

1990

Meadow Fresh Farms, Inc. v. Utah State University
Department of Agriculture and Applied Science,
State of Utah Department of Health, Division of
Family Health Services, Utah State Department of
Agriculture, Von T. Mendenhall, Archie Hurst,
Claudia Clark, Nancy G. Robinette, Barbara Prater
and John/Jane Does 1 through 20 : Brief of

Appellee
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Utah Court of Appeals

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.

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IN THE UTAH COURT OF APPEALS

MEADOW FRESH FARMS, INC., :
 :
Plaintiff/Appellant, :
 :
vs. :
 :
UTAH STATE UNIVERSITY :
DEPARTMENT OF AGRICULTURE :
AND APPLIED SCIENCE, STATE :
OF UTAH DEPARTMENT OF :
HEALTH, DIVISION OF FAMILY :
HEALTH SERVICES, UTAH STATE :
DEPARTMENT OF AGRICULTURE, :
VON T. MENDENHALL, ARCHIE :
HURST, CLAUDIA CLARK, NANCY :
G. ROBINETTE, BARBARA PRATER :
and JOHN/JANE DOES 1 THROUGH :
20, :
 :
Defendants/Appellees.

all

Case No. 900410-CA

Priority No. 16

BRIEF OF APPELLEES

STATE OF UTAH DEPARTMENT OF HEALTH, DIVISION
OF FAMILY SERVICES, UTAH STATE DEPARTMENT OF
AGRICULTURE, ARCHIE HURST, CLAUDIA CLARK AND
NANCY G. ROBINETTE

- - - -

APPEAL FROM AN ORDER DENYING PLAINTIFF'S MOTION
TO SET ASIDE AN ORDER OF DISMISSAL IN THE THIRD
JUDICIAL DISTRICT COURT, IN AND FOR SALT LAKE
COUNTY, THE HONORABLE J. DENNIS FREDERICK, PRESIDING

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of Agriculture, Archie Hurst,
Claudia Clark and Nancy G.
Robinette

FILED

FEB 13 1991

COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

MEADOW FRESH FARMS, INC.,	:	
Plaintiff/Appellant,	:	
vs.	:	
UTAH STATE UNIVERSITY	:	
DEPARTMENT OF AGRICULTURE	:	
AND APPLIED SCIENCE, STATE	:	
OF UTAH DEPARTMENT OF	:	
HEALTH, DIVISION OF FAMILY	:	
HEALTH SERVICES, UTAH STATE	:	
DEPARTMENT OF AGRICULTURE,	:	Case No. 900410-CA
VON T. MENDENHALL, ARCHIE	:	
HURST, CLAUDIA CLARK, NANCY	:	
G. ROBINETTE, BARBARA PRATER	:	
and JOHN/JANE DOES 1 THROUGH	:	Priority No. 16
20,	:	
Defendants/Appellees.	:	

BRIEF OF APPELLEES

STATE OF UTAH DEPARTMENT OF HEALTH, DIVISION
OF FAMILY SERVICES, UTAH STATE DEPARTMENT OF
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IN THE UTAH COURT OF APPEALS

MEADOW FRESH FARMS, INC.,	:	
Plaintiff/Appellant,	:	
vs.	:	
UTAH STATE UNIVERSITY	:	
DEPARTMENT OF AGRICULTURE	:	
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HURST, CLAUDIA CLARK, NANCY	:	
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BRIEF OF APPELLEES
STATE OF UTAH DEPARTMENT OF HEALTH,
DIVISION OF FAMILY SERVICES, UTAH STATE
DEPARTMENT OF AGRICULTURE, ARCHIE HURST
CLAUDIA CLARK AND NANCY G. ROBINETTE

- - - -

JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from an order denying plaintiff's motion to set aside an order of dismissal for failure to prosecute. This Court has jurisdiction to hear this appeal, which was transferred from the Utah Supreme Court, under Utah Code Ann. § 78-2a-3(2)(j) (Supp. 1990).

