

2000

Joseph W. Rohan v. Chad Boseman, Jerald Boseman : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JOSEPH W. ROHAN	:	
	:	Appeal No. 20001148-CA
Plaintiff/Appellant	:	
 v.	 :	
CHAD BOSEMAN	:	
JERALD BOSEMAN	:	Argument Priority 15
	:	
Defendants/Appellees		

APPELLEES' BRIEF

Appeal from Decision of the
Third Judicial District Court
Salt Lake County, State of Utah
The Honorable J. Dennis Frederick

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Salt Lake City, UT 84111

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STATEMENT OF JURISDICTION

The Utah Court of Appeals has appellate jurisdiction over the above-entitled matter pursuant to Utah Code Ann. §78-2-2(4).

STATEMENT OF ISSUES AND STANDARD OF REVIEW

1. Did the trial court abuse its discretion in refusing to continue the June 20, 1999 trial date or to dismiss Plaintiff/Appellant Joseph W. Rohan's (herein "Rohan" or "Plaintiff") case without prejudice?

Standard of Review: The Appellate Court's review of a trial court's decision to grant or deny a continuance is conducted under the abuse of discretion standard. Christenson v. Jewkes, 761 P.2d 1375, 1377 (Utah 1988). Likewise, this Court's review of a trial court's decision to grant or deny a request for voluntary dismissal is also done pursuant to the abuse of discretion standard. Harmon v. Greenwood, 596 P.2d 636 (Utah 1979); The applicability of the Americans with Disabilities Act to the present circumstances is reviewed for correctness. State v. Pena, 869 P.2d 932, 936 (Utah 1994). This issue was preserved for the court's review by Rohan's "Motion for Continuance of Trial Setting, Withdrawal of Counsel, Substitution of Counsel, and Enlargement of Discovery," dated June 2, 2000 (herein also referred to as "June 2nd motion" or "first motion to continue") as well as the trial court's June 5, 2000 Minute Entry Ruling denying the motion. The issue is separately preserved pursuant to Rohan's "Motion for Voluntary Dismissal and Motion to Expedite," dated June 7, 2000 (herein also referred to as "June 7th motion" or first motion to dismiss") and the trial

court's June 20, 2000 Order denying that motion. Finally, the matter is preserved under Rohan's June 19, 2000 "Renewed Motion for Voluntary Dismissal and Motion for Expedited Disposition or Alternatively Motion to Continue Trial Setting to Consider Plaintiff's Claims Under the ADA," (herein also referred to as "June 19th motion" or "second motion to dismiss" or "second motion to continue") and the trial court's July 31, 2001 "Findings of Fact, Conclusions of Law" and "Order and Judgment" denying the Plaintiff's June 19 motion.

2. Did the trial court's denial of Rohan's motions to continue, to voluntarily dismiss, for a new trial or to amend pleadings violate his due process or equal protection rights?

Standard of Review: Constitutional issues involve questions of law which are reviewed by this Court for correctness. Whitmer v. City of Lindon, 943 P.2d 226 (Utah 1997).

This issue was preserved for this Court's review by Rohan's June 19, 2000 "Renewed Motion for Voluntary Dismissal and Motion for Expedited Disposition or Alternatively Motion to Continue Trial Setting to Consider Plaintiff's Claims Under the ADA," and the trial court's July 31, 2001 "Findings of Fact, Conclusions of Law" and "Order and Judgment" denying the Plaintiff's June 19th motion. The issue was also preserved by Rohan's "Motion for New Trial Pursuant to Rule 59 or Alternatively Motion to Amend" (herein also referred to as "motion for new trial" or "motion to amend" or "August 7th motion") and the trial court's November 2, 2000 order denying Plaintiff's motion.

3. Did the trial court act improperly in involuntarily dismissing Plaintiffs case for failing to prosecute the matter?

Standard of Review: The standard of review adopted for purposes of an appellate court reviewing a trial courts decision to involuntarily dismiss a case because of a parties failure to prosecute falls under the abuse of discretion standard. Wilson v. Lambert, 613 P.2d 765 (Utah 1980).

This issue was preserved pursuant to the Findings of Fact, Conclusions of Law as well as the Order and Judgment entered by the trial court on July 31, 2000.

4. Did the trial court act appropriately in awarding attorney's fees and costs against the Plaintiff?

Standard of Review: The appellate court applies a multiple standard in evaluating a decision to award attorney's fees under U.C.A. §78-27-56. As to whether a claim asserted was without merit, the appellate court reviews the same for correctness. Wardley Better Homes and Garden v. Cannon, 21 P.3d 235 (Utah App. 2001). As to the second prong necessary for the award of attorney's fees, bad faith, that issue is a factual question which is reviewed under the clearly erroneous standard. Warner v. DMG Color, Inc., 20 P.3d 868 (Utah 2000).

This issue is preserved for appellate review pursuant to the July 31, 2000, Findings of Fact, Conclusions of Law and the Order of Judgment entered by the trial court.

5. Did the trial court abuse its discretion in rejecting Plaintiff's motion for a new trial or to amend?

Standard of Review: An appellate court examines a trial court's decision to grant or deny a motion for a new trial under Rule 59 of the Utah Rules of Civil Procedure under an abuse of discretion standard. Christenson v. Jewkes, 761 P.2d 1375 (Utah 1988); The applicability of the Americans with Disabilities Act to the present circumstances is reviewed for correctness. State v. Pena, 869 P.2d 932, 936 (Utah 1994).

DETERMINATIVE AUTHORITY

The issues addressed in this appeal are governed by:

1. Utah Code Ann. §78-27-56
2. Rule 40(b) of the Utah Rules of Civil Procedure
3. Rule 41(a)(2)(ii) of the Utah Rules of Civil Procedure
4. Rule 59(a) and (e) of the Utah Rules of Civil Procedure
5. Rule 4-506 of the Utah Rules of Judicial Administration
6. Rule 4-105 of the Utah Rules of Judicial Administration.
7. United States Code Service §12131
8. United States Code Service §12132

STATEMENT OF THE CASE

The original cause of action in this matter was brought by way of a complaint filed by the Plaintiff Joseph W. Rohan against Defendants Chad Boseman and Jerald Boseman on

April 23, 1998. The complaint was brought to recover for alleged injuries sustained by Rohan in a vehicular accident involving Rohan and Chad Boseman in January 1997.

Plaintiff claimed injuries resulting from the accident with Boseman, including a closed head injury. At the time of the filing of the Complaint Rohan was represented by Paul M. Halliday Jr. and Stephen B. Watkins of *Halliday & Watkins*, a legal firm with which Rohan practiced law.

Plaintiff filed a certificate of readiness for trial on January 19, 2000. Defendants' council objected to Plaintiffs certificate on February 1, 2001, asserting to the court that Plaintiff had yet to provide requested documentation and that Plaintiff's deposition could not be completed until the documentation was provided.

The trial court scheduled a telephone conference for the matter on March 2, 2000. During the conference the court established a schedule for the case including a discovery cutoff of May 26, 2000, a final pretrial for June 5, 2000 and trial for June 20-23, 2001.

On June 2, 2001, less than three weeks before trial, Rohan's legal counsel filed with the trial court a "Motion for Continuance of Trial Setting, Withdrawal of Counsel, Substitution of Counsel, and Enlargement of Discovery." The motion essentially requested the Court continue the matter so that Rohan could substitute attorneys and acquire additional time for identifying and designating previously undisclosed witnesses and exhibits. Plaintiffs counsel argued the motion before the Court at the final pretrial on June 5, 2000. The Court

subsequently denied the motion declaring that Rohan had failed to show good cause why the continuance should be granted.

Even though the Court had rejected Rohan's motion to continue at the June 5, 2000, hearing, he fired his attorney a day later on June 6, 2000.

A second motion was filed by Rohan, pro se, on June 7, 2001. This "Motion for Voluntary Dismissal and Motion for Expedited Disposition" was opposed by the Defendant. The trial court denied Plaintiff's second motion as well and entered an order consistent with the denial on June 20th.

The day before trial, June 19, 2000, Rohan filed a "Motion for Voluntary Dismissal, Motion for Expedited Disposition or Alternatively Motion to Continue Trial Setting to Consider Plaintiffs Claims Under the ADA." Plaintiff's motion essentially argued that Rohan was entitled to a voluntary dismissal of the case or a continuance of the trial date under the Americans with Disabilities Act inasmuch as he had no legal counsel and was unable to represent himself as a result of his "disability". The Defendants opposed Plaintiff's third motion.

On the following day, the day of trial, the parties appeared before the trial court. Defendants were present and prepared to move forward with the trial. Rohan was also present, pro se, but was unprepared to call witnesses or otherwise proceed with the trial. The parties argued Plaintiff's third motion. The Court denied Plaintiff's motion to voluntarily dismiss or continue trial under the ADA declaring that the ADA was both factually and

legally inapplicable to the present circumstance. Inasmuch as Rohan expressed an inability to proceed with trial, the trial court granted a defense request to dismiss the Plaintiff's case for failure to prosecute. The dismissal was with prejudice and on the merits. The trial court also awarded the defense costs and fees from the Plaintiff and further ordered Plaintiff to pay the expense of the jurors being brought to the court that morning.

The trial court issued Findings of Fact, Conclusions of Law as well as an Order and Judgment consistent with its ruling from the bench on the day of trial. The "Findings" and Order and Judgment were entered on July 31, 2000.

The Plaintiff filed a "Motion for New Trial Pursuant to Rule 59 or Alternatively Motion to Amend" on August 7, 2000. The supporting memorandum essentially argued that the trial court committed error in concluding Rohan was not entitled to a continuance or voluntary dismissal as a result of his disability. It again suggested that the American with Disabilities Act applied and that the court had discriminated against Rohan by not granting his prior motions. The Defendants opposed Plaintiff's motion for a new trial or amendment and the trial court denied the motion.

STATEMENT OF FACTS

1. Joseph Rohan and the Defendant Chad Boseman were involved in an automobile accident on January 27, 1997 in Salt Lake City, Utah.

2. Plaintiff is a licensed attorney with the Utah State Bar and has practiced with the firm of *Halliday & Watkins* since at least the instigation of this lawsuit. Pg. 526:4; 472-74 and 337.¹
3. Since the time of the January 1997 accident Plaintiff has continued to practice law, including acquiring and representing new clients, filing pleadings and motions with the Utah Courts and conducting trials. Pgs. 472-74 and 480-88.
4. At all times pertinent to this litigation Plaintiff has been a member of good standing with the Utah State Bar (herein “Bar”) and licensed to practice law without restriction. Pgs. 472-74
5. Between 1998 and 1999, Rohan unilaterally contacted the Utah State Bar’s Office of Professional Conduct to discuss his alleged injuries and disability resulting from the January 1997 accident. After evaluating the information and representations made by Plaintiff concerning his disability, and its impact on his ability to practice law, the Bar’s Office of Professional Conduct decided not to initiate private or public disability proceedings against the Plaintiff. Pg. 472-74.
6. On April 28, 1999, Rohan filed a complaint in the trial court alleging negligence by the Defendants and claiming damages for injuries allegedly sustained in the accident, including a purported closed head injury. Pg. 1-5.

¹ All page citations are to the trial court record.

2. Plaintiff is a licensed attorney with the Utah State Bar and has practiced with the firm of *Halliday & Watkins* since at least the instigation of this lawsuit. Pg. 526:4; 472-74 and 337.¹
3. Since the time of the January 1997 accident Plaintiff has continued to practice law, including acquiring and representing new clients, filing pleadings and motions with the Utah Courts and conducting trials. Pgs. 472-74 and 480-88.
4. At all times pertinent to this litigation Plaintiff has been a member of good standing with the Utah State Bar (herein “Bar”) and licensed to practice law without restriction. Pgs. 472-74
5. Between 1998 and 1999, Rohan unilaterally contacted the Utah State Bar’s Office of Professional Conduct to discuss his alleged injuries and disability resulting from the January 1997 accident. After evaluating the information and representations made by Plaintiff concerning his disability, and its impact on his ability to practice law, the Bar’s Office of Professional Conduct decided not to initiate private or public disability proceedings against the Plaintiff. Pg. 472-74.
6. On April 28, 1999, Rohan filed a complaint in the trial court alleging negligence by the Defendants and claiming damages for injuries allegedly sustained in the accident, including a purported closed head injury. Pg. 1-5.

¹ All page citations are to the trial court record.

7. Plaintiff's counsel at the time the lawsuit was instigated were Paul M. Halliday and Stephen B. Watkins of the firm *Halliday & Watkins*, the firm with which Plaintiff is affiliated and practiced law. Pgs. 1-5.
8. On August 17, 1999 Plaintiff, through counsel, corresponded with the Defendants' counsel and stated Plaintiff's intent to terminate settlement negotiations and bring this case to trial. Pg. 337.
9. On October 28, 1999, approximately a year and half following filing of the complaint, the trial court, upon its own motion ordered the parties to this action to appear and show cause why the case should not be dismissed for failure to prosecute. Pg. 94.
10. On November 18, 1999 the trial court held the Order to Show cause. Upon hearing the comments of counsel for the parties the trial judge stated an expectation that certificates indicating readiness for trial would be filed within sixty (60) days. Pg. 96.
11. Plaintiff, through counsel, filed a certificate indicating his readiness to proceed to trial on January 19, 2000. Pg. 97-99
12. On February 1, 2000, Defendants filed an objection to Plaintiff's "Certificate of Readiness for Trial" asserting that Plaintiff had refused to provide requested documentation in Plaintiff's possession, including, but not limited to, documents concerning Plaintiff's claim of lost earning. Moreover, Defendants indicated to the trial court that they had been unable to complete Plaintiff's deposition as a result of the Plaintiff's failure to make the requested documents available. Pgs. 100-102

13. In response to Plaintiff's "Certificate" and Defendants' "Objection," on February 2, 2000 the trial court issued a notice of a telephone conference to be held on March 2, 2000. The notice indicated that during the conference the following topics would be discussed: "trial dates, discovery completion dates, jury or non-jury trial, trial length, dates for dispositive motions, dates for exchange of witness lists, nature and complexity of case, final pretrial date and settlement status." Pg.103-105
14. On March 2, 2000 the trial court held its telephonic conference with the parties in which Plaintiff, Plaintiff's counsel Stephen B. Watkins both participated. Pgs. 110-114.
15. At the time of the conference the trial court and parties agreed to the following schedule:

Final Pretrial Conference: June 5, 2000

Jury Trial: June 20-23, 2000

Witness and exhibit designation: Plaintiff-March 16, 2000 and Defendants-March 23, 2000

Discovery cutoff: May 26, 2000

Pgs. 110-114.
16. The trial court also issued an entry to the court's file and to the parties identifying the above dates and further stating: "The foregoing dates should be considered firm settings and will not be modified without court order, and then only upon a showing of manifest injustice." Pg. 112.

