

2010

# Jay and Kathy Slaughter v. Leo Anderson dba Complete Landscape and Sprinkler : Brief of Appellee

Utah Court of Appeals

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

JAY AND KATHY SLAUGHTER,  
Plaintiffs/Appellants,  
vs.  
LEO ANDERSON DBA  
COMPLETE LANDSCAPE AND  
SPRINKLER,  
Defendant/Appellee.

BRIEF OF APPELLEE  
Case No. 20100037-CA

JAY AND KATHY SLAUGHTER,  
Plaintiffs/Appellants,  
vs.  
LEO ANDERSON DBA  
COMPLETE LANDSCAPE AND  
SPRINKLER,  
Defendant/Appellee.

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Appeal from an Order of Judge Glen R. Dawson, Case No. 080700512, Second  
Judicial District Court in and for Davis County, State of Utah

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FILED  
UTAH APPELLATE COURT  
JUL 20 2010

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## TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	3
JURISDICTIONAL STATEMENT.....	5
ISSUES PRESENTED FOR REVIEW.....	5
STANDARDS OF REVIEW.....	5
CONSTITUTIONAL PROVISIONS, STATUTES, RULES AND REGULATIONS.....	6
STATEMENT OF THE CASE.....	6
STATEMENT OF FACTS.....	6
SUMMARY OF ARGUMENTS.....	9
ARGUMENT.....	11
I.    The Trial Court Properly Exercised its Discretion to Dismiss This Case for Failure to Prosecute Where Plaintiffs Engaged in a Pattern of Delay by Refusing to Provide the Initial Disclosures Required by the Rules and the Directions of the Court.....	11
II.   The Trial Court Correctly Found That Plaintiffs Did Not Provide the Initial Disclosures Required by Rule 26 and Court Order.....	16
III.  Plaintiffs Cannot Raise for the First Time on Appeal the Issue of Defendant’s Purported Failure to Respond to Discovery Requests.....	19
CONCLUSION.....	21
ADDENDUM.....	23

## TABLE OF AUTHORITIES

### CASES

<i>Badger v. Brooklyn Canal Co.</i> , 966 P.2d 844 (Utah 1998).....	20
<i>Brookside Mobile Home Park, Ltd. v. Peebles</i> , 2002 UT 48, 48 P.3d 968 .....	6, 19, 20
<i>Calkins v. Pacel Corp.</i> , 2008 WL 2311565 (W.D. Va. June 4, 2008).....	18
<i>Campbell v. State Farm Mut. Auto Ins. Co.</i> , 840 P.2d 130 (Utah Ct. App. 1992)..	21
<i>Charlie Brown Construction Company v. Leisure Sports Inc.</i> , 740 P.2d 1368 (Utah Ct. App. 1994).....	11, 14
<i>Chen v. Stewart</i> , 2004 UT 82, 100 P.3d 1177.....	5, 16
<i>Country Meadows Convalescent Ctr. v. Utah Dep’t of Health</i> , 851 P.2d 1212 (Utah Ct. App. 1993).....	15
<i>Hartford Leasing Corp. v. State</i> , 888 P.2d 694 (Utah Ct. App. 1994).....	11
<i>Meadow Fresh Farms, Inc. v. Utah State Univ. Dep’t of Agri. &amp; Applied Sci.</i> , 813 P.2d 1216 (Utah Ct. App. 1991).....	12
<i>PDC Consulting, Inc. v. Porter</i> , 2008 UT App 372, 196 P.3d 626.....	5, 11, 12, 13, 14, 15
<i>Rohan v. Boseman</i> , 2002 UT App 109, 46 P.3d 753.....	12, 15, 16
<i>State v. Evans</i> , 2001 UT 22, 20 P.3d 888 .....	19
<i>Westinghouse Elec. Supply Co. v. Paul W. Larsen Contractor, Inc.</i> , 544 P.2d 876 (Utah 1975).....	12, 14, 15

### RULES

Utah R. App. P. 24.....	16, 20, 21
Utah R. Civ. P. 8.....	19

Utah R. Civ. P. 26.....	5, 6, 9, 13, 14, 16, 17, 18, 19
Utah R. Civ. P. 37(a)(2)(B).....	11, 20, 21
Utah R. Civ. P. 41(b).....	6, 9, 12

## **STATUTES**

Utah Code Anno. § 78A-4-103(2)(j).....	5
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## **OTHER AUTHORITIES**

Fed. R. Civ. P. 26, Advisory Committee Notes (1993).....	18
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## **JURISDICTIONAL STATEMENT**

The Court has jurisdiction over this appeal pursuant to Utah Code Anno. § 78A-4-103(2)(j).

