

1999

Marilyn R. Hales v. Dr. J. Jay Oldroyd M.D., Dr. Nolan Money M.D. : Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca2



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Curtis J. Drake; Attorneys for Defendant.

Dexter L Anderson; Attorney for Plaintiff.

Recommended Citation

Brief of Appellant, *Hales v. Oldroyd*, No. 990288 (Utah Court of Appeals, 1999).

https://digitalcommons.law.byu.edu/byu_ca2/2124

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at

http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

990288

IN THE UTAH COURT OF APPEALS

MARILYN R. HALES,
Plaintiff and Appellant,

vs

DR. J. JAY OLDROYD M.D.,
DR. NOLAN MONEY M.D.,
Defendants and Appellees.

) **APPELLANT'S BRIEF**

)

) Court of Appeal's #990288-CA

)

) Priority Number 15

)

)

)

)

AN APPEAL FROM A FINAL JUDGMENT
ENTERED BY THE FOURTH JUDICIAL DISTRICT COURT
IN AND FOR MILLARD COUNTY
THE HONORABLE Ray M. Harding Jr., PRESIDING.

Curtis J. Drake
Attorney for Defendant/Appellee
Broadway Centre Suite 900
111 East Broadway
Salt Lake City, Utah 84110
Telephone 801 237-1900

Dexter L Anderson (084)
Attorney for Plaintiff/Appellant
730 N. 3900 W.
Fillmore, Utah 84631
Telephone 435 743-6522

FILED

Utah Ct.

SEP 13 1999

Julia D'Aleandro
Clerk of the Court

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	I
LOWER COURT'S RULING AND ORDER OF DISMISSAL.... Addendum	A-18
TABLE OF CASES AND AUTHORITIES.....	II
STATEMENT OF JURISDICTION.....	1
STATEMENT OF ISSUES PRESENTED FOR REVIEW.....	1
STANDARDS OF REVIEW.....	3
STATEMENT OF THE CASE.....	3
I Nature of the case.....	3
II Course of Proceedings and Disposition Below.....	3
III Marshaling of the Evidence.....	5
IV Statement of Facts.....	8
 SUMMARY OF THE ARGUMENT.....	 13
<u>Argument 1:</u>	13
<u>Argument II:</u>	13
<u>Argument III:</u>	14
<u>Argument IV:</u>	14
<u>Argument V:</u>	14
<u>Argument VI:</u>	15
<u>Argument VII:</u>	15
ARGUMENT.....	15
I.....	15
II.....	21
III.....	24
IV.....	26
V.....	28
VI.....	29
VII.....	33
CONCLUSION.....	35
CERTIFICATE OF MAILING.....	35

ADDENDUM
Table of contents

Utah Rules of Civil Procedure, Rule 37.....	A-1
Utah Rules of Civil Procedure, Rule 34.....	A-5
Utah Code of Judicial Administration, Rule 4-502.....	A-7
Utah Rules of Civil Procedure, Rule 84.....	A-9
Utah Code Annotated Section 78-24-8.....	A-10
United States Constitution, Amendment XIV. Section 1.....	A-12
Utah State Constitution, Article I. Section 11.....	A-13
Plaintiff's Complaint.....	A-14
Order dismissing plaintiff's complaint.....	A-18
Defendants' first motion to compel.....	A-22
Defendants' first informal request for medical records release form.....	A-24
Consent to Release of Information.....	A-25
Defendant's acknowledgment of signing of releases.....	A-26
Defendants' second motion to compel.....	A-27
Defendants' second informal request for medical records release forms...	A-29
Consent to Release of Information.....	A-30
Ruling that second request for second set of release forms be signed.....	A-31
Plaintiff's letter advising release forms signed.....	A-33
Defendants' third motion to compel re; "Altered documents".....	A-35
Plaintiff's aborted deposition.....	A-37
Order of the Court re; several motions dated September 14, 1998.....	A-57
Defendants' fourth motion to compel.....	A-62
Defendants' third informal request for medical records release forms....	A-64
Consent to Release of Medical Information.....	A-65
Plaintiff's letter objecting to defendants' claim.....	A-66
Consent to Release of Medical Information.....	A-67
Defendants' letters acknowledging releases signed and use thereof.....	A-68 -72

TABLE OF CASES AND AUTHORITIES

Pages

A. Cases:

Morton v. Continental Baking Co. 938 P.2d 271.....	3, 17, 18, 34
State v. Pena 869 P.2d 932.....	3
Fjelstad v. American Honda Motor Co, Inc.	17

B. Statutes:

Utah Rules of Civil Procedure, Rule 37.....	1, 4, 13, 14, 16, 17, 21, 24
Utah Rules of Civil Procedure, Rule 34.....	1, 13, 14, 16, 22, 23
Utah Code Section 78-24-8.....	22, 29
Utah Rules of Civil Procedure, Rule 84.....	24
Utah Rules of Civil Procedure, Rule 11.....	25
Utah Code of Judicial Administration, Rule 4-502.....	25

C. Constitutional provisions

United States Constitution, Fourteenth Amendment, Section 1.....	33
Utah State Constitution, Article I, Section 11.....	34

D. Legal books

Federal Civil Rules Handbook, 1999.....	16
---	----

IN THE UTAH COURT OF APPEALS

MARILYN R. HALES,
Plaintiff and Appellant,

) APPELLANT'S BRIEF

)

) Court of Appeal's #990288-CA

)

vs.

) Priority Number 15

)

DR. J. JAY OLDROYD M.D.,

)

DR. NOLAN MONEY M.D.,

)

Defendants and Appellees.

)

STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction in this matter pursuant to Section 78-2a-3(j) Utah Code Annotated, 1953 as amended

STATEMENT OF ISSUES PRESENTED FOR REVIEW

AND STANDARDS OF REVIEW

I. Issues Presented

1. Did the lower court err in dismissing plaintiff's complaint and cause of actions against Dr. Oldroyd and Dr. Money as a discovery sanction pursuant to Utah Rules of Civil Procedure, Rule 37(d) [A-1] where the plaintiff did not fail to respond to defendants' discovery demands made pursuant to Rule 34 [A-5] and did not violate any discovery order of the court?

2. Did the lower court err in dismissing plaintiff's complaint and cause of action

as a discovery sanction because the defendants filed Motions to Compel concerning the informally requested medical release forms, [A-24, 25, 29,30, 64 & 65] where the Utah Rules of Discovery do not provide for such a manner and means of discovery?

3. Did the lower court err in dismissing plaintiff's complaint as a discovery sanction where defendant's informal request for medical release forms did not conform to the rules of pleading and the defendants did not follow discovery procedures provided for in the Utah Rules of Civil Procedure or the Utah Code of Judicial Administration?