STATEMENT OF ISSUES PRESENTED ON APPEAL
AND STANDARDS OF REVIEW

1. Whether the lower court did not abuse its discretion in refusing to set aside the order of dismissal for plaintiff's failure to prosecute? An appellate court will not reverse a trial court's denial of a motion to set aside a judgment unless an abuse of discretion is clearly established. Airkem Intermountain, Inc., v. Parker, 30 Utah 2d 65, 513 P.2d 429, 431 (1973).

2. Whether plaintiff is barred from raising his claim regarding the refiling statute because he failed to raise it in the lower court? A matter not raised in the trial court may not be raised for the first time on appeal. James v. Preston, 746 P.2d 799, 801 (Utah Ct. App. 1987).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Utah Code Ann. § 78-12-40 (1987):

78-12-40. Effects of failure of action not on merits.

If any action is commenced within due time and a judgment thereon for the plaintiff is reversed, or if the plaintiff fails in such action or upon a cause of action otherwise than upon the merits, and the time limited either by law or contract for commencing the same shall have expired, the plaintiff, or if he dies and the cause of action survives, his representatives, may commence a new action within one year after the reversal or failure.

Rule 4-103, Utah Code of Judicial Administration:

Statement of the Rule:

(1) If a default judgment has not been entered by the plaintiff within 60 days of the availability of default and absent a showing of good cause, the court shall dismiss the case without prejudice for lack of prosecution.

(2) If a certificate of readiness for trial has not been served and filed within 180 days of the filing date and absent a showing of good cause, the court shall dismiss the case without prejudice for lack of prosecution.

Utah Rules of Civil Procedure 60(b)(1):

Rule 60. Relief from judgment or order.

(b) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc. On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect

STATEMENT OF THE CASE

Plaintiff, Meadow Fresh Farms, Inc., filed the instant action on January 12, 1988, alleging that defendants were negligent in their analysis of Meadow Fresh Farms imitation milk products (R. 20-36). Plaintiff's cause of action was dismissed for failure to prosecute on January 18, 1990, by the Honorable J. Dennis Frederick, Third District Court Judge (R. 180). On May 22, 1990, Judge Frederick entered an order denying plaintiff's motion to set aside the order of dismissal (R. 481-82).

STATEMENT OF FACTS

Plaintiff filed its original Summons and Complaint against defendants on April 25, 1983, alleging defendants issued false information about plaintiffs imitation milk products in several news releases and policy statements made in May through September of 1981. (See Addendum "A"; July 10, 1981, News Release). On July 19, 1984, plaintiff's counsel filed a notice of withdrawal of counsel and served it upon defendants (R. 364-65). The Honorable Scott Daniels, Third District Court Judge, dismissed plaintiff's complaint on September 27, 1985, for failure to prosecute (R. 368).

On January 26, 1987, attorneys B. H. Harris and Joseph M. Chambers filed an entry of appearance and a motion to vacate the minute entry dismissing plaintiff's case (R. 370-75). On March 13, 1987, Judge Daniels denied plaintiff's motion to vacate the judgment of dismissal (R. 379-81).

On appeal, the Utah Supreme Court affirmed the judgment of dismissal and allowed plaintiff one year to refile under Utah Code Ann. § 78-12-40 (1953), as amended (R. 383).

On January 14, 1988, attorneys B. H. Harris, George W. Preston and Thomas L. Willmore filed an amended complaint on behalf of the plaintiff which forms the basis of this appeal (R. 20-36). On December 14, 1988, B. H. Harris, one of the attorneys of record for plaintiff, withdrew as counsel (R. 424-25).

Attorney Harris' notice of withdrawal of counsel was mailed to Mr. Roy Brog, President of Meadow Fresh Farms Inc. (Id.).

On December 5, 1989, the Honorable J. Dennis Frederick, Third District Court Judge, issued an order to show cause why the case should not be dismissed for plaintiff's failure to prosecute (R. 432, 33). He explained that counsel's failure to appear would be considered acquiescence in entry of an order of dismissal (Id.). The order to show cause was sent to attorney George W. Preston, attorney of record for plaintiff (Id.).

