

2000

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

Utah Court of Appeals

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## Recommended Citation

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IN THE UTAH COURT OF APPEALS

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JOSEPH W. ROHAN

Plaintiff/Appellant

v.

CHAD BOSEMAN,  
JERALD BOSEMAN  
Defendants/Appellees

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Appeal No. 20001148-CA

Argument Priority 15

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APPELLANT'S BRIEF

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Appeal from a Decision of the  
Third Judicial District Court  
Salt Lake County, Judge J. Dennis Frederick

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Plaintiff/Appellant *Pro se*

ORAL ARGUMENT REQUESTED

**FILED**  
Utah Court of Appeals

SEP 06 2001

Paulette Stagg  
Clerk of the Court

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## **STATEMENT OF JURISDICTION**

The Utah Court of Appeals has appellate jurisdiction of this appeal pursuant to Utah Code Ann. §78-2-2(4) (1996 as amended).

## **STATEMENT OF ISSUES AND STANDARD OF REVIEW**

1. The trial court erred as a matter of law when it violated the provisions of Title II of the Americans With Disabilities Act, and Rohan's due process and equal protection rights as guaranteed by the both the Constitution of the United States and the Utah Constitution when it refused to grant a continuance or voluntary dismissal and dismissed his case with prejudice, after Mr. Rohan had made a prima facie showing that he was a qualified individual with a disability under the ADA.

### **Standard of review:**

The appropriate standard of review for a trial court's interpretation of statutes, rules and ordinances is a question of law reviewed for correctness. Rushton v Salt Lake County. 977 P.2d 1201, 1203 (Utah 1999).

The issue was preserved for review in Plaintiff's Motion for Voluntary Dismissal, Plaintiff's Renewed Motion for Voluntary Dismissal or Alternatively Motion to Continue Trial Setting to Consider Plaintiff's Claims Under the ADA and Plaintiff's Motion for New Trial Pursuant to Rule 59 or Alternatively Motion to Amend.

2. The trial court erred as a matter of law, and abused its discretion when

it denied Rohan's motions for voluntary dismissal pursuant to Rule 41(a)(2) after Mr. Rohan had made a prima facie showing that he was a qualified individual with a disability under the ADA. The trial court erred as a matter of law and abused its discretion when it dismissed Rohan's case with prejudice pursuant to Rule 41(b).

#### Standard of Review

The appropriate standard of review for determining whether the trial court properly denied Rohan's first motion for voluntary dismissal is abuse of discretion.

The appropriate standard of review for determining whether the trial court properly denied Rohan's second motion for voluntary dismissal after he had established he was a qualified individual with a disability under the ADA, presents a mixed question of law and fact to the court. Factual questions are to be reviewed under the clearly erroneous standard and legal questions under the correctness standard. Jefferies v. Stubbins, 970 P.2d 1234, 1244 (Utah 1999), State v. Pena, 869 P.2d 932, 936-9 (Utah 1994). "A district court by definition abuses its discretion when it makes an error of law." Koon v. United States, 518 U.S. 81, 100, 116 (1996).

The appropriate standard of review for determining whether the trial court properly dismissed Mr. Rohan's case pursuant to Rule 41(b) is a question of law reviewed for correctness. Southern Title Guar. Co. v. Bethers, 761 P.2d 951, 954 (Utah App.1988).

The issue was preserved for review in Plaintiff's Motion for Voluntary

Dismissal, Plaintiff's Renewed Motion for Voluntary Dismissal or Alternatively Motion to Continue Trial Setting to Consider Plaintiff's Claims Under the ADA, and Plaintiff's Motion for New Trial Pursuant to Rule 59 or Alternatively Motion to Amend.

3. The trial court erred as a matter of law and abused its discretion in contravention of Rule 40(b) of the Utah Rules of Civil Procedure, when it denied Rohan's first and second motions for a continuance.

Standard of review:

The appropriate standard of review for determining whether the trial court properly denied Rohan's first motion for a continuance is abuse of discretion.

Trial courts have substantial discretion in deciding whether to grant continuances, Christenson v. Jewkes, 761 P.2d 1375, 1377 (Utah 1988), and their decision will not be overturned unless that discretion has been clearly abused, see State v. Cabututan, 861 P.2d 408, 413 (Utah 1993). An abuse of discretion may be found if a party has "made timely objections, [has] given necessary notice, and has made a reasonable effort to have the trial date changed for good cause." Id. Brown v. Glover, 16 P.3d 540, 548-9 (Utah 2000).

The appropriate standard of review for determining whether the trial court properly denied Rohan's second motion for a continuance after Rohan had made a prima facie showing that he was a qualified individual with a disability under the ADA

is correction of error.

"A district court by definition abuses its discretion when it makes an error of law." Koon v. United States, 518 U.S. 81, 100, 116 (1996).