## **ISSUES PRESENTED FOR REVIEW**

1. Whether the trial court properly exercised its discretion by dismissing the action below for failure to prosecute where Plaintiffs engaged in a pattern of delay by refusing to provide initial disclosures despite court order to do so?
2. Whether the trial court erred in finding that Plaintiffs did not provide the initial disclosures required by Utah R. Civ. P. 26 and court order?
3. Whether Plaintiffs can raise for the first time on appeal the issue of Defendant's purported failure to respond to discovery requests?

## **STANDARDS OF REVIEW**

The standard of review of the lower court's order dismissing Plaintiffs' case for failure to prosecute is abuse of discretion. *PDC Consulting, Inc. v. Porter*, 2008 UT App 372, ¶ 5, 196 P.3d 626. (Issue 1). On the other hand, the lower court's finding that Plaintiffs failed to provide initial disclosures must be upheld unless this Court determines that the finding was clearly erroneous. *Chen v. Stewart*, 2004 UT 82, ¶ 19, 100 P.3d 1177. (Issue 2). With respect to the third issue, no standard of review applies because Plaintiffs failed to raise the matter below and

therefore waived it. *Brookside Mobile Home Park, Ltd. v. Peebles*, 2002 UT 48, ¶ 14, 48 P.3d 968.

## **CONSTITUTIONAL PROVISIONS, STATUTES, RULES, AND REGULATIONS**

Utah R. Civ. P. 26(a)(1) and (2), set forth in the Addendum hereto.

Utah R. Civ. P. 41(b), which states in pertinent part:

**(b) Involuntary dismissal; effect thereof.** For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. . . . Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue or for lack of an indispensable party, operates as an adjudication upon the merits.

## **STATEMENT OF THE CASE**

On September 4, 2008, Plaintiffs Jay and Kathy Slaughter filed suit in the court below against Defendant Leo Anderson DBA Complete Landscape and Sprinkler for alleged breach of contract, breach of the covenant of good faith and fair dealing, and infliction of emotional distress. (R. at 1-7). Despite the passage of over fifteen months, Plaintiffs failed to provide their initial disclosures, even after the court ordered them to do so. (R. at 49, 83-85, 94-98). As a result, on December 15, 2009, the court entered an order dismissing the case with prejudice for failure to prosecute. (R. at 83-85).

## **STATEMENT OF FACTS**

1. Plaintiffs filed suit against Defendant on September 4, 2008. (R. at 1-9).



2. Defendant filed his Answer on October 9, 2008. (R. at 10-14).
3. On November 12, 2008, Defendant filed Certificates of Service for his Initial Disclosures and his First Set of Interrogatories, Request for Production of Documents and Requests for Admission to Plaintiffs. (R. at 15-18).
4. On January 20, 2009, Defendant's counsel sent a letter to Plaintiffs' counsel expressing concern that Plaintiffs had not yet provided initial disclosures. (R. at 33-34).
5. On February 14, 2009, Defendant's counsel again wrote to Plaintiffs' counsel and asked when Plaintiffs would provide initial disclosures. (R. at 38-39).
6. On March 25, 2009, Defendant's counsel sent yet another letter to Plaintiffs' counsel stating that Plaintiffs had not yet provided initial disclosures. (R. at 41).
7. On June 23, 2009, over eight months after Defendant filed his Answer, he filed a Motion to Dismiss for Failure to Prosecute and supporting memorandum, based in part upon Plaintiffs' failure to provide initial disclosures. (R. at 23-41).
8. On July 15, 2009, Plaintiffs filed their Responses to Defendant's Motion to Dismiss but did not attach any initial disclosures. (R. at 45-46).

9. On August 24, 2009, the trial court conducted a telephone conference with attorneys for both parties in which the court ordered that Plaintiffs file initial disclosures within 10 days. Plaintiffs' counsel agreed to do so. The court also stated that Plaintiffs' case would be dismissed if they did not comply with the order. (R. at 49, 94-98).
10. On September 9, 2009, Defendant's counsel sent a letter to Plaintiffs' counsel reminding him that Plaintiffs had not provided initial disclosures as required by the court's order. (R. at 57).
11. On September 21, 2009, Defendant filed a Supplemental Memorandum in Support of Defendant's Motion to Dismiss for Failure to Prosecute and Request to Submit for Decision, informing the court that Plaintiffs still had not provided initial disclosures. (R. at 50-57).
12. On September 24, 2009, Plaintiffs filed their Objections to Defendant's Request to Submit for Decision, once again failing to attach initial disclosures. (R. at 58-60). Instead, Plaintiffs filed copies of their prior responses to discovery requests, claiming that those responses contained all of the information that initial disclosures would have contained. (R. at 61-78).