4. Did the lower court err in dismissing plaintiff's complaint against Dr. Oldroyd and Dr. Money as a discovery sanction because early in the case it had dismissed plaintiff's independent cause of action against another defendant, Mt. View Hospital, as a sanction for not fully answering written interrogatories filed by Mt. View?

5. Did the lower court err in dismissing plaintiff's complaint as a sanction because the plaintiff invoked her attorney client/ privilege when defendants noticed up the deposition of a former attorney of hers to question him about his consultations with her in private about legal matters?

6. Did the lower court err in dismissing plaintiff's complaint as a sanction where the delays in the case were caused by defendants unfounded motion practices and not discovery violations by the plaintiff?

7. Was plaintiff's Federal and State constitutional rights to her day in court violated by the lower court's dismissal of her complaint as a discovery sanction under the

true facts and discovery procedures followed by the defendants in this case?

II. Standards of Review

A. These issue were preserved in the trial court in *Plaintiff's Motion to Set Aside the Court's Order Dismissing Plaintiff's Complaint*, [R 1467] and *Plaintiff's Reply Memorandum to Defendants' Memorandum in Opposition to Plaintiff's Motion to Set Aside Order Dismissing Plaintiff's Complaint*, [R 1670].

B. The apparent standard of review for these issues is abuse of discretion, 938 P.2d 271, *Morton v. Continental Baking Co.*, (Utah 1997).¹ However it is respectfully submitted that the Court of Appeals should use a correction of an error standard in this case because as will be shown in this Brief the lower court acted outside the pasture of discretion allowed him under the rules of discovery and therefore his errors were of law, and not discretion.[See footnote 1.]

STATEMENT OF THE CASE

I. Nature of the case.

This is a medical malpractice case resulting from two surgeries performed by the defendants on the plaintiff's digestive tract.

II. Course of Proceedings.

¹*Morton* suggest that discovery sanctions are within the discretion of the trial court and that their decisions will be reviewed for abuse of discretion. However since the dismissal in this case was really errors of law, the standard should be a correction of error standard without deference to any discretion. See *State v. Pena*, 869 P.2d 932 and **Argument 1** below.

Plaintiff's Complaint and causes of actions against Defendant's Oldroyd and Money were dismissed by the lower court as a discovery sanction pursuant to Rule 37(b)(2) and (d) of the Utah Rules of Civil Procedure [A-1] by Order dated March 17, 1999 [R1607; A-18]. The Order stated;

"The Court finds that plaintiff's counsel has established a consistent pattern and practice of not complying with discovery requests and other dilatory behavior. The pattern includes the following;

(1) On March 27, 1995, the then co-defendant Mountain View Hospital filed its first motion to compel, which was subsequently granted by the Court.

(2) On May 8, 1995, the then co-defendant Mountain View Hospital filed its second motion to compel, which was subsequently granted by the Court.

(3) On August 7, 1995, the then co-defendant Mountain View Hospital filed a motion for default judgment, seeking sanctions for plaintiff's failure to respond to the first and second motions to compel.

(4) On August 29, 1995, the Court granted the then co-defendant Mountain View Hospital's motion for default judgment and dismissed plaintiff's Complaint for failure to comply with discovery requests.

(5) On April 11 1995, the defendant filed their first motion to compel, which was subsequently granted by the Court.

(6) On July 30, 1998, the defendants filed their second motion to compel, which was subsequently granted by the Court.

(7) Also on July 30, 1998, the defendants filed a motion for sanctions, seeking an award of attorney's fees and costs for plaintiff's failure to comply with discovery requests, which was subsequently granted by the Court.

(8) On September 14, 1998, the defendants filed their third motion to compel, which was subsequently granted by the Court.

(9) On November 25, 1998, the defendants filed a motion for sanctions, seeking dismissal of plaintiff's Complaint for failure to comply with discovery requests, which was subsequently granted by the Court.

(10) On December 8, 1998, the defendants filed a notice to submit for decision and request for ruling, since the plaintiff did not file a memorandum in opposition. The Court finds that the behavior of plaintiff in failing to comply with discovery requests was willful. The Court further finds that plaintiff has engaged in persistent dilatory tactics that have frustrated the judicial process. The sanction of dismissal of plaintiff's Complaint is justified based upon the willful behavior and the repeated practice of

failure to comply with discovery requests.

Based upon the foregoing, IT IS HEREBY ORDERED as follows:

- 1. Defendants' Motion to Strike is denied.*
- 2. Plaintiff's Application to Submit an Over Length Reply Memorandum to Defendant's Memorandum Objecting to Plaintiff's Motion to Set Aside Order Dismissing Plaintiff's Complaint is granted.*
- 3. Plaintiff's Motion for Attorney's Fees is denied.*
- 4. Plaintiff's Motion to Set Aside Order Dismissing Plaintiff's Complaint is denied.*
- 5. Plaintiff's Second Amended Complaint is hereby dismissed without prejudice."*

III. Marshaling of the Evidence.

The following references to the Record are made marshaling evidence supporting the Order of the Court dismissing plaintiff's complaint dated March 17, 1999 [Record page 1607].

1. Plaintiff's initial complaint was filed August 2, 1993 [R 4; A-14].
2. Mt. View Hospital's first Motion to compel was filed March 27, 1995 [R 273] supported by Memorandum filed on the same day [R 327]
3. On June 15, 1995 the court issued its Order compelling that Mt. View's interrogatories be answered and documents produced more fully than plaintiff had done in her answers to interrogatories, and to answer Mt. Views second set of interrogatories and request for production of documents. [R 398].
4. Mt. View filed its Motion for Default Judgment due to alleged failures of plaintiff to answer interrogatories fully to Mt. View's satisfaction and produce documents on August 7, 1995. [R 423].
5. On August 29, 1995 the lower court filed its Ruling striking or dismissing

plaintiff's complaint against Mr. View Hospital without prejudice and ordered Mt. View to prepare an Order consistent with the Ruling. [R 434]

6. On October 4, 1995 the lower court filed its Order dismissing plaintiff's complaint against Mt. View Hospital. [R 446].

7. On April 11, 1995 Defendants Oldroyd and Money filed their first Motion to Compel the signing of informally requested medical records release forms, fourteen in number.[A-24 & 25]. The Motion to Compel was dated April 6, 1995. [R 329; A-22, and see Memorandum in support thereof, also signed on April 6, 1995 and filed April 11, 1995 R 357].²

8. On June 30, 1995 Defendants Oldroyd and Money filed their second Motion to Compel [A-27] with supporting Memorandum, seeking two or three additional informally requested medical records release forms [A-29 & 30]. [R 400 and 419].