The issues were preserved for review in Plaintiff's Motion for Voluntary Dismissal, Plaintiff's Renewed Motion for Voluntary Dismissal or Alternatively Motion to Continue Trial Setting to Consider Plaintiff's Claims Under the ADA, and Plaintiff's Motion for New Trial Pursuant to Rule 59 or Alternatively Motion to Amend.

4. The trial Court erred as a matter of law when it denied Rohan's motions for a new trial or alternatively motion to amend when he had made a prima facie showing that he was a qualified individual with an disability under the ADA.

Standard of review:

Although a trial court has broad discretion to deny a motion for new trial, where that denial is based on questions of law, the trial court's decision is reviewed for correctness. Crookston v. Fire Ins. Exch., 860 P.2d 937, 940 (Utah 1993);

The issue was preserved for review in Plaintiff's Motion for New Trial Pursuant to Rule 59 or Alternatively Motion to Amend.

5. The trial courts award of costs and attorney fees against Mr. Rohan pursuant to U. C. A. §78-27-56 was erroneous as a matter of law.

Standard of review:

The appropriate standard of review for the award of attorney fees under section 78-27-56 requires a two step analysis. As to whether the party lacked good faith, the trial court must make a factual finding of a party's subjective intent. In addition, the trial court must conclude, as a matter of law, that the action was without merit. Pennington v. Allstate Insurance Co., 973 P.2d 932, 942 (FN 3 ) (Utah 1998).

The issue was preserved for review in Rohan's Motion for New Trial Pursuant to Rule 59.

**DETERMINATIVE CONSTITUTIONAL AND STATUTORY PROVISIONS**

The issues raised in this appeal are governed by:

- A. The Americans With Disabilities Act, 42 U.S.C. §§ 12131 et. seq., (hereinafter the "ADA");
- B. Rules 40(b), 41(a)(2), 41(b), of the Utah Rules of Civil Procedure;
- C. Rule 4-105 of the Utah Rules of Judicial Administration;
- D. U. C. A. §78-27-56.
- E. The Fourteenth Amendment to United States Constitution;
- F. Article 1 Section 7 Utah Constitution;
- G. Article 1 Section 11 Utah Constitution;
- H. Article 1 Section 24 Utah Constitution;



## **STATEMENT OF THE CASE**

On April 28, 1998 Joseph Rohan (hereinafter Rohan)) brought a lawsuit against the Chad and Gerald Boseman (hereinafter collectively referred to as “Boseman”) seeking damages for injuries, including a closed head injury, sustained when a vehicle driven by Chad Boseman struck the vehicle Rohan was driving during an early morning snow storm in January 1997. Addendum Exhibit 1, Page 1 (Hereinafter A:1:1)

Initially, it appeared that the injuries sustained by Rohan consisted of a severe cervical sprain and his complaints of cognitive difficulties were attributed to effects of the cervical injury. In April 1997, after several months of treatment with little improvement in the cogitative difficulties, a brain MRI was ordered. The scan was abnormal showing changes typical of a closed head injury with axonal shearing. A CT scan of Rohan’s brain done before the accident was normal. A:23:131-133, 128

Neurological testing was also performed in May 1997 and showed Rohan was experiencing disrupted cognitive performance, with his performance being substantially below what would be expected, given his educational and vocational background. Rohan began cognitive therapy in November of 1997 and assessments done at that time indicated moderate dysfunction. A:23:134-137, 138-144.

In July of 1998 due to the sleep problems Rohan had experienced since the accident, he underwent a sleep study, which showed a severely disrupted sleep cycle with a sleep efficiency of 41% (normal is greater than 90%), and a total absence of

REM sleep, additionally measurements of his attentiveness were markedly abnormal. As a result of the sleep study Rohan was prescribed stimulant medications to maintain wakefulness. A:23:130, 145-153.

In May of 2000 shortly before the scheduled trial, testing by the neuropsychologist retained by Boseman showed Rohan was severely impaired in terms of memory skills and information processing. Although he performed better on a test of visual attention than in 1997, his visual memory remained severely impaired, i.e. below the 10% percentile. The testing also showed continued significant impairment in the his verbal memory and learning including confusion and poor mental tracking. A:23:154-164.

In August of 1998 Rohan was seen by Robert K. Rothfeder M. D., J. D., for an independent medical examination. Dr. Rothfeder found that as a result of the injuries sustained in the accident, Mr. Rohan had a 34% permanent partial impairment of the whole person. He stated that the closed head injury and posttraumatic brain injury along with the sleep disturbance had a profound affect on Rohan's activities of daily living. Dr. Rothfeder, stated that in his opinion the intellectual impairments suffered by Rohan had essentially resulted in a 100% disability with respect to the independent practice of law. A:23:165-169

