

1999

Marilyn R. Hales v. J. Jay Oldroyd, M.D.; and Nolan B. Money, M.D. : Brief of Appellee

Utah Court of Appeals

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MARILYN R. HALES,

Plaintiff and Appellant,

VS.

**J. JAY OLDROYD, M.D.; and
NOLAN B. MONEY, M.D.,**

Defendants and Appellees.

Appeal No. 9902883-CA

Trial Court No. 930400409

Priority No. 15

**APPEAL FROM AN ORDER DISMISSING PLAINTIFF'S COMPLAINT
ENTERED BY THE FOURTH JUDICIAL DISTRICT COURT
FOR UTAH COUNTY
THE HONORABLE RAY M. HARDING, JR.**

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FILED

Utah Court of Appeals

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Julia D'Alesandro
Clerk of the Court

IN THE UTAH COURT OF APPEALS

MARILYN R. HALES,

Plaintiff and Appellant,

vs.

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BRIEF OF APPELLEES

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JURISDICTIONAL STATEMENT

The Utah Supreme Court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2-2(3)(j) (1996), and this Court has pour-over jurisdiction pursuant to Utah Code Ann. § 78-2-2(4) (1996).

STATEMENT OF ISSUE AND STANDARD OF REVIEW

Did the trial court err in dismissing plaintiff's Second Amended Complaint as a sanction for plaintiff's persistent and willful dilatory behavior in complying with discovery requests?

This Court reviews the trial court's ruling for abuse of discretion, according broad deference to the trial court.

Even though dismissal of a noncomplying party's action is one of the "most severe of the potential sanctions that can be imposed," it is clear from the language of rule 37 that it is within a trial court's discretion to impose such a sanction. "Because trial courts must deal first hand with the parties and the discovery process, they are given broad discretion regarding the imposition of discovery sanctions." Thus [appellate courts] have long held that [they] will not interfere unless "abuse of that discretion [is] clearly shown' [and] trial courts are granted a great deal of deference in dismissing a case as a discovery sanction."

Morton v. Continental Baking Co., 938 P.2d 271, 274 & 276 (Utah 1997) (citations omitted). See also Preston & Chambers, P.C. v. Koller, 943 P.2d 260, 262 (Utah Ct. App. 1997) ("[U]nder Rule 37 of the Utah Rules of Civil Procedure, the trial court . . . has broad discretion in selecting and imposing sanctions for discovery violations, including dismissing the noncomplying party's action.").

DETERMINATIVE LAW

Rule 37 of the Utah Rules of Civil Procedure provides, in relevant part:

(b) Failure to comply with order.

(2) 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 striking out pleadings or parts thereof, staying further proceedings until the order is obeyed, 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 [discovery].

If a party . . . fails . . . 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.

Utah R. Civ. P. 37(b)(2) & (d).

STATEMENT OF THE CASE

A. Nature of Case, Course of Proceedings, and Disposition in the Court Below

In this case, plaintiff appeals from the trial court's order dismissing her medical malpractice action against defendants J. Jay Oldroyd, M.D., and Nolan B. Money, M.D. (collectively the "**Doctors**"). Plaintiff initially brought this claim against both the Doctors and against Mountain View Hospital ("**Mountain View**"). However, after plaintiff failed to respond to Mountain View's discovery, and then violated the trial court's orders compelling this discovery, the trial court dismissed plaintiff's claim against Mountain View as a sanction. Over the next three years, the Doctors filed four separate motions to compel discovery to which plaintiff previously failed to respond. After

plaintiff violated the trial court's order on their third motion to compel, the Doctors' moved for the sanction of dismissal of plaintiff's Second Amended Complaint in this case. The trial court granted the Doctors' motion, citing numerous examples of what the trial court found to be wilful and persistent dilatory tactics by plaintiff in responding to discovery. The trial court found that these tactics had frustrated the judicial process and therefore ordered that "[p]laintiff's Second Amended Complaint is hereby dismissed without prejudice."

