

2010

# Jay Slaughter, Kathy Slaughter v. Leo Anderson DBA Complete Landscape and Sprinkler : Reply Brief

Utah Court of Appeals

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**IN THE COURT OF APPEALS OF THE STATE OF UTAH**

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**JAY SLAUGHTER AND KATHY  
SLAUGHTER**

**Plaintiffs and Appellants**

**v**

**LEO ANDERSON DBA COMPLETE  
LANDSCAPE AND SPRINKLER**

**Defendants and Appellee**

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**APPELLANT'S REPLY BRIEF**

**CASE NO 20100037-CA**

**Appeal from the Second District Court, Farmington Division Davis County, Utah.  
Case no 080700512, Honorable Judge Glen R Dawson**

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## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	-3-
PLAINTIFFS' ISSUES PRESENTED FOR REVIEW .....	-5-
STATEMENT OF THE CASE .....	-5-
STATEMENT OF FACTS .....	-6-
SUMMARY OF ARGUMENTS .....	-6-
ARGUMENT .....	-7-
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? .....	-7-
The Amount of Difficulty or Prejudice That May Have Been Caused to the Other Side .....	-9-
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? .....	-11-
Plaintiffs Cannot Raise for the First Time on Appeal the Issues of Defendant's Purported Failure to Respond to Discovery Requests-	13-
CONCLUSION .....	-14-

## TABLE OF AUTHORITIES

### CASES

Calkins v Pacel Corp., 2008 WL 2311565 (W.D.Va. June 4 2008) .....	-11-
Fenn v. Leads Enterprises, Inc., 103 P.3d 156 (Utah App. 2004) .....	-10-
Hartford Leasing Corp. v. State, 888 P.2d 694 (Utah Ct.App.1994). .....	-7-
Johnson v. National Public Service Ins. Co., 536 P.2d 138 (Utah 1975) .....	-14-
Lucero v. Kennard, 125 P.3d 917 (Utah 2005) .....	-10-
Nipper v. Douglas, 90 P.3d 649 (Utah App. 2004) .....	-10-
PDC Consulting, Inc. v. Porter, 2008 UT App 372, 196 P.3d 626 (Utah App. 2008) -5-, -7-	
Pete v. Youngblood, 2006 UT App 303, 141 P.3d 629 (Utah App. 2006) .....	-11-
Rohan v. Boseman, 46 P.3d 753 (Utah App. 2002) .....	-9-, -10-
Rosenthyne v. Matthews-McCulloch Co., 51 Utah 38, 168 P. 957 (1917) .....	-13-
State v. Lovell, 2010 UT 48, 20061025 (UTSC) .....	-11-
Tech-Fluid Servs., Inc. v. Gavilan Operating, Inc., 787 P.2d 1328 (Utah Ct.App.1990) .....	-5-, -11-
Westinghouse Elec. Supply Co. v. Paul W. Larsen Contractor, Inc., 544 P.2d 876 (Utah 1975) .....	-8-

## **RULES**

Ut.R.Civ.P. Rule 8(f) .....	-10-
Ut.R.Civ.P. Rule 24. ....	-10-
Utah R. Civ. P. 26 .....	-4-, -5-, -6-, -7-, -10-, -11-, -12-, -14-
Ut.R.Civ.P. Rule 61. ....	-14-

## PLAINTIFFS' ISSUES PRESENTED FOR REVIEW

1. Whether the trial court abused its discretion in dismissing the trial court case by failing to consider the factors required to justify dismissal..
2. Whether the discovery responses provided by the Plaintiff in substance complied with the requirement of initial disclosures or was harmless error.
3. Whether equity demands a remand to the trial court.
4. Whether the Defendants were acting in bad faith.

For issue #1 the standard of review is a two part test of abuse of discretion coupled with an absence of injustice. Plaintiffs accede to the case cited by Defendants: PDC Consulting, Inc. v. Porter, 2008 UT App 372, 196 P.3d 626 ¶5 (Utah App. 2008): “[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.” (Cites Omitted.)

For Issues Presented for Review number 2 the standard of review is substantial compliance. Tech-Fluid Servs., Inc. v. Gavilan Operating, Inc., 787 P.2d 1328, 1333 (Utah Ct.App.1990).