After filing the lawsuit, the parties began discovery and entered into settlement negotiations. Despite the fact that the court docket reflected activity during 14 of 20

months since the complaint had been filed, the trial court ordered the parties to appear on November 18, 1999 and show cause why the case should not be dismissed for failure to prosecute. At the hearing the trial court continued its own order to show cause for 60 days for certification of readiness for trial. A:1:1, On January 19, 2000, Rohan, pursuant to the trial courts order, filed his certification of readiness for trial. A:2:12-14. On February 1, 2000 Boseman filed an objection to the certificate of readiness for trial on the basis that there was ongoing discovery that had not been completed, and Boseman requested 120 days (until June 1, 2000) to complete discovery. A:3:15. A telephone conference was held on March 2, 2000 and the trial court, without addressing the Boseman objection, scheduled the trial for June 20, 2000. A:1:1

When Rohan learned that trial was set for June 2000, he began searching for experienced trial counsel to handle his case due to the fact that Mr. Halliday & Mr. Watkins had limited jury trial experience and they did not have any experience trying a brain injury case. Rohan contacted, and signed a fee agreement, with Robert F. Orton (“Orton”) of the law firm of Fabian & Clendenin to try the case. A:5:20, A:6:24,

From March 2000 onward, Rohan’s case was handled primarily by Mr. Orton. A:24:174,184. Orton represented Rohan at supplemental depositions in March and April and examined medical records at the offices of opposing counsel in May. Approximately one week before the scheduled pretrial Orton informed Mr. Rohan that

he would not try the case because he could not have the experts he needed for trial ready by June 20, 2000. However, Orton agreed that Rohan could represent to the trial court that if he were able to secure a ninety day continuance he, Orton, would try the matter. A:6:24. Upon learning that Orton would not try the case without a continuance and with no hope of finding an attorney to try a brain injury case on such short notice, Rohan, filed a Motion for Continuance of Trial Setting, Withdrawal of Counsel, Substitution of Counsel and Enlargement of Discovery on the Friday before the final pre-trial which was scheduled the for the following Monday. This was eighteen days before the start of scheduled trial. Boseman would not stipulate to a continuance but did not oppose the motion. A:4, 5, 6.

At the pre-trial, the trial court denied Rohan's first motion for a continuance on the grounds that there was no showing of good cause and a decision to change counsel 15 days before trial is too late. A:7:27,28. On June 7, 2000, the day after the motion was denied, and knowing that Mr. Halliday and Mr. Watkins were not prepared to represent him, as they had been under the impression since March that Orton would try the case, Rohan filed a notice of discharge of his attorneys and his first motion for voluntary dismissal. A:8,9. On June 14, 2000 the trial court denied the first motion for voluntary dismissal "for the reasons specified in the opposing memorandum." A:11,41-42. On June 15, 2000, Rohan filed a Notice of Plaintiff's Inability to Bring This Matter to Trial A:12:43,44 in order to make clear to all concerned that he would not and could

not to proceed to trial and that expenditures of time and resources by Boseman and the trial court were unjustified. The next day the trial court granted the Boseman unopposed motion to exclude the testimony of one of Rohan's experts on the grounds that there was no timely opposition. A:13:

On June 19, 2000 Rohan filed his Renewed Motion for Voluntary Dismissal or Alternatively Motion to Continue Trial Setting to Consider Plaintiff's Claims under the ADA, with a supporting Affidavit, in which he made a prima facie showing that he was a qualified individual with a disability under the ADA and requested the reasonable accommodation of either a continuance to obtain counsel or voluntary dismissal. A:14,15,16. When the parties appeared on June 20, 2000, the scheduled date of the trial, Rohan's motion to continue and for voluntary dismissal pursuant to the ADA was denied. The trial court refused to make an individualized inquiry into the claim asserted by Rohan that he was a qualified individual with a disability pursuant to the ADA as required by the statute, instead the trial court "rules as stated on the record and orders this case be dismissed with prejudice for failure to prosecute. Defendants are awarded costs and fees in an amount to be determined per Rule 4-501." A:18:75-77. On July 31, 2000 the Order and Judgment against Rohan in the amount of \$7347.78 was filed A:20:1-3.

On August 7, 2000 Rohan filed a motion for New Trial Pursuant to Rule 59 or Alternatively Motion to Amend, A:21, 22, 23, again raising his claims that the ADA

had been violated. On September 28, 2000 the trial court again, without making an individualized inquiry into Rohan's claims that he was a qualified individual with a disability pursuant to the ADA, denied the motion, and issued a minute entry ruling stating, "Plaintiff's Motion for New Trial, etc. is denied for reasons specified in the opposing memorandum. Counsel for Defendant to prepare Order."A:26:237-238.

### **STATEMENT OF FACTS**

1. On January 27, 1997, the Appellant, Joseph Rohan was injured in a traffic accident when a vehicle driven by Chad Boseman struck Mr. Rohan's vehicle during an early morning snowstorm in Salt Lake City. A:1:1.

2. Rohan was subsequently treated for the neck injury sustained in the accident by orthopedic surgeon William Muir M. D. In April 1997, because Rohan's headaches and cognitive problems had not improved, Muir recommended he see a neurologist.