17. According to Plaintiff, following the March 2, 2000 pretrial conference he began searching for new trial counsel inasmuch as his prior counsel had limited trial experience and never tried a brain injury case. Pg. 191-194
18. In March 2000, Plaintiff apparently contacted Robert F. Orton of the law office of Fabian & Clendenin who agreed to represent him in this matter. Pg. 207-209
19. Notwithstanding any agreement Plaintiff may have reached with him, Mr. Orton never entered an appearance in the case, although he did attend the supplemental deposition of the Plaintiff. Pg. 448 and 479
20. On June 2, 2000, two and a half weeks before trial, Plaintiff filed with the trial court a “Motion for Continuance of Trial Setting, Withdrawal of Counsel, Substitution of Counsel and Enlargement of Time.” The motion essentially requested that the trial court continue the trial for ninety (90) days so that Robert F. Orton could appear as counsel in place of Paul Halliday and Stephen Watkins and that, discovery be allowed to continue for sixty (60) days in order for Plaintiff to supplement his prior designation of exhibits and witnesses. Pgs. 184-190.
21. The Defendants refused to stipulate to Plaintiff’s June 2nd motion but did not object to it. Pg. 196-98.
22. At the final pretrial three days later, June 5, 2000, Plaintiff appeared with counsel, Stephen B. Watkins. Mr. Watkins renewed Plaintiffs motion to continue the trial date, allow the substitution of counsel and extend witness designation dates. The trial court

indicated to the parties at that time that it would take Plaintiff's motion under advisement, but further stated that Plaintiff and his counsel should continue to prepare for trial in the event said motion was denied. Pgs. 195 and 338

23. Later that same day, the Court issued a Minute Entry Ruling denying Plaintiff motion to continue, to substitute counsel or extend discovery or witness designation. In said ruling the trial court noted that Plaintiff had used the same counsel since the instigation of the litigation, that a decision to change counsel fifteen (15) days before trial was too late and further found that the Plaintiff had failed to show good cause for the continuance. Pgs. 196-98.
24. Notwithstanding the trial court's ruling on Plaintiff's motion for continuance/substitution, the following day, June 6, 2000, Plaintiff gave notice to the court and the Defendants that he had discharged his attorney's Stephen B. Watkins, Paul M. Halliday, Jr. and the law firm of *Halliday and Watkins* as his legal counsel in this matter. Pgs. 199-200.
25. On June 7, 2000, Plaintiff, acting pro se, filed with the trial court a "Motion for Voluntary Dismissal and Motion to Expedite." Plaintiff's June 7th motion asked the court to dismiss the Plaintiff's complaint, without prejudice. In his supporting memorandum, Plaintiff argued that he was unable to proceed to trial because he lacked legal counsel and had a brain injury. He requested the court allow him to

voluntarily dismiss so that new counsel could re-file the cause of action and again prepare the matter for trial. Pgs. 201-206.

26. The Defendants opposed Plaintiff's motion for voluntary dismissal. Pgs. 210-214.
27. On June 14, 2000, the trial court issued a Minute Entry Ruling denying Plaintiff's motion for voluntary dismissal for the reasons set forth in the Defendants' opposing memorandum. Pgs. 230-231. An order consistent with the court's ruling was entered on June 20, 2000. Pgs. 309-10.
28. Also on June 14, 2000, Plaintiff, pro se, corresponded with Defendants' counsel indicating his intention to file an interlocutory appeal in order to stay the trial date. His correspondence also stated: "I also want to inform you that whether or not a stay is granted, a trial will not occur on Tuesday and therefore the defense does not need to expend time and effort in preparation of trial on that date." Pg. 340.
29. On June 15, 2000, Defendants' counsel wrote back to Plaintiff indicating the Defendants intent to continue preparation for trial absent an order from the trial or an appellate court striking the trial scheduled for June 20-23, 2000. The letter also indicated that if Plaintiff refused to move the case forward at trial that the Defendants would request the trial court impose sanctions against the Plaintiff. Pgs. 340; 268-69.
30. On June 19, 2000 Plaintiff filed, pro se, a "Renewed Motion for Voluntary Dismissal and Motion for Expedited Disposition or Alternatively Motion to Continue Trial Setting To Consider Plaintiff's Claims Under the ADA." The June 19th motion

argued that Plaintiff was disabled and because of the absence of counsel for the Plaintiff the Court's failure to voluntarily dismiss the case or to continue the trial would be discriminatory. Pgs. 284-293; 340-341.

31. Plaintiff and Defendant's counsel argued Plaintiff's June 19th motion. The Court denied the motion concluding that Title II of the Americans with Disabilities Act is legally and factually inapplicable to the present case and that the Act did not require the trial court to continue the trial or voluntarily dismiss the case without prejudice. Pgs. 526:1-7; 342
32. The following day, the first morning of trial, Plaintiff appeared pro se, and the Defendants appeared with their counsel. Defendants were prepared to try the defense of the case. Pg. 341.
33. As of June 20, 2000 the trial court had not entered any order permitting withdrawal of Stephen Watkins or Paul Halliday as counsel for Plaintiff as required by Rule 4-506(1) or (5) of the Utah Rules of Judicial Administration. Pg. 341.
34. On the morning of trial, Plaintiff appeared unprepared and/or unwilling to proceed with the trial or the calling of witnesses on his own behalf and stated in open court that he was not prepared to proceed with the presentation of his evidence. Pgs. 526:1-7; 341.

35. As a result of Plaintiff's failure to prosecute his case, either pro se or through counsel, the Court dismissed Plaintiff's complaint with prejudice and upon the merits. Pgs. 526:1-7; 344-45; 302.
36. The trial court also concluded that Plaintiff's failure to prosecute the case was without merit and in bad faith and was done with the purpose to hinder or delay the proceedings of the court. Pgs. 526:1-7; 336-45.
37. The trial court awarded the Defendants costs of court and attorney's fees from the Plaintiff and further ordered the Plaintiff to reimburse the court for the costs associated with calling the jurors in this case. Pgs. 526:1-7; 336-45; 302.
38. On July 31, 2000 the trial court entered Findings of Fact, Conclusions of Law and an Order and Judgment consistent with its ruling of June 20, 2000. Pgs. 336-45.
39. On August 7, 2000, Plaintiff filed a "Motion for New Trial or Alternatively to Amend." Plaintiff's motion argued that the trial court had discriminated against him under the Americans with Disabilities Act by refusing to continue the June 20, 2000 trial setting or by refusing to permit the voluntary dismissal of the case, without prejudice. Pgs. 350-378.
40. The Defendants opposed Plaintiff's August 7th motion asserting that the ADA was inapplicable to the present circumstances and that Plaintiff failed to "qualify" for protection under the ADA. Pgs. 345-487.

41. On September 28, 2000 the trial court issued a Minute Entry Ruling denying Plaintiff's August 7, 2000 motion for the reasons set forth in the Defendants' opposing memorandum. Pgs. 507-08.
42. On November 2, 2000, the trial court entered an order consistent with its September 28, 2000 ruling. Pgs. 509-10.

SUMMARY OF ARGUMENT

The Motion to permit Rohan to continue the trial and substitute counsel provided no evidence of good cause. The legal counsel which Rohan originally employed to prosecute and try this case apparently did not have the trial experience Rohan wanted; however, Plaintiff knew this when he originally hired them. Thereafter Rohan made no substantial effort to prepare or arrange the appearance of new counsel until eighteen (18) days before trial. Plaintiff knew the trial date was fast approaching. He had indicated to the trial court and to Defendants' counsel on separate occasions that he was preparing and ready for trial. If those representations were true, then the trial court properly concluded that the Plaintiff could put on his case on the scheduled trial date. If Plaintiff had misrepresented his level of preparation, then the trial court properly determined that he had had over 25 months to prepare his case and should not be rewarded for being dilatory.

The trial court's decision to deny Rohan's first motion to voluntarily dismiss the case without prejudice was appropriately denied for the same reason as the motion to continue. Plaintiff indicated in his supporting memorandum that he intended to get new counsel and

rapidly re-file the case. However, the court concluded Rohan's failure to request the relief until an extraordinarily late date, as well as his unilateral attempt to sabotage his representation was improper. To dismiss only two weeks before trial would have placed substantial prejudice on the Defendants, who had incurred the costs of preparation and were ready to try the case. Finally, Plaintiff still had available to him whatever legal case he had prepared in the preceding 25 months as well as the assistance his counsel of record, Paul Halliday and Stephen Watkins, to present his cause of action at trial.

The above stated rationale is equally applicable in rejecting Rohan's second motion to voluntarily dismiss his case or to continue the trial date, set forth in his June 19th motion. In addition, however, Rohan argued, at that time, that the trial court was required to grant voluntary dismissal or continuance as an appropriate modification of the rules of procedure under the Americans with Disabilities Act (herein "ADA" or "Act"). Such a modification was not required for a plethora of reasons. First, Plaintiff was not a "qualified person with a disability" as defined by the ADA. Second, Rohan was never denied access to any benefits of the judicial process. He had the right and ability to be heard and acquire justice. Third, any concerns which Plaintiff had as to whether his case could be properly presented on June 20-23, 2001, did not come about as a result of any "disability" under which Plaintiff may have been operating.

Instead of continuing the trial or voluntarily dismissing the case without prejudice the trial court correctly dismissed Plaintiff's case with prejudice, and on the merits, when Rohan

refused to present his case on the morning of trial. Plaintiff had received numerous warnings from the trial court and the Defendants as to when he needed to be ready for trial. Notwithstanding the substantial time which Rohan had to prepare, he failed to line up the evidence and witnesses necessary to present his case. On the morning of trial, with the jury present, Plaintiff indicated to the court that he was unprepared to proceed. Nobody besides Plaintiff has the responsibility of preparing his case. If a Plaintiff chooses not to prepare or is dilatory in doing so, as is the present case, the court can and should dismiss his action with prejudice.

Plaintiff's August 7th motion for a new trial or to amend was also appropriately denied by the trial court. Rohan's assertion that the ADA required the trial court to modify its rules and procedures for his benefit is without basis. Rohan does not even qualify under the Act, even if he is accurate that he has a brain injury. Besides, the trial court gave Rohan every opportunity to present his case.

ARGUMENT

POINT I: THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN REFUSING TO CONTINUE THE PREVIOUSLY SCHEDULED TRIAL AND IN REJECTING PLAINTIFF'S REQUEST TO VOLUNTARILY DISMISS HIS COMPLAINT WITHOUT PREJUDICE.

The Plaintiff in this matter made two separate requests to the trial court that the trial date be continued and two separate requests that the case be voluntarily dismissed without prejudice. The initial motion to continue and motion for voluntary dismissal was made

separately within 18 days of trial. The second motion to continue or to voluntarily dismiss the case was made jointly within 24 hours of the scheduled commencement of trial.

Rule 40(b) of the Utah Rules of Civil Procedure do allow the trial court to continue a trial or other proceeding at its discretion. The rule specifically states:

Upon motion of a party, the court may in its discretion , and upon such terms as may be just, including the payment of costs occasioned by such postponement, postpone a trial or proceeding upon good cause shown.²

Similarly Rule 41(a)(2)(ii) of the Utah Rules of Civil Procedure permits the trial court to voluntarily dismiss a case without prejudice “upon such terms and conditions as the court deems proper.” The decision to grant such a dismissal is at the trial court’s discretion.

Harmon v. Greenwood, 596 P.2d 636 (Utah 1979).

A. Plaintiff Failed to Demonstrate Good Cause to the Trial Court in Order to Receive the Requested Continuances.

Rule 40(b) of the Utah Rules of Civil Procedure requires that the Plaintiff demonstrate some form of good cause for the trial court to grant a continuance of the trial date in this matter. Rohan failed to do so. A review of the motion, memorandum, and affidavit in support of Plaintiff’s original motion shows no reasonable basis upon which the Court could find a continuance to be appropriate. The memorandum and affidavit indicate that Rohan’s rationale for requesting the continuance is exclusively limited to his realization that he needs new legal counsel to help him present his brain injury case. Whether or not Plaintiff would

²It should be noted that in denying Plaintiff’s second motion to continue the trial court specifically relied upon Rule 4-105(3) of the Utah Rules of Judicial Administration, which is similar in scope and review to 40(b). See, Findings of Fact, Conclusions of Law, p.342.

have been better served by new legal counsel is not the question. Such may or may not have been the case. Regardless, Rohan's delay in attempting to arrange new counsel to appear in this case until eighteen (18) days before trial is clearly insufficient to establish good cause.

By the time the initial request for continuance had been made Rohan's case had been pending for almost 26 months. Certainly somewhere during that period Rohan should have recognized the need for legal counsel that could present his issues to judge and jury in a manner which he found acceptable. Nevertheless, Rohan delayed until shortly before trial before even making an effort to involve the counsel of his choice. The trial court found this to be too late. This rationale for denying Plaintiff's initial motion to continue is clearly within the trial court's discretion. Christensen v. Jewkes, 761 P.2d 1375, 1377 (Utah 1988). In Christensen, the Court further indicated that such a decision rendered by the trial court will not be disturbed unless the trial court abused its discretion by acting unreasonably.. It should be noted that in the Christensen case both parties appeared before the trial court and stipulated to a continuance. The trial court still denied the request. In the present case, while the Defendants did not specifically oppose Plaintiff's initial motion, they certainly refused to stipulate to the same.

1. Plaintiff was Dilatory in Finding and Putting in Place New Counsel.

The trial court recognized that Plaintiffs delay in exchanging counsel was inappropriate and imposed a burden on the time and financial resources of both the court and the Bosemans. Further, Rohan still had Mr. Watkins and Mr. Halliday available to present

his case. These were the same gentlemen who had represented Rohan from the instigation of the matter and had assisted him in preparing this case for trial. The trial court reasonably concluded that Mr. Watkins and Mr. Halliday were sufficiently prepared and could adequately present Rohan's case at trial.

Importantly, courts in other jurisdictions have concluded that a continuance on the eve of trial for purposes of locating new legal counsel is inappropriate. They have recognized that such a continuance would improperly prejudice the remaining parties and court. Siggelkow v. Siggelkow, 643 P.2d 985 (Alaska 1982). In Matter of Wong, 827 P.2d 90, 252 Mont. 111 (Mont. 1992) the Montana Supreme Court specifically indicated that in making a decision on a request to continue due to lack of counsel, the trial court must first assess whether the party petitioning for the continuance has acted diligently in seeking counsel. See also, Modla v. Parker, 495 P.2d 494, 17 ArizApp. 54 (Ariz. App. 1972) (Where plaintiff himself created a situation of lack of counsel denying continuance was not abuse of discretion on theory that at time of denial of continuance of motion plaintiff was without counsel); Cheek v. Hind, 675 P.2d 935, 9 KanApp.2d 248 (Kan.App. 1984); Federal Land Bank of Wichita v. Musgrove, 796 P.2d 641 (Okl.App. 1990).

There is no question in the present case that the Plaintiff procrastinated in acquiring new trial counsel. He had almost three and a half years from the time of his accident and twenty-five (25) months from the filing of this case to locate and put in place the individual(s) he wanted to try his case. Plaintiff's failed to explain to the trial court at the

times of his motions to continue, why he did not do so. His only explanation to the trial court for wanting to substitute counsel was that the trial experience of Mr. Watkins and Mr. Halliday was limited. Defendants do not suggest here whether or not Mr. Watkins and Mr. Halliday's trial experience was significant or limited. However, if their trial experience was insufficient to present Plaintiff's case at trial, this was not news to Plaintiff. Mr. Halliday and Mr. Watkins are members of Plaintiff's firm. They work together on a regular basis. Plaintiff knew the experience of these individuals when he filed his Complaint in April 1998. Even if there was a false impression as to their skills prior to filing, Plaintiff then had the next 24 months to witness their work on his case. Certainly it would not take Plaintiff that entire time to recognize their skills were not up to the presentation of his case, if in fact they were not. This Court should recall that Plaintiff himself is an attorney. Plaintiff, therefore, is aware of what talents and skills are essential for a good trial attorney. He cannot say that he was surprised to find out , at the time of trial, that Watkins and Halliday did not have what it takes. And yet for over 25 months following filing of this action Plaintiff did nothing as far as substituting into this case new legal counsel.