## STATEMENT OF THE CASE

Plaintiffs filed suit against Defendant for breach of contract, breach of the covenant of good faith and fair dealing and infliction of emotional distress. The Plaintiffs responded to discovery requests sent by the Defendants, which requests contained substantially all of the information that is included in the Utah R. Civ. P. 26 initial

disclosures. Defendant objected that the Plaintiffs never filed any document entitled “Initial Disclosures” but never denied that they received the answers to discovery containing all of the information that would have otherwise been contained in the Rule 26 initial disclosures. The court, based on the failure to file the ‘initial disclosures’ form, dismissed the Plaintiffs’ suit.

As a result of the dismissal the Plaintiffs suffer a great injustice including the loss of substantial funds and with no other remedy.

### **STATEMENT OF FACTS**

Please see the Statement of Facts filed in the Plaintiffs’ Brief.

### **SUMMARY OF ARGUMENTS**

The Plaintiffs’ arguments set forth in their brief have not been addressed by the Defendant’s Brief. Having not responded, any defense is waived. Therefore based on Defendant’s failure to respond, the Plaintiffs should be deemed to have prevailed on those issues, which is sufficient justification to remand the case to the lower court.

The proper test for dismissal is a two part test. First is abuse of discretion and the second is an absent of injustice. Both parties rely on the same case, but analyze it differently. While there is disagreement about the analysis, one crucial element is undeniable, the dismissal resulted in injustice for the Plaintiffs. The Rules incorporate substantial justice as a lynchpin - and the Plaintiffs fail to make their case that dismissal of the lawsuit resulted in substantial justice under Utah law.

The Defendant takes a strict compliance standard with Rule 26. However, that stance is not justified under Utah's "substantial compliance" doctrine. In short the rule is that if the action is procedural, then substantial compliance is acceptance, absent the creation of prejudice. The Defendant does not identify any prejudice, therefore substantial compliance is acceptable.

Defendant's last issue is whether the Plaintiff can raise for the first time on appeal the issues of Defendant's failure to respond to discovery requests. The Plaintiffs do not seek sanctions for the Defendant's failure to cooperate, only that the Defendant appeared with unclean hands. "One who seeks equity, must do equity." The Defendant has not complied with this maxim.

## ARGUMENT

### **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?**

The standard of review for dismissal is a two part test (A) abuse of discretion coupled with (B) an absent of injustice.. PDC Consulting, Inc. v. Porter, 2008 UT App 372, 196 P.3d 626 ¶5 (Utah App. 2008): "[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." Hartford Leasing Corp. v. State, 888 P.2d 694, 697 (Utah Ct.App.1994).

Defendant also cites Westinghouse Elec. Supply Co. v. Paul W. Larsen Contractor, Inc., 544 P.2d 876, 879 (Utah 1975) and the five factors suggested therein. A comparison of the two positions on the Westinghouse factors is helpful.

**1. The Conduct of Both Parties.** The Defendants stated that they did not receive the initial disclosures in a timely manner. However, the Plaintiffs' served their discovery requests on the Defendants on March 16, 2009 prior to any objection by the Defendant. Those responses contained substantially all of the information - and more - that would have been filed in the Rule 26 Initial Disclosures. Defendants do not deny receiving this information.

**2. The Opportunity Each Party Has Had to Move the Case Forward.**

Neither party was aggressive about moving the case forward. The Defendants failed to answer the Plaintiffs' discovery requests, neither did they follow up on the answers to discovery provided by the Plaintiffs. Admittedly Plaintiffs were not moving the case aggressively either. Both parties could have done more to move the case forward. Defendants do not deny this in their Brief.

**3. What Each Party Has Done to Move the Case Forward.**

The Plaintiffs responded to the Defendants' discovery requests. The Defendants did not respond to the Plaintiffs' discovery requests. The Defendants did seek sanctions for the failure to file the initial discovery. Notably the Defendants possessed all of the *information* that they needed to go forward, however the Defendant was focused on a

single form as if there was some magic in that form that prevented them from defending themselves.

**4. The Amount of Difficulty or Prejudice That May Have Been Caused to the Other Side.**

The Defendants never identified any single difficulty or prejudice related to the failure to receive the initial disclosures. They already had all of the initial disclosure information in the Plaintiffs' Answers to the Defendants' Discovery since March 16, 2009. The Defendant does not deny this either, although they claim "inconvenience" and costs related to the Defendant not having the form. Defendant does not cite any prejudice they suffered..