B. Statement of Facts

On August 2, 1993, plaintiff filed her Complaint in this action against, among others, the Doctors and Mountain View. (R. 4) On March 27, 1995, Mountain View filed a motion to compel plaintiff's response to Mountain View's first set of interrogatories and document requests, noting that close to four months had passed since Mountain View served this discovery and that plaintiff had yet to provide complete responses. (R. 273, 325-27) The trial court granted Mountain View's motion to compel and ordered plaintiff to respond to Mountain View's discovery. (R. 398-99) On April 11, 1995, the Doctors filed a motion to compel, seeking an order requiring plaintiff to sign consent forms for the release of her medical records, noting that, two months after the Doctors requested these releases, plaintiff had yet to respond to this request. (R. 329, 356) The trial court granted this motion. (R. 432)

On May 8, 1995, Mountain View filed a motion to compel responses to its second set of interrogatories and document requests, noting that, two months after Mountain

View served this discovery, plaintiff had yet to respond, despite Mountain View's letter requesting a response. (R. 369, 385-87) The trial court granted this motion, ordering plaintiff to produce the requested discovery within 20 days. (R. 396) On June 30, 1995, the Doctors filed another motion to compel, again seeking plaintiff's consent to release of medical records and information. (R. 400) The trial court granted this motion. (R. 432)

By August 7, 1995, plaintiff had yet to respond to Mountain View's discovery, even though the trial court had ordered plaintiff to do so by July 5, 1995. (R. 423) Hence, Mountain View filed a motion seeking a default judgment as a sanction for plaintiff's violations of the trial court's discovery orders. (R. 423) The trial court granted Mountain View's motion, and struck plaintiff's complaint as against Mountain View. (R. 432-34)

On July 1, 1998, the Doctors' counsel took plaintiff's deposition. (R. 1046) During this deposition, plaintiff reiterated a previous claim that the Doctors' counsel had been following her, and that the Doctors' counsel was involved in a conspiracy against her. (R. 1006, 1044) In the course of these contentions, the following exchange took place between plaintiff and the Doctors' counsel:

Q. Can you answer my question now, Mrs. Hales, about what it is that you believe I have been doing to interfere with your ability to obtain health care in the State of Utah?

A. I feel you are rewriting my records.

Q. And in what way? How am I supposedly doing that?

A. Whiting them out.

Q. Which records are you referring to?

A. All my records, sir.

Q. You believe that I have been whitening out your medical records; is that correct?

A. Yes, sir.

Q. So you have you seen any records in which you believe I have whitened out or changed any information? Can you answer my question, Mrs. Hales. Have you seen any record or document like that?

A. Yes.

Q. Do you have them with you today?

A. No, I do not.

Q. Where are they?

A. I don't know.

Q. Where were they the last time that you saw them?

A. At Mrs. Lloyd's house.

[Plaintiff's counsel]: I think we can produce some today, Counsel, if you wanted to see them. I can find them right now.

(R. 995-96) Insisting the documents before them were too voluminous, both plaintiff and her counsel refused to identify any of the allegedly altered documents, whereupon the following exchange occurred:

Q. [Doctors' counsel] Mrs. Hales, are you willing to go through these documents to identify the materials that you claim have been altered and that relate to the claims that you are making against Dr. Oldroyd and Dr. Money? Are you willing to do that today?

A. No.

Q. All right. Then this deposition will be recessed. We will take the matter up with the judge and we will come back again on another day. My view--well, enough said, for the record, my position is these are materials this witness has indicated are relevant, that relate to her claims in this case. These materials are available for review today, she has declined to do that, and I am unable to pursue my examination based upon the witness's position. That will conclude the deposition at this time.