Rohan does suggest at various points that in March of 2000 he did contact Robert F. Orton of the law office of Fabian & Clendenin to substitute in as new counsel. In fact, Plaintiff's original motion to continue specifically asked the Court to allow the substitution of Mr. Orton. Nevertheless, the motions to continue still fail to explain why Plaintiff delayed until two and half weeks before trial to attempt substitution. Why did Plaintiff wait almost

two years to even contact Mr. Orton? Why couldn't Mr. Orton prepare for trial with the evidence available to Plaintiff, when he had at least three months lead time? Why didn't Plaintiff request the substitution of counsel, or if necessary a continuance, until eighteen (18) days before trial? All of these questions go to the issue as to whether the Plaintiff was diligent in this matter and address the issue of good cause as to the granting of continuance. None, however, were addressed by Plaintiff, either in his motions, memoranda and affidavit, or in argument before the trial judge.

2. No "Good Cause" Existed for a Continuance Under Plaintiff's June 19th Motion Inasmuch as Plaintiff was Still Represented by Legal Counsel.

It should be noted that all the arguments made above are as applicable to Plaintiff's second request for a continuance, as contained in his June 19th motion, as to the original motion of June 2, 2000. The June 19th motion is distinct in that Plaintiff's rationale for the continuance changes from the need to substitute more experienced legal counsel to the necessity of acquiring any legal counsel. In the two week period between the first and second motion to continue Plaintiff had unilaterally terminated his relationship with Halliday and Watkins leaving himself without any legal representation. The trial court; however, was properly unimpressed with Rohan's cries of prejudice resulting from lack of representation. Rohan had adequate representation for over two years. In fact he had two attorney's representing him. Two weeks before trial, however, Plaintiff attempted to sabotage that representation solely for the purpose of being able to cry "foul" to the trial court. Clearly, the trial court could not find good cause in Plaintiff's second request for a continuance.

Moreover, pursuant to the law, Plaintiff still had proper representation. Rule 4-506(1) of the Utah Rules of Judicial Administration states as follows:

An attorney may withdraw as counsel or record only upon approval of the court when a motion has been filed and the court has not issued an order on the motion or after a certificate of readiness for trial has been filed. Under these circumstances, an attorney may not withdraw except upon motion and order of the court.

Subsection (5) of the rule further states, “Where new counsel requests a delay of proceedings, substitution of counsel requires the approval of the court as provided in this rule.” While Halliday and Watkins had requested permission to withdraw and Plaintiff had requested the substitution of Mr. Orton, the trial court had rejected both requests as being untimely. Consequently, Halliday and Watkins were still acting as counsel for the Plaintiff at the time the June 19th motion was considered.

Plaintiff’s second motion to continue also asserted a right to continuance under the Americans with Disabilities Act. The ADA, however, is inapplicable to the present circumstances and did not act as good cause for the granting a continuance as shall be discussed more fully below.

B. The Trial Court Properly Utilized its Discretion in Rejecting Plaintiff’s Requests to Voluntarily Dismiss the Case Without Prejudice.

The trial court’s decision to deny Plaintiff’s motion to voluntarily dismiss his case without prejudice was correct for many, if not all, of the same reasons the court rejected Rohan’s requests to continue. Rule 41(a)(2) of the Utah Rules of Civil Procedure states that an action may only be dismissed at the request of the plaintiff by order of the court, “upon

such terms and conditions as the court deems proper.” The trial court again is granted great discretion in determining whether a party should be permitted to voluntarily dismiss a case. Harmon v. Greenwood, 596 P.2d 636 (Utah 1979). The trial court concluded Rohan’s request was improper.

1. The Plaintiff’s Motion for Voluntary Dismissal was Unnecessary Since he Already Had Both Legal Counsel and Witnesses Available to Appear at Trial.

Plaintiff’s initial motion requesting voluntary dismissal was filed June 7, 2000, two weeks before trial. Rohan argued to the court that dismissal would be proper as he was unrepresented and to proceed to trial would require him to try the case himself. Rohan suggested that because of his “brain injury” it would be unjust to require him to try his own case.

Rohan’s argument to the Court, however, was in error. Plaintiff was represented by counsel. As noted above, Rule 4-506 of the Utah Rules of Civil Procedure prohibited Mr. Watkins and Mr. Halliday from withdrawing from the case absent an order of the trial court permitting them from doing so. Such an order was never forthcoming. The request for the withdraw of Mr. Watkins and Mr. Halliday had been specifically rejected by the court only two days prior to the Defendant’s motion. Consequently, they were still legal counsel for the Plaintiff and had a legal and ethical obligation to represent Rohan skillfully and diligently.

The fact that Robert F. Orton was apparently Rohan’s attorney of choice at the time of the motion was irrelevant. The trial court never restricted Mr. Orton’s participation in the

case, provided he chose to work within the schedule already established by the court and the parties some three months prior. Rohan's affidavit in support of his motion never indicates that Mr. Orton could not get up to speed on the case before the morning of trial. Instead, it indicates that Mr. Orton "could not schedule the experts he requires in time for June 20, 2001 trial. See, Court Record, Pg.208, ¶8. The problem, therefore, is not dissatisfaction with legal counsel as much as it was a need to restructure witnesses and experts with which the Plaintiff was unsatisfied.

This Court should again recall that Plaintiff himself is a member of the Utah State Bar. Plaintiff was a practicing litigator both prior and subsequent to his accident. While Plaintiff argued to the trial court in support of his motions to voluntarily dismiss this matter that his brain injury made it impossible for him to try his own case, such indications were self-serving and misleading. Plaintiff had continued to practice law subsequent to his accident. He had acquired new clients and continued to represent them according the Utah Rule of Professional Conduct. He had represented clients in court settings and even tried cases since his accident. Even with his "brain injury" Rohan was better prepared to represent himself at a trial than any number of other pro se complainants who are required to act as their own counsel because of preference or lack of finances.

The Utah State Bar likewise believed Plaintiff's "brain injury" to be sufficiently nominal to allow him to continue practicing law. The Bar had investigated Plaintiff's injury in 1998-99. Upon review, the Bar's Office of Professional Conduct chose to take no action

to restrict Plaintiff's ability to practice law in this state. The OPC didn't even demand that Rohan's practice be supervised. Plaintiff contradicts his claim that his brain injury inhibits his self-representation at trial by continuing to maintain his own personal law practice which includes litigation.

2. Rohan's Request for Dismissal Without Prejudice on the Eve of Trial Resulted from his Own Procrastination in Preparing his Case.

In the trial court's June 20th order denying Plaintiff's motion for voluntary dismissal without prejudice, the Court indicated that the motion was denied for the reasons set forth in the Defendants' opposing memorandum. One reason which the Defendants' opposing memorandum identifies for rejecting Rohan's request to dismiss is that his need to exchange counsel two weeks before trial resulted only from Rohan's failure to diligently prepare his case.

Rohan argued to the trial court that Halliday and Watkins had little jury experience and never tried a brain injury case. Certainly this wasn't news to Rohan in June 2000. Rohan was intimately familiar with the capabilities of his original counsel. He had worked with them in the legal field for an extended period of time. He felt sufficiently comfortable with their representation at the beginning of the case. He had them prepare him for trial. They conducted discovery. They took depositions. They attended pretrial matters before the court. Yet it was not until weeks before trial that Plaintiff made any attempt to notify the court or the Bosemans of his desire to find new legal counsel. Such notice is insufficient, particularly when a change on such a late date will impact both the Defendants and the trial court.

Plaintiffs attempted delay by requesting to both continue and voluntarily dismiss this action is exacerbated by the fact that he continually represented to the trial court and the Defendants that he was actually preparing for trial. On August 17, 1999, Plaintiff counsel or record corresponded with Defendants counsel terminating settlement negotiations and indicating a desire to proceed to trial. Moreover, Plaintiff filed a certificate of readiness for trial over five months prior to the date trial was scheduled to commence. It was an unfortunate surprise to the court and the Bosemans, therefore, when Rohan indicated that he was, in fact, not “ready” to for trial only a few days before trial was to commence.

Plaintiff’s failure to properly prepare his case was particularly unacceptable considering the warnings the trial court had previously issued the parties about being ready come June 20. The minutes prepared by the court and mailed to the parties, reflecting the March 2, 2000 pretrial certainly set forth such a warning. The notes identified the June 20–23 trial dates which the court set in this case. Following the dates the trial court noted, “The foregoing dates should be considered firm settings and will not be modified without court order, and then only upon a showing of manifest injustice.” The Plaintiff’s failure to get his legal counsel put in place or desire to acquire a new slate of expert witness cannot reasonably be argued to constitute “manifest injustice.”

3. Plaintiff's Requests to Dismiss Without Prejudice Would Have Resulted in Prejudice to the Defendants and Imposed a Substantial Inconvenience to the Trial Court.

Plaintiff attempts to argue that the dismissal of his case without prejudice would not have imposed any burden on the Defendants. This is incorrect. The trial court properly considered the prejudice to the Defendants that such a dismissal would produce. Utah appellate courts have previously recognized the purpose behind the court order requirement imposed by Rule 41(a)(2)(ii) when contrasted with 41(a)(1). Subsection (1) does not require a court order be issued or a stipulation of the parties be reached. The appellate courts have indicated that the “order” requirement of 41(a)(2)(ii) is to guard against potential harassment and prejudice which results from the inconvenience and investment of time and resources subsequently lost when a case is dismissed. Thiele v. Anderson, 975 P.2d 481 (Utah App. 1999).

The Bosemans had expended a substantial amount of time and resources preparing for trial by June, 2000. They had conducted discovery. They had taken the depositions of witnesses which Plaintiff identified as his “experts”. They had gathered their own witnesses and prepared them for their examination. This is both time and money that could not be recovered. Most, if not all, expenditures would have been lost if Rohan would have been allowed to dismiss at the last minute. Moreover, Rohan’s memorandum and affidavit supporting his motions for voluntary dismissal made it clear that new counsel desired to line

up his own experts. The Defendants therefore would have been in the position of preparing their defense from scratch.

As noted to the trial court in its opposing memorandum, the Bosemans personally incurred many costs just by attending trial. The Defendant Jerald Boseman is a dentist who was required to cancel an entire work week in order that he could attend the trial of this matter. Had the court allowed Plaintiff to dismiss so close to the time of trial, Mr. Boseman would have lost the income of the entire week and then still been required to take another week off for trial at some later date.

As with the multiple motions to continue, Rohan filed multiple requests to voluntarily dismiss the case without prejudice. The arguments above apply equally well to both motions. However, Plaintiffs June 19th motion to voluntarily dismiss or to continue relied almost entirely on Plaintiff's claim that he was entitled to the requested relief under the Americans with Disability Act. The ADA claims, however, are irrelevant for the reasons identified below.

C. Plaintiff's Claims for Relief Under the Americans with Disabilities Act are Inappropriate by Considered as the Act Does Not Apply to Plaintiff and is Inapplicable to the Present Facts.

The bulk of Rohan's June 19th motion, as well as the argument currently presented by Plaintiff to this Court, centers around Rohan's assertion that his "brain injury" entitles him to the dismissal or continuance under the Americans with Disabilities Act. Notwithstanding the substantial amount of time Plaintiff has spent attempting to make the point, Defendants

are not disputing here whether or not Plaintiff's "brain injury" constitutes a "disability" as defined by the ADA. Instead, Defendant's position is that even if this Court were to conclude that Plaintiff had a disability, it would still be left with no alternative but to conclude that Plaintiff fails to qualify for the Act and that the facts and law do not support implementation of the Act in any case.

Title II of the Americans with Disabilities Act is designed to prevent and discrimination of a disabled party by a public entity. 42 U.S.C.S. § 12132 states:

[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

In this case, Plaintiff was permitted to participate in and given the benefits of all the services typically available through the Third Judicial District Court. He was not discriminated against.

In order to receive relief under Title II of the Americans with Disabilities Act, as Plaintiff has requested, Rohan must show:

- (1) that he is a qualified individual with a disability;
- (2) that he was either excluded from participation in or denied the benefits of some public entity's services, programs, or activities, or was otherwise discriminated against by the public entity; and
- (3) that such exclusion, denial of benefits, or discrimination was by reason of his disability.

Tyler v. City of Manhattan, 857 F.Supp. 800, 817 (D.Kan. 1994). Rohan is unable to meet any of the elements necessary to receive protection under the ADA.

1. Rohan is not a “Qualified Individual with a Disability” as Defined By the Americans with Disabilities Act.

In order to receive protection under the Americans with Disabilities Act a party must not only be disabled, but must also “qualify”. See, 42 U.S.C.S. § 12132; 28 CFR §35.130.

The definition of a “qualified individual with a disability” is set forth by statute. It is:

[A]n individual with a disability who with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids, and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

42 U.S.C.S. §12131; 28 CFR 35.104. Again, while the Defendants does not argue here as to whether the Plaintiff would fit the “disability” definition³, he clearly does not meet the definition for a “qualified individual with a disability.”

Rohan is not a “qualified individual” because he does not meet the essential eligibility requirements for the services he is demanding. What are the services he is demanding? That the trial court voluntarily dismiss his case without prejudice or grant him a continuance. What are the requirements for those services? That the Plaintiff show good cause, that the request is proper and that his request does not prejudice the trial court or the remaining parties to this case. As previously indicated in this brief, Rohan failed to meet these requirements.

³It should be noted that while the Defendants do not argue the issue as to whether or not Rohan is disabled the Defendants do not admit the same.

Plaintiff argues that if the trial court modified the Rules of Civil Procedure that he would be eligible for relief; however, this is not how the statute defines a “qualified individual.” To be “qualified” the Plaintiff must be eligible for a dismissal or continuance, “with **or without** reasonable modifications to rules. . . .” 42 U.S.C.S. §12131; 28 CFR 35.104. Without modifications to the Utah Rules of Civil Procedure the Plaintiff obviously was ineligible for the relief. He provided the trial court no good cause. He failed to prepare his case timely by substituting in his preferred counsel and by failing to have the witnesses available who he desired to call at trial. Furthermore, he sabotaged his own case by terminating his legal counsel two weeks before trial. Even so, he had adequate representation if the court properly considers that Watkins and Halliday were still of counsel to the case and Plaintiff himself was a member of the Bar. Each of these reasons in and of itself is sufficient to prevent the dismissal or continuance and make Rohan ineligible for that particular service from the trial court.

2. Plaintiff Was Not Excluded From Participating In the Judicial Process or Otherwise Discriminated Against by the Trial Court.

