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Utah Court of Appeals

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Peter C. Collins; Tamara K. Prince; Winder and Haslam; Attorneys for Appellants.
Robert G. Gilchrist; Masuda a. Medcalf; Richards, Brandt, Miller and Nelson; Attorneys for Respondents.

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

ROBERT HEIDLEBAUGH and GRETTA JOYCE HEIDLEBAUGH, husband and wife, Plaintiffs/Appellants, -v- LEROY WEBB, PAUL NELSON, and CLINTON CITY, Defendants/Respondents.	Case No. 890071-CA

APPELLANTS' REPLY BRIEF

APPEAL FROM A FINAL ORDER OF THE
SECOND JUDICIAL DISTRICT COURT OF
AND FOR DAVIS COUNTY, STATE OF UTAH,
HONORABLE DOUGLAS L. CORNABY

Robert G. Gilchrist
Masuda A. Medcalf
RICHARDS, BRANDT, MILLER
& NELSON
Key Bank Tower, Suite 700
50 South Main Street
Salt Lake City, UT 84110
Telephone: (801) 531-1777

Attorneys for Respondents

Peter C. Collins
Tamara K. Prince
WINDER & HASLAM, P.C.
Suite 4000
175 West 200 South
Post Office Box 2668
Salt Lake City, UT 84110-2668
Telephone: (801) 322-2222

Attorneys for Appellants

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Plaintiffs/Appellants,	:	
-v-	:	
LEROY WEBB, PAUL NELSON, and CLINTON CITY,	:	Case No. 890071-CA
Defendants/Respondents.	:	

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Key Bank Tower, Suite 700
50 South Main Street
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Tamara K. Prince
WINDER & HASLAM, P.C.
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Post Office Box 2668
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Telephone: (801) 322-2222

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APPELLANTS' REPLY BRIEF

Respondents have failed to counter the most salient fact of this Appeal and the most essential point of appellants' argument. That fact and that point are that the dismissal of the first action came about by reason of a stipulation between the parties. None of the cases cited by respondents in support of their contention that the dismissal was pursuant to Rule 41(b) rather than 41(a), was "with prejudice," and was "on the merits" includes that simple but most important element of the procedural history. As pointed out in Appellants' Brief (at page 12), the court in the first action was never even asked to rule on anything in dispute. The question of what the court in the first action would have done in the absence of a

stipulation for dismissal, and in the event that the proceedings scheduled for December 1986 on defendants' motion to compel had gone forward, is one that can only be answered by speculation. The court may well have entered sanctions, such as the imposition of costs and attorney's fees, but it is not likely, or at least not close to certain, that the court, which had entered no prior discovery order, would have imposed so harsh a sanction as dismissal of the action.

Mr. and Mrs. Heidlebaugh do not contest the correctness of the proposition, hammered hard in Respondents' Brief, that a trial court has broad discretion in determining whether an action should be dismissed because of a plaintiff party's non-appearance for a scheduled deposition. The main point of this Appeal, however, is that there was no discretion for the court to exercise in the first action. The cases cited by respondents, in which the very dismissals were contested matters, and in which it was incumbent on the trial courts to exercise some discretion, are of only academic interest. They have no bearing on this Appeal. For, in the first action, there was no need for the judge to exercise any discretion whatsoever or to make any decision whatsoever. The judicial decision-making function was simply not triggered in that action, just as it is not triggered in most, if not all, civil disputes, when a stipulation of counsel is presented to a trial judge.

Respondents' contention that "Judge Cornaby properly dismissed the Heidlebaughs' first action for their repeated failure to make themselves available for depositions" (Respondents' Brief, p. 17) is, simply, inaccurate. The deposition of Mrs. Heidlebaugh had never been scheduled, prior to the December 1986 stipulation that led to the dismissal. More importantly, Judge Cornaby dismissed the first action because there was a stipulation by counsel for the parties that the action would be dismissed.

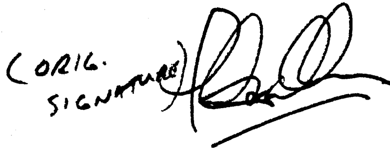
Nor is there support for defendants' proposition (Respondents' Brief, p. 19) that "Mr. Caine [the Heidlebaughs' counsel in the first action] was compelled to sign the stipulation because of Clinton City's motion to compel." Entering the stipulation was a voluntary act, not a compulsory one, and the dismissal was a Rule 41(a) voluntary dismissal.

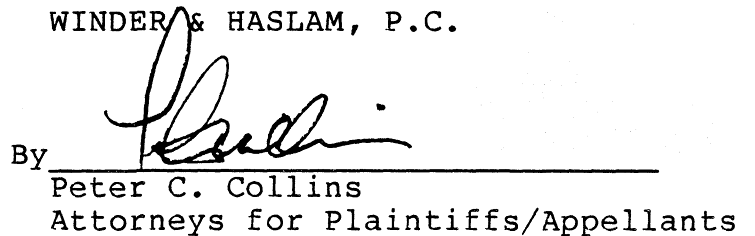
Based on (1) the authorities presented in Appellants' Brief, (2) the brief reply set forth herein to the contentions advanced in Respondents' Brief, (3) the proposition, discussed at page 11 of Appellants' Brief, that a dismissal with prejudice should not lightly be inferred where, as here, an attorney has not been empowered by his clients to stipulate to a dismissal with prejudice, and (4) the proposition, discussed at pages 13 and 14 of Appellants' Brief, that the benefit of the

doubt with respect to the application of the rules should be given to determinations of cases on their merits, Mr. and Mrs. Heidlebaugh restate their contention that the District Court's order of dismissal of the second action should be reversed.

Respectfully submitted this 26th day of April, 1989.

WINDER & HASLAM, P.C.





By
Peter C. Collins
Attorneys for Plaintiffs/Appellants

CERTIFICATE OF MAILING

I hereby certify that, on the 26th day of April, 1989, I caused four true and correct copies of the foregoing Appellants' Reply Brief to be mailed, first class, postage prepaid, to Robert G. Gilchrist, Esq., RICHARDS, BRANDT, MILLER & NELSON, Key Bank Tower, Suite 700, 50 South Main Street, Post Office Box 2465, Salt Lake City, Utah 84110.