(R. 1010-11)

By July 28, 1998, plaintiff had not produced any of the so-called "altered documents," and the Doctors filed a motion to compel seeking production of these documents. The Doctors also sought sanctions for attorney's fees and costs incurred due to plaintiff's failure to provide these documents. On September 14, 1998, the trial court granted the Doctors' motion to compel and for sanctions, ordering plaintiff to respond to the Doctors' request for the altered documents within 30 days and to pay the Doctors' attorney fees and costs incurred in their motion to compel. (R. 1366-69) Also on September 14, 1998, the Doctors filed their fourth motion to compel, again seeking production of medical records which plaintiff had failed to provide. (R. 1344)

By November 25, 1998, plaintiff had failed to respond in any way to the trial court's September 14, 1998 order that she produce the altered documents within 30 days. Consequently, the Doctors filed a motion for sanctions, seeking dismissal of plaintiff's Second Amended Complaint.¹ (R. 1429, 1452) In support of their motion for sanctions,

¹ Plaintiff filed her Second Amended Complaint on September 28, 1998. (R. 1395)

the Doctors pointed to all of the delays caused by plaintiff's failure to respond to discovery and her violation of discovery orders, including the order to produce the altered documents. (R. 1443-52)

On December 10, 1999, the trial court ruled in the Doctors' favor, dismissing plaintiff's Second Amended Complaint. (R. 1458) On March 17, 1999, the trial court entered an order on its ruling granting the Doctors' motion for sanctions. (R. 1607) In the order, the trial court detailed all of the motions to compel filed by the Doctors and Mountain View that were necessitated by plaintiff's failure to respond to discovery. (R. 1605-06) The trial court also noted that plaintiff had previously violated court orders regarding discovery propounded by Mountain View, and that these violations had resulted in the dismissal of plaintiff's claim against Mountain View. (R. 1605-06) Finally, the trial court noted that plaintiff had violated its order requiring production of the altered documents. (R. 1606) Based on all of these facts, the trial court concluded that plaintiff had wilfully and persistently engaged in dilatory tactics, and that dismissal of her Second Amended Complaint was thus justified. (R. 1604-05)

SUMMARY OF THE ARGUMENT

By the time the trial court ordered dismissal of plaintiff's Second Amended Complaint, plaintiff had engaged in a three-year pattern of delaying discovery in this case. Plaintiff persistently ignored discovery requests until the parties filed motions to compel responses, which the trial court invariably granted. On at least two occasions, plaintiff violated the trial court's order compelling responses to discovery requests.

Additionally, plaintiff made wild accusations of record alteration and then refused to produce or even identify the allegedly altered documents, forcing the Doctors to seek and obtain an order from the trial court compelling production of these documents. When plaintiff failed to make even a cursory response or explanation in compliance with this order, the trial court determined that plaintiff's discovery abuses had compounded to a degree warranting dismissal of her claims against the Doctors. In addition to being warranted if not necessary under the circumstances, this decision was well within the trial court's discretion under Rule 37 of the Utah Rules of Civil Procedure and should not be disturbed by this Court.

In an effort to divert attention from her persistent discovery abuses, plaintiff insists that her grudging responses to discovery, in reply to motions to compel, the informal nature of some of the discovery, and the Doctors' legitimate motions and objections somehow excuse her discovery violations. However, under Utah law, none of these contentions alter plaintiff's duty to timely comply with discovery requests and court orders — a duty that plaintiff violated time and time again. Also, although plaintiff claims that she did not have possession of all of the requested documents, the record demonstrates that she did have actual possession of these documents, and that, in any event, she completely failed to raise her lack of possession as an objection to discovery. Likewise, plaintiff's claim that the trial court erred by considering plaintiff's violations of orders compelling discovery requested by Mountain View completely ignores the overall delays caused by this conduct. Finally, plaintiff's argument that dismissing her lawsuit

violated her constitutional rights ignores the fact that plaintiff was accorded every procedural opportunity and willingly chose to abuse these opportunities. Therefore, this Court should affirm the trial court's sanction of dismissal of plaintiff's Second Amended Complaint.