Rohan never met the second requirement for implementation of ADA, that he be excluded from participation or otherwise discriminated against by the trial court. See, Tyler. That Rohan was permitted free and open access to the judicial process cannot be questioned.

The trial court constitutes a public entity to which Plaintiff is entitled to access. Moreover, Plaintiff has the right to be heard and to seek justice before the court. Westinghouse Elec. Supply Co. v. Paul W. Larsen Contractor, Inc., 544 P.2d 876, 879 (Utah

1975). However, nothing in the Plaintiff's brief or the trial court record suggests that Rohan was denied access or his opportunity to seek justice. The trial court accepted his complaint in April 1998 and required the Defendants to appear and defend. The court also allowed Plaintiff to utilize its judicial authority to seek discovery, including taking depositions. The court nowhere prohibited Rohan from filing motions or seeking other forms of relief. Even a jury trial was scheduled for the Plaintiff and jury appeared to hear Plaintiff's case on the morning of June 20, 2000.

Rohan erroneously argues that the requirement of participation or possibility of benefits somehow equates to a requirement that the trial court provide him the end result he is looking for. The opportunity to be heard and seek justice does not always equate with the right to be successful in your request for relief. For example, simply because a party may be entitled to apply for social security benefits does not mean that the administration is mandated to award them. The Social Security Administration would still be required to review its policies and procedures and insure the applicant meet the criteria for payment. Even under the ADA there remains an expectation that the justice being sought is the justice to which a party is entitled.

The trial court provided Plaintiff access and the method by which Rohan could acquire relief. The court made available to him every opportunity to retain the counsel of his choice. Moreover, the court delayed over two years in bringing Rohan's case to trial in order that Rohan, and the Defendants, could be prepared with the witnesses and exhibits necessary to

present their case. Plaintiff was given an opportunity to call witnesses and present evidence, even as late as the first morning of trial. It is not discriminatory for the trial court to expect Plaintiff to diligently prepare his case and to approach the court in a timely manner with any concerns as to representation.

3. Any Exclusion, Denial of Benefits or Discrimination Which Plaintiff Experienced Resulted From His Dilatory Conduct Not By Reason of His “Disability”.

The fact that Plaintiff’s June 19th motion for voluntary dismissal or continuance was denied by the court did not result from any exclusion of Rohan from the judicial process by reason of his disability. Instead, any lack of access to the process came about because Plaintiff was dilatory in preparing his case. Plaintiff cannot, therefore, meet the third requirement identified by the Tyler court needed to implement Title II of the ADA. Id., at 857 F.Supp. 800, 817 (D.Kan. 1994). The law imposes the burden of proof as to this element upon the Plaintiff. Id.

The fact that the court continued to provide Rohan access to the judicial process can be seen by the fact that the court presented him an opportunity to present his case on the morning of trial. Plaintiff’s response to the court was that he was unprepared to proceed.

Plaintiff has argued both to the trial court and this Court that his inability to proceed resulted from his lack of legal counsel. However, the record is crystal clear that Rohan’s lack of representation on the morning of trial resulted not because he was disabled but because he discharged his lawyers two weeks prior. His decision to terminate them was not because

of his disability or discrimination, but admittedly because his counsel had “limited jury trial experience” and lacked the experience required to “properly present his claims.” This decision by Plaintiff can hardly be suggested to be discriminatory conduct on the part of the trial judge.

Moreover, even on the morning of trial Plaintiff had the legal assistance necessary to proceed with the case. Halliday and Watkins were still of counsel to the case, having never been released by the Court. Further, the Plaintiff, notwithstanding his cries of disability, was still an “active” member of the Utah State Bar continuing to represent his own clients in legal proceedings. The indication to the trial court that the matter needed to be continued or dismissed resulted more from Plaintiff’s tactical predilections rather than any disability.

The fact of the matter is that Plaintiff simply failed to prepare. He made no effort to substitute counsel until just before trial when it would cause the greatest inconvenience to the court and the Bosemans. He terminated his original attorneys to intentionally inhibit his ability to present his case.

It is also important to consider Rohan’s allegations of prejudice under the ADA in light of the fact that he delayed until the day prior to trial to raise the issue with the trial court⁴. Other jurisdictions have imposed the requirement, even on the disabled, that the trial

⁴The trial court should take notice of the instructions by the trial court to the parties in this matter, including the Plaintiff, in the file note prepared following the March 2, 2000 pretrial. Those instructions state, “In compliance with the Americans with Disabilities Act, individuals needing special accommodations. . . during this proceeding should call Third District Court. . .at least three working days prior to the proceeding.”

court be “timely” notified of any discriminatory result in trial procedure. For example, a Florida appellate court declared in an ADA case:

[U]nder state and federal disability laws, disabled persons are entitled to equal and meaningful access to the courts; however, in order to be accommodated such persons have the duty not only to make their disabilities known but also to inform the court when measures taken to remedy such obstacles are ineffective. The **law requires diligence of all parties to protect their rights – including the disabled** to the extent that they are capable of doing so.

Allstate Ins. Co. v. Gulisano, 722 So.2d 216, 218 (Fl. App. 1998)(emphasis added). Even though Plaintiff had attempted to continue and dismiss the case since the first part of June, he never indicated to the trial judge that he was entitled to relief under the ADA. The judge, therefore, could not even consider Plaintiff's ADA argument until the jury was in place on the morning of trial.

It is clear that Rohan cannot meet any of the requirements necessary for the Americans with Disabilities Act to apply in this case. This Court must, therefore, reject Plaintiff's argument that the trial court committed error or abused its discretion in denying his June 19th motion.

POINT II: THE TRIAL COURT PRESERVED PLAINTIFF'S DUE PROCESS AND EQUAL PROTECTION RIGHTS EVEN IN REJECTING HIS MOTIONS TO VOLUNTARILY DISMISS THE ACTION OR TO CONTINUE THE TRIAL DATE.

The Plaintiff, in addition to his other claims, alleges several state and federal constitutional violations. The tactic of including alleged constitutional violations is typical. This tactic is unjustified and unfair because it imposes too great a burden on the opposing

party, as well as the court. “[a] reviewing court is entitled to have the issues clearly defined with pertinent authority cited and is not simply a depository in which the appealing party may dump the burden of argument and research.” Jensen v. IHC Hospitals, Inc., 944 P.2d 327 (Utah 1997). This is precisely what the Plaintiff has done. He has alleged violations of due process, equal protection, the open courts provision, the uniform application of laws provision, as well as the fourteen amendment, but failed to support these allegations with any reasoning beyond the most basic generalities. It is, therefore, then left to the opposing party and the court to marshal applicable facts to provide reasoning one way or the other. In effect, this tactic allows the burden to be unjustifiably shifted, requiring the opposition to prove that everything was constitutional. Under such circumstances, the Utah Supreme Court has held that it “may refuse to address a claim of unconstitutionality where the party making the claim has failed to make the requisite showing to support the claim.” Id. This court should, as the court in Jensen did, “decline to address this issue as it is inadequately researched and briefed.” Id.

A. The Court Did Not Violate the Plaintiff’s Due Process or Equal Protection Rights.

Assuming that the Plaintiff’s allegations of constitutional violations are adequately researched and briefed in order to be addressed by the court, they are insufficient to show any constitutional violation.

First, there was no violation of the Plaintiff’s due process rights. The Plaintiff fails to cite the factors which make up due process, the Utah Supreme Court has held that:

[I]n depriving a person of life or liberty, the essentials of due process are: (a) the existence of a competent person, body, or agency, authorized by law to determine the questions; (b) an inquiry into the merits of the question by such person, body or agency; (c) notice to the person of the inauguration and purpose of the inquiry and the time at which such person to appear if he wishes to be heard; (d) right to appear in person or by counsel; (e) fair opportunity to submit evidence, examine and cross examine witnesses; (f) judgment to be rendered upon the record thus made. *In the absence of a statute laying down other or more specific requirements, the above conditions meet the demands of due process.*

Christiansen v. Harris, 163 P.2d 314, 317 (Utah 1945)(emphasis added). The Plaintiff has not alleged that any of these elements were not met, nor has he asserted that any statutorily created due process requirements have been violated. Rather, the Plaintiff merely argues that because the court did not accept his argument that the ADA applied in this matter his due process rights have been violated. This, he claims, “offend[s] the fundamental principle of fairness that underpins the judicial process.” (Appellants Brief, p.38). However, the ADA has not been violated and is inapplicable to these circumstances for the reasons previously identified.

B. The Trial Court Did Not Violate the Plaintiff’s Constitutional Right to an Open Court.

The Plaintiff’s next alleged constitutional violation involves the open courts provision of the Utah Constitution. This clause of the Utah Constitution states:

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and not personal shall be barred from prosecuting or defending before any tribunal in this state, by himself or counsel, any civil cause which he is a party.

Utah Constitution, Article I, Section 11. Again, the Plaintiff fails to indicate how this provision was violated, but merely states the “denial of his motions and the dismissal with prejudice with the imposition of fees and costs, under the facts of this case was neither fair, nor were the rules and procedures equally and uniformly applied.” (Appellant’s Brief, p.39). There is no explanation of why the denials were unfair nor is there an explanation showing that the rules and procedures were not uniformly applied.

Furthermore, “the courts have, however, always considered and treated [the open court’s provision], not as creating new rights, or as giving new remedies where none otherwise are given, but as placing a limitation upon *the legislature* to prevent that branch of the state government from closing the doors of the courts against any person who has a legal right which is enforceable in accordance with some known remedy.” Brown v. Wightman, 151 P.2d 366, 367 (Utah 1915)(emphasis added). There is no legislative limitation in question in this case, which is what the open courts provision restricts. No remedy available to the Plaintiff has been abrogated by the court or the legislature. As the court in Wightman said, “courts can only protect and enforce existing rights, and they may do that only in accordance with established and known remedies.” Id. at 367. The Plaintiff’s argument, therefore, is without foundation.

C. The Trial Court Did Not Violate the Plaintiff's Constitutional Right to Uniform Application of the Law, Nor Did the Court Violate the Plaintiff's Fourteenth Amendment Rights.

The Plaintiff now moves on to alleged violations of the uniform application of laws provisions of the Utah Constitution and the Fourteenth Amendment of the U. S. Constitution. Importantly, the Utah Supreme Court in Whitmer v. City of Lindon, stated that “we have made clear that Utah’s uniform operation of the laws provision is ‘at least as exacting, and in some circumstances, more rigorous than the standard applied under the Federal constitution’ [citation omitted] therefore, ‘we need only determine whether the ordinances in question satisfy Article I, Section 24’ of the Utah Constitution. ‘If so, they will pass [Fourteenth Amendment] Federal muster.’” 943 P.2d 226, 230 (Utah 1997); Carrier v. Pro-Tech Restoration, 944 P.2d 346, 356 (Utah 1997). The Plaintiff’s uniform application of laws claim is unfounded, which necessarily makes the Fourteenth Amendment claim, likewise, unfounded.

Though the trial court found otherwise, the Plaintiff argues that he is disabled under the ADA. He then argues, as far as the Defendants can discern, that disabled people are discriminated against under Rule 4-105 and Rule 41. That is, however, as much explanation as the Plaintiff provides. He does not explain how disabled people are treated differently, which is a burden that he must meet. One who assails a legislative classification as arbitrary has the burden of proving it to be such. See, State v. J.B.&R.E. Walker, Inc., 100 UT 523, 116 P.2d 766 (1941). Furthermore, one page later, the Plaintiff specifically states that, in fact,

he was not treated differently than non-disabled people, stating: “the trial court even after becoming aware of the appellant’s circumstances treated him as any other litigant in spite of his reasonable request for a modification. . .” (Appellant’s Brief, p.41-42).

With such contradictory statements, it is difficult to understand exactly what is being argued. In the event, however, that the Plaintiff is arguing that he was treated differently than other disabled people, his argument is unpersuasive because it is unsupported by any facts.

**POINT III: THE TRIAL COURT ACTED APPROPRIATELY IN
DISMISSING PLAINTIFF’S COMPLAINT WITH PREJUDICE
WHEN PLAINTIFF FAILED AND REFUSED TO TIMELY
PROSECUTE THE MATTER.**

The trial court dismissal of Plaintiff’s case with prejudice and upon the merits was appropriate inasmuch as Plaintiff refused to prosecute the matter. It should be noted before proceeding further that this Court’s consideration of the trial court’s decision to dismiss the case with prejudice must be viewed independently from the trial court’s rejection of Plaintiff’s requests to dismiss without prejudice or to continue the trial. The trial court was still willing and did provide the Plaintiff an opportunity to prosecute the cause subsequent to its rejection of Plaintiff’s June 19th and earlier motions. Nevertheless, Plaintiff failed to move forward at trial.

This last action was that which resulted in the dismissal.

Utah case law is clear that the disposition of a motion to dismiss for failure to prosecute rests entirely within the sound discretion of the trial court and such a decision will not be upset absent a showing of abuse of discretion. Grundmann v. Williams & Peterson,

685 P.2d 538 (Utah 1984); Wilson v. Lamber, 613 P.2d 765 (Utah 1980). Case law also supports the proposition that a dismissal for failure to prosecute may be with prejudice and considered an adjudication on the merits. Charlie Brown Const v. Leisure Sports, 740 P.2d 1368 (Utah App. 1987); Maxfield v. Rushton, 779 P.2d 237, 239 (Utah App. 1989).

The trial court record reflects that the Plaintiff's case was dismissed as a result of Plaintiff's failure to prosecute the same. See, Findings of Fact, Conclusions of Law and Order and Judgment, Pgs. 336-346. The trial court's decision was appropriate considering the findings which it made. In evaluating the decision to dismiss with prejudice this Court should examine the following factors to see if the trial court abused its discretion. These factors include:

- (1) The time elapsed in the case prior to dismissal;
- (2) The opportunity each party had to move the case forward;
- (3) What each party had done to move the case forward;
- (4) What difficulty or prejudice may have been caused to the other side; and
- (5) Whether injustice may result from the dismissal.

Maxfield v. Rushton, 779 P.2d 237, 239 (Utah App. 1989). In evaluating all these factors from the findings which the trial court made in this matter, this Court must preserve the trial court's discretion in dismissing that matter for failing to prosecute.

The failure to prosecute which resulted in dismissal essentially occurred on the morning of trial. On that date, the parties appeared, and the record indicates that defense

counsel was present and prepared to proceed. The Plaintiff was not prepared and upon inquiry from the court refused to present his evidence.

Plaintiff was a party during the entire case. He had ample opportunity to prepare to case for trial. The record does not reflect any request that the Plaintiff made of the trial court to assist in trial preparation, prior to June 5, 2000, which was denied him. He was not restricted in any way from pursuing discovery, witnesses or testimony. Moreover, he was never inhibited from changing his legal counsel until he made the request a scant two and half weeks before trial.

The fact of the matter was that Plaintiff had prepared for trial, with the assistance of counsel Paul Halliday and Stephen Watkins. An examination of Rohan's witness and exhibit disclosures shows over twenty witnesses available to testify at trial as well as a number of documents. Yet, during the two year discovery period Plaintiff did not make the effort to acquire the one thing he claims he needed most, new trial counsel.