9. On August 29, 1995 the lower court filed its Ruling requiring that the two or three consent forms be signed, and ordered defendants' counsel to prepare an Order to that effect.³[R 432; A-31]. These forms were timely signed consistent with the Ruling

² No Ruling or Order of the Court was issued pursuant to this Motion to Compel. Defendants assertions that there was, is wrong and is not supported in the record. In turn the Court's Order finding the same was wrong. Defendants Oldroyd and Money's counsel admitted that these informally requested forms were signed and delivered to him on April 4, 1995, two days before he signed the first Motion to Compel and seven days before it was filed. [R 419 -418 paragraph 4 and 5; A-26].

³ No Order was ever prepared by defendants' counsel to this effect. Therefore, as argued below there really was no court order compelling the signing of these two or three forms as wrongly asserted by the defendants and erroneously found by the Court in the

and returned to defendants' counsel by plaintiff.[R 438; A-33].

10. On July 30, 1998 Defendants Oldroyd and Money filed their third Motion to Compel seeking production of the so-called "altered documents" and their supporting Memorandum. [R 985; A-35].

11. On July 30, 1998 the defendants also filed a Motion for Attorney's fees concerning the filing of the Motion to Compel seeking production of the so-called "altered documents". [R 983]

12. On August 26, 1998, several motions of both parties were before the Court for hearing and the Court filed an Order pursuant to the hearing on September 14, 1998, which among other orders, the Court granted defendants' July 30 Motion to Compel and ordered *"Within thirty (30) days from August 26, 1998, plaintiff will produce all documents which she contends have been altered in any manner by defendants, defendants' counsel, or any agent or employee of defendants' insurance carrier. Plaintiff will submit to a deposition to take place on or before November 13, 1998."*[R 1367; A-57].

The Court also granted defendants' Motion for attorney's fees and cost which were set at \$232.10. [R 1369]

13. The fourth motion to compel was filed September 14, 1998 [R 1344; A-62]. It

Order dismissing plaintiff's complaint . And they were timely signed anyway pursuant to the Ruling.

again was seeking an order of the Court requiring the plaintiff to sign informally requested medical records release forms.[A-64 & 65]. No court order was ever entered concerning this Motion to Compel or Objection.⁴

14. Defendants filed a Subpoena Duce Tecum on attorney W. Andrew McCullough to take his deposition and to produce “all files, documents and other records which in any way record or refer to any meetings, consultations, or conversations with Marilyn R. Hales”. [R 1411].

15. Plaintiff’s attorney invoked her attorney/client privilege in a letter to Mr. McCullough because neither she nor her attorney could attend the deposition. [R 1432 and 1441]

IV. Statement of Facts.

The file in this case is voluminous, more than 1,670 pages are contained in the Record. Three different District Court Judges have considered this case, Judge Burningham, Judge Schofield, and finally Judge Harding Jr., pursuant to the Fourth District’s rotation schedule.

⁴The Plaintiff filed an Objection to this Motion to Compel on September 23, 1998 .[Record page 1376]. Neither the Objection nor the Motion to Compel was ever considered by the court. However plaintiff signed the requested release forms after they were submitted to her anyway, and the defendants utilized them to obtain the medical records they wanted.[Record page 1645 through 1639]. As in other footnotes above, no court order was ever entered concerning this motion to compel either, and the defendants’ assertion that there was is wrong, and in turn the Court’s Order to that effect was also in error and not supported by the Record.

Plaintiff filed her original complaint for medical malpractice against Dr. Oldroyd and Dr. Money, and also against Mt. View Hospital, in August 1993. [R 4; A-14] The complaint against Drs. Oldroyd and Money concerns two operations they performed on plaintiff's digestive tract in April of 1987. The first of the two operations, according to defendants' operative reports, was to explore for a possible small intestine blockage. But, according to plaintiff's expert's opinion the first operation was not necessary or even called for in the first place and next was incorrectly performed anyway for the type of surgery it was. The second surgery was to correct failures which occurred in the first surgery. During the second surgery sixty-percent or more of plaintiff's stomach was removed and other manipulations of plaintiff's digestive tract were performed by the defendants, again unnecessarily according to plaintiff's expert's testimony, leaving plaintiff's digestive tract basically non-functioning.[R 747-12 & 761]⁵ Since that time the plaintiff has basically lived in hospitals all over the western United States, for purposes of preventing her demise as a result of the faulty operations performed by the defendants.[R. 225, 438, 686, &1345; A-33]

Defendants Oldroyd and Money filed several Motions to Dismiss. The first filed December 3, 1993 [R 17 & 22]; the second filed March 29, 1994 [R 135]. All of defendants' said motions were denied by the lower court.[R 236]. Finally on December

⁵Plaintiff's memorandum was misnamed, and should have been entitled "Memorandum in Opposition to Defendants' Motion for Summary Judgment.

4, 1997, about four and one-half years after plaintiff's complaint, defendants Oldroyd and Money filed their first Answer in the case.[R 862]. They filed their Answer to the Second Amended Complaint on October 9, 1998, [R. 1426].

In spite of the fact that an answer was never filed by defendants, the case was set for trial three times by the lower court. Two of those settings were continued by the defendants.[R 896 & 1036].

During the course of the above motion practice and proceedings concerning motions to dismiss and motions for summary judgment, defendants Oldroyd and Money also filed their first motion to compel the signing of fourteen informally requested medical records release forms, filed April 11, 1995 [R. 329, 357; A-22]. This was done in spite of the fact that the plaintiff had already signed them and after the defendants' attorneys had received them.. Defendants's attorneys acknowledged that the original fourteen consent forms were signed by plaintiff and returned to them on or about April 4, 1995. They acknowledged the prior signing and return in their Memorandum in support of their second motion to compel the signing of additional informally requested release forms. [R. 418; paragraph 4 and 5; A-26]. No court order was made requiring the plaintiff to sign the first set of informally requested medical records release forms. The court's order filed June 15, 1995 concerned Mt. View Hospital's interrogatories and demands for production of documents and had nothing to do with Defendants Oldroyd and Money's first set of informally requested release forms. [R. 327 and 388, and Order of the Court

filed June 15, 1995 R. 398]

Defendants Oldroyd and Money's second Motion to Compel the signing of informally requested release forms was filed June 30, 1995. [R. 400, 403 & 407; A.-27, 29, & 30]. The Court Ruled, on August 29, 1995, that they should be signed, and required the defendants to prepare an Order to that effect which was never done, [R. 432; A-31]. Plaintiff timely signed and returned the second set of informally requested release forms and thus fully complied with the Ruling. [R. 438; A-33].