ARGUMENT

I. BASED ON PLAINTIFF'S VIOLATION OF THE TRIAL COURT'S ORDER, COMPOUNDED BY HER REPEATED DELAYS, THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ITS CHOSEN SANCTION

Plaintiff's persistent and excessive dilatory tactics in responding to discovery warranted the sanction of dismissal and this Court should therefore affirm the trial court's ruling.

[A] party's conduct merits sanctions under rule 37 if any of the following circumstances are found: (1) the party's behavior was willful; (2) the party has acted in bad faith; (3) the court can attribute some fault to the party; or (4) the party has engaged in persistent dilatory tactics tending to frustrate the judicial process.

Morton v. Continental Baking Co., 938 P.2d 271, 277 (Utah 1997). Harsh sanctions are particularly justified in response to "elusive and uncooperative" behavior in responding to discovery. Darrington v. Wade, 812 P.2d 452, 456 (Utah Ct. App. 1999). See also Utah R. Civ. P. 37(a)(3) (for purposes of imposing sanctions, "an evasive or incomplete answer is to be treated as a failure to answer").

In responding to discovery in this case, plaintiff's conduct has ranged from elusive and uncooperative to completely nonresponsive, amounting to a chronic pattern of

dilatory tactics which have frustrated the judicial process. For over three years plaintiff persistently failed to respond to discovery, forcing both the Doctors and Mountain View to seek court-ordered responses. In doing so, plaintiff has wilfully or knowingly created excessive procedural delays.

For instance, regarding the trial court's dismissal of plaintiff's claim against Mountain View due to her discovery violations, plaintiff concedes that she "was not able to sustain her cause of action against Mountain View, and chose to allow it to be dismissed by the court." (Appellant's Br. at 27). In other words, she knew she had no claim against Mountain View but, rather than assent to an expeditious dismissal, she chose to ignore Mountain View's discovery, force Mountain View to obtain an order on a motion to compel, defy this order, and then "allow" her claim to be dismissed by the court as a sanction — all the while stymieing the judicial process for both the Doctors and Mountain View. In addition to violating the trial court's order on Mountain View's two motions to compel, plaintiff failed to respond to the Doctors' discovery, forcing them to file four separate motions to compel — all of which the trial court granted. On six separate occasions, plaintiff forced the parties to seek judicial intervention to compel discovery responses, creating persistent and needless delays.

Finally, plaintiff defied the trial court's order mandating a response to the Doctors' request for production of the altered documents. At this point, plaintiff's persistent dilatory tactics had compounded to such a degree that the trial court exercised its discretion to impose the sanction of dismissal. The trial court had previously awarded

attorney's fees as a sanction, but this obviously did not deter plaintiff from abusing the discovery process. Consequently, the trial court opted for the more severe sanction of dismissal. This decision was entirely warranted under the circumstances and certainly did not constitute a clear abuse of the trial court's discretion. Accordingly, this Court should affirm the trial court's dismissal order.

In this appeal, plaintiff contends that her occasional responses to the Doctors' discovery somehow excuse her pattern of delays. However, all of the responses cited by plaintiff came **after** the Doctors were constrained to file motions compelling such responses. "[O]nce the motion for sanctions has been filed, the opposing party may not preclude their imposition by making a belated response in the interim between the filing of the motion for sanctions and the hearing on the motion." W.W. & W.B. Gardner, Inc. v. Park West Village, Inc., 568 P.2d 734, 737 (Utah 1977). Hence, notwithstanding her grudging responses to the Doctors' discovery, plaintiff still caused persistent delays and the trial court thus correctly imposed the sanction of dismissal.

Plaintiff also claims that, because not all of her discovery violations involved actually defying the trial court's orders, this Court should find an abuse of discretion. However, the discovery violation which ultimately swayed the trial court to impose the sanction of dismissal was plaintiff's violation of the trial court's order to produce the altered documents. After plaintiff's deposition was recessed due to her refusal to produce the allegedly altered documents, the trial court ordered plaintiff to produce these documents within 30 days so that the Doctors could depose plaintiff as to these

documents when her deposition resumed. Yet, to this day, plaintiff has failed to produce any documents.