On December 21, 1989, at 8:30 a.m., the order to show cause came on regularly for hearing (R. 435). Counsel for the plaintiff failed to appear (Id.). Judge Frederick entered an order of dismissal without prejudice on January 18, 1990 (Id.).

On February 22, 1990, attorney Steven F. Alder filed a notice of appearance of counsel and a motion to set aside the order of dismissal (R. 437-51). Plaintiff explained that he had failed to communicate with his previous attorney from January to early December of 1989 (Id.). Judge Frederick entered an order on May 22, 1990, denying plaintiff's motion for an order to set aside the order of dismissal (R. 481-82) (See Addendum "B"; Order).

One week before the dismissal, on May 14, 1990, plaintiff filed a third action against defendants which was identical to his previous two actions. (See Brief of Appellant

at pp. 18-19). The Honorable Kenneth Rigtrup, Third District Court Judge, dismissed the third action without prejudice on December 7, 1990, by reason of this appeal from Judge Frederick's order (See Addendum "C", Order). Plaintiff now appeals Judge Frederick's order denying defendants' motion to set aside the order of dismissal.

SUMMARY OF THE ARGUMENT

Plaintiff claims the lower court abused its discretion in refusing to set aside the order of dismissal for failure to prosecute. Plaintiff argues that its failure to communicate with counsel for almost a year constitutes "excusable neglect" under Rule 60(b)(1). In contrast, Utah case law expressly rejects the argument that a plaintiff's failure to communicate with counsel constitutes excusable neglect sufficient to set aside an order of dismissal for failure to prosecute. In light of the fact that plaintiff's cause of action is nearly a decade old, has been lingering in the judicial system for more than seven years, was previously dismissed for lack of prosecution, and was affirmed on appeal as appropriately dismissed, the lower court did not abuse its discretion in refusing to set aside the order of dismissal for failure to prosecute.

Plaintiff also requests this Court to decide whether he may refile his cause of action under Utah Code Ann. § 78-12-40 (1987), but only if this Court affirms the lower court's

dismissal. Because plaintiff did not raise the issue in the lower court, this Court should not consider this issue raised for the first time on appeal. In any event, plaintiff essentially requests this Court to issue an advisory opinion, a result which is against judicial policy.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO SET ASIDE THE DISMISSAL FOR FAILURE TO PROSECUTE

Plaintiff contends that the lower court erred in refusing to set aside the order of dismissal for failure to prosecute. He asserts that "excusable neglect" existed justifying from relief from the final judgment of dismissal. He requests this Court to reverse the lower court's dismissal and remand this case for trial. Plaintiff's claim should be rejected.

Rule 60(b), Utah Rules Civil Procedure, provides that a trial court may relieve a party from a final judgment if "excusable neglect" is established. The Utah Supreme Court defines "'excusable neglect' as the exercise of 'due diligence' by a reasonably prudent person under similar circumstances." Mini Spas, Inc. v. Industrial Com'n of Utah, 733 P.2d 130, 132 (Utah 1987). While the Court has explained that a trial court should be generally indulgent toward setting a judgment aside

where there is reasonable justification or excuse, the mere fact that some basis may exist to set aside the default "does not require the conclusion that the court abused its discretion in refusing to do so when facts and circumstances support the refusal." Katz v. Pierce, 732 P.2d 92, 92 (Utah 1986). More specifically, the Court has ruled that where a party has been negligent by not communicating with his attorney, the party may not claim his attorney's neglect in failing to notify him of proceedings as grounds for setting aside a default judgment. Gardiner & Gardiner Bldrs. v. Swapp, 656 P.2d 429, 430 (Utah 1982). See also Airkem Intermountain, Inc. v. Parker, 30 Utah 2d 65, 513 P.2d 429, 431 (1973).

In the present case, plaintiff contended in the lower court that he satisfied the conditions of Rule 60(b) due to "excusable neglect on behalf of the defendant and/or plaintiff or plaintiff's counsel and failure in communications which resulted in confusion as to whether counsel had withdrawn from representation or not." (R. 186-87). This explanation, however, was rejected by Judge Frederick as insufficient to set aside the dismissal. Reviewing plaintiff's conduct in this case, it is readily apparent that Judge Frederick was correct in concluding that plaintiff's dilatory conduct was inexcusable.