13. Defendant's counsel sent a proposed Order of Dismissal to Plaintiff's counsel, in response to which Plaintiffs filed an objection on December 3, 2009. (R. at 79).
14. On December 14, 2009, Defendant filed another Request to Submit for Decision. (R. at 80-82).
15. On December 15, 2009, the trial court entered an Order of Dismissal with Prejudice under Utah R. Civ. P. 41(b), finding that Plaintiffs had failed to provide initial disclosures as required by Utah R. Civ. P. 26(a) and the court's August 24, 2009 Order. (R. at 83-85).
16. On January 12, 2010, Plaintiffs filed their Notice of Appeal. (R. at 86).

### **SUMMARY OF ARGUMENTS**

The trial court properly exercised its broad discretion in dismissing Plaintiffs' case for failure to prosecute. Despite fifteen months elapsing from the time they filed their complaint until dismissal, Plaintiffs never provided initial disclosures, even after the court ordered them to do so. Defendant, on the other hand, served his initial disclosures within a month of filing his answer, as well as making several attempts to get Plaintiffs to provide their initial disclosures. Defendant also propounded discovery requests early in the case. Defendant was inconvenienced and incurred additional costs as a result of Plaintiffs' repeated failure to provide initial disclosures. Although Plaintiffs will not receive a remedy

for their alleged claims because of the dismissal, they had ample opportunity to pursue those claims but abused that opportunity. They refused to produce one of the first documents required in a case--initial disclosures. The lower court properly dismissed Plaintiffs' case based upon their failure to move forward in accordance with the civil rules and the directions of the court.

Encompassed within the lower court's order of dismissal was a finding that Plaintiffs failed to provide initial disclosures. That finding was correct. Nowhere in the entire Record are there any initial disclosures from the Plaintiffs or any certification that they served such disclosures. Plaintiffs' argument that they substantially complied with the court's order to provide initial disclosures is without merit. Not only did they fail to substantially comply with that order—they made no effort whatsoever to comply. Even when Defendant renewed his Motion to Dismiss a month after the court's order, Plaintiffs still did not produce initial disclosures. Instead, they merely referred Defendant to Plaintiffs' prior discovery responses, which were not initial disclosures and did not contain the required information.

Plaintiffs also allege that Defendants failed to respond to Plaintiffs' discovery requests. Plaintiffs did not raise this issue in the court below and, therefore, cannot raise it now for the first time on appeal. Application of this well-established rule of appellate procedure is particularly compelling in this case. This

is the first time that Defendant has heard that Plaintiffs claim to have served discovery requests. If Plaintiffs had followed the proper procedure in the court below, first attempting to confer in good faith with Defendant in an effort to secure Defendant's responses and then sending the certification letter required by Utah R. Civ. P. 37(a)(2)(B), Defendant would have been made aware of the discovery requests and would have responded to them. If Plaintiffs were dissatisfied with his responses, they could have filed a motion to compel under Rule 37(a)(2)(B), thus giving the lower court a chance to resolve the matter. Because Plaintiffs did not raise the issue below, they cannot do so now.

## ARGUMENT

### **I. The Trial Court Properly Exercised its Discretion to Dismiss This Case for Failure to Prosecute Where Plaintiffs Engaged in a Pattern of Delay by Refusing to Provide the Initial Disclosures Required by the Rules and the Directions of the Court.**

In *PDC Consulting*, this Court set forth the standard of review an appellate court should follow in reviewing a trial court's dismissal of a case for failure to prosecute: "[We] do not disturb [a trial court's order of dismissal for failure to prosecute] absent an abuse of discretion and a likelihood that an injustice occurred." 2008 UT App 372, ¶ 5 (quoting *Hartford Leasing Corp. v. State*, 888 P.2d 694, 697 (Utah Ct. App. 1994)) (alteration in original); *see also Charlie Brown Constr. Co. v. Leisure Sports Inc.*, 740 P. 2d 1368, 1370 (Utah Ct. App. 1994) ("Dismissal for failure to prosecute is a decision within the broad discretion

of the trial court. This Court will not interfere with that decision unless it clearly appears that the court has abused its discretion and that there is a likelihood an injustice has been wrought.”). The Court further explained that “it is well within a trial court’s discretion to dismiss a case under rule 41(b) when ‘a party fails to move forward according to the rules and the directions of the court, without justifiable excuse.’” *PDC Consulting*, 2008 UT App 372, ¶ 5 (quoting *Westinghouse Elec. Supply Co. v. Paul W. Larsen Contractor, Inc.*, 544 P.2d 876, 879 (Utah 1975)) (citations omitted); *see also Rohan v. Boseman*, 2002 UT App 109, ¶ 28, 46 P.3d 753 (“The party challenging the dismissal bears the burden of offering ‘a reasonable excuse for [his or her] lack of diligence.’”) (alteration in original) (citations omitted).