3. He saw neurologist Robert Miska M. D., who diagnosed Rohan as having suffered a closed head injury in the accident. Dr. Miska stated, "A MRI scan done after the accident showed changes typical for closed head injury with axonal shearing . . . including atrophy disproportionate to age and some small areas of increased T2 signal." A:23:131-133

4. Dr. Miska ordered neuropsychological testing which was administered by Erin Bigler Ph.D. This testing showed disrupted cognitive performance, with Mr.

Rohan's performance being substantially below what would be expected, given his educational and vocational background. A:23:134-137

5. In November 1997 Dr. Miska referred Rohan to Mark Fox for cognitive therapy. At this time Rohan was tested with the Ross Information Processing Assessment-2, which is normed on individuals who have suffered a brain injury, his mean score of 10 represented a moderate dysfunction. Rohan received cognitive therapy for about two years. A:23:138-144.

6. In July 1998, Dr. Miska referred Rohan to the Intermountain Sleep Disorders Center to address the chronic sleep disruption that he had suffered since the accident. Mr. Rohan underwent a sleep study, which showed a severely disrupted sleep cycle with a sleep efficiency of 41% (normal is greater than 90%), and a total absence of REM, stage III & IV sleep. Additionally, measurements of the Rohan's attentiveness were markedly abnormal. As a result of this testing Rohan was diagnosed as suffering with excessive daytime sleepiness and was prescribed stimulant medications, it is anticipated he will need to take these medications indefinitely to maintain wakefulness. A:23:130, 146-48, 165.

7. On August 8, 1998 Rohan was seen by Robert K. Rothfeder M. D., for an independent medical examination. Dr. Rothfeder found that as a result of the injuries sustained in the accident Mr. Rohan had sustained a 34% permanent partial impairment of the whole person. Dr. Rothfeder noted the closed head injury and

posttraumatic brain injury along with sleep disturbance “has had a profound affect on the patient’s activities of daily living.” A:23:165-166.

8. Dr. Rothfeder is also an attorney. He stated that in was his opinion the intellectual impairments suffered by Mr. Rohan in the accident had essentially resulted in a 100% disability with respect to the independent practice of law. A:23:166.

9. After receiving Dr. Rothfeder’s report, and being concerned with his ethical responsibilities, Rohan contacted with the Utah State Bar, Office of Professional Conduct (the “OPC”). The OPC did not initiate public or private disability proceedings against Mr. Rohan however as a result of this contact, after discussions between Rohan, the OPC and members of the firm of Halliday & Watkins P.C., it was understood that members of Halliday & Watkins would voluntarily supervise Rohan in various aspects of his legal practice to insure that Rohan could practice law responsibly and ethically as the OPC has no mechanism available for informal supervision of an attorney. A:24:200-201.

10. Rohan filed his lawsuit on April 28, 1998 seeking damages for the injuries, including the closed head injury, sustained in the accident. A:1:1

11. Following the filing of the lawsuit, the parties initiated discovery, Boseman subpoenaed records from among others, the Utah State Bar. A:1:1-2

12. Bar Counsel opposed the subpoena on the grounds that it sought privileged material and filed a motion to quash on October 16, 1998. A:1:1



13. On December 11, 1998 the trial court issued a Minute Entry Ruling granting the “Ut. State Bar’s Objection to Subpoena, etc.” ruling that until Plaintiff supplies Defendant’s with an express waiver for materials sought from the Bar, the Plaintiff will be precluded from asserting claims as stated in the minute entry. A:1:2

14. On February 3, 1999 the Order on the Utah State Bar’s Objection to Subpoena was filed; On March 15, 1999 Rohan filed a certificate of service of discovery; On April 14, 1999 Boseman filed a certificate of service of discovery. On August 19, 1999, Rohan filed a Notice of Deposition of Jerald Boseman; On August 31, 1999 Rohan filed a Stipulation and Order on Protective Order; On September 30, 1999 Boseman filed a notice of deposition of Dr. Nord; On October 4, 1999 Boseman filed a notice of deposition of Mr. Rohan. A:1:2.

15. Despite the fact that the court docket reflected activity during 14 of 20 months since the complaint had been filed, the trial court, on October 28, 1999, on its own motion ordered the parties to appear on November 18, 1999 and show cause why the case should not be dismissed for failure to prosecute. A:1:2:

16. On November 18, 1999 the trial court continued its own order to show cause for 60 days for certification of readiness for trial; On January 19, 2000, Rohan, pursuant to the trial court’s order, filed his certification of readiness for trial. A:2:12:

17. On February 1, 2000, Boseman filed an Objection to Plaintiff’s Certificate of Readiness for Trial on the basis that there is ongoing discovery that had

not been completed, and requested 120 days to complete discovery. A:1:3, 3:15.