On July 1, 1998 the plaintiff attended her first scheduled deposition, scheduled by Defendant's Oldroyd and Money. The third motion to compel was filed on July 30, 1998 [R 985; A-35]. It grew out of the taking of Plaintiff's deposition on July 1, 1998 which was aborted by Curtis Drake, attorney for defendants, when plaintiff told him she thought he or the insurance company had altered some of her medical records.[R. 1012; A.-37]. That motion to compel resulted in an Order of the Court dated September 14, 1998 [R. 1367; A-57] where the Court said "*Defendant's Motion to Compel is granted; Within 30 days from August 26, 1998, plaintiff will produce all documents which she contends have been altered. . . .*" (Emphasis added). "*Plaintiff will submit to a deposition to take place on or before November 13, 1998.*" [R. 1366 last paragraph; A.-58]. Other than the claimed altered documents she produced at her deposition of July 1, 1998, [R. 991 - 986;] plaintiff found no other documents which she contended were altered and therefore produced no other documents in response to the court's order.[R.1667 paragraph 9].

Defendants never rescheduled her deposition on or before November 13, 1998.

The fourth motion to compel was filed September 14, 1998 [R. 1344; A-62]. It again was for an order of the Court requiring the plaintiff to sign informally requested medical records release forms.[A-64 & 65]. The Plaintiff filed an Objection to this Motion to Compel on September 23, 1998 because it falsely accused her of not signing release forms which had never been submitted to her.[R. 1376; and see letter A-66]. However she signed the requested release forms after they were submitted to her anyway, and the defendants utilized them to obtain the medical records they wanted.[R. 1645 through 1639; A-67, 68, 69, 70, 71 & 72]. No court order was ever entered concerning this Motion to Compel or the Objection thereto.

The defendants' motion to dismiss as a discovery sanction was also based on an order of the lower court dismissing plaintiff's cause of action against Mt. View Hospital, October 10, 1995.[R 446]. Mt. View had been named as a defendant early on in the case on a theory of vicarious liability because the doctors had performed the questioned operations there.[R 4; A-14].

The defendants' motion to dismiss as a discovery sanction was also based on a claim that the plaintiff violated the discovery rules because she invoked her attorney/client privilege when defendants noticed up the taking of attorney Andy McCullough's deposition, and subpoenaed his files concerning his consultations with the plaintiff.[R. 1372 and 1452]

The lower court entered an order dismissing plaintiff's Second Amended Complaint as a sanction by Order dated March 17th, 1999 which is the Order appealed from in this case.[R 1607; A-18]

SUMMARY OF ARGUMENTS

Argument 1:

Before a trial court may dismiss a parties complaint or cause of action against another party as a sanction under Rule 37(d) of the Utah Rules of Civil Procedure, without there being a violation of a court order compelling discovery, there must have first been an altogether or complete failure to respond to a moving parties' demands for production of documents under Rule 34. In this case the plaintiff's complaint and cause of action was dismissed as a discovery sanction, but she did not altogether or completely fail to respond to defendants' demands for production of documents under Rule 34. In fact she completely responded to all of defendant Oldroyd and Money's discovery request and fully complied with any order or ruling that was issued by the court.

Argument II:

It is clear from reading the Rules of Discovery in the Utah Rules of Civil Procedure and particularly the provisions of Rule 34, that the discovery requirements to produce documents only covers the production of evidence, or medical records in this case, that are in the possession, custody or control of the plaintiff. From the very nature

of the informal request, that she sign medical release forms for different doctors and hospitals, it goes without saying that the records the defendants were seeking were in the possession, custody or control of third parties i.e. doctors and hospitals, not the plaintiff. Therefore the informally request that she sign medical records release forms is not covered under Rule 34 or enforceable under Rule 37(d) or any other rule of discovery and the lower court erred in dismissing plaintiff's complaint as a discovery sanction relating to the informally requested medical records release forms.

Argument III:

Defendants' requests that plaintiff sign medical release forms, were informal requests submitted to plaintiff's counsel via personal letters signed by a paralegal to defendants' attorneys. Since the request were not submitted formally under the Rules of Civil Procedure, they were submitted outside the rules and the defendants are not entitled to claim the sanctions provided for in the rules.

Argument IV.

The dismissal of plaintiff's cause of action against Mt. View Hospital early in the case as a discovery sanction had nothing to do with defendants Oldroyd and Money, and that early dismissal in favor of Mt. View did not justify the lower court's dismissal of plaintiff's complaint against Oldroyd and Money.

Argument V.

The plaintiff was entitled to claim her attorney/client privilege when the

defendants noticed up to taking of a former attorney's deposition. No waiver or exceptions of the privilege is provided for in case law, rules, or by statute, and the lower court's dismissal of her complaint as a discovery sanction because she did was error.

Argument VI. The plaintiff did not delay the proceedings in this case, but rather the defendants did with their unfounded motion practice in the case, their failure to file an Answer for about four and one-half years, their disruption of plaintiff's attempt to take the deposition of a key witness and other acts of delay. Plaintiff cooperated in discovery in many ways and responded the best she could under the serious life and death condition the defendants left her in after their negligent and uncalled for operations.

Argument VII.

The lower court's dismissal of plaintiff's complaint and cause of action against the defendants Oldroyd and Money violated the plaintiff's right to her day in court to redress the injuries caused her by defendants' negligently performed and uncalled for operations.

ARGUMENTS

Argument I

Before a trial court may dismiss a parties complaint or cause of action against another party as a sanction under Rule 37(d) of the Utah Rules of Civil Procedure without there being a violation of a court order compelling discovery, there must have first been an altogether or complete failure to respond to a moving parties' demands for production

of documents under Rule 34. In this case the plaintiff's complaint and cause of action was dismissed as a discovery sanction, but she did not fail to respond to defendants demands for production of documents under Rule 34 and did not violate any court order. In fact she did fully respond to all of defendants' discovery request and complied with any discovery orders made by the court.

The Utah version of Rule 37 [A-1] is nearly identical to the Federal Rule 37, for all intents and purposes. It may be that under the Federal Rule and cases found thereunder, sanctions under Rule 37(d) [A-3] do not always require a violation of a court order.⁶ However, even if the Utah Rules follow the federal rule on this question, under the Federal Rule there must be an altogether and complete failure to respond to a Rule 34 demand for production of documents before the court is empowered to impose a sanction of dismissal, or any sanction, without a violation of a court order. Or put another way, if a party has responded either fully or partially, the court can not dismiss the parties complaint as a sanction unless there has been a court order of discovery entered, and the order violated by the party. This is made clear in Federal Civil Rules Handbook, 1999 Edition, Baicker-McKee, Janssen, and Corr, West Group, page 536 where it is stated that; *"Rule 37(d) only applies if the party fails altogether to serve a response to interrogatories or document requests. If the party serves an incomplete or evasive response, the proper procedure is a motion to compel under Rule 37(a), then a motion for sanctions under Rule 37(b) if the party does not comply with the court order."* Citing

⁶However there has been no direct holding on this issue, under the Utah version of the Rule.