The Court then set forth five factors Utah appellate courts should use to analyze whether a case was properly dismissed for failure to prosecute (the *Westinghouse* factors):

(1) the conduct of both parties; (2) the opportunity each party has had to move the case forward; (3) what each party has done to move the case forward; (4) the amount of difficulty or prejudice that may have been caused to the other side; and (5) “most important, whether injustice may result from the dismissal.”

*PDC Consulting*, 2008 UT App 372, ¶ 6 (quoting *Meadow Fresh Farms, Inc. v. Utah State Univ. Dep’t of Agric. & Applied Sci.*, 813 P.2d 1216, 1219 (Utah Ct.

App. 1991)) (citation omitted). None of these factors is determinative but should be applied under “the totality of the circumstances.” *Id.* ¶ 15.

Plaintiffs let several months pass from the filing of their complaint without providing the initial disclosures required by Utah R. Civ. P. 26(a)(1). (R. at 49, 94-98). Defendant, on the other hand, served his initial disclosures, as well as interrogatories, requests for production of documents, and requests for admission, just a month after filing his answer. (R. at 15-18). Defendant’s counsel also wrote several letters to Plaintiffs’ counsel requesting initial disclosures, but to no avail. (R. at 33-34, 38-39, 41). Nevertheless, the trial court gave Plaintiffs another chance to produce their disclosures. In an August 24, 2009, telephonic hearing, the court ordered Plaintiffs to provide initial disclosures within 10 days, stating that the court would dismiss the case if Plaintiffs did not comply. (R. at 49, 94-98). Plaintiffs’ counsel agreed to supply the disclosures within that timeframe. *Id.* Despite that fact, Plaintiffs still did not provide the disclosures, nor did they give any excuse whatsoever for their failure to do so. (R. at 53-57, 58-60). In flagrant disregard of the court’s order, Plaintiffs delayed yet another month. *Id.* At that point, rather than producing the court-ordered disclosures, they merely referred Defendant to prior discovery responses, doing so only after Defendant renewed his motion to dismiss. *Id.* Three months later, Plaintiffs still had not provided their

initial disclosures, and the trial court entered an order dismissing their case for failure to prosecute. (R. at 83-85).

The first three *Westinghouse* factors, “the parties’ conduct, what they had the opportunity to do, and what was actually done to move the case forward” support the lower court’s decision to dismiss this case for failure to prosecute. *PDC Consulting*, 2008 UT App 372, ¶ 7. Plaintiffs had ample opportunity to provide the required Rule 26 initial disclosures but did not, even after the court ordered them to do so. They failed “to move forward according to the rules and the directions of the court, without justifiable excuse.” *Id.* ¶ 5. Defendant, on the other hand, served his initial disclosures within a month of filing his answer, as well as making several attempts to get Plaintiffs to provide their initial disclosures. (R. at 17-18, 33-34, 38-39, 41, 57). Defendant also propounded discovery requests early in the case. (R. at 15-16).<sup>1</sup>

The fourth *Westinghouse* factor, prejudice, also supports the lower court’s decision to dismiss this case. Prejudice to the opposing party need not be overwhelming to warrant dismissal. *PDC Consulting*, 2008 UT App 372, ¶ 12.

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<sup>1</sup> Plaintiffs for the first time now claim that they served discovery requests on the Defendant and that he did not respond. As discussed in Section III., Plaintiffs cannot raise that issue for the first time on appeal. Further, even if Plaintiffs had served discovery requests, “nothing was done to compel discovery . . .” *PDC Consulting*, 2008 UT App 372, ¶ 10 n. 8; *see also Charlie Brown*, 740 P.2d 1368, 1371 (Court based dismissal for failure to prosecute partly on eight-month period during which plaintiffs failed to follow up on their interrogatories and, therefore, did not realize that defendants had not received them.)