18. On February 2, 2000 the trial court scheduled a telephone scheduling conference to be held on March 2, 2000. At the March 2, 2000 conference, the discovery cutoff was set for May 26, 2000, the pretrial was set for June 5, 2000 and a jury trial was set for June 20, 2000, the trial court did not address the Boseman objection to the certification of readiness for trial. A:1:4-5.

19. Rohan attended a neuropsychological evaluation performed by the Boseman's expert, Elaine Clark PhD., on May 5, 2000. Dr. Clark's report was not faxed to Rohan until June 6, 2000, a day after the trial court had denied Rohan's first motion to continue and 10 days after discovery had closed. A:23:154.

20. Dr. Clark's report showed that as of May 5, 2000, weeks before trial, Rohan was severely impaired in terms of memory skills and information processing. Although he performed better on a test of visual attention than he had in May of 1997, his visual memory remained severely impaired i.e. below the 10% percentile. The testing also showed significant impairment in the his verbal memory and learning, other problems noted by Dr. Clark included confusion and poor mental tracking. A:23:154

21. After the March scheduling conference, Rohan began searching for experienced trial counsel, because Mr. Halliday and Mr. Watkins had limited jury trial experience and they did not have any experience trying a brain injury case. A:6:24

22. Rohan, realizing he needed substitute counsel, contacted several experienced trial attorneys during March 2000. Rohan contacted, and signed a fee agreement, with Robert F. Orton of the law firm of Fabian & Clendenin to try the case. Orton attended Mr. Rohan's supplemental deposition on March 30, 2000 and told opposing counsel he was going to be making an appearance in the case. He also represented Rohan at a supplemental deposition on April 26, 2000 and examined medical records at the offices of Strong & Hanni in May of 2000. A:24:174,184

23. Approximately one week before the scheduled pretrial on June 5, 2000, Orton informed Rohan that would not try the case because he could not have the experts he needed ready for a June 20, 2000 trial. However, Mr. Orton agreed that Mr. Rohan could represent to the Court that if he were able to secure a ninety day continuance Orton would try the matter. A:6:24

24. Upon learning at that late date that Orton would not try the case without a continuance, and with no hope of finding an attorney to try a brain injury case on such short notice, Rohan filed a Motion for Continuance of Trial Setting, Withdrawal of Counsel, Substitution of Counsel and Enlargement of Discovery (hereinafter the "first motion for a continuance") on June 2, 2000. This was the Friday before the Monday final pre-trial and eighteen days before the scheduled trial. Prior to filing the motion Boseman was asked to stipulate to the motion, which they declined, they agreed not to oppose the motion. A:4:16.

25. At the June 5, 2000 pretrial, the trial court denied the first motion for a continuance on the grounds that there is no showing of good cause and decision to change counsel 15 days before trial is too late. A:7: 27-28.

26. After the first motion for a continuance was denied, and knowing that Mr. Halliday & Mr. Watkins were not prepared to represent him, as they had been under the impression since March that Orton would try the case, Rohan filed a Notice of Discharge of his attorneys and a Motion for Voluntary Dismissal (hereinafter the “first motion for voluntary dismissal”) on June 7, 2000. A:8:30, 9: 32-35. On June 14, 2000 the trial court denied the first motion for voluntary dismissal “for the reasons specified in the opposing memorandum.” A:11:41.

27. On June 15, 2000, Mr. Rohan, in order prevent additional expense by Boseman and the trial court filed a Notice of Plaintiff’s Inability to Bring This Matter to Trial. A:12-43. The day after the notice, was filed the trial court granted the unopposed Boseman motion into exclude testimony of witness Ingebretsen. “there being no timely opposition.” A:13:45.

28. On June 19, 2000 Rohan filed his Renewed Motion for Voluntary Dismissal or Alternatively Motion to Continue Trial Setting to Consider Plaintiff’s Claims under the ADA, (hereinafter the “second motion for voluntary dismissal” or “second motion for a continuance”) with supporting Affidavit, in which Rohan made a prima facie showing that he was a qualified individual with a disability pursuant to

the statutory requirements of the ADA and requested the reasonable accommodation of either a continuance or voluntary dismissal. A:14:47, 15:50-56, 16:57-64.

29. On June 20, 2000 the parties appeared for trial. A:18:71. Rohan's second motion for voluntary dismissal or to continue was denied. The trial court without conducting the statutorily mandated individualized inquiry into the ADA claims raised by Mr. Rohan, "rules as stated on the record and orders this case be dismissed with prejudice for failure to prosecute. Defendants are awarded costs and fees in an amount to be determined per Rule 4-501. Attorney Trayner to prepare findings of fact and conclusions of law and judgment including jury fees." A:18:75-76.

30. On July 31, 2000 the Order and Judgment in the amount of \$7347.78 against Rohan was filed and the case was dismissed with prejudice. A:20:88.