Fjelstad v. American Honda Motor Co., Inc. 762 F.2d 1334, 9th Cir. 1985.

Utah Rules of Civil Procedure, Rule 37, in pertinent part, provides as follows;

“(a) Motion for Order Compelling Discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows: . . .

(2) Motion. . . .if a party, in response to a request for inspection submitted under Rule 34, fails to respond. . . . the discovering party may move for an order compelling. . . inspection in accordance with the request

(b) Failure to Comply With Order. . . .

(2) Sanctions by Court in Which Action Is Pending. If a party . . . fails to obey an order to provide or permit discovery,. . . the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following: . . .

(C) an order . . . dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;. . .

(d) Failure of Party to . . . Respond to Request for Inspection. If a party . . . fails (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under Paragraphs (A), (B), and (C) of Subdivision (b)(2) of this rule.”

Subdivision (b) where it says “*Failure to Comply with Order*” makes it clear that an Order of the Court compelling a discovery step and a violation of that order is a condition precedent to the imposition of the any sanction provided for under (b). This obvious requirement is fortified by subdivision (2) above where it says, if a party fails to ***obey an order*** to provide or permit discovery the court may dismiss the action.

This requirement is again fortified by the holding in 938 P.2d 271, *Morton v.*

Continental Baking Co., (Utah 1997). Morton is the case that the defendants in this sub judice case primarily based their Motion to Dismiss on, as a sanction, in the lower court. Morton is a case where the Supreme Court of Utah did uphold the dismissal of Morton's case as a discovery sanction but it is not authority for defendants' dismissal as a sanction in this case. It is clear from reading the Morton case that the lower court's order compelling discovery which Morton violated, was a prerequisite to the approved dismissal of his case as a sanction. The Supreme Court in Morton said;

"Morton did not provide the discovery responses by March 10, and on March 18, 1994, Continental filed a motion to compel, a copy of which was served on Morton. In the motion, Continental requested that the trial court order Morton to respond within ten days or face dismissal of his case. Morton failed to respond to this motion.

On March 31, 1994, Continental filed a notice to submit for decision its motion to compel, a copy of which was sent to Morton. Morton did not respond. The court, on April 12, 1994, directed Continental to prepare an order requiring Morton to respond to Continental's discovery requests within ten days or face "the dismissal of all of Plaintiff's claims for relief." In the order, the court made it clear that Morton had "until 5:00 o'clock p.m. on the tenth day" from the signing of the order to comply. (FN1) This order was mailed to Morton on April 12.

Morton did not respond in any way to either the notice to submit or the court's order. The discovery responses were not received by the Friday, April 22, deadline. On Monday, April 25, 1996, Continental prepared a proposed order to dismiss pursuant to the April 12 order, a copy of which was hand-delivered to Morton. On that same day, Morton responded for the first time to the discovery requests by faxing responses to Continental. The court signed the order to dismiss on April 28, 1994."

In this sub judice case defendants filed four motions to compel. The first concerned fourteen informally requested medical records release forms, but no motion to

compel was filed and no court order was filed concerning this first request.⁷

Defendants Oldroyd and Money's second Motion to Compel the signing of informally requested release forms [R 403 & 407; A-29 & 30] was filed June 30, 1995. [R. 400; A-27]. The court ruled that they should be signed, and required the defendants to prepare an Order to that effect which was never done, on August 29, 1995 [R. 432; A-31]⁸. Even if the Ruling is considered an order of the court, the plaintiff timely complied with the Ruling by return letter enclosing the requested release forms and advising the court.[R. 438; A-33]

The third motion to compel which was filed on July 28, 1998 [R 985; A-35]. It grew out of the taking of Plaintiff's deposition on July 1, 1998 which was aborted by Curtis Drake, attorney for defendants, when plaintiff told him she thought he or the insurance company might have altered some of her medical records.[R 1012; A-37]. That motion to compel resulted in an Order of the Court dated September 14, 1998 [R 1367; A-57] where the Court said "*Defendant's Motion to Compel is granted; Within 30 days from August 26, 1998, plaintiff will produce all documents which she contends have been altered. . . .*" (Emphasis added). "*Plaintiff will submit to a deposition to take place*

⁷The defendants' recitation in their Memorandum in Support of their Motion to Dismiss as a sanction,[R 1452], and in turn the lower courts Ruling, [R 1458] and Order [R 1607] are wrong according to what is reflected in the Record.

⁸Since the court required the defendants attorney to prepare an order to put the Ruling in effect, and since the defendants did not do so, the plaintiff argues that there was no court order requiring her to sign the two or three release forms covered in the second motion to compel.

on or before November 13, 1998. [R 1366 last paragraph; A-58]. Other than the claimed altered documents she produced at her deposition of July 1, 1998, [R page 991 - 986] plaintiff found no other documents which she contended were altered and therefore produced no other documents in response to the court's order.[R 1667 paragraph 9]. Defendants never rescheduled her deposition on or before November 13, 1998. The question is, did the plaintiff violate an order of the court compelling discovery? She did not. The language of the order, that she produce documents "**which she contends have been altered**" leaves the production up to her, and whether or not she found any and wanted to claim that they had been altered by Curtis Drake or the insurance company. If she did, she was to produce them by the deadline to be used during her rescheduled deposition on or before November 13, 1998. If she did not find any she wanted to contend had been altered she was not required to produce anything. The court order of September 14, 1998 was open ended, and her failure to produce additional documents over and above what she had already produced on July 1, 1998 did not violate the Court's order. The order only required her to produce them if she found others.

This is particularly true where the defendant's never rescheduled her deposition on or before November 13, 1998. Instead they filed a Motion to Dismiss, as a sanction for failure to produce additional documents. If they had rescheduled, and if the plaintiff would have then produced other documents after the deadline of September 26, 1998 then she may have been in violation of the Court's order, but that never happened. Even

if that had happened, the remedy would have been to bar her from claiming anything for the documents produced to late, not dismissal of her case.[Rule 37; A-1]

The fourth motion to compel was filed September 14, 1998 [R. 1344; A-62]. It again was for an order of the Court requiring the plaintiff to sign informally requested medical records release forms.[R. 1353 & 1352; A-64 & 65]. The Plaintiff filed an Objection to this Motion to Compel on September 23, 1998 because it falsely accused her of not signing release forms which had never been submitted to her.[R. 1376; and see letter A-66]. However she signed the requested release forms after they were submitted to her anyway, and the defendants utilized them to obtain the medical records they wanted.[R. 1645 through 1639; A-67, 68, 69, 70, 71, & 72]. No court order was ever entered concerning this Motion to Compel or Objection.⁹

Since plaintiff has demonstrated from the Record that she did not completely fail to respond to defendants Rule 34 request, but rather fully complied, and did not violate any court order compelling discover, or did in fact comply with the orders, it was error for the lower court to dismiss her complaint against Dr. Oldroyd and Money as a discovery sanction. The lower court's order of dismissal should be reversed and the lower court ordered to proceed with discovery and conclusion of the case consistent with its Order of September 14, 1998.[R 1367; A-57].