Relevant considerations include increased costs and inconvenience to the opposing party. *Rohan*, 2002 UT App 109, ¶ 31. In this case, the Defendant obviously was inconvenienced by Plaintiffs' repeated failure to provide initial disclosures despite Defendant's numerous requests for them. (R. at 33-34, 38-39, 41, 57). Further, Defendant's counsel incurred additional costs in preparing and renewing a motion and memoranda related to Plaintiffs' delay. (R. at 23-44, 50-57, 80-82).

With respect to the final *Westinghouse* factor, Plaintiffs argue that it would be unjust to leave them without a remedy for their claims. This Court rejected a similar argument in *PDC Consulting*, concluding that the plaintiff ““had more than ample opportunity”” to pursue its claims but failed to do so. *PDC Consulting*, 2008 UT App 372, ¶ 13 (citations omitted). Although the *PDC* plaintiff had more time to pursue its claims than Plaintiffs did in this case, Plaintiffs certainly had adequate time to serve their initial disclosures, one of the first documents required in a lawsuit, and to take other steps to move their case forward but did not do so.

In determining that dismissal can be upheld despite a finding of possible injustice, this Court stated in *Rohan*: “[E]ven where a trial court finds facts indicating that “injustice could result from the dismissal of [a] case,” it can dismiss when a plaintiff has “had more than ample opportunity to prove his [or her] asserted interest and simply failed to do so.”” 2002 UT App 109, ¶ 28 (quoting *Country Meadows Convalescent Ctr. v. Utah Dep’t of Health*, 851 P.2d 1212, 1215

(Utah Ct. App. 1993)) (alteration in original) (citation omitted). The Court affirmed dismissal despite the fact that the plaintiff, who had received a closed head injury in an auto accident, was left without a remedy. The Court determined that in the two years between filing his case and dismissal, the plaintiff “‘had ample opportunity to litigate [his] case . . . but abused such opportunity, . . .” *Id.* ¶ 32 (citation omitted) (alteration in original). Likewise, Plaintiffs had ample opportunity to litigate their claims in this case but abused that opportunity, thus warranting dismissal. The trial court properly exercised its broad discretion in dismissing Plaintiffs’ case.

## **II. The Trial Court Correctly Found That Plaintiffs Did Not Provide the Initial Disclosures Required by Rule 26 and Court Order.**

Encompassed within the lower court’s dismissal order was a finding that Plaintiffs failed to provide initial disclosures. This Court must uphold that finding unless it was clearly erroneous. *Chen*, 2004 UT 82, ¶ 19.<sup>2</sup> In their brief, Plaintiffs claim to have served initial disclosures a few weeks after the lower court ordered them to do so, and the index to their addendum lists initial disclosures as the

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<sup>2</sup> The Utah Supreme Court stated that “[i]n order to establish that a particular finding of fact is clearly erroneous, ‘[a]n appellant must marshal the evidence in support of the findings and then demonstrate that despite this evidence, the trial court’s findings are so lacking in support as to be against the clear weight of the evidence.’ . . . If the evidence is inadequately marshaled, this court assumes that all findings are adequately supported by the evidence.” *Chen*, 2004 UT 82, ¶ 19; accord Utah R. App. P. 24(a)(9); *Rohan*, 2002 UT App 109, ¶ 35. Plaintiffs have not even attempted to marshal the evidence in support of the lower court’s finding. Therefore, that finding must be upheld.

second item. (Brief of Appellant at 9, 11, 16). However, there are no initial disclosures from the Plaintiff anywhere in that addendum or in the entire Record. Neither is there any certification that Plaintiffs served such disclosures. Instead, the item in Plaintiffs' addendum labeled as "Initial Disclosures" is a copy of Plaintiffs' unsigned responses to Defendant's prior discovery requests. (Appellant's Brief, Addendum, Item 2).

Plaintiffs' argument that they substantially complied with the court's order to provide initial disclosures is without merit. Not only did they fail to substantially comply with that order—they made no effort whatsoever to comply. All they had to do was prepare initial disclosures, but they did not do so. Even when Defendant renewed his Motion to Dismiss a month after the court's order, Plaintiffs still did not prepare initial disclosures. Instead, they merely referred Defendant to Plaintiffs' prior discovery responses, which were not initial disclosures and did not contain the required information. (R. at 58-78).