**5. Most Important, Whether Injustice May Result from the Dismissal.**

This factor is determinative. The dismissal of the Plaintiffs' case left the Plaintiffs without a remedy for their claim that the Defendant breached the contract, violated the covenant of good faith and fair dealing, wrongfully removed property, and inflicted emotional distress on the Plaintiffs. Upon dismissal, the Plaintiffs were left without a remedy or offset, while the Defendants got paid in full, plus were able to wrongfully remove property from the Plaintiffs' home.. That result is manifest injustice.

The Defendant relies on Rohan v. Boseman, 46 P.3d 753 (Utah App. 2002). There a year and a half after filing suit the court issued an order to show cause why the case should not be dismissed. Later, over two years after the complaint was filed the court

ordered a date by which discovery was to be completed. After several more months and another attorney, Rohan entered his own appearance and sought a voluntary dismissal, which was denied. Rohan then appeared pro se at trial but claimed he could not go forward with trial. That court dismissed his case after finding that the Defendants there were prejudiced.

Rohan is not on point. There Rohan had over two years before trial. The instant case was filed and dismissed within one year. Rohan appeared at trial, the Plaintiff here has been denied trial. Rohan had a shot at trial, the Plaintiffs here have been unjustly denied a trial. The focus for the last 6 months of the instant case has been on whether a single form has been filed, not on the substantive information already provided, and the actual issues.

Utah focuses on whether substantial justice is being obtained. Cf. Ut.R.Civ.P. Rule 8(f); Rule 61; Lucero v. Kennard, 125 P.3d 917, 292 (Utah 2005); Fenn v. Leads Enterprises, Inc., 103 P.3d 156, 161 (Utah App. 2004); Nipper v. Douglas, 90 P.3d 649, 653 (Utah App. 2004). Dismissal of the Plaintiffs' complaint does not result in substantial justice.

## **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?**

The Standard of Review is substantial compliance regarding compliance with a Rule. Tech-Fluid Servs., Inc. v. Gavilan Operating, Inc., 787 P.2d 1328, 1333 (Utah Ct.App.1990) (Tech-Fluid concerned interpretation of Ut.R.Civ.P. Rule 69(f)(2).):<sup>1</sup>

If failure to adhere to the requirements will affect a substantive right of one of the parties and possibly prejudice that party, then courts require strict compliance. On the other hand, if the requirements are merely procedural and will not prejudice one of the parties, substantial compliance is sufficient.

Without question Rule 26 is procedural. Therefore substantial compliance is sufficient. The trial court erred when it failed to consider substantial compliance.

Defendant argues under Calkins v Pacel Corp., 2008 WL 2311565 (W.D.Va. June 4 2008) that there is no substantial equivalent to initial disclosures, in other words Calkins requires strict compliance.. Calkins is not Utah law, and further we have no information of any differences between West Virginia laws and court rules exist. Tech-Fluid precludes the use of Calkins.

Defendant claims that there was not substantial compliance. Utah law contemplates situations where Rule 26 has not been substantially complied with, and provides a possible remedy. In Pete v. Youngblood, 2006 UT App 303, 141 P.3d 629 (Utah App. 2006) this court struck an affidavit of a witness who, although being

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<sup>1</sup> See also State v. Lovell, 2010 UT 48, 20061025 (UTSC) (substantial compliance with Ut.R.Crim.P. Rule 11).

identified as a witness was not identified as an expert witness. Comparing to the instant case, the lower court would have been better advised to strike any portions of testamentary evidence that the Defendant can identify as prejudicial by reason of a failure to disclose under Rule 26. The lower court did not do that because the court never made the comparison between the information in the discovery responses and that which would have been provided under Rule 26. To dismiss an entire action however, simply goes to far.

Defendant for the first time engages in a comparison between the discovery responses and Rule 26. The Defendant never raised these objections or arguments below and should be precluded from raising them now.

Defendant objects because the expected testimony of the witnesses was not set forth. Interrogatory 14 identified all improperly performed work. Interrogatory 15, identified all documents. Interrogatory 24 identified photographs. Interrogatory 25 identified expert witnesses.