Argument II.

⁹Again, the defendants' assertion and the court's order that there was are wrong and not supported by the Record.

Defendants' Motion to dismiss as a sanction seems to rely on the provisions of Rule 34 to support their position.

Rule 34 [A-5] of the Utah Rules of Civil Procedure provides that;

“(a) Scope. Any party may serve on any other party a request

(1) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained,. . . or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; . . .

It is clear from reading these provisions of Rule 34, that the discovery requirement to produce documents only covers the production of documents, medical records in this case, that are in the possession, custody or control of the plaintiff. From the very nature of the informal request, that she sign medical release forms for procuring medical records from different doctors and hospitals, it goes without saying that the records the defendants were seeking were in the possession, custody or control of third parties, not the plaintiff. Therefore the informally request that she sign medical records release forms is not covered or enforceable under Rule 34 or any other rule of discovery.

Neither can it be argued that medical records in a medical malpractice case are in the exclusive control of a patient because of the physician/patient privilege. In medical malpractice cases such records are not protected by the physician/patient privilege. Utah Code § 78-24-8 [A-10] in pertinent part provides that;

“There are particular relations in which it is the policy of the law to encourage

confidence and to preserve it inviolate. Therefore, a person cannot be examined as a witness in the following cases: . . .

(4) A physician or surgeon cannot, without the consent of his patient, be examined in a civil action as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient. However, this privilege shall be deemed to be waived by the patient in an action in which the patient places his medical condition at issue as an element or factor of his claim or defense. Under those circumstances, a physician or surgeon who has prescribed for or treated that patient for the medical condition at issue may provide information, interviews, reports, records, statements, memoranda, or other data relating to the patient's medical condition and treatment which are placed at issue. . . .”

A defendant in a medical malpractice case is free to go directly to the plaintiff's health care providers to obtain the medical records' of the plaintiff which are in the provider's possession, custody and control. No release forms are needed. This was obviously well known to defendants attorneys' herein because most of plaintiff's medical records were obtained by them via the subpoena duces tecum process.[See footnote 3]. In fact Rule 34 of the Utah Rules of Civil Procedure recognizes that documents in the possession of other third parties, not parties to the action are outside the rules. Paragraph (c) of the rule says;

“(c) Persons Not Parties. This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land.”

The discovery rules and particularly Rule 34 of the Utah Rules of Civil Procedure does not require the plaintiff in this case to sign informally requested medical records release forms, or suffer a sanction of dismissal in connection thereto, and the signing of

these forms by plaintiff is not necessary for defendants to get any medical records of hers they want from her health care providers. This is to say nothing of the fact that she signed them all anyway as set out above. Certainly the lower court erred when it dismissed plaintiff's complaint and causes of action because the defendants ask her to sign them and then filed motions to compel the signing of them. The Order appealed from should be reversed by this Court and the lower Court ordered to proceed with discovery as ordered in the September 14, 1998 order and conclude this case according to law.

Argument III.

As has been pointed out throughout this Brief, the defendants' request that plaintiff sign medical release forms, were informal request submitted to plaintiff's counsel via personal letters. Since the request were not submitted formally under the Rules of Civil Procedure, they were submitted outside the rules and the defendants are not entitled to claim the sanctions provided for under the rules.

Rule 37(d) [A-3] requires a proper formal service of the request. It says, "*. . . If a party . . . fails . . . (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under Paragraphs (A), (B), and (c) of Subdivision (b)(2) of this rule.*"(Emphasis added).

Rule 84 of the Utah Rules of Civil Procedure [A-9] provides that;
"*The forms contained in the Appendix of Forms are sufficient under the rules and are intended to indicate the simplicity and brevity of statement which the rules contemplate.*"

Form 1 of the “forms” in the appendix of the Rules shows the caption to be used in all formal pleadings filed under the rules of procedure. Defendants’ request were submitted via personal letters and did not conform with these formal pleading requirements. In addition, Rule 11 of the Utah Rules of Civil Procedure provides that all pleadings will be sign by an attorney for the party filing the pleading or by the party. In regards to the informally requested medical records release forms, the letters sent to plaintiff’s attorney to that effect were not signed by defendants attorney nor were they signed by the defendants themselves. Rather they were signed by a paralegal person for the law firm.[A-24, 29 & 64]. Certainly the informal request can not be considered formal discovery request under the rules.

In addition to the formal pleading requirements of the Utah Rules of Civil Procedure, Rule 4-502 of the Rules of Judicial Administration, [A-7] provides as follows;

“(1) Parties conducting discovery under Rules 33, 34 and 36 of the Utah Rules of Civil Procedure shall not file discovery requests with the clerk of the court, but shall file only the original certificate of service stating that the discovery requests have been served on the other parties and the date of service. The responding party shall file a similar certificate with the clerk of the court.

(2) The party serving the discovery request shall retain the original with a copy of the proof of service affixed to it and serve a copy of the discovery request and proof of service upon the opposing party or counsel. The party responding to the discovery request shall retain the original with a copy of the proof of service affixed to it, and serve a copy of the responses and the proof of service upon the opposing party or counsel. The discovery requests and response shall not be filed with the clerk of the court unless the court on motion and notice and for good cause shown so orders.

(3) Any party filing a motion to compel compliance with a discovery request or a motion which relies upon the discovery response shall attach a copy of the discovery

request or response which is at issue in the motion. . . .

(5) All parties shall be entitled to conduct discovery proceedings in accordance with this rule. . . .”

It is respectfully submitted that the defendants did not follow Rule 4-502 in any sense of the word. They did not serve a formal demand on the plaintiff’s counsel, and they did not file a formal Certificate of Service of the request for release forms with the Clerk of the Court. Neither did they attach copies of a formal demand or of a certificate of service to their Motions to Compel. Defendants’ utter failures to follow the Rules of discovery in the Utah Rules of Civil Procedure and the Rules of Judicial Administration, bars them from seeking the sanctions they did under the Rules, and bars the lower court from dismissing as a sanction the plaintiff’s complaint. The lower court’s order of dismissal should be reversed for this reason also, and ordered to proceed with discovery consistent with its Order of September 14, 1998 and conclusion of this case according to law.

Argument IV.