Apparently, Plaintiffs claim that their prior discovery responses were the substantial equivalent of initial disclosures because they contained some of the information required by Rule 26(a)(1). The Utah Rules of Civil Procedure, however, do not contemplate a "substantial equivalency" test for initial disclosures. Rule 26(a) categorizes the disclosures described therein as "required" and directs that parties "shall" provide them. Utah R. Civ. P. 26(a)(1). If parties could escape

Rule 26(a)(1)'s initial disclosure requirement by filing discovery responses, that section of the rule would be obliterated. In *Calkins v. Pacel Corp.*, 2008 WL 2311565 (W.D. Va. June 4, 2008), the court rejected the parties' argument that they need not produce initial disclosures because the same information was included in their discovery responses. The court stated

[T]he fact that such information was provided only in response to an interrogatory or request for production undermines the very purpose of required initial disclosures. . . . "A major purpose of the [1993] revision is to accelerate the exchange of basic information . . . and to eliminate the paper work involved in requesting such information. . . . [Initial disclosures are] the functional equivalent of court-ordered interrogatories."

*Id.* at \*3 (quoting Fed. R. Civ. P. 26, Advisory Committee Notes (1993)) (alterations in original). Like the non-complying parties in *Calkins*, Plaintiffs' attitude "has been one of cavalier indifference toward their [disclosure] obligations." *Id.* at \*7.

Moreover, Plaintiffs' discovery responses do not contain all of the required information. In their brief, Plaintiffs compare the disclosures required by Rule 26(a)(1) to their discovery responses. (Appellants' Brief at 10). With respect to the information required by Rule 26(a)(1)(A) regarding individuals likely to have discoverable information, Plaintiffs refer to their answers to Interrogatories 1, 10, and 25. Their responses to Interrogatories 1 and 10, however, do not identify the required subjects of which the individuals have knowledge. (R. at 62-66).

Moreover, their response to Interrogatory No. 25 does not even list names, let alone subject matter. *Id.* Further, none of the interrogatory responses cited even list Plaintiff Kathy Slaughter or describe the subject of her knowledge. Neither do Plaintiffs' written responses to Defendant's document requests satisfy the requirements of Rule 26(a)(1)(B) to provide a copy of, or description by category and location of, all discoverable documents. Several of the responses state that Plaintiffs are still searching for records, or direct the Defendant to the non-existent initial disclosures. (R. at 67-69, Responses 1, 2, 4, 9, 10, 13, and 19). Even if a "substantial equivalency" test applied, which it does not, Plaintiffs' discovery responses are not the substantial equivalent of initial disclosures.

This Court should uphold the lower court's finding that Plaintiffs failed to provide initial disclosures.<sup>3</sup>

### **III. Plaintiffs Cannot Raise for the First Time on Appeal the Issue of Defendant's Purported Failure to Respond to Discovery Requests.**

Plaintiffs also allege that Defendants failed to respond to Plaintiffs' discovery requests. Plaintiffs did not raise this issue in the court below and, therefore, cannot raise it now for the first time on appeal. *Brookside*, 2002 UT 48,

¶ 14. As stated by the Utah Supreme Court, "in order to preserve an issue for

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<sup>3</sup> In their Brief, Plaintiffs mistakenly claim that the "harmless error" standard set forth in *State v. Evans*, 2001 UT 22, 20 P.3d 888 applies here. That case, however, involved the standard of review of a trial court's actions in an attempted murder trial. Plaintiffs also incorrectly cite Utah R. Civ. P. 8, which applies to pleadings, not initial disclosures.

appeal the issue must be presented to the trial court in such a way that the trial court has an opportunity to rule on that issue.” *Id.* (citing *Badger v. Brooklyn Canal Co.*, 966 P.2d 844, 847 (Utah 1998)). Plaintiffs did not do so, as evidenced by their failure in their brief to provide the required “citation to the record showing that the issue was preserved in the trial court; . . .” Utah R. App. P. 24(a)(5)(A).<sup>4</sup> As a result, Plaintiffs cannot pursue the issue before this Court.

Application of this well-established rule of appellate procedure is particularly compelling in this case. This is the first time Defendant has heard that Plaintiffs claim to have served discovery requests. If Plaintiffs had followed the proper procedure in the court below, first attempting to confer in good faith with Defendant in an effort to secure Defendant’s responses and then sending the certification letter required by Utah R. Civ. P. 37(a)(2)(B), Defendant would have