In a delayed effort to get the new counsel he needed the Plaintiff requested a continuance on June 2nd. This was appropriately denied as untimely. However, in a bizarre attempt to make the needed delay as important to the trial court as it was to him, Rohan discharged his counsel two weeks before trial. In his motions thereafter, Plaintiff attempted to argue that he could not proceed to try the case without assistance. The trial court, however, seeing that Plaintiff had or created his own crises, required Rohan to proceed with Halliday

and Watkins or alone. This resulted in Plaintiff standing before the trial judge the first morning of trial indicating that he was unprepared to call any witnesses.

Had the trial court bought into Plaintiff's stall tactics so late in the proceedings, it certainly would have prejudiced the Defendants. As indicated above, the financial cost and time to locate and prepare witnesses was significant. A continuance of dismissal without prejudice meant Defendants would spend an equal amount in time and money locating and preparing new witnesses, as well as apparently deposing Plaintiff's newly anticipated experts. According to Plaintiff's affidavits with his new counsel in place it was expected that locating and preparing experts would start from scratch. Plaintiff was attempting to witness shop at Defendants' expense. There were also direct costs incurred by Jerald Boseman who had taken a week off from his dental practice in order to attend the trial.

The real surprise in this case is that Rohan has attempted to assert any injustice in the dismissal at all. How can injustice occur when Plaintiff was the party refusing to put on his case the morning of trial? No one prohibited or inhibited his presentation. His argument that his lack of legal counsel was an improper restriction by the trial court is baseless. He had legal counsel, Watkins and Halliday. He simply did not want to use them. In fact he intentionally excluded them knowing trial was to occur in two weeks. Moreover, Plaintiff's own skills were sufficient to present his case if need be. Even with own skills available on the morning of trial Plaintiff chose not to proceed.

It is not injustice for the trial court to require a party to prepare its case in a reasonable period of time. Two years is certainly a reasonable period for a party to prepare. It is not injustice for the court to refuse delay when a party has been dilatory. It is not injustice for a trial court to expect a party to try his own case when that party has intentionally subverted his own representation expecting the court to continue or dismiss the matter.

POINT IV: THE TRIAL COURT'S AWARD OF ATTORNEY'S FEES TO THE PLAINTIFF WAS FACTUALLY AND LEGALLY JUSTIFIED.

In his brief Rohan argues that the trial court erroneously awarded attorney's fees and costs to the Bosemans. In the Findings of Fact, Conclusions of Law issued by the trial court July 31, 2000, the Court concluded that "Plaintiff's actions are sanctionable within the contemplation under Utah Code Ann. §78-27-56 and this court's inherent authority to govern judicial proceedings and make appropriate sanctions."

U.C.A §78-27-56 states, "In a civil action, the court shall award reasonable attorney's fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought in good faith." Such were the findings and conclusions reached by the trial court in this matter.

Plaintiff's numerous motions and actions of June 2000 certainly lacked merit. He made various attempts to influence the trial court as to his need to continue or dismiss the trial because of an alleged disability or lack of counsel. Nevertheless, he at all times lacked sufficient factual background to support the claims he was making. His motions were frivolous, lacking even the suggestion of good cause needed for success.

Plaintiff's June 19th motion is a prime example as to his meritless conduct. Alleging discrimination by the trial court under the ADA, was baseless for the reasons previously set forth. The trial court recognized this fact and set forth conclusions of law indicating that the argument was without foundation in law or fact. The conclusions of law also noted that the ADA does not require the trial court to issue a continuance or voluntary dismissal. The argument was clearly without merit and made frivolously. See, Cady v. Johnson, 671 P.2d 149 (Utah 1983).

Plaintiff's arguments were also made in bad faith. Bad faith exists when party makes an effort to hinder or delay others to an action. Id. Plaintiff's conduct during June 2000 was the epitome of efforts to hinder or delay the court and the Boseman's from proceeding with the case so he could restructure his legal counsel and expert witnesses. He made numerous requests that the court continue the trial or dismiss the case without prejudice to cover for his own error in failing to timely retain and involve trial counsel. Requests for relief were made repeatedly even though the trial court had previously denied the same. Finally, the Plaintiff argued again and again that he could not proceed with trial because he did not have assistance of counsel. Simultaneously, Rohan himself was reeking havoc on his own case by dismissing his legal counsel of two years and failing to bring witnesses to trial to testify. His failure to prepare not lack of counsel was the issue. This conduct constitutes bad faith under the statute and entitles the Defendants to attorney's fees. Id.

Plaintiff also argues in his brief that the trial court did not draw any specific conclusions concerning bad faith. Plaintiff is in error. While the court's conclusions of law do not specifically identify bad faith by name, conclusion 7 does indicate that Plaintiff's actions were sanctionable under U.C.A. §78-27-56. Bad faith is an essential element of that statute and is therefore a part of the Conclusions of Law.

POINT V: PLAINTIFF WAS NOT ENTITLED TO A NEW TRIAL UNDER RULE 59(a) OF THE UTAH RULES OF CIVIL PROCEDURE.

Subsequent to the trial court's entry of the Findings of Fact, Conclusions of Law and Order and Judgment, which occurred on July 31, 2000, Rohan requested the court grant him a new opportunity to try his case pursuant to Rule 59(a) or amend the July 31, 2000 Order to dismiss the case without prejudice under 59(e). The court denied Plaintiff's request. The granting or denial of such a motion is within the discretion of the trial judge. Thorley v. Kolob Fish Club, 13 Utah 2d 294, 373 P.2d 574 (1962). Plaintiff maintains the burden of proof to show the evidence is insufficient to sustain the trial court's order when viewed in the light most favorable to the ruling. Tingey v. Christensen, 987 P.2d 588 (Utah 1999).

Before the trial court could even consider granting a new trial Plaintiff had to demonstrate that one or more of the causes identified in Rule 59(a) existed. The causes which Plaintiff indicates existed in the July 31, 2000 ruling was:

- (1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion by which either party was prevented from having a fair trial; and
- (7) Error in law.

Rohan argues that the trial court abused its discretion in denying his various motions filed throughout June 2000. Each of the motions requested the trial court either grant a continuance of the trial or permit Plaintiff to voluntarily dismiss his case without prejudice. However, the trial court did not abuse its discretion as previously discussed above.

Each motion to continue or dismiss which Plaintiff filed was done for the purpose of substituting in new counsel of his choice and allowing new counsel to prepare for trial. The court correctly concluded that Rohan had been dilatory in getting new counsel aboard and up to speed. The court recognized that Rohan had adequate counsel in Halliday and Watkins. Finally, the court rightly perceived that such a request a few days before trial would impose a substantial burden of time and cost on both the Defendants and the court. All these reasons, in addition to the arguments set forth above, provided the trial judge sufficient rationale to deny Plaintiff's motions.

The majority of Rohan's "error of law argument" centers around the trial court's refusal to apply the Americans with Disabilities Act in providing Plaintiff with the continuance or dismissal he requested. Bosemans do not intend to reargue the entire issue of the ADA as it pertains to Plaintiff's motions to continue or dismiss; however, as previously discussed, the Act did not apply at that time, nor does it apply to Rohan's Rule 59(a) motion.

Plaintiff is not a qualified person with a disability. Rohan fails to meet the eligibility requirements imposed for receiving a new trial. In order to be a "qualified person" under the

ADA Rohan must meet those eligibility requirements with or without modifications to the rules.

Rohan also received complete and total access to the court system. He was provided an opportunity to pursue justice and have the jury hear his complaints. Even as late as the morning of July 20, 2000, with the jury present, the trial judge gave Plaintiff the opportunity to put on his witnesses. He failed to do so.

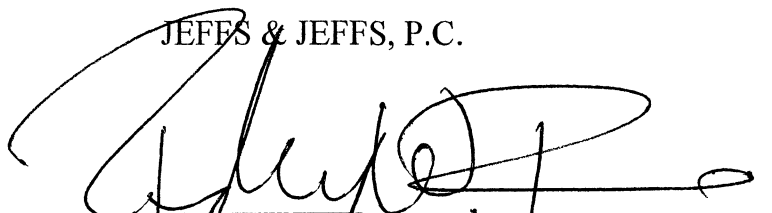
Finally, the evidence indicates that any denial of access to the judicial process did not result from the Plaintiff's disability. All limitations, if any occurred as a result of Plaintiffs failure to timely prepare and prosecute his case.

CONCLUSION

For the reasons set forth herein, Defendants/Appellees Chad and Jerald Boseman respectively request that this Court reject Plaintiff's appeal of the trial court's dismissal of his case and sustain the decisions of the trial court previously rendered.

DATED and SIGNED this 24th day of October, 2001.

JEFFS & JEFFS, P.C.

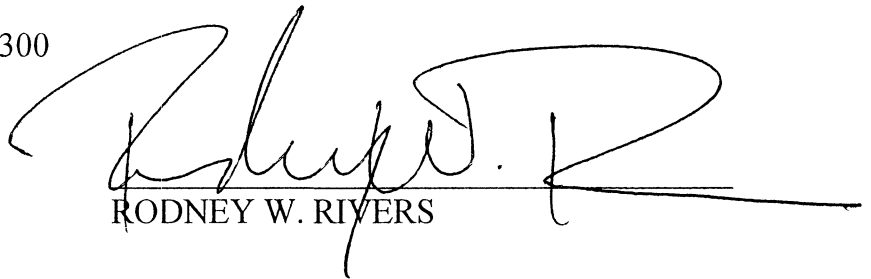


RODNEY W. RIVERS
Attorney for Defendants/Appellees

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copies of the foregoing were deposited with the Utah Court of Appeals and mailed, first class mail, postage prepaid, this 24th day of October, 2001, addressed as follows:

Joseph W. Rohan
376 East 400 South, Suite 300
Salt Lake City, UT 84111



RODNEY W. RIVERS

ADDENDUM “A”

nance of a ski run that was alleged to create a hazard to skiers. *Clover v. Snowbird Ski Resort*, 808 P.2d 1037 (Utah 1991).

— **Supervision of employees.**

Evidence raised a genuine issue of material

fact, precluding summary judgment, as to whether a ski area operator was negligent in not supervising its employees in regard to the practice of reckless skiing. *Clover v. Snowbird Ski Resort*, 808 P.2d 1037 (Utah 1991).

COLLATERAL REFERENCES

Utah Law Review. — Utah's Inherent Risks of Skiing Act: Avalanche from Capitol Hill, 1980 Utah L. Rev. 355.

78-27-54. Inherent risks of skiing — Trail boards listing inherent risks and limitations on liability.

Ski area operators shall post trail boards at one or more prominent locations within each ski area which shall include a list of the inherent risks of skiing, and the limitations on liability of ski area operators, as defined in this act.

History: L. 1979, ch. 166, § 4.

Meaning of "this act." — See note following same catchline in notes to § 78-27-51.

78-27-55. Repealed.

Repeals. — Section 78-27-55 (L. 1979, ch. 166, § 5), relating to notice requirements in case of injury arising from the inherent risks of

skiing and the statute of limitations on such action, was repealed by Laws 1980, ch. 43, § 1.

78-27-56. Attorney's fees — Award where action or defense in bad faith — Exceptions.

(1) In civil actions, the court shall award reasonable attorney's fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith, except under Subsection (2).

(2) The court, in its discretion, may award no fees or limited fees against a party under Subsection (1), but only if the court:

(a) finds the party has filed an affidavit of impecuniosity in the action before the court; or

(b) the court enters in the record the reason for not awarding fees under the provisions of Subsection (1).

History: L. 1981, ch. 13, § 1; 1988, ch. 92, § 1.

NOTES TO DECISIONS

ANALYSIS

Appeal.

— Frivolous appeal.

Breach of covenant of good faith by insurer.

Discretion of court.

Essential elements.

Findings.

Hearing.

Paralegal services.

State of mind.

"Without merit" and "good faith."

Advisory jury.**—Equity.**

When there is a demand for a jury trial in an equity case, the jury will serve only in an advisory capacity unless both parties have clearly consented to accept a jury verdict. *Romrell v. Zions First Nat'l Bank*, 611 P.2d 392 (Utah 1980).

Trial court did not commit prejudicial error by allowing a jury to sit in an equity proceeding where the jury was retained merely as an advisory jury to consider the sole question of the reasonableness of plaintiff's reliance on defendant's act. *Tolboe Constr. Co. v. Staker Paving & Constr. Co.*, 682 P.2d 843 (Utah 1984).

—Notice to parties.

In an action involving both legal and equitable issues, where both parties demanded a jury trial without limiting their demand to particular claims, trial court should have notified the parties before the trial began of its intention to consider the jury advisory; it could not deem the jury's verdict advisory and nonbinding after the trial without such notice. *Goldberg v. Jay Timmons & Assocs.*, 896 P.2d 1241 (Utah Ct. App. 1995).

Trial by consent.**—Equity.****—Motion for directed verdict.**

Where the case was essentially one in equity but the parties and court appeared to have consented to presenting their case to a jury whose verdict would have "the same effect as if trial by jury had been a matter of right," under Subdivision (c), the determination of whether a directed verdict was proper was to be tested by the same rules governing cases at law. *Willard M. Milne Inv. Co. v. Cox*, 580 P.2d 607 (Utah 1978).

Trial by court.**—Waiver of bench trial.**

Even though former statute providing for trial by court in absence of demand for jury was couched in mandatory terms, and a party might have an absolute right to have the issues tried by the court, the right could be waived, as by proceeding to trial before a jury. *Houston Real Estate Inv. Co. v. Hechler*, 47 Utah 215, 152 P. 726 (1915).

—Waiver of jury trial.

Where it did not appear that any demand for a jury trial was made, or that any objection or exception was made at any time during trial against right of the court to try the case without a jury, it would be presumed on appeal that a trial by jury was waived. *Perego v. Dodge*, 9 Utah 3, 33 P. 221 (1893), *aff'd*, 163 U.S. 160, 16 S. Ct. 971, 41 L. Ed. 113 (1896).

Trial by jury.**—Absence of demand.**

Court did not abuse its discretion in granting jury trial to defendant, under this rule, over plaintiff's objections although defendant had not made proper demand for jury trial under Rule 38, where plaintiff was not prejudiced thereby. *James Mfg. Co. v. Wilson*, 15 Utah 2d 210, 390 P.2d 127 (1964).

—Quiet title action.

This rule gives the right to have any legal issue of fact tried by a jury upon proper demand, and plaintiff in an action to quiet title to mining claims was entitled to a jury trial on issues of fact. *Holland v. Wilson*, 8 Utah 2d 11, 327 P.2d 250 (1958).

Cited in *Randall v. Tracy Collins Trust Co.*, 6 Utah 2d 18, 305 P.2d 480 (1956); *Peirce v. Peirce*, 2000 UT 7, 994 P.2d 193.

COLLATERAL REFERENCES

Am. Jur. 2d. — 47 Am. Jur. 2d Jury §§ 61, 69; 75A Am. Jur. 2d Trial § 714 et seq.

C.J.S. — 50 C.J.S. Juries §§ 98 to 105; 88 C.J.S. Trial §§ 20, 203, 547 et seq.

A.L.R. — When does jeopardy attach in a non-jury trial, 49 A.L.R.3d 1039.

Discretion of district court under Rule 39(b) of Federal Rules of Civil Procedure, authorizing it to order jury trial notwithstanding party's failure to make seasonable demand for jury, 6 A.L.R. Fed. 217.