When the plaintiff first filed her case, she named the hospital where Dr.’s Oldroyd and Money performed the two operations in question, Mt. View Hospital. Mt. View’s attorneys filed discovery request consistent with the rules, and ultimately filed a motion to dismiss as a sanction, which the lower court granted. Plaintiff’s complaint was dismissed as against Mt. View Hospital, but not against Dr.’s Oldroyd and Money. The dismissal of plaintiff’s complaint had nothing to do with these latter defendants and they continued their defense, filing there own discovery request, and filing their own Motions to Dismiss

and Motions for Summary Judgment.

Some three years later, when the Defendants Oldroyd and Money filed the questioned Motion to Dismiss as a sanction for discovery violations against the plaintiff, they cited the fact that plaintiff's case against Mt. View had been earlier dismissed as a discovery sanction. The lower court based its order dismissing plaintiff's complaint against Defendant Oldroyd and Money on the fact that it had earlier dismissed her case against Mt. View as a discovery sanction. This error is patently wrong, as the plaintiff had already suffered a sanction for what ever court ordered discovery violation she had committed and to punish her again by dismissing her complaint against Defendants Oldroyd and Money cannot be upheld. This is especially true where plaintiff's cause of action against Mt. View had nothing to do with Defendants Oldroyd and Money. Plaintiff's cause of action against Mt. View was based on a vicarious liability theory which Mt. View vigorously opposed. The plaintiff was attempting to state a cause of action against Mt. View solely on the premise that the operations performed by Drs. Oldroyd and Money were performed there. No allegation was made against Defendants Oldroyd and Money based on the premise that they were liable for some wrong that Mt. View had committed during the operations. [A-14]. Plaintiff was not able to sustain her cause of action against Mt. View, and chose to allow it to be dismissed by the court. But that dismissal did not have anything to do with Defendants Oldroyd and Money and their claim that the causes of action against them should be dismissed because of it cannot be

sustained.

Argument V.

The final bases for the dismissal advocated by the defendants was because when the defendants noticed up the deposition of a former attorney of plaintiff's, W. Andrew McCullough, [R 1411], the plaintiff's attorney advised Mr. McCullough that she invoked her attorney/client privilege and did not want him to answer any questions about her consultations with him, primarily because neither the plaintiff nor her attorney could attend the scheduled deposition.[R 1432]. Had they been able to be there, the insinuation is that plaintiff would have allowed the deposition and examination of attorney McCullough's files as she did when the defendants did the same with attorney Chuntz.

Defendants' claim, that the plaintiff's invoking of her privilege violated the Rules of Discovery and that as a result, her case against the defendants should be dismissed as a sanction.[R 1452, 1446]. The defendants never filed a Motion to Compel the allowance of the deposition of Mr. McCullough and there never was a hearing concerning this issue. No order of the court was obtained ordering the plaintiff to allow the deposition in spite of the privilege. In short the lower court never considered this issue. Defendants did use the invoking of the privilege to support their motion to dismiss as a sanction and the lower court apparently used it as a reason to dismiss plaintiff's complaint as a sanction. [R 1458] when it said "plaintiff's counsel has established a consistent pattern and practice of not complying with discovery requests and other dilatory behavior". Apparently this

statement refers to the letter that plaintiff's counsel wrote to Mr. McCullough advising him that plaintiff invoked her attorney/client privilege when defendants noticed up his deposition.[R 1432].

This error on the part of the lower court in dismissing plaintiff's cause of action as a discovery sanction because plaintiff invoked her attorney/client privilege is especially heinous where there is no Utah case law or statutory authority that says a party waives her attorney/client privilege in a medical malpractice case.[R 1452]. Neither Utah Code Annotated Section 78-24-8 nor Utah Rule of Evidence Rule 504 provides for a waiver of the attorney/client privilege as asserted by defendants and executed by the lower court. This is in contrast with the Physician/patient privilege in Section 78-24-8 [A-10] where an exception or waiver is provided for in medical malpractice cases.

Argument VI.

The defendants cite delay in their memorandums in support of their motion to dismiss as a sanction, and point out the several years that the case has been pending since it was filed in August of 1993. The delay in prosecuting the case is on the backs of the defendants, not the plaintiff because of her alleged discovery violations as set out and argued above.

A review of the Record shows that;

Drs. Oldroyd and Money first filed Motions to Dismiss on the bases that the plaintiff did not plead and avoid the affirmative defense of the case being filed beyond the statute

of limitations. In fact the defendants filed two such motions to dismiss. The first on December 3, 1993 [R. 17 and 22] which was opposed by the plaintiff. [R. 66]. The second motion to dismiss was filed on March 29, 1994. [R. 135]. The second motion was opposed by the plaintiff on the basis that the plaintiff was not required by the rules of pleading to plead avoidance of the affirmative defense of the running of a statute of limitation, and that the defendants could not raise the defense in a motion to dismiss, but rather were required to plead it as an affirmative defense in an Answer. [R. 192]. Notice to submit for decision was filed April 18, 1994. The court's decision overruling and denying the defendants' motions to dismiss was filed June 13, 1994 [R. 236] consuming nearly one year of time. It is obvious from the courts Ruling that the defendants were wrong in raising the statute of limitation defense in a motion to dismiss rather than as an affirmative defense in their Answer. They did not raise the defense until they filed their first Answer December 3, 1997 [R. 862] nearly four and one-half years later. The defendants next tried a series of motions for summary judgment, the first was filed March 5, 1997. [R. 637 and 678]. That motion for summary judgment was denied by the court on June 12, 1997, [R. 818] and order filed November 21, 1997 [R. 855]. The defendants filed another motion for summary judgment again on June 24, 1997 [R. 828]. On July 9, 1998 the defendant Money again filed a motion for summary judgment which was almost the same as the first motion for summary judgment [R. 937 and 969]. The court denied this last motion for summary judgment on the basis that it was repetitive of the earlier

motion for summary judgment.

In addition to the repetitive motions, the defendants' attorney frustrated plaintiff's early attempt to take the deposition of a possible key witness in the case, Dr. Richard Thomas. The plaintiff had noticed up the taking of the Doctor's deposition, and Curtis Drake attended on behalf of his clients. Curtis Drake deliberately interfered with the deposition, and absolutely refused to allow the plaintiff to continue the deposition and even blocked the witness from answering the questions. Plaintiff was required to obtain a protective order of the court to prevent defendants' attorney from using the tactic to further frustrate the plaintiff's case.[R. 449, 461 and resulting order 498 and 520]

It is clear from reading the record that the delays in this case were primarily caused by the motion and tactics of the defendants, and not the result of any so called discovery violations which the defendants point to in their motion for sanctions. In fact the defendants do not claim or show that the passing of time in this case resulted from the actions of the plaintiff in discovery matters.

Further, it is clear from reading the deposition of the plaintiff where she thought Curtis Drake had altered some of her medical records, that the problem was not the impact it might have on his clients case, but rather the impact it had on him personally. [R 1012 -993; A-37-56] Even though plaintiff's attorney tried to get him to proceed with the deposition of the plaintiff, Curtis Drake refused because of his concern for his personal reputation and stalled the progress of the case even further. [R. 1012 - 993 and see R.