31. On August 7, 2000 Rohan filed a motion for New Trial Pursuant to Rule 59 or Alternatively Motion to Amend. (hereinafter the "motion for new trial") A:21:91. On September 28, 2000 the trial court issued a minute entry ruling stating, "Plaintiff's Motion for New Trial, etc. is denied for reasons specified in the opposing memorandum. Counsel for Defendant to prepare Order." A:26:237-8. The order on the motion for a new trial was filed on November 2, 2000. A:27:239-40.

32. Rohan filed his Notice of Appeal on November 30, 2000.

### **SUMMARY OF ARGUMENT**

Title II, Subchapter A of the Americans With Disabilities Act, 42 U.S.C. §

12132, bars public entities from discriminating on the basis of a disability and provides that no qualified individual with a disability shall, by reason of such a disability, be excluded from participation in or denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity. The term "qualified individual with a disability" is defined by 42 U.S.C. § 12131(2), as an individual with a disability who, with or without reasonable modifications to rules, policies, or practices . . . meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

The United States Supreme Court has repeatedly affirmed that the question of whether a person has a disability under the ADA is an individualized inquiry. See Sutton v. United Air Lines, Inc., 527 U. S. 471, 483 (1999), Bragdon v. Abbott, 524 U.S. 624, 641-642, (1998); PGA Tour, Inc., v. Martin 121 S.Ct. 1879, 1896 (2001). However, even after Rohan presented prima facie evidence to the trial court demonstrating that he was a qualified individual with a disability the trial court refused to engage in such a individualized inquiry and therefore discriminated against him as defined by the act.

The trial court also violated the act by refusing to conduct an individualized inquiry to determine whether his request for a accommodation permitting a 90 day continuance or voluntary dismissal was a fundamental alteration of the judicial process again violating the statute. The trial court's refusal to consider Rohan's personal

circumstances in deciding whether to accommodate his disability runs counter to the clear language and purpose of the ADA. The ADA was enacted to eliminate discrimination against “individuals” with disabilities, and to that end the act requires without exception that rules, policies, practices or procedures of a public entity be reasonably modified for disabled “individuals” as necessary to afford access, unless doing so would fundamentally alter what is offered.

Unquestionably, neither a continuance or voluntary dismissal is a unreasonable modification that would fundamentally change the operation courts. The trial court’s refusal to consider Mr. Rohan’s claims pursuant to the ADA was erroneous as a matter of law and violated not only the ADA but Rohan’s due process and equal protections as guaranteed by the Utah and United States Constitutions.

## **ARGUMENT**

### **POINT 1.**

**The trial court erred as a matter of law and violated the provisions of Title II of the Americans With Disabilities Act, and Mr. Rohan’s due process and equal protection rights as guaranteed by the both the Constitution of the United States and the Utah Constitution when it failed to grant a continuance or voluntary dismissal and dismissed his case with prejudice after Rohan had made a prima facie showing that he was a qualified individual with a disability pursuant to the provisions of the ADA.**

Mr. Rohan raised his claims pursuant to the ADA in his Renewed Motion for Voluntary Dismissal or Alternatively Motion to Continue Trial Setting to Consider

Plaintiff's Claims Under the ADA and in his Motion for New Trial Pursuant to Rule 59 or Alternatively Motion to Amend. A:14, 21.

The trial court denied the motion ruling:

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;*

4. *That plaintiffs 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 no require that this court grant plaintiffs request for a continuance and/or a voluntary dismissal without prejudice;*

The trial court issued a minute entry in response to Rohan's motion for new trial ruling:

1. *Plaintiff's Motion for New Trial, etc. is denied for the reasons specified in the opposing memorandum.*

The trial court erred as a matter of law and discriminated against Rohan by failing to conduct an individualized inquiry into Rohan's claim that he was a qualified individual with a disability pursuant to the terms of the ADA, by refusing to consider whether Rohan's request for an accommodation in the form of a 90 day continuance or voluntary dismissal without prejudice was "reasonable, whether it was necessary for the disabled individual, and whether it would fundamentally alter the



nature of the judicial process .” PGA Tour, Inc. 121 S.Ct. 1896.

### **I. Violation of the ADA.**

The ADA forbids discrimination against disabled individuals in major areas of public life, among them employment (Title I of the Act), public services (Title II), and public accommodations (Title III). A “public entity,” includes “any department, agency, special purpose district, or other instrumentality of a State or States or local government. Pennsylvania Dept. of Corrections v. Yeskey, 118 S.Ct. 1952, 1955 (1998). See also 28 C.F.R. § 35.104. The courts of this state unquestionably are public entities falling within the mandate of the of the act.

