certify that a true and correct copy of the foregoing **ORDER TO ADMIT THE DEPOSITION OF RHONDA JONES** was mailed, postage prepaid, this 23 day of OCTOBER, 2007, to:

Stephen D. Spencer
DAY SHELL & LILJENQUIST
45 East Vine Street
Murray, Utah 84107

Randy Ludlow
Attorney at Law
185 South State Street, Suite 208
Salt Lake City, Utah 84111