1018].

On the other hand the plaintiff did her best to see that the case could move along when ever she could. Besides responding to the numerous motions to dismiss and motions for summary judgments filed by all defendants, the plaintiff answered defendants' interrogatories [R. 352] she signed all release forms submitted to her as argued above, she attended her first scheduled deposition in a timely manner which was aborted by the defendants' attorney, she stipulated to defendants motion for a psychiatric examination even though the defendants never pursued the motion [R. 1364 paragraph 7; A-57] , she stipulated to defendants' motion to not mention other lawsuits against the defendants [R. 1365 paragraph 4; A-57], she stipulated to defendants motion to bar mentioning insurance at the trial [R. 1365 paragraph 3; A-57], and last but not least she stipulated to defendants motions for an order requiring Wasatch Mental Health and Timpanogos Community Mental Health to provide copies of her mental health records to the defendants after Wasatch apparently refused to provide them pursuant to the subpoena duces tecum process the defendants regularly used. [A-57] This is particularly important in face of the allegation that the plaintiff was attempting to hinder the progress of defendants' discovery of her medical records. She was not, as demonstrated by her cooperation in defendants quest to get Wasatch's and Timpanogos' records.[R. 1407 and 1364 paragraph 8 A-57] [see in general the courts order of September 14, 1998 R. 1367; A-57].

In addition to being as cooperative as possible with defendants' discovery quest, through out these proceedings, plaintiff has attempted to explain to the defendants' attorneys and the court that she spends a great deal of time in emergency hospital stays, usually out of state, in an effort to stay alive following the surgeries performed by the defendants in this case and has not been able to respond as a healthy and active person might be expected to respond in discovery matters. Sometimes she has not been physically able to perform at all during the course of the proceedings.[See plaintiff's motion for enlargement of time in which to respond to defendants' discovery request filed August 29, 1994 R. 255; R686 and plaintiff's letter to defendants' attorneys filed September 12, 1995 R. 438; A-33; and see plaintiff's letter to defendants' attorneys received by them August 27, 1998 R. 1345].

In comparing the causes of delay in this case attributable to the respective parties, it is clear that the bulk of any delays in this case were caused by the unfounded motion practice persisted in by the defendants. It resulted from their failure to file an answer until nearly four and on-half years had passed. The long running of this case cannot be attributed to the plaintiff as the lower court did, and the Utah Court of Appeals should reverse the lower court's dismissal for that reason and direct the lower court to proceed with its order of September 14, 1998 and conclude this case according to law.

Argument VII.

The Constitution of the United States, Fourteenth Amendment, Section 1. declares that; “. . .*No state shall make or enforce any law which shall abridge the privileges or*

immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” [A-12]

The Constitution of the State of Utah, Article I, Section 11 [A-13] declares that; *“All courts shall be open, and every person, for an injury done to him in his person, . . . shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party”*

Justice Daniel Stewart of the Utah Supreme Court has aptly warned that there are serious constitutional concerns about the imposition of the sanction of dismissal of a parties case under the rules of discovery. In Morton, cited above, in his dissenting opinion, he said

“Indeed, constitutional due process rights may be violated if a court refuses to hear the merits of the case where there has been a relatively trivial infraction of procedural rules. . . . Thus, [d]ismissal is generally imposed only for egregious misconduct, such as repeated failure to appear for deposition. . . . Dismissal is "the most extreme sanction provided for in the rule, and the Supreme Court has emphasized the necessity for cautious use of the rule.... [I]t should be exercised only in exceptional circumstances.

The overriding purpose of modern rules of procedure is to assure that disputes are decided on the merits whenever possible. Appellate courts have repeatedly stressed that trial courts should seek to impose penalties less severe than the dismissal that Rule 37 makes available. . . .

Indeed, the general rule is that extreme sanctions "should be employed only if the district court has determined that it could not fashion an 'equally effective but less drastic remedy. . . . Thus, [t]he district court abuses its discretion if it imposes a sanction of dismissal without first considering the impact of the sanction and the adequacy of less drastic sanctions. . . .” (citations and inter quotation marks have been omitted)

Without repeating each argument above it is respectfully submitted that under the facts and circumstances of this case, the lower court’s order dismissing plaintiff’s

complaint and cause of action against Drs. Oldroyd and Money severally violated the plaintiff's constitutional rights to have her day in court to redress the very serious negligent injuries she sustained at the hands of the defendants. In the words of Dr. Ryser, her doctor, as a result of the defendants' negligent, even uncalled for operations, the plaintiff has a non functioning gut.

This is a complicated case of medical malpractice. The defendants have a right to be extremely concerned about their liability to the plaintiff, but they do not have the right to have there liability to the plaintiff dismissed as a sanction under the rules of discovery, to shield themselves. The lower courts dismissal should be reversed by this court as a matter of law, and as a matter of abuse of discretion.

CONCLUSION

The Utah Court of Appeals should reverse the lower court's error of dismissing plaintiff's complaint and causes of action against Dr. Oldroyd and Dr. Money and require the lower Court to proceed with the last order of the court of September 14, 1998 reopening discovery, and complete the case according to law.

Plaintiff so prays.

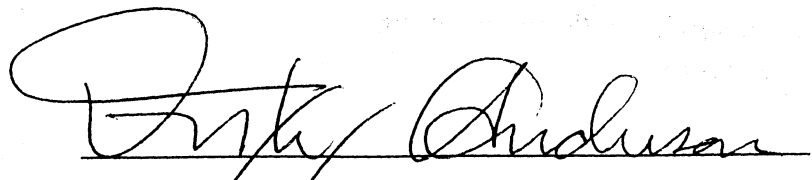
Dated this

11th

Day of

Sept.

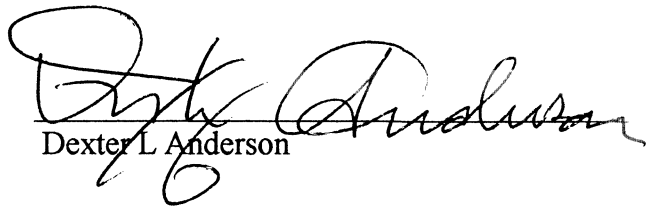
1999.


Dexter L. Anderson

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing document entitled Brief of Plaintiff/Appellant on the following person, by mailing two (2) copies to him by United States Mail, postage prepaid this 11th Day of Sept, 1999.

Curtis J. Drake
Attorney for Defendants/Appellees Drs. Oldroyd and Money
Broadway Centre, Suite 900
111 East Broadway
Salt Lake City, Utah 84111


Dexter L. Anderson