Rule 40. Assignment of cases for trial; continuance.

(a) *Order and precedence.* The district courts shall provide by rule for the placing of actions upon the trial calendar (1) without request of the parties or (2) upon request of a party and notice to the other parties or (3) in such other manner as the courts may deem expedient. Precedence shall be given to actions entitled thereto by statute.

(b) *Postponement of the trial.* Upon motion of a party, the court may in its discretion, and upon such terms as may be just, including the payment of costs occasioned by such postponement, postpone a trial or proceeding upon good cause shown. If the motion is made upon the ground of the absence of evidence, such motion shall also set forth the materiality of the evidence expected to be obtained and shall show that due diligence has been used to procure it. The court may also require the party seeking the continuance to state, upon affidavit or under oath, the evidence he expects to obtain, and if the adverse

party thereupon admits that such evidence would be given, and that it may be considered as actually given on the trial, or offered and excluded as improper, the trial shall not be postponed upon that ground.

(c) *Taking testimony of witnesses present.* If required by the adverse party, the court shall, as a condition to such postponement, proceed to have the testimony of any witness present taken, in the same manner as if at the trial; and the testimony so taken may be read on the trial with the same effect, and subject to the same objections that may be made with respect to a deposition under the provisions of Rule 32(c)(3)(A) and (B).
(Amended effective April 29, 1999.)

Amendment Notes. — The 1999 amendment substituted “Rule 32(c)(3)(A) and (B)” for “Rule 32(e)(1) and (2)” in Subdivision (c).

Compiler’s Notes. — Subdivision (a) of this

rule is similar to Rule 40, F.R.C.P.

Cross-References. — Amendment of pleadings to conform to evidence, continuance upon, U.R.C.P. 15(b).

NOTES TO DECISIONS

Abuse of discretion.

Postponement.

— In general.

— Absence of party.

— Discretion of court.

— Inability of counsel to attend trial.

— Unavoidable absence.

— New theory of case.

— Procedural delays.

— Supporting affidavits.

— Unavailable witness.

— Lack of diligence.

— Need.

Cited.

Abuse of discretion.

Where the plaintiff sought to substitute a new expert only after his previously-designated expert decided at the last minute not to testify and moved to substitute witnesses before the discovery completion date, the court could have obviated any prejudice by granting a motion for a continuance and requiring the plaintiff to pay for the expense of deposing the new expert, and it abused its discretion in excluding the substitute expert’s evidence. *Boice v. Marble*, 1999 UT 71, 982 P.2d 565.

Postponement.

— In general.

To grant one party continuance after continuance to the prejudice of the other party would be patently unfair. This is especially true when such continuances are being granted to the plaintiff who has triggered the time constraints of litigation by bringing the suit in the first place. It is equally unfair to allow a party to name new witnesses several days before trial. *Hill v. Dickerson*, 839 P.2d 309 (Utah Ct. App. 1992).

— Absence of party.

Continuance would not be granted because of absence of a party, unless he was a material witness, and, if so, the facts expected to be proved by him had to be stated under oath, unless the oath was waived. It was also necessary that party had used due diligence to be present at the trial. *McGrath v. Tallent*, 7 Utah 256, 26 P. 574 (1891).

Refusal of trial court to postpone trial was not abuse of discretion where case was set down for trial, and had once before been continued because of absence of party who was principal witness, and second continuance was sought by attorney who was not of record in case. *Lancino v. Smith*, 36 Utah 462, 105 P. 914 (1909).

Refusal to grant continuance in personal injury case was an abuse of discretion where plaintiff was not able to attend the trial because of his physical condition, there was no evidence of malingering by the plaintiff, and the plaintiff’s testimony was essential to his case. *Bairas v. Johnson*, 13 Utah 2d 269, 373 P.2d 375 (1962).

Defendant was not prejudiced by court’s refusal to grant a continuance after defendant herself had stated that her illness probably would not impair her ability to function at the trial other than by causing her some discomfort and the trial court made provisions to accommodate defendant in case the illness forced her to leave suddenly. *Godfrey v. Godfrey*, 854 P.2d 585 (Utah Ct. App. 1993).

— Discretion of court.

Denial of motion for continuance was within discretion of trial court. *Sharp v. Canakis Gianoulakis*, 63 Utah 249, 225 P. 337 (1924).

Trial courts have substantial discretion in deciding whether to grant continuances. *Christenson v. Jewkes*, 761 P.2d 1375 (Utah 1988).

— Inability of counsel to attend trial.

The inability of counsel to be present at the time set for trial does not necessarily entitle his client to a continuance. *Griffiths v. Hammon*, 560 P.2d 1375 (Utah 1977).

— Unavoidable absence.

When counsel has made timely objections, given necessary notice, and has made a reasonable effort to have the trial date changed for good cause, it would be an abuse of discretion not to grant a continuance. *Griffiths v. Hammon*, 560 P.2d 1375 (Utah 1977).

— New theory of case.

Continuance could be obtained to develop a theory of the case suggested after issue joined

and before trial. *Tiernan v. Trewick*, 2 Utah 393 (1877).

—**Procedural delays.**

Court properly denied motion for continuance in action based on credit card obligation which had been procedurally delayed for two and a half years by interrogatories and by various motions of the defendant; and although trial date had been set for four months, motion for continuance was not filed until nine days before trial. *First Sec. Bank v. Johnson*, 540 P.2d 521 (Utah 1975).

—**Supporting affidavits.**

Subdivision (b) does not require affidavits to accompany a motion for continuance. *Bairas v. Johnson*, 13 Utah 2d 269, 373 P.2d 375 (1962).

—**Unavailable witness.**

—**Lack of diligence.**

Where subpoena for absent witness was not placed in hands of an officer for service until the morning the case was called for trial, though it had been set for several weeks, and the witness had testified at a former trial, continuance was denied. *Corporation of Members of Church of Jesus Christ of Latter-Day Saints v. Watson*, 30 Utah 126, 83 P. 731 (1906).

In malpractice action, motion for continuance

based on plaintiff's inability to serve subpoena on vacationing medical witness was properly denied, where plaintiff had made no effort to depose witness and had never contacted witness for the purpose of testifying. *Maxfield v. Fishler*, 538 P.2d 1323 (Utah 1975).

After plaintiff had been granted one continuance because of unavailability of her preferred expert witness, and her second request for a continuance several months later was solely due to her own failure to retain and designate a new expert witness in a timely manner, there was no abuse in the district court's denial of plaintiff's second motion. *Hill v. Dickerson*, 839 P.2d 309 (Utah Ct. App. 1992).

—**Need.**

Where the defendant's counsel had three weeks to prepare for trial, and where two of the witnesses, purportedly important to his case, were actually present at trial and thus subject to cross-examination, the purely speculative need for a third witness did not entitle the defendant to the granting of a motion for continuance. *State v. Humpherys*, 707 P.2d 109 (Utah 1985).

Cited in *Thorley v. Thorley*, 579 P.2d 927 (Utah 1978); *Holbrook v. Master Protection Corp.*, 883 P.2d 295 (Utah Ct. App. 1994).

COLLATERAL REFERENCES

Am. Jur. 2d. — 17 Am. Jur. 2d Continuance § 1 et seq.; 75 Am. Jur. 2d Trial §§ 76, 80, 83, 84.

C.J.S. — 17 C.J.S. Continuances § 1 et seq.; 88 C.J.S. Trial §§ 18 to 35.

A.L.R. — Admissions to prevent continuance

sought to secure testimony of absent witness in civil case, 15 A.L.R.3d 1272.

Continuance of civil case as conditioned upon applicant's payment of costs or expenses incurred by other party, 9 A.L.R.4th 1144.

Rule 41. Dismissal of actions.

(a) *Voluntary dismissal; effect thereof.*

(1) *By plaintiff.* Subject to the provisions of Rule 23(e), of Rule 66(i), and of any applicable statute, an action may be dismissed by the plaintiff without order of court by filing a notice of dismissal at any time before service by the adverse party of an answer or other response to the complaint permitted under these rules. Unless otherwise stated in the notice of dismissal, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

(2) *By order of court.* Unless the plaintiff timely files a notice of dismissal under paragraph (1) of this subdivision of this rule, an action may only be dismissed at the request of the plaintiff on order of the court based either on:

(i) a stipulation of all of the parties who have appeared in the action; or

(ii) upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

(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. After the plaintiff,

in an action tried by the court without a jury, has completed the presentation of his evidence the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). 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.

(c) *Dismissal of counterclaim, cross-claim, or third-party claim.* The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third-party claim. A voluntary dismissal by the claimant alone pursuant to Paragraph (1) of Subdivision (a) of this rule shall be made before a responsive pleading is served or, if there is none, before the introduction of evidence at the trial or hearing.

(d) *Costs of previously-dismissed action.* If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

(e) *Bond or undertaking to be delivered to adverse party.* Should a party dismiss his complaint, counterclaim, cross-claim, or third-party claim, pursuant to Subdivision (a)(1)(i) above, after a provisional remedy has been allowed such party, the bond or undertaking filed in support of such provisional remedy must thereupon be delivered by the court to the adverse party against whom such provisional remedy was obtained.

(Amended effective November 1, 1997.)

Amendment Notes. — The 1997 amendment rewrote Subdivisions (a)(1) and (a)(2).

Compiler's Notes. — Subdivisions (a) to (d) of this rule are similar to Rule 41, F.R.C.P.

NOTES TO DECISIONS

Adoption proceedings.

Conversion of motion for directed verdict.

Costs of previously dismissed action.

—Attorney fees.

Counterclaim.

—Lack of prosecution.

Involuntary dismissal.

—Appeal.

—Standard of review.

—Time limits.

—Directed verdict distinguished.

—Findings and conclusions.

—Effect.

—Evidence to be considered.

—Federal rules.

—Form.

—Grounds.

—Failure to establish prima facie case.

—Failure to join indispensable party.

—Failure to prosecute.

—Failure to replace counsel.

—Insufficient evidence.

—Lack of jurisdiction.

—Improper venue distinguished.

—Prejudice.

—Procedure.

—Reinstatement of dismissed count.

—Water appropriation cases.

Uncontested proceedings.

Voluntary dismissal.

—Action pending in another state.

—Conditions.

—Appeal.

—Payment of attorney's fees.

—Court's discretion.

—Laches.

—Two-dismissal rule.

—Second dismissal.

—Quashing of previous summons.

Cited.

Adoption proceedings.

Even if adoption proceedings are "special statutory proceedings" under Rule 81(a), this rule is not inherently inapplicable to adoption proceedings. Thiele v. Anderson, 1999 UT App 56, 975 P.2d 481.

A plaintiff's voluntary dismissal under this rule rendered proceedings in district court a nullity, depriving the court of jurisdiction over the adoption petition as of the date of the filing of the dismissal notice. Thiele v. Anderson, 1999 UT App 56, 975 P.2d 481.

been lost, the court in which such judgment was recovered may, upon motion and satisfactory proof, authorize the attorney of the judgment creditor to satisfy the same, or may enter an order declaring the same satisfied and direct satisfaction to be entered upon the docket.

(c) *Entry by clerk.* Upon receipt of a satisfaction of judgment, duly executed and acknowledged, the clerk shall file the same with the papers in the case, and enter it on the register of actions. He shall also enter a brief statement of the substance thereof, including the amount paid, on the margin of the judgment docket, with the date of filing of such satisfaction.

(d) *Effect of satisfaction.* When a judgment shall have been satisfied, in whole or in part, or as to any judgment debtor, and such satisfaction entered upon the docket by the clerk, such judgment shall, to the extent of such satisfaction, be discharged and cease to be a lien. In case of partial satisfaction, if any execution shall thereafter be issued on the judgment, such execution shall be endorsed with a memorandum of such partial satisfaction and shall direct the officer to collect only the residue thereof, or to collect only from the judgment debtors remaining liable thereon.

(e) *Filing transcript of satisfaction in other counties.* When any satisfaction of a judgment shall have been entered on the judgment docket of the county where such judgment was first docketed, a certified transcript of satisfaction, or a certificate by the clerk showing such satisfaction, may be filed with the clerk of the district court in any other county where the judgment may have been docketed. Thereupon a similar entry in the judgment docket shall be made by the clerk of such court; and such entry shall have the same effect as in the county where the same was originally entered.

Compiler's Notes. — There is no federal rule covering this subject matter.

NOTES TO DECISIONS

Acceptance of full payment.

— Effect.

Attachment.

Vacation of satisfaction.

Attachment.

Court had duty to make order directing partial satisfaction of judgment to extent of money collected through attachment proceeding. *Blake v. Farrell*, 31 Utah 110, 86 P. 805 (1906).

Acceptance of full payment.

— Effect.

When plaintiff voluntarily accepted full payment of a judgment in his favor, the satisfaction and discharge operated to satisfy and discharge everything merged in and adjudicated by the judgment. *Sierra Nev. Mill Co. v. Keith O'Brien Co.*, 48 Utah 12, 156 P. 943 (1916).

Vacation of satisfaction.

The recorded satisfaction of judgment signed by judgment creditor cannot be vacated without action and hearing in equity, and the lien of an attorney against the proceeds of the judgment does not include his personal right to execute against the judgment debtor. *Utah C.V. Fed. Credit Union v. Jenkins*, 528 P.2d 1187 (Utah 1974).

COLLATERAL REFERENCES

Am. Jur. 2d. — 47 Am. Jur. 2d Judgments § 1004 et seq.

C.J.S. — 49 C.J.S. Judgments §§ 574 to 584.

A.L.R. — Voluntary payment into court of judgment against one joint tort-feasor as release of others, 40 A.L.R.3d 1181.

Rule 59. New trials; amendments of judgment.

(a) *Grounds.* Subject to the provisions of Rule 61, a new trial may be granted to all or any of the parties and on all or part of the issues, for any of the following causes; provided, however, that on a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of

law or make new findings and conclusions, and direct the entry of a new judgment:

(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion by which either party was prevented from having a fair trial.

(2) Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by resort to a determination by chance or as a result of bribery, such misconduct may be proved by the affidavit of any one of the jurors.

(3) Accident or surprise, which ordinary prudence could not have guarded against.

(4) Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial.

(5) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice.

(6) Insufficiency of the evidence to justify the verdict or other decision, or that it is against law.

(7) Error in law.

(b) *Time for motion.* A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

(c) *Affidavits; time for filing.* When the application for a new trial is made under Subdivision (a)(1), (2), (3), or (4), it shall be supported by affidavit. Whenever a motion for a new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits. The time within which the affidavits or opposing affidavits shall be served may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) *On initiative of court.* Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor.

(e) *Motion to alter or amend a judgment.* A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

Compiler's Notes. — This rule is similar to Rule 59, F.R.C.P.

Cross-References. — Harmless error not ground for new trial, Rule 61.

Juror's competency as witness as to validity of verdict or indictment, Rules of Evidence, Rule 606.

NOTES TO DECISIONS

Abandonment of motion.

Accident or surprise

Arbitration awards.

Burden of proof.

Caption on motion for new trial

Correction of insufficient or informal verdict.

Correction of record.

Costs.

Decision against law.

Discretion of trial court.

Effect of order granting new trial.