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<sup>4</sup> The only related item in the Record is a certificate of mailing filed on March 16, 2009, which states that a copy of Plaintiffs’ Discovery Requests was served on Defendant’s counsel. (R. at 21). Filing a certificate of service, however, is not the same as raising the issue of a party’s failure to respond to discovery requests. “[T]he issue must be specifically raised” in the court below. *Brookside*, 2002 UT 48, ¶ 14 (quoting *Badger*, 944 P.2d at 847). Moreover, it is debatable whether the alleged discovery requests ever existed. Plaintiffs did not attach a copy of those requests to their brief. In addition, both prior to and during this appeal, Plaintiffs referred to the subject certificate of mailing as proof that Plaintiffs had responded to Defendant’s discovery requests. (R. at 61; Appellant’s Brief, Addendum, Item 2). (In both instances, the certificate is attached to Plaintiffs’ unsigned discovery responses, not requests). It appears that through a typographical error, the certificate mistakenly referred to Plaintiff’s Discovery Requests, when it should have referred to Plaintiff’s Discovery Responses. Because this issue is not properly before this Court, however, no determination need be made thereon.

been made aware of the discovery requests and would have responded to them.<sup>5</sup> If Plaintiffs were dissatisfied with his responses, they could have filed a motion to compel under Rule 37(a)(2)(B), thus giving the lower court a chance to resolve the matter. Because Plaintiffs did not raise the issue below, they cannot do so now.

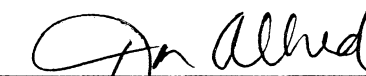
### CONCLUSION

Defendant/Appellee Leo Anderson DBA Complete Landscape and Sprinkler respectfully requests the Court to affirm the lower court's order dismissing the case below with prejudice for failure to prosecute.

DATED: July 20, 2010

PETERSEN & ASSOCIATES

BY:



JAN ALLRED,  
Attorney for Defendant,  
LEO ANDERSON DBA COMPLETE  
LANDSCAPE AND SPRINKLER

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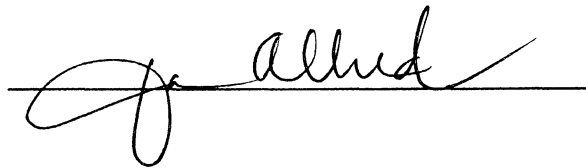
<sup>5</sup> In connection with their claim that Defendant did not respond to discovery requests, Plaintiffs make serious accusations of bad faith without any citations to the Record. Utah R. App. P. 24(a)(9) is designed to prevent such spurious claims by requiring the argument itself to contain citations to the portions of the record upon which the party relies. Further, the cases upon which Plaintiffs rely to support their bad faith claim are inapplicable. Those cases pertain to an insured bringing a bad faith claim against its insurer. *See Campbell v. State Farm Mut. Auto. Ins. Co.*, 840 P.2d 130 (Utah Ct. App. 1992).

## CERTIFICATE OF SERVICE

I certify that two true and correct copies of the foregoing **Brief of Appellee** were mailed, postage prepaid, on July 20, 2010, to the following:

Alvin R. Lundgren  
5015 West Old Highway, #200  
Mountain Green, UT 84050

and that an original and seven copies were hand delivered to the Clerk of the Utah Court of Appeals this 26 day of July, 2010.

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



## **ADDENDUM**

**Attached are:**

1. Utah R. Civ. P. 26(a)(1) and (2)
2. Transcript of August 24, 2009 Telephonic Hearing and Order

## **Rule 26. General Provisions Governing Discovery**

### **(a) Required disclosures; Discovery methods.**

(a)(1) *Initial disclosures.* Except in cases exempt under subdivision (a)(2) and except as otherwise stipulated or directed by order, a party shall, without awaiting a discovery request, provide to other parties:

(a)(1)(A) the name and, if known, the address and telephone number of each individual likely to have discoverable information supporting its claims or defenses, unless solely for impeachment, identifying the subjects of the information;

(a)(1)(B) a copy of, or a description by category and location of, all discoverable documents, data compilations, electronically stored information, and tangible things in the possession, custody, or control of the party supporting its claims or defenses, unless solely for impeachment;

(a)(1)(C) a computation of any category of damages claimed by the disclosing party, making available for inspection and copying under Rule 34 all discoverable documents or other evidentiary material on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and

(a)(1)(D) for inspection and copying as under Rule 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the case or to indemnify or reimburse for payments made to satisfy the judgment.

Unless otherwise stipulated by the parties or ordered by the court, the disclosures required by subdivision (a)(1) shall be made within 14 days after the meeting of the parties under subdivision (f). Unless otherwise stipulated by the parties or ordered by the court, a party joined after the meeting of the parties shall make these disclosures within 30 days after being served. A party shall make initial disclosures based on the information then reasonably available and is not excused from making disclosures because the party has not fully completed the investigation of the case or because the party challenges the sufficiency of another party's disclosures or because another party has not made disclosures.