Title II, Subchapter A of the Americans With Disabilities Act, 42 U.S.C. §12132, bars public entities from discriminating on the basis of a disability in the provision of programs and benefits to qualified individuals, it provides that:

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

The act is applicable only to qualified individuals with a disability not to the public at large. The question of whether a person has a disability under the ADA is an individualized inquiry. Sutton v. United Air Lines, Inc., 527 U. S. 471, 483 (1999). The operative language of Title II must be read in conjunction with applicable implementing regulations. Crandon v. United States, 494 U.S. 152, 158, (1990). The

Tenth Circuit evaluates whether a individual states a claim under Title II by applying the three part standard articulated in Tyler v City of Manhattan, 849 F. Supp. 1429 (D. Kan. 1994), that substantially tracks the EEOC implementing regulations. To state a cause of action under Title II of the ADA the individual must prove:

- (A.) That he [or she] is a qualified individual with a disability;
- (B.) That he [or she] 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
- (C.) That such exclusion, denial of benefits, or discrimination was by reason of the Plaintiff's disability.

Mr. Rohan presented undisputed evidence to the trial court that he was a qualified individual with a disability, that the denial of his motions for a continuance or voluntary dismissal resulted in his exclusion from participation in or denial of the benefits of the judicial process to redress his injuries, or he was otherwise discriminated against by the trial court; and the exclusion, denial of benefits, or discrimination was by reason of his disability in that the trial court refused to conduct a individualized inquiry to consider his claim pursuant to the ADA once it had been presented with unchallenged evidence that he was a qualified individual with a disability. By so doing the trial court discriminated against Mr. Rohan as a matter of law.

- (A.) Rohan a qualified individual with a disability.**

The first requirement necessary to state a claim pursuant to Title II of the ADA,

is that the individual must show he is a qualified individual with a disability. This is a two step process that requires the individual to first show that he is disabled, and then the individual must next show he is a qualified individual with an disability.

The term "qualified individual with a disability" is defined in 42 U.S.C. § 12131(2) as:

*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.*

Mr. Rohan presented uncontested evidence to the trial court showing that he is disabled as defined by the ADA and that he is a qualified individual with a disability. A:16:57-64, 23:120-169.

**1. Rohan meets the elements of disability as defined by the ADA.**

The U. S. Supreme Court, in affirming the Tenth Circuit in Sutton v. United Air Lines, Inc., 130 F.3d 893, 902 (C.A.10 1997), aff'd, 527 U.S. 471, 474-78 (1999), looked to the EEOC implementing regulations to construe the meaning of the term disability as used in the ADA. Sutton at 527 U.S., 474-478. The regulations define three essential elements of a disability: (a.) physical or mental impairment, (b.) substantially limits, and (c.) major life activities. 29 C.F.R. §§ 1630.2(h)-(j). Taking these three elements in turn it is clear that Rohan is disabled as defined by the act.

**(a.) Physical or Mental Impairment**

The first essential element that Mr. Rohan must show to meet the definition of disability as used in the ADA is that he suffers from a physical or mental impairment that is covered by the act. The EEOC regulations define a physical or mental impairment to include any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine. 29 C.F.R. §1630.2(h)(1).

Unlike the other titles of the Act, Title II does not list all of the forms of discrimination that the title was intended to prohibit. Because of this the Attorney General was directed to issue regulations setting forth the forms of discrimination prohibited. In response to this congressional mandate the Department of Justice (DOJ) issued regulations defining the forms of discrimination prohibited by Title II of the ADA. [28 C. F. R. pt. 35 (1992) which became effective on January 26, 1992 at Section 36.508]. Because the DOJ is the agency directed by Congress to issue Title II regulations, its views warrant respect. The well-reasoned views of the agencies implementing a statute constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. e.g., Bragdon v. Abbott, 524 U.S. 624, 642.

The definition of “impairment” as used by the DOJ regulation is essentially the same as EEOC definition. However, unlike the EEOC regulation, brain injury is specifically dealt with at pages 35:698-35:700 of the Department of Justice Commentaries to the Title II implementing regulation:

“As explained in paragraph (1)(i) of the definition, "impairment" means any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological . . . It also means any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

Many commentators asked that "traumatic brain injury" be added to the list in paragraph (1)(i). **Traumatic brain injury** is already included because it is a physiological condition affecting one of the listed body systems, i.e., "neurological." Therefore, it was unnecessary to add the term to the regulation, which only provides representative examples of physiological disorders.” (Emphasis Added).

Mr. Rohan presented the following undisputed objective evidence to the trial court showing that his brain injury that meet the of the definition of a neurological impairment.

A CT scan of Rohan’s brain taken before the accident showed a normal brain scan. A:23:128. However, an MRI of his brain taken after the accident, was interpreted as abnormal, A:23:129, interestingly the same radiologist read both scans. Rohan’s treating neurologist reported the MRI showed changes typical for closed head injury with axonal shearing. Neuropsychological testing performed in May 1997 showed disrupted cognitive performance, with performance being substantially below what would be expected. Rohan has been evaluated with testing that was meaned on

individuals confirmed to have suffered brain injury and his score represented a moderate dysfunction on this scale. A:23:139. Finally, in the response to the motion for a new trial Boseman did not dispute the fact that Mr. Rohan is afflicted by a neurological disorder that meets the definition of a disability under the ADA. A:24:181.