Effect of untimely motion.

Evidence.

— Insufficiency.

— Sufficiency.

Excessive or inadequate damages.

— Punitive damages.

Failure to object to findings of fact.

Failure to order discovery.

Filing of affidavits.

Grounds for new trial.

— Particularization in motion.

Improper statement by counsel.

Incompetence or negligence of counsel.

Misconduct of jury.

Motion to alter or amend judgment.

Motion to be presented to trial court.

Newly discovered evidence.

New trial on initiative of court.

Procedure for questioning grant of new trial.

Reconsideration of motion for new trial.

Sanctions.

Settlement bars appeal.

Summary judgment.

Time for motion.

Tolling time for appeal.

(9) No attorney fees awarded pursuant to this rule, nor portion thereof, may be shared in violation of Rule of Professional Conduct 5.4.

(Added effective March 31, 1992; amended effective November 15, 1995.)

NOTES TO DECISIONS

Construction

Construction with other rules

Construction.

Attorney-fee-augmentation motions under Subdivision (6) are not conclusively governed by the fee schedule, since the language in the subdivision is very broad and does not mention any restrictions imposed by the schedule. *N A R , Inc v Farr*, 2000 UT App 62, 997 P 2d 343.

Subdivision (6) of this rule, which deals with attorney fees incurred before judgment, does not affect the implementation of Subdivision (5), which deals with attorney fees incurred post-judgment. *N A R , Inc v Farr*, 2000 UT App 62, 997 P 2d 343.

Construction with other rules.

The trial court's decision denying plaintiff's request for attorney fees was reversed and remanded for a determination of an award of reasonable attorney fees pursuant to Rule 4-505 where the record was unclear if the trial court used the fee schedule in Rule 4-505 01 merely as one of the factors in arriving at its decision that the attorney fees requested by plaintiff were not to be awarded, or whether the trial court believed that Rule 4-505 01 was the sole mechanism to award fees. *N A R , Inc v Marcek*, 2000 UT App 300, 13 P 3d 612.

Rule 4-506. Withdrawal of counsel in civil cases.

Intent:

To establish a uniform procedure and criteria for withdrawal of counsel in civil cases.

Applicability:

This rule shall apply to all counsel in civil proceedings in trial courts of record except guardians ad litem and court-appointed counsel.

Statement of the Rule:

(1) *Withdrawal requiring court approval.* Consistent with the Rules of Professional Conduct, an attorney may withdraw as counsel of record only upon approval of the court when a motion has been filed and the court has not issued an order on the motion or after a certificate of readiness for trial has been filed. Under these circumstances, an attorney may not withdraw except upon motion and order of the court.

(2) *Withdrawal not requiring court approval.* If an attorney withdraws under circumstances where court approval is not required, the notice of withdrawal shall include a statement by the attorney that no motion has been filed on which the court has not issued an order and that no certificate of readiness for trial has been filed.

(3) If an attorney withdraws as counsel of record, the withdrawing attorney must serve written notice of the withdrawal upon the client of the withdrawing attorney and upon all other parties not in default. A certificate of service must be filed with the court. If a trial date has been set, the notice of withdrawal shall include a notification of the trial date.

(4) If an attorney withdraws, dies, is suspended from the practice of law, is disbarred, or is removed from the case by the court, opposing counsel shall serve a Notice to Appear or Appoint Counsel on the unrepresented client. The Notice to Appear or Appoint Counsel must inform the unrepresented client of the responsibility to appear in a court or appoint counsel. A copy of the Notice to Appear or Appoint Counsel must be filed with the court. No further proceedings shall be held in the case until 20 days have elapsed from filing of the Notice to Appear or Appoint Counsel unless the client of the withdrawing attorney waives the time requirement or unless otherwise ordered by the court.

(5) *Substitution of counsel.* An attorney may replace the current counsel of record by filing and serving a notice of substitution of counsel. Filing a substitution of counsel enters the appearance of new counsel of record and

effectuates the withdrawal of the attorney being replaced. Where a request for a delay of proceedings is not made, substitution of counsel does not require the approval of the court. Where new counsel requests a delay of proceedings, substitution of counsel requires the approval of the court as provided in this rule.

(Amended effective January 15, 1990; April 15, 1991; May 15, 1994; November 1, 1997.)

Amendment Notes. — The 1997 amendment rewrote this rule.

NOTES TO DECISIONS

Notice to appoint counsel.
Cited.

Notice to appoint counsel.

Defendant's failure to give notice to plaintiff of its responsibility to appoint counsel under Subdivision (3) before filing its motion to dismiss rendered it improper for the trial court to dismiss plaintiff's action, notwithstanding the inordinate period of inactivity that preceded defendant's motion to dismiss. *Hartford Leasing Corp. v. State*, 888 P.2d 694 (Utah Ct. App. 1994).

Because this rule compels opposing counsel to file a required notice and also directs the trial court to wait 20 days after that filing before holding further proceedings, the court erred by striking a wife's pleadings and placing her in default after granting her counsel's motion to withdraw. *Loporto v. Hoegemann*, 1999 UT App 175, 982 P.2d 586.

Cited in *Jeschke v. Willis*, 811 P.2d 202 (Utah Ct. App. 1991).

Rule 4-507. Disposition of funds on trustee's sale.

Intent:

To establish a uniform procedure for filing trustee affidavits of deposit and claimant petitions for adjudication of priority in trustee's sales.

To establish a uniform procedure in determining the disposition of funds on trustee's sales.

Applicability:

This rule shall apply to all courts of record.

Statement of the Rule:

(1) At the time of depositing with the Clerk of the Court any proceeds from a trustee's sale in accordance with Utah Code Ann. Section 57-1-29, the trustee shall file an affidavit with the clerk setting forth the facts of the deposit and a list of all known claimants, including known addresses. The clerk shall notify the listed claimants within 10 days of receiving the affidavit of deposit.

(2) Any claimant may then file a petition for adjudication of priority to these funds and request a hearing before the court. The petitioner requesting the hearing shall give notice of the hearing to all claimants listed in the trustee's affidavit of deposit and any others known to the petitioner. All persons having or claiming an interest must appear and assert their claim or be barred thereafter.

(3) Pursuant to the determination hearing, the court will establish the priorities of the parties to the trustee's sale proceeds and enter an order with the clerk of the court or county treasurer directing the disbursement of funds as determined.

NOTES TO DECISIONS

Cited in 2793 S. 3095 W. v. *Munford*, 2000 UT App 116, 1 P.3d 1116.

Rule 4-508. Unpublished opinions.

Intent:

parties stating that absent a showing of good cause by a date specified in the notification, the court shall dismiss the case without prejudice for lack of prosecution.

(3) Any party may, pursuant to the Utah Rules of Civil Procedure, move to vacate a dismissal entered under this rule.
(Amended effective January 15, 1990; May 1, 1993; May 15, 1994; November 1, 1996; November 1, 1999.)

Amendment Notes. — The 1999 amendment substituted “within 330 days of the first answer” for “within 180 days of the filing date” in Subdivision (2).

NOTES TO DECISIONS

Effect of dismissal.
Good cause.
Source of rule.

Effect of dismissal.

If a trial court wishes to dismiss a case with prejudice for failure to prosecute, the trial court must expressly indicate that dismissal is with prejudice or pursuant to U.R.C.P. 41(b); otherwise, the dismissal is presumed to be without prejudice under this rule. *Panos v. Smith's Food & Drug Ctrs.*, 913 P.2d 363 (Utah Ct. App. 1996).

Good cause.

Implicit in “absent a showing of good cause”

is the concept that plaintiff should have notice of a court's consideration of dismissal before a matter is dismissed and also should have an opportunity to show good cause why this should not occur. *Preuss v. Wilkerson*, 858 P.2d 1362 (1993) (decided before 1994 amendment requiring notification to parties).

Source of rule.

This rule merely codifies an inherent power of the trial court to dismiss a case sua sponte for lack of prosecution under R. Civ. P. 41(b). *Meadow Fresh Farms v. Utah State Univ. Dept. of Agriculture*, 813 P.2d 1216 (Utah Ct. App. 1991).

Rule 4-104. Repealed.

Repeals. — Rule 4-104, providing for requests for trial setting, was repealed effective November 1, 1999. For comparable provisions, see Rule 16, U.R.C.P.

Rule 4-105. Continuances in special circumstances.

Intent:

To establish uniform procedures governing the granting and denial of continuances in civil and criminal cases.

Applicability:

This rule shall apply to the trial courts of record.

Statement of the Rule:

(1) In civil law and motion matters, except orders to show cause and bench warrants, matters may be continued upon stipulation of the parties and notice to the clerk of the judge to whom the case is assigned, except that when a matter has been placed upon the official law and motion calendar, the matter may be continued only upon approval of the court.

(2) In sexual abuse cases involving minor victims, continuances may be granted upon a written finding by the court, or written minute entry which shall include the reason(s) for the continuance.

(3) A motion to continue made on or within 10 days prior to the date of a hearing may be granted by the court upon a showing of good cause and upon such conditions as the court determines to be just, including but not limited to the payment of costs and attorney fees.

(4) If the hearing is an “important criminal justice hearing” or an “important juvenile justice hearing” as defined by § 77-38-2 of which the victim has requested notification, the court should consider the impact of the continuance upon the victim.

(Amended effective November 15, 1995.)

42 USCS § 12117, n 42

against labor organization for employer's potential liability under ADA (42 USCS §§ 12101 et seq.). *Lane v United States Steel* (1994, ND Ala) 871 F Supp 1434, 8 ADD 247, 3 AD Cas 1605, 66 BNA FEP Cas 902, 149 BNA LRRM 3043.

43. Preliminary injunction

In action by applicant to hospital's pediatric residency program alleging that hospital violated Rehabilitation Act (29 USCS §§ 794 et seq.) and ADA (42 USCS §§ 12101 et seq.) by refusing to admit him because of his visual disability, applicant was not entitled to preliminary injunction to force his admission to program, since he had failed to establish some likelihood of success on merits in that he had failed to meet his threshold burden of establishing that he was disabled within meaning of statutes. *Roth v Lutheran Gen. Hosp.* (1995, CA7 Ill) 57 F3d 1446, 11 ADD 288, 4 AD Cas 936.

44. Reinstatement

Where unlawful discrimination resulted in discharge, preferred remedy is reinstatement with reasonable accommodation; thus, where employee who suffered from migraine headaches was fired by county public works department for excessive absences, employee is to be reinstated, and county must accommodate his disability by allowing him to use vacation time without prior notice for illnesses occurring after all his sick time is used.

PUBLIC HEALTH AND WELFARE

Dutton v Johnson County Bd. of Comm'rs (1994, DC Kan) 868 F Supp 1260, 7 ADD 1016, 3 AD Cas 1614.

Where after-acquired evidence concerning employee's drug use came to light, and such evidence, had it been discovered earlier, would have resulted in employee's termination, employee will be barred from obtaining remedies of either reinstatement or front pay should employee ultimately prevail in proving that his discharge violated ADA (42 USCS §§ 12101 et seq.). *McDaniel v Mississippi Baptist Medical Ctr.* (1994, SD Miss) 869 F Supp 445, 7 ADD 879, 3 AD Cas 1530, findings of fact/conclusions of law (1995, SD Miss) 877 F Supp 321, 8 ADD 573, 4 AD Cas 241, affd without op (1995, CA5 Miss) 74 F3d 1238, 6 AD Cas 800.

County sheriff's deputy who received jury verdict in his favor on discriminatory demotion claim under ADA Title I (42 USCS §§ 12111 et seq.), and who was awarded backpay, compensatory damages, and reinstatement, is entitled to be reinstated at annual salary of \$41,034.83 based on testimony of his expert witness regarding deputy's salary growth rate, since jury implicitly adopted that testimony in calculating backpay award; however, deputy is not entitled to reinstatement at higher rank of corporal because his claim that he might have been promoted to corporal but for his demotion is too speculative. *Kemp v Monge* (1996, MD Fla) 919 F Supp 404, 16 ADD 839.

PUBLIC SERVICES

PROHIBITION AGAINST DISCRIMINATION AND OTHER GENERALLY APPLICABLE PROVISIONS

§ 12131. Definition

As used in this title:

(1) Public entity. The term "public entity" means—

(A) any State or local government;

(B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and

(C) the National Railroad Passenger Corporation, and any commuter authority (as defined in section 103(8) of the Rail Passenger Service Act [45 USCS § 502(8)]).

(2) Qualified individual with a disability. The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

(July 26, 1990, P. L. 101-336, Title II, Subtitle A, § 201, 104 Stat. 337.)

disability.” *Pottgen v Missouri State High Sch. Activities Ass’n* (1994, ED Mo) 857 F Supp 654, 6 ADD 756, 3 AD Cas 364, revd, remanded (1994, CA8 Mo) 40 F3d 926, 7 ADD 378, 3 AD Cas 1479, reh, en banc, den (1995, CA8 Mo) 1995 US App LEXIS 1374.

Individual who was born with no left hand has disability within meaning of Title II of ADA (42 USCS §§ 12131 et seq.). *Stillwell v Kansas City Bd. of Police Comm’rs* (1995, WD Mo) 872 F Supp 682, 7 ADD 723, 3 AD Cas 1828.

Disabled person is not “qualified” individual because she has not been denied any municipal services, and therefore she lacks standing to bring action alleging that city violated ADA (42 USCS §§ 12101 et seq.) by refusing to amend its zoning ordinance in order to accommodate proposed health care facility for disabled persons. *Kessler Inst. for Rehabilitation v Mayor of Essex Fells* (1995, DC NJ) 876 F Supp 641, 8 ADD 837.

In action by doctor with bipolar illness, alleging that state board of medicine violated Title II of ADA (42 USCS §§ 12131 et seq.) by refusing to reinstate his license which was revoked following his conviction for felony, doctor was not “qualified individual with disability” within meaning of ADA since his mental condition posed threat to public’s safety if his license were reinstated. *Alexander v Margolis* (1995, WD Mich) 921 F Supp 482, 13 ADD 1017, affd without op (1996, CA6 Mich) 98 F3d 1341, reported in full (1996, CA6 Mich) 1996 US App LEXIS 26738.

Determination of whether HIV-positive inmate is “qualified” to participate in overnights visits with his wife must be made on case-by-case basis. *Bullock v Gomez* (1996, CD Cal) 929 F Supp 1299, 18 ADD 542.

With respect to complaint alleging that public school district has discriminated against student on basis of disability, student is qualified person/individual with disability under regulations implementing § 504 of Rehabilitation Act (29 USCS § 794) and ADA Title II (42 USCS §§ 12131 et seq.) and therefore entitled to protection of those statutes where student (1) is 8-year-old male diagnosed as having congenital spina bifida which affects his mobility and some bodily functions; (2) uses manual wheelchair which he is learning to maneuver by himself; (3) may wear leg braces to school, at which time he does some walking with walker and standing for periods of time in class-

room; (4) also has (a) hydrocephalus, (b) neurological deficiencies which affect his cognitive ability and fine motor skills, and (c) learning disability; and (5) is of age when students without disabilities are provided educational services under state law. *In re Whitman-Hanson Regional Sch. Dist.* (1993, Dept of Education) 4 ADD 399.