Rule 26(a)(1) requires the names and information for the witnesses. Interrogatory 1 identifies the Plaintiff. Interrogatory 6 recited all conversations or agreements alleged to have occurred. Interrogatory 8 discussed all injuries, economic or otherwise suffered by the Plaintiffs. Interrogatory 9 requested detailed damages. Interrogatory 10 provided the identity of “all individuals who have stated that the quality of the installation” was substandard. Thus part 1 was substantially complied with. The only ‘omission’ was that

an expert witness had not yet been named, but that upon naming one, the Defendant would be advised.

There were responses for production of documents that stated that the Defendants were searching for records. However, Rule 26 requires the Plaintiff to provide the documents that the Plaintiff possessed. In response to the request for production of documents the Plaintiffs provided copies of the documents they possessed, with the additional promise that if any more documents were located that they would also be provided. That promise is not a breach of Rule 26 or the rules of discovery.

Most importantly, the Defendant does not identify a single item that constitutes prejudice to him. Note that even if this court upholds the substantial compliance doctrine, the Defendant may still conduct additional discovery to avoid any hypothetical prejudice. However, without the Defendant suffering a prejudice, there is no justice in dismissing the case.

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

The fact that the Defendant did not respond to the Plaintiffs' discovery requests is before this court. The certificate of mailing of Plaintiff's First Set of Discovery was filed December 16, 2008. There is no certificate of mailing of any answers from the Defendant. Neither does the Defendant deny that it did not respond to the Plaintiffs' discovery requests. This fact is not an issue for which the Plaintiffs are seeking a remedy. This fact is the basis of Plaintiff's claim that the Defendant is before this court with unclean

hands. This claim the Defendant does not deny.

Dismissal is an equitable remedy. It is not a remedy based on merit. In order for the Defendant to be entitled to such an extreme remedy as dismissal of a lawsuit with prejudice, the Defendant must appear before court with clean hands. He admits that he also failed to comply with the rules of discovery at the same time as he demands strict compliance by the Plaintiff.

The clean hands, is an equitable doctrine. Johnson v. National Public Service Ins. Co., 536 P.2d 138, 141 (Utah 1975) “It is elemental that one who invokes considerations of equity and good conscience must have so conducted herself as to justifiably demand them.” “The clean hands doctrine finds expression in the maxim that ‘ he who seeks equity must do equity.’” Rosenthyn v. Matthews-McCulloch Co., 51 Utah 38, 168 P. 957, 960 (1917)). The Defendant is not entitled to relief until he has shown that he complies with the same rules of procedure that he demands of the Plaintiffs.

## CONCLUSION

The Defendant did not respond to the issues raised by the Plaintiff, including

1. Whether the trial court abused its discretion in dismissing the trial court case by failing to consider the factors required to justify dismissal..
2. Whether the discovery responses provided by the Plaintiff in substance complied with the requirement of initial disclosures or was harmless error.
3. Whether equity demands a remand to the trial court.

4. Whether the Defendants were acting in bad faith.

Having not responded, any defense is waived, and the Plaintiff is deemed to have prevailed.


The Defendant raised three new issues. In Defendant's first issue the Plaintiff showed that the lower court failed to utilize the two part test required for dismissal. The first part is abuse of discretion and the second is an absent of injustice. Even if there were facial justification, the Defendant cannot not deny that there is actual injustice in the dismissal.

The second issue is whether the Plaintiffs complied with Rule 26. Under Utah's substantial compliance test, the Plaintiffs succeed and the court should have found substantial compliance.

Defendant's last issue is whether the Plaintiff can raise for the first time on appeal the issues of Defendant's purported failure to respond to discovery requests. The Plaintiffs do not seek sanctions for the Defendant's failure to cooperate, only that the Defendant appeared with unclean hands. "One who seeks equity, must do equity."

This case should be remanded to the district court so that the case may proceed to trial.

August 18, 2010

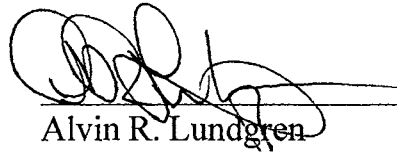


Alvin R. Lundgren

## CERTIFICATION

The undersigned affirms that a copy of Reply Brief was sent by US Mail postage prepaid to the below party(ies) on August 19, 2010:

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