The original complaint in this action was filed on April 25, 1983, more than seven years prior to Judge Frederick's

dismissal. Approximately fifteen months after the original filing, plaintiff's original counsel of record withdrew from the case (R. 364). The reason stated for the withdrawal was that plaintiff had recently reorganized and had retained in-house counsel in the process (Id.). Also, plaintiff had never paid any of the bills that the original law firm had submitted (Id.). On August 29, 1985, an order to show cause was issued notifying plaintiff that its action was in jeopardy and that a hearing would be held on September 27, 1985 (R. 366). On the day of the hearing, plaintiff and its counsel failed to appear and the case was dismissed (Id.).

Sixteen months thereafter, on January 26, 1987, plaintiff filed a notice of appearance of counsel and request for scheduling conference (R. 370). This occurred more than two and a half years after plaintiff's original counsel had withdrawn. On the same day, plaintiff filed a motion to vacate the minute entry dismissing its case (R. 372). On March 13, 1987, Judge Scott Daniels issued an order denying plaintiff's motion to vacate (R. 378). Plaintiff appealed the order to the Utah Supreme Court which affirmed, but granted plaintiff one year in which to refile its action.

Ten months later, on January 6, 1988, plaintiff filed its Amended Complaint (R. 385). After two more years of inactivity by plaintiff, the lower court on December 5, 1989,

issued an order to show cause indicating that "failure to appear will be considered acquiescence in entry of an order of dismissal." (R. 431). Plaintiff and its counsel once again failed to appear at the order to show cause hearing and the action was dismissed on January 18, 1990 (R. 434) (See Addendum "B"; Order).

On March 15, 1990, plaintiff moved to set aside the dismissal, asking the lower court to excuse his dilatory behavior (R. 183-90). He contended that the failure to appear at the order to show cause hearing was due to his and his counsel's confusion as to whether or not he was indeed represented by counsel. (Id.) This contention was not, however, supported by the record. Although it was correct that attorney B. H. Harris withdrew from the case on December 14, 1988, he did so only on his own behalf due to his appointment as a judge in the First Circuit Court (R. 171). Had plaintiff contacted his attorney over the next eleven months leading up to the lower court's order to show cause, any confusion would easily have been remedied.

Plaintiff's alleged confusion did not relieve it of its duty to diligently prosecute its case. The reasoning of the Utah Supreme Court in the case of Wilson v. Lambert, 613 P.2d 765 (Utah 1980) is helpful. In Wilson, the plaintiffs contended that they should be relieved from the lower court's dismissal for failure to prosecute because their predecessor in interest, Mr.

Baldwin, had unknowingly been without counsel when the action was dismissed. In response, the Wilson Court stated: "It is . . . immaterial that Plaintiff's predecessor was unwittingly without counsel for a time before his death. Mr. Baldwin was not relieved of his duty to pursue his action by any failure of his attorney to act - the matter should have been investigated within a reasonable time." Wilson, 613 P.2d at 768.

Likewise, plaintiff was not relieved of its duty to diligently prosecute this action due to any confusion as to whether or not it was represented by counsel. Just as when plaintiff's first action was dismissed, it was the district court's own motion that renewed plaintiff's interest in the case. Had the Court not moved sua sponte to dismiss, this case would likely have remained idle.

Additionally, defendants have been prejudiced by plaintiff's delay in prosecuting this action. Since the original filing of this action more than seven years ago, defendants have undergone a considerable change of circumstances. None of the three named individuals represented by the Attorney General's Office are still employed with the State agencies against whom this lawsuit was filed (R. 323). One of the three is still employed by the State, but in a different agency and in an entirely different capacity (Id.). Of the other two, one has moved to Texas, and the other to the State of Washington (Id.).

Neither of these two individuals have any continuing employer/employee relations with the State of Utah. The changes of occupation and domicile have created difficulties and prejudice for each of the named defendants and the agencies involved in the lawsuit.