Plaintiff insists that she found no altered documents and was therefore not required to respond to the trial court's order. However, at no time within the 30 days following the trial court's order did plaintiff inform the Doctors or the trial court that no documents could be located. Plaintiff also failed to inform the Doctors or the trial court as to what measures, if any, she had taken to locate these documents. Consequently, the Doctors could not resume deposing plaintiff because they still had no idea which documents plaintiff contended were altered. The trial court entered its order to avoid this very situation and plaintiff's violation of the order thus warranted dismissal. See W.W. & W.B. Gardner, Inc., 568 P.2d at 737 (affirming dismissal because "[p]laintiff had not undertaken to object to the [discovery], to request additional time, or to explain or justify his failure to answer"); Tuck v. Godfrey, 981 P.2d 407, 413 (Utah Ct. App. 1999) (affirming dismissal where party had "'done virtually nothing' since the prior sanction hearing").

Also, in addition to plaintiff's violation of its order, the trial court dismissed plaintiff's Second Amended Complaint based on her failure to respond to discovery, a ruling permitted by Utah Rule of Civil Procedure 37(d). Rule 37(d) "allows a court to impose sanctions against a party for disregarding discovery obligations even when that party has not directly violated a court order specifically compelling discovery." Schoney v. Memorial Estates, Inc., 790 P.2d 584, 585 (Utah Ct. App. 1990). Hence,

notwithstanding plaintiff's violation of a court order, dismissal was an appropriate sanction based on her disregard of discovery obligations.

Indeed, plaintiff's violation of the trial court's order was the culmination of a protracted pattern of delaying the proceedings in this case by abusing the discovery process.² Based on this conduct, the trial court did not abuse its discretion in dismissing plaintiff's claims against the Doctors and this Court should therefore affirm the trial court's ruling.

II. PLAINTIFF FAILED TO PRODUCE RELEASES FOR MEDICAL RECORDS WHICH WERE IN HER ACTUAL POSSESSION

Although her failure to sign medical release forms was merely one of many dilatory tactics, plaintiff takes issue with the trial court's reliance on this dereliction, contending that the records sought by the release forms were not within her possession. However, the Doctors requested releases that would enable them to obtain records, not the records themselves. Moreover, for purposes of responding to Rule 34 record requests, a party has actual control of the records if they can direct the records' custodian to produce them, which plaintiff could have done. *See Tuck v. Godfrey*, 981 P.2d 407, 413 n.5 (Utah Ct. App. 1999). Moreover, even if she did not have possession of the records, plaintiff was obligated to object to the discovery requesting these records, or to seek a

² Particularly troubling is plaintiff's contention that the trial court's failure to enter a formal order on each ruling somehow excuses plaintiff's discovery violations. "Although the trial court [may] not specifically designate [an] order as such," parties must still respond if "the court's ruling . . . inarguably compelled discovery." *Preston & Chambers, P.C. v. Koller*, 943 P.2d 260, 262 (Utah Ct. App. 1997).

protective order, not to simply ignore the request. See id. “[T]he failure to [serve a written response to discovery requests] may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order.” Utah R. Civ. P. 37(d). Because plaintiff failed to object to the Doctors’ request that she sign medical release forms, she is deemed to have waived any objection on appeal. See Tuck, 981 P.2d at 413.

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY PARTIALLY BASING ITS SANCTION ON PLAINTIFF’S FAILURE TO SIGN INFORMALLY-REQUESTED RELEASE FORMS

Plaintiff contends that the trial court erred by partly basing dismissal on her failure to respond to informally-requested discovery.³ However, the “[t]ime, place, and manner requirements relating to discovery are committed to the [court’s] discretion [and the court] has sufficient discretion to require discovery practices that are fair and effective in the circumstances of the pending controversy.” Bennion v. Utah State Bd. of Oil, Gas & Mining, 675 P.2d 1135, 1144 (Utah 1983). See also Preston & Chambers, P.C. v. Koller, 943 P.2d 260, 263 (Utah Ct. App. 1997) (affirming trial court’s dismissal based, in part, on dilatory actions in responding to informal letter requesting discovery). After plaintiff ignored the Doctors’ informal request for her signature on medical release forms, the trial