(a)(2) *Exemptions.*

(a)(2)(A) The requirements of subdivision (a)(1) and subdivision (f) do not apply to actions:

(a)(2)(A)(i) based on a contract in which the amount demanded in the pleadings is \$20,000 or less;

(a)(2)(A)(ii) for judicial review of adjudicative proceedings or rule making proceedings of an administrative agency;  
(a)(2)(A)(iii) governed by Rule 65B or Rule 65C;  
(a)(2)(A)(iv) to enforce an arbitration award;  
(a)(2)(A)(v) for water rights general adjudication under Title 73, Chapter 4; and  
(a)(2)(A)(vi) in which any party not admitted to practice law in Utah is not represented by counsel.

(a)(2)(B) In an exempt action, the matters subject to disclosure under subpart (a)(1) are subject to discovery under subpart (b).

IN THE SECOND JUDICIAL DISTRICT COURT OF DAVIS COUNTY,

STATE OF UTAH, BOUNTIFUL DEPARTMENT

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JAY SLAUGHTER, et al.,	:	Case No. 080700512
	:	
Plaintiff,	:	Appellate Case No. 20100037
v	:	
	:	
LEO ANDERSON,	:	
	:	
Defendants.	:	

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ORDER AUGUST 24, 2009

BEFORE

JUDGE GLEN R. DAWSON

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REC'D FEB 11 2010

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CAROLYN ERICKSON, CSR  
CERTIFIED COURT TRANSCRIBER  
1775 East Ellen Way  
Sandy, Utah 84092  
801-523-1186

ORIGINAL

APPEARANCES

For the Plaintiff:

ALVIN R. LUNDGREN  
Attorney at Law

For the Defendant:

DAVID W. LUND  
Attorney at Law

\* \* \*

1 BOUNTIFUL, UTAH; AUGUST 24, 2009

2 JUDGE GLEN R. DAWSON

3 (Transcriber's note: speaker identification  
4 may not be accurate with audio recordings.)

5 TELEPHONIC PROCEEDINGS

6 THE COURT: Hello counsel. We are on the phone and  
7 on the record in case 080700512, set today for a hearing on  
8 the motion to dismiss by the defendants. Will counsel please  
9 note their appearance for the record?

10 MR. LUNDGREN: Alvin Lundgren for Jay Slaughter and  
11 Kathy Slaughter, plaintiffs.

12 MR. LUND: David Lund for the defendant.

13 THE COURT: Counsel, I've read everything that  
14 you've filed. I'll give you a chance to address me but  
15 here's where I am. Let me throw it out at the beginning. My  
16 inclination is to enter an order that plaintiff make initial  
17 disclosures within 10 days. The plaintiff provide the court  
18 an agreed upon - with assistance from the defendants, of  
19 course - attorney planning report within 20 days. If I don't  
20 have those on those dates the case will be dismissed. So I'm  
21 basically going to reserve on the motion pending completion  
22 of those two items. That's my inclination.

23 Mr. Lund, you can address me first.

24 MR. LUND: That sounds completely reasonable to me,  
25 Your Honor. I'm just trying to get this moved along.

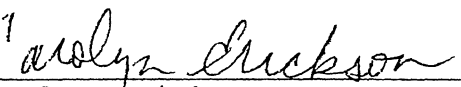
1 THE COURT: Mr. Lundgren.  
2 MR. LUNDGREN: Yes, Your Honor, we can do that.  
3 THE COURT: Then that will be the order of the  
4 court. We're on the record right now. I don't know that I  
5 need a separate order setting that out but, Mr. Lund, I guess  
6 the burden is on your shoulders if one or either of those  
7 things don't happen, if you would simply...  
8 MR. LUND: Advise the court?  
9 THE COURT: Advise the court with a copy to Mr.  
10 Lundgren and I'll do a ruling at that point in time.  
11 MR. LUND: Will do, Your Honor.  
12 THE COURT: All right, counsel. Thank you for your  
13 time.  
14 MR. LUND: Thank you, Your Honor.  
15 MR. LUNDGREN: Thank you, Your Honor.  
16 (Whereupon the hearing was concluded)

17  
18  
19  
20  
21  
22  
23  
24  
25 -C-

CERTIFICATE

I HEREBY CERTIFY that the foregoing transcript in the before mentioned hearings were held before Judge Glen Dawson was transcribed by me from a audio recording and is a full, true and correct transcription of the requested proceedings as set forth in the preceding pages to the best of my ability.

Signed this February 9<sup>th</sup>, 2010, in Sandy, Utah.

  
\_\_\_\_\_  
Carolyn Erickson  
Certified Shorthand Reporter  
Certified Court Transcriber