There are numerous reasons why a reinstatement of this case would be a continuing burden on the parties involved. First, reinstating the lawsuit would create a burden on the individual defendants who would have to interrupt their personal and business lives to travel to Utah in order to defend their actions which occurred nearly a decade ago. Second, it would be an undue burden on the agencies involved. Because none of the individual defendants are currently employed by the defendant agencies, other agency employees would be required to become familiar with the facts and circumstances surrounding this action. These agency employees would have the difficulty of trying to familiarize themselves with a matter that occurred almost a decade ago. Lastly, after lingering in the court system for more than seven years, witnesses may no longer be available for trial, and if available, may be unable to recall information that is vital in defending this action.

In sum, plaintiff has been afforded ample opportunity to prosecute this case. Plaintiff, however, has abused the opportunity. After seven years of delay and two dismissals for

lack of prosecution, plaintiff requests the judicial system to condone his behavior by allowing him a third chance. In light of plaintiff's dilatory behavior, Judge Frederick's ruling should not be considered an abuse of discretion.

POINT II

PLAINTIFF CANNOT RAISE ISSUES FOR THE FIRST TIME ON APPEAL.

On appeal, plaintiff raises the issue of whether it may, for a second time, utilize the provisions of Utah Code Ann. § 78-12-40 (1987) which allows a plaintiff to refile an action within one year after the reversal or failure of a cause of action other than upon the merits. However, because this issue was not raised in the lower court, it should not be considered on appeal.

Utah courts have long held that appellate issues must be first raised in the trial court. In James v. Preston, 746 P.2d 799 (Utah App. 1987), this Court explained that "matters not raised in the pleading nor put in issue at the trial level may not be raised for the first time on appeal." Id. at 801.

In the instant case, the issue of the legality of a second refiling was not raised below and the lower court had no "opportunity to make findings of fact or conclusions of law." James, 746 P.2d at 801. Admittedly, plaintiff did raise the issue in the subsequent action filed before Judge Rigtrup. However, Judge Rigtrup's dismissal was not based on that issue

and no appeal was taken. Had plaintiff desired a ruling on the refiling statute, he could have raised the issue before Judge Frederick in his motion to set aside the judgment. Plaintiff should not be permitted to seek reversal of Judge Frederick's ruling on the basis of a legal argument not presented below.


In reality, plaintiff's argument is premature. If this Court reverses Judge Frederick's dismissal order, the issue will be moot. If this Court affirms Judge Frederick's ruling and plaintiff refiles its cause of action, the issue can then be argued and decided. In that Utah has a longstanding judicial policy avoiding advisory opinions, plaintiff's premature claim should not be considered in this appeal. See Reynolds v. Reynolds, 788 P.2d 1044, 1045 (Utah Ct. App. 1990).

CONCLUSION

For the foregoing reasons, defendants respectfully request this Court to affirm the lower court's denial of plaintiff's motion to set aside the order of dismissal.

DATED this 9th day of February, 1991.

R. PAUL VAN DAM
Attorney General


DAN R. LARSEN
Assistant Attorney General
Attorney for Defendants

CERTIFICATE OF MAILING

This is to certify that I mailed four true and correct copies of the foregoing **BRIEF OF APPELLEES** to each of the following this 12th day of February, 1991:

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A handwritten signature in cursive script, appearing to read "Dan Larson", is written over a horizontal line.

ADDENDA

ADDENDUM A



DR. KENNETH B. CREER
COMMISSIONER

STATE OF UTAH

DEPARTMENT OF AGRICULTURE

147 North 200 West Salt Lake City, Utah 84103 801/533 5421

July 10, 1981

N E W S R E L E A S E

WARNING ISSUED ON IMITATION MILK PRODUCT

A new food product is currently being marketed throughout the state which is falsely represented and may pose a health risk for certain individuals. The product called "Meadow Fresh" is an imitation lowfat milk and is offered to consumers on a distributor basis.

According to Archie Hurst, Director of the Division of Food and Consumer Services for the Utah Department of Agriculture, "Consumers should be aware that Meadow Fresh is improperly labeled and makes false advertising claims." "Meadow Fresh is an imitation product and should not be considered a dairy product or a substitute for milk," says Mr. Hurst.