³ None of the rules cited by plaintiff stand for the proposition that all discovery must necessarily conform to rigid formalities. Utah Rule of Civil Procedure 37(d)(3) permits sanctions to be imposed for failure to respond to document requests served upon the responding party. Rule 11 of the Utah Rules of Civil Procedure requires court submissions to have a valid factual and legal basis. Rule 4-502 of the Utah Code of Judicial Administration prohibits parties from filing discovery requests with the court and requires parties to file certificates of service for formal discovery.

court entered an order compelling discovery in this regard, a decision entirely within the court's discretion. Concluding that plaintiff's failure to respond to the Doctors' informal requests was one of many dilatory tactics justifying dismissal was also within the trial court's discretion.

Moreover, plaintiff was required to challenge technical failures in the Doctors' discovery in an objection or motion for protective order, and her failure to take either of these actions constitutes a waiver of this claim on appeal. See Utah R. Civ. P. 37(d); Tuck, 981 P.2d at 413. Therefore, the trial court did not abuse its discretion in partially basing its sanction on plaintiff's failure to respond to informal discovery.

IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY PARTIALLY BASING DISMISSAL ON PLAINTIFF'S FAILURE TO RESPOND TO MOUNTAIN VIEW'S DISCOVERY

Although plaintiff's delays in responding to the Doctors' discovery alone warranted dismissal, the trial court did not abuse its discretion by considering plaintiff's delays in responding to Mountain View's discovery in imposing this sanction. "A party to an action has a right to have the benefits of discovery procedure promptly, not only in order that he may have ample time to prepare his case, but also in order to bring to light facts which may entitle him to summary judgment or induce settlement prior to trial." W.W. & W.B. Gardner, Inc. v. Park West Village, Inc., 568 P.2d 734, 738 (Utah 1977). Hence, contrary to plaintiff's arguments, the Doctors were entitled to the benefits of discovery procedure, not just responses to their discovery. In other words, as parties to plaintiff's action, the Doctors were entitled to the benefits of plaintiff's responses to

Mountain View's discovery. These responses may have assisted the Doctors in preparing their case, revealed facts which entitled them to summary judgment, or induced settlement. By ignoring Mountain View's discovery, plaintiff deprived the Doctors of these benefits and it was thus appropriate to include plaintiff's failure to respond to Mountain View's discovery among her many other discovery violations which warranted dismissal.

Rule 37 sanctions are designed to prevent persistent dilatory tactics. Plaintiff ignored Mountain View's discovery and violated orders to produce that discovery, holding up the entire litigation in this matter. Plaintiff then persisted in these delays against the Doctors. At this point plaintiff cannot escape the consequences of her delays simply because they were inflicted upon two separate parties. Thus, the trial court properly considered plaintiff's failure to respond to Mountain View's discovery in imposing the sanction of dismissal.

V. THE TRIAL COURT DID NOT BASE ITS SANCTION ON PLAINTIFF'S REFUSAL TO PERMIT DISCOVERY FROM HER FORMER COUNSEL

In support of dismissal, the trial court articulated specific dilatory tactics engaged in by plaintiff, none of which included her refusal to permit discovery from her former counsel. In their motion seeking sanctions against plaintiff, the Doctors noted that plaintiff had capriciously invoked a non-existent claim of attorney-client privilege which further stalled discovery. However, the trial court did not adopt this fact as a basis for imposing the sanction of dismissal. Yet, plaintiff raises the validity of her attorney-client

privilege claim on appeal as if the trial court had actually incorporated this issue into its ruling. In reality, the trial court had a vast body of dilatory conduct and discovery abuses upon which to base dismissal, and did not need to include plaintiff's invalid privilege claim as a ground for its order. Hence, in reviewing this order on appeal, plaintiff's contentions regarding the propriety of her refusal to permit discovery from her former counsel should not be considered.