In action challenging state conservatorship laws, ward for whom conservator has been appointed in accordance with state law does not meet “essential requirements” test to be considered qualified individual with disability. *State ex rel. McCormick v Burson* (1994, Tenn App) 894 SW2d 739, 7 ADD 54, app den (Feb 21, 1995).

Where requirement that child graduate by age 19 in order to be eligible for state “Aid to Needy Families with Children” benefits beyond child’s eighteenth birthday tended to exclude persons with disabilities from qualifying for benefits past their eighteenth birthdays, thus violating ADA § 202 (42 USCS § 12132), extending such benefits to families in question until their children reached age of 19 was reasonable modification of graduation requirement and thus was mandated by ADA. *Howard v Department of Social Welfare* (1994) 163 Vt 109, 655 A2d 1102, 10 ADD 434, 5 AD Cas 1548.

Person is “qualified” individual with disability with respect to licensing if he can meet, with or without reasonable modifications, essential requirements for receiving such license; consequently, disabled attorney who committed serious misconduct was not qualified to be member of state bar, and no reasonable modifications were possible. *The Florida Bar v Clement* (1995, Fla) 662 So 2d 690, 13 ADD 179, 20 FLW S553, amd (1995, Fla) 20 FLW S597 and cert den (1996, US) 134 L Ed 2d 933, 116 S Ct 1829.

Police officers who retired as result of disabilities before they had served for 20 years were not “qualified individuals with disabilities” with regard to city retirement plan which offered supplemental benefits to officers who retired after 20 years of service, since disabled officers did not meet essential eligibility requirements for receipt of benefit in question. *Gagliardo v Dinkins* (1996) 89 NY2d 62, 651 NYS2d 368, 674 NE2d 298, 20 ADD 439, reh den (1996) 89 NY2d 917, 653 NYS2d 921, 676 NE2d 503 and reh den (1996) 89 NY2d 917, 653 NYS2d 920, 676 NE2d 502 and reh den (1996) 89 NY2d 917, 653 NYS2d 921, 676 NE2d 503.

§ 12132. Discrimination

Subject to the provisions of this title, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

(July 26, 1990, P. L. 101-336, Title II, Subtitle A, § 202, 104 Stat. 337.)

ADDENDUM “B”

FILED DISTRICT COURT
Third Judicial District

JUL 31 2008

By C. Bailey
SALT LAKE COUNTY
Deputy Clerk

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IN THE THIRD JUDICIAL DISTRICT COURT,

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

JOSEPH W. ROHAN, Plaintiff, v. CHAD BOSEMAN, a minor; JERALD BOSEMAN, an individual, Defendant.	FINDINGS OF FACT, CONCLUSIONS OF LAW Civil No.: 980904135 PI Judge J. Dennis Frederick
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The above referenced matter came on for trial on June 20, 2000, defendants appeared personally and by and through their counsel of record, Stephen J. Trayner and Peter H. Christensen of the law firm of *Strong & Hanni*, and plaintiff, Joseph W. Rohan, Esq., pro se, appeared personally, having discharged his prior counsel, Paul M. Halliday, Jr. and Steven B. Watkins, on June 6, 2000. Plaintiff Joseph W. Rohan having filed a renewed Motion for Voluntary Dismissal and Motion for Expedited Disposition or Alternatively Motion to Continue Trial Setting to Consider Plaintiff's Claims Under the ADA on June 19, 2000, and the court having heard the arguments of counsel, having reviewed the pleadings on file, and otherwise being fully apprised in the premises hereby makes the following findings of facts and conclusions of law:

FINDINGS OF FACT

1. On or about April 23, 1998, plaintiff, by and through his counsel of record, Paul M. Halliday, Jr. and Steven B. Watkins of the law firm of *Halliday & Watkins, P.C.*, filed the present suit seeking damages for certain injuries allegedly sustained by plaintiff as a result of a January 23, 1997 motor vehicle accident.
2. On or about August 17, 1999, plaintiff's counsel of record corresponded with defendant's counsel to indicate plaintiff's desire to cutoff further settlement negotiations and to proceed to trial.
3. On or about August 23, 1999, defendants' counsel corresponded with plaintiff's counsel of record to acknowledge plaintiff's desire to move the matter forward to trial and further indicated defendants' desire to commence the necessary discovery to prepare the case for trial.
4. On or about January 18, 2000, plaintiff, by and through his counsel of record, filed a Certificate of Readiness for Trial.
5. Plaintiff, Joseph W. Rohan, Esq., is a licensed attorney and is a member in good standing of the Utah State Bar.
6. On March 2, 2000, the court, following a telephonic conference with counsel of record, set a four day jury trial for June 20-23, 2000, and further set appropriate witness designation deadlines, discovery cutoff date, and a final pre-trial conference for June 5, 2000.

7. On or about June 2, 2000, one business day prior to the final pre-trial conference, plaintiff filed a Motion for Continuance of Trial Setting, Withdrawal of Counsel, Substitution of Counsel, and Enlargement of Discovery. Plaintiff's Motion sought to continue the trial, to allow new counsel to substitute for his current counsel, and to allow additional time for the filing of Designations of Witnesses, and for an extension of discovery.
8. On June 5, 2000, the court held the previously scheduled final pre-trial conference. Defendants appeared by and through their counsel of record, Stephen J. Trayner of the law firm of *Strong & Hanni*, and plaintiff appeared personally and by and through his counsel of record, Steven B. Watkins of the law firm of *Halliday & Watkins, P.C.*
9. At the final pre-trial conference, plaintiff's counsel, Steven B. Watkins, Esq., requested that the trial date be stricken, that new witness designation dates be established, and that new counsel be allowed to substitute. Defendants did not actively oppose plaintiff's motion, but did not stipulate to the motion. The court indicated at the final pre-trial conference that it would take the matter under advisement, but that plaintiff and his counsel should continue to prepare for trial in the event that said motion was denied.
10. On or about June 5, 2000, the court issued its Minute Entry ruling on plaintiff's Motion for Continuance of Trial Setting, Withdrawal of Counsel, Substitution of Counsel and Enlargement of Discovery, denied plaintiff's Motion for

Continuance/Substitution based upon plaintiff's failure to show good cause for such a continuance.

11. On or about June 6, 2000, plaintiff gave notice to the court and defendant's counsel that he had discharged Steven B. Watkins and Paul M. Halliday, Jr. and the law firm of *Halliday & Watkins, P.C.* as his attorneys.
12. On or about June 7, 2000, plaintiff moved for Voluntary Dismissal and Motion for Expedited Disposition under Rule 41(2)(ii) of the Utah Rules of Civil Procedure. Plaintiff's Motion was supported by his own affidavit and a Memorandum of Points and Authorities indicating that plaintiff desired additional time "to find trial counsel who could properly prepare a brain injury case", that plaintiff's prior counsel had "limited jury trial experience and do not have any experience in trying a brain injury case" and that upon dismissal of the case, plaintiff intended to re-file his action.
13. Defendants opposed plaintiff's Motion for Voluntary Dismissal in part on the grounds that plaintiff had voluntarily chosen to discharge his prior attorneys with the law firm of *Halliday & Watkins, P.C.*, that plaintiff could claim no surprise with respect to the nature of his claims or the degree of experience and competency of his prior attorneys, and that defendants would be prejudiced as a result of any further continuances in the matter.
14. On June 14, 2000, the court issued its Minute Entry denying plaintiff's Motion for Voluntary Dismissal for the reasons specified in the opposing memorandum of the

defendants.

15. On June 14, 2000, Joseph W. Rohan, pro se, wrote to defendants' attorneys indicating his intention to file a petition for interlocutory appeal and stay of the trial date. Mr. Rohan's correspondence further indicated, "I also want to inform you that whether or not a stay is granted, a trial will not occur on Tuesday and therefore the defense does not need to expend time and effort in preparation of trial on that date."
16. On June 15, 2000, defendants' counsel wrote back to Mr. Rohan indicating their intention to continue with their preparations of trial since there was no Order from any trial or appellate court indicating that the trial would not occur as scheduled on June 20-23, 2000. Defendants' counsel's letter further indicated that defendants would not stop their preparations for trial until an appropriate Order was obtained staying the trial date or dismissing the case with prejudice and that in the event plaintiff failed or refused to move forward with his case at trial, that defendants would seek sanctions against plaintiff.
17. On or about June 15, 2000, plaintiff, Joseph W. Rohan, pro se, filed a "Notice of Plaintiffs Inability to Bring this Matter to Trial" indicating "that [plaintiff] cannot present his case that is scheduled for trial on Tuesday, June 20, 2000 through Friday, June 23, 2000."
18. On June 16, 2000, plaintiff wrote to defendants' counsel indicating "I am unable and unprepared to try my own brain injury case and that under no circumstances will a

trial be held on Tuesday, June 20th” and “both the Court and Defendants (for at least the second time) have been notified that this matter will not proceed to trial as scheduled.”

19. On or about June 19, 2000, plaintiff filed a renewed Motion for Voluntary Dismissal and Motion for Expedited Disposition or Alternatively Motion to Continue Trial Setting to Consider Plaintiff’s Claims Under the ADA.
20. On or about June 20, 2000, the court entered its Order Denying Plaintiff’s Motion for Voluntary Dismissal without Prejudice.
21. On June 20, 2000, defendants appeared personally and by and through their counsel of record, and were prepared to try the defense of this matter. Plaintiff appeared pro se, being unrepresented by other counsel.
22. As of the first day of trial, June 20, 2000, the court had not entered any order permitting withdrawal of counsel under Rule 4-506(1) or (5) of the Rules of Judicial Administration.
23. On the morning of trial, plaintiff appeared unprepared and/or unwilling to proceed with the calling of witnesses on his own behalf and stated in open court that he was not prepared to proceed with the presentation of his evidence.

Based upon the foregoing Findings of Facts, the court makes the following Conclusions of

Law:

CONCLUSIONS OF LAW

1. Plaintiff's conduct individually and by and through his prior counsel of record demonstrate a clear pattern of failure to prosecute plaintiff's case, and as a result, warrants dismissal of plaintiff's complaint with prejudice and upon the merits;
2. Plaintiff failed to comply with or to make the requisite showing under Rule 4-105(3) with respect to his Motions to Continue the Trial in this case in that plaintiff failed to show good cause for such a continuance;
3. Plaintiff's Motions for Substitution of Counsel would have caused a continuance of the trial date and failed to comply with or meet the requirements of Rule 4-506(1) and (5) of the Rules of Judicial Administration;
4. That plaintiff's assertion that the trial of this case must be delayed or continued due to the provisions of Title II of the Americans with Disabilities Act is without foundation in law or in fact;
5. The provisions of Title II of the Americans with Disabilities Act do not require that this court grant plaintiff's request for a continuance and/or a voluntary dismissal without prejudice;
6. Plaintiff's failure to prosecute his case under the circumstances present in this case resulted in defendants incurring needless costs and fees and therefore, defendants shall be entitled to an awards of costs and fees as sanctions because of plaintiff's refusal and/or failure to present his case at trial and that said refusal and/or failure was

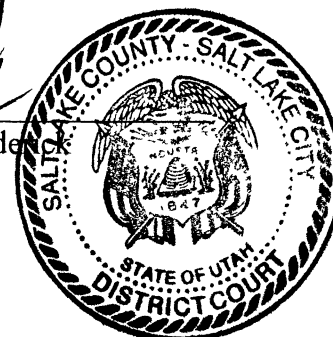
without merit and in bad faith and was engaged in with an intent to hinder or delay the proceedings of this court.

7. Plaintiff's actions are sanctionable within the contemplation under Utah Code Ann. §78-27-56 and this court's inherent authority to govern judicial proceedings and make appropriate sanctions

DATED this 28th day of July, 2000.

By: _____

Honorable J. Dennis Frederick
District Court Judge



APPROVED AS TO FORM:

Joseph W. Rohan, Esq.

Stephen J. Trayner, # 4928
Steven T. Densley, # 8171
STRONG & HANNI
Attorneys for Defendants
Nine Exchange Place
Sixth Floor Boston Building
Salt Lake City, Utah 84111
Telephone: (801) 532-7080

FILED DISTRICT COURT
Third Judicial District

JUL 31 2000

By *[Signature]* SALT LAKE COUNTY
Deputy Clerk

**ENTERED IN REGISTRY
OF JUDGMENTS**

DATE 8/1/00

**IN THE THIRD JUDICIAL DISTRICT COURT,
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH**

IMAGED

JOSEPH W. ROHAN, Plaintiff, v. CHAD BOSEMAN, a minor; JERALD BOSEMAN, an individual, Defendant.	ORDER AND JUDGMENT Civil No.: 980904135 PI Judge J. Dennis Frederick
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980904135
JD1423628
BOSEMAN, CHAD
JC
Order and Judgment (with 2 separate judg

The above referenced matter came on for trial on June 20, 2000, defendants appeared personally and by and through their counsel of record, Stephen J. Trayner and Peter H. Christensen of the law firm of *Strong & Hanni*, plaintiff, Joseph W. Rohan, Esq., pro se, appeared. At the time of trial, plaintiff had pending Plaintiff's Renewed Motion for Voluntary Dismissal and Motion for Expedited Disposition or Alternatively Motion to Continue Trial Setting to Consider Plaintiff's Claims under the ADA. The court having previously made its Findings of Facts and Conclusions of Law, now rules as follows:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff's Renewed Motion for Voluntary Dismissal and Motion for Expedited Disposition or Alternatively Motion to Continue

Trial Setting to Consider Plaintiff's Claims under the ADA being the same is hereby DENIED.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that plaintiff's complaint and all claims contained therein, whether alleged or not alleged, against the defendants be and the same are HEREBY DISMISSED WITH PREJUDICE AND ON THE MERITS DUE TO PLAINTIFF'S FAILURE OR REFUSAL TO PROSECUTE HIS CASE, and defendants are thereby granted costs of court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that judgment shall be entered in favor of defendants and against the plaintiff in the amount of \$ 1728.¹⁰ ^{SA} for costs of court incurred;

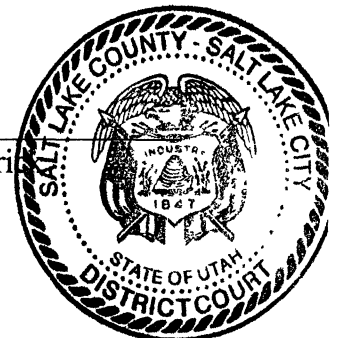
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that judgment shall be also entered in favor of defendants and against the plaintiff in the amount of \$ 4632.⁵⁰ ^{SA} in attorney's fees and \$ 987.¹⁸ ^{SA} in other costs as a result of the dismissal of said action and plaintiff's willful failure or refusal to proceed with trial. Interest shall accrue upon said judgment from the date of this Order until satisfied at the highest rate permitted by law.

IT IS FURTHER ORDERED AND DECREED that plaintiff, Joseph W. Rohan, Esq , shall reimburse the clerk of the Third District Court of Salt Lake County for the costs incurred in connection with the calling of the jurors in this case in the sum of \$518.

DATED this 9th day of July, 2000.

By:


Honorable J. Dennis Frederick
District Court Judge



APPROVED AS TO FORM:

Joseph W. Rohan, Esq.