Contrary to advertising claims, Meadow Fresh is not nutritionally comparable to milk. It is, in fact, inferior to milk in several nutrients, which is the reason for it being classified as an imitation product.

"The Department is concerned that dietary detriment may result to individuals using this product as a sole replacement for milk, especially for infants, growing children, the elderly and pregnant and nursing mothers," says Mr. Hurst. "It is important that the product not be used as an infant formula."

Janet Heins, a Public Health Nutritionist for the Utah State Department of Health and Director of the WIC Program, states that "Meadow Fresh does not meet the minimum standards of the Infant Formula Act of 1980. This act establishes minimum levels of nutrients and standards for quality and safety in the manufacture of infant formula. Furthermore, Meadow Fresh may not support normal infant growth and development, and prolonged use of it in infant feeding could be life threatening."

0200500

ADDENDUM B

MAY 10 1990

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Attorneys for Utah State University
Department of Agriculture and Applied
Science, Von T. Mendenhall and
Barbara Prater

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

-----oo0oo-----

MEADOW FRESH FARMS, INC.,	:	
Plaintiff,	:	ORDER DENYING PLAINTIFF'S
vs.	:	MOTION FOR ORDER TO SET
	:	ASIDE ORDER OF DISMISSAL
UTAH STATE UNIVERSITY, et al.,	:	Civil No. 880900171
Defendants.	:	Judge J. Dennis Frederick

-----oo0oo-----

Plaintiff's motion for an order to set aside this Court's January 18, 1990 Order of Dismissal without prejudice was noticed for decision on April 30, 1990. After having reviewed all of the pleadings in the case and after having reviewed the memoranda of points and authorities submitted in connection with plaintiff's motion to set aside order of dismissal, including the exhibits attached thereto, and for good cause shown,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiff's motion for order to set aside this Court's January 18, 1990 Order of Dismissal without prejudice is denied for the reasons more particularly set forth in the defendants' memoranda in opposition to plaintiff's motion.

DATED this 32 day of May, 1990.

BY THE COURT:



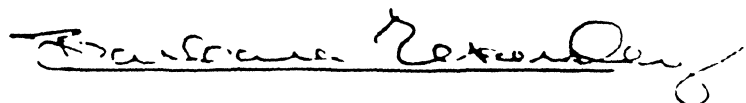
J. Dennis Frederick
District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Order was served upon the following by depositing a copy of the same in the U. S. Mails, postage prepaid thereon, this 2nd day of May, 1990:

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ASSISTANT ATTORNEY GENERAL
236 State Capitol Building
Salt Lake City, Utah 84114

Steven F. Alder
ALDER & ASSOCIATES
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ADDENDUM C

File ✓

MF III

DEC 18 1990

FILED DISTRICT COURT
Third Judicial District

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DEC 07 1990
Constance George
By _____ Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

-----oo0oo-----

MEADOW FRESH FARMS, INC.,	:	
Plaintiff,	:	ORDER OF DISMISSAL
vs.	:	
UTAH STATE UNIVERSITY, et al.,	:	Civil No. 900902988CV
Defendants.	:	Judge Kenneth Rigtrup


-----oo0oo-----

Defendants' motion to dismiss came before this Court for regularly scheduled hearing at 10:00 a.m. on Monday, November 26, 1990. Plaintiff was represented by Marcus G. Theodore. The State of Utah and its related departments and individuals were represented by Dan R. Larsen. Defendants Utah State University and its related departments and individual defendants were represented by Mark O. Morris. After considering the memoranda on file and hearing arguments of counsel, and for good cause shown,

IT IS HEREBY ORDERED that this case be dismissed without prejudice by reason of the appeal now pending of Civil No. C88-00171, the predecessor case to this instant action.

DATED this 7th day of December, 1990.

BY THE COURT:


Kenneth Rigtrup
District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of November, 1990, a true and correct copy of the foregoing Order of Dismissal was served upon the following by depositing a copy of the same in the U.S. Mails, postage prepaid thereon:

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