VI. THE TRIAL COURT BASED ITS SANCTION ON PLAINTIFF'S UNNECESSARY DELAYS

The trial court dismissed plaintiff's Second Amended Complaint based on the delays caused by her repetitive discovery abuses, and, contrary to plaintiff's claims, the Doctors' legitimate motions and objections do not mitigate her delays. Plaintiff insists that her failing to respond to discovery and her violations of court orders should be excused because the Doctors filed motions to dismiss and for summary judgment, and because they objected during the depositions of plaintiff and her expert. However, the Doctors' conduct was entirely permissible under the Utah Rules of Civil Procedure and certainly not sanctionable. In contrast, ignoring discovery and violating a court's discovery orders is impermissible and sanctionable under Rule 37. Even if "everyone, including the court, shares some blame for [the] delay, . . . the primary responsibility for moving the case along rest[s] with plaintiffs" and dismissing a plaintiff's claim for delays in responding to discovery is still appropriate. Schoney v. Memorial Estates, Inc., 790 P.2d 584, 586 (Utah Ct. App. 1990). Rather than taking responsibility for moving the

case along, plaintiff repeatedly caused needless delays. In light of these delays, the Doctors' legitimate motions and objections do not excuse plaintiff's conduct or support a finding that the trial court abused its discretion.

VII. THE TRIAL COURT'S SANCTION DID NOT VIOLATE PLAINTIFF'S CONSTITUTIONAL RIGHTS

Dismissal of plaintiff's action did not violate her state or federal due process rights because plaintiff was given every opportunity to pursue her case and chose to abuse this opportunity. "Although [this Court has] recognize[d] that a party must be given an opportunity to be heard, dismissal with prejudice is appropriate when a party pursues a claim in a manner that abuses that opportunity." Preston & Chambers, P.C. v. Koller, 943 P.2d 260, 263 n.2 (Utah Ct. App. 1997) (affirming dismissal of malpractice claim for discovery delays). As with the dismissal based on discovery delays affirmed by the Utah Supreme Court in UDOT v. Osguthorpe, 892 P.2d 4, 7 (Utah 1995), "[t]his is not a case where a confused and unassisted layman was thrown out of the courthouse simply for missing a discovery deadline." Plaintiff was represented by counsel at all times and had every opportunity to respond to the Doctors' discovery, provide partial responses, or object to the discovery. Instead, plaintiff repeatedly chose to either provide no response until she faced motions to compel, or to violate the trial court's orders on motions to compel. These are not the "relatively trivial" discovery violations discussed in Justice Stewart's dissent in Morton v. Continental Baking Co., 938 P.2d 271, 280 (Utah 1997) (Stewart, J., dissenting). Rather, plaintiff has persistently engaged in egregious discovery

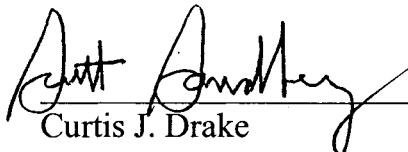
violations which warrant the sanction of dismissal. Based on these flagrant violations, and on the numerous opportunities plaintiff was given to comport with discovery rules, dismissing plaintiff's Second Amended Complaint did not violate her constitutional rights. Therefore, this Court should affirm the trial court's order imposing this sanction.

CONCLUSION

Because this Court accords great deference to the trial court's decision to dismiss plaintiff's lawsuit as a discovery sanction, and because plaintiff's discovery violations were particularly egregious and persistent, this Court should affirm the trial court's dismissal of plaintiff's Second Amended Complaint.

RESPECTFULLY SUBMITTED this 14th day of October, 1999.

SNELL & WILMER, L.L.P.



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MAILING CERTIFICATE

I hereby certify that on the 14th day of October 1999, I caused to be mailed, first-class postage pre-paid, two (2) true and correct copies of the foregoing **BRIEF OF APPELLEE** to the following:

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