**(b.) Substantially Limited.**

The second essential element Mr. Rohan must show to meet the definition of disability as used in the ADA is that he is substantially limited. The term “substantially limits” means, among other things, “[u]nable to perform a major life activity that the average person in the general population can perform; or significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.” 29 C.F.R. § 1630.2(j). Additionally, an individual is disabled when the impairment in fact “substantially limits” a major life activity, not where it “might,” “could,” or “would” be substantially limiting if corrective measures were not taken. Sutton at 483. A physical impairment need not appear on a specific list of disorders to constitute a disability, nor must the impairment affect those aspects of a persons life that have strictly a public or economic character. Bragdon v. Abbott, 524 U. S. 624 (1998).

The Tenth Circuit also applies a three factor test that was gleaned from the

implementing regulations to determine whether an individual is "substantially limited" in a major life activity. These are: (i) the nature and severity of the impairment, (ii) the duration or expected duration of the impairment, and (iii) the permanent or expected long-term impact of the impairment. Sutton, 130 F.3d at 900. Taking these three factors in turn it is clear that Rohan was substantially limited in any number of major life activities.

*i. The nature and severity of the impairment:* Rohan presented unchallenged objective medical evidence (CT, MRI, neuropsychological testing) to the trial court showing that he has a physical or mental impairment covered by the act. Rohan presented evidence of from the Boseman nueropsychologist, showing that just weeks before the trial he was severely impaired in terms of memory skills, information processing and visual memory. Rohan also presented uncontested evidence to the trial court establishing that he had been diagnosed with excessive daytime sleepiness, that he was taking stimulant medications to maintain wakefulness, that he did not dream, that he was constantly fatigued and often had to interrupt his practice to take naps, that colleagues often had call him to awaken him in the mornings, that he suffers from severe debilitating headaches which sometime prevent him from doing any activities at all, including maintaining a legal practice, and that he contacted the Utah State Bar, Office of Professional Conduct due to concerns about his disability and as a result of those contacts members of the law firm of Halliday and Watkins P.C., informally

supervise Mr. Rohan's practice. A:23:122-123. This evidence amply demonstrated to the trial court both the nature of the impairment suffered by Rohan and its severity.

*ii. The duration or expected duration of the impairment:* Rohan presented objective medical evidence to the trial court establishing the fact that he had exhibited the symptoms of traumatic brain injury since the January 1997 accident and there was no indication that the impairment was improving or will improve even after several years of cognitive therapy and treatment with various medications. A:23:165. In fact, neuropsychological testing performed by Dr. Clark in May 2000 revealed that the cognitive defects experienced by Rohan were not only were not improving, but they were the same or worse than before. A:23:163.

Rohan will require maintenance of his present regimen of medications indefinitely. Although the medications are able to mitigate the more drastic effects of the brain injury dealing with wakefulness, he remains significantly restricted in every facet of his daily life as compared to the average person. Rohan's condition has become chronic and static, and he was assigned a permanent partial impairment of the whole person of 34% and a 100% impairment with respect to the independent practice of law. A:23:166. The closed head injury and posttraumatic brain injury along with sleep disturbance has lasted for 4 years and "has had a profound affect on the patient's activities of daily living" and is expected to continue indefinitely.



*iii. The permanent or expected long-term impact of the impairment.* Mr.

Rohan also presented unchallenged objective medical evidence to the trial court showing the impairments to be severe, permanent, and they will impact every aspect of his life indefinitely. Medical records reveal that Mr. Rohan “has reported significant difficulties since his accident in completing both activities of daily living and work related activities . . . Specifically, Mr. Rohan experiences significant difficulties attending to important information for a given task. He experiences a decrease in his attentional abilities as the complexity of the information increases and as distractions are introduced. This has and will continue to significantly impact his abilities to complete activities at home and at work.” A:23:142. As noted above the Boseman nueropsycholgist stated, “Data from the current neuropsychological evaluation show Mr. Rohan is severely impaired . . . Despite receiving cognitive rehabilitation since the time of the first evaluation by Dr. Bigler, Mr. Rohan seems to be doing the same or worse in a number of areas.”

Having met the test showing he is substantially limited, Rohan was also required to demonstrate to the trial court that the limitation applies to major life activities which he did in fact do.

**(c.) Major life activities.**

The third essential element of the definition of disability as used in the ADA is that Rohan’s participation in major life activities is substantially limited by his

disability. The United States Supreme Court, using the EEOC definition, has stated that major life activities mean, among other things functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. 29 C.F.R. § 1630.2(i). Id. The ADA “addresses substantial limitations on major life activities, not utter inabilities,” Bragdon at 641, and as it has repeatedly done, the Court observed, the determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis. Id. at 642.

Rohan presented uncontested evidence to the trial court that he was, is, and will be substantially limited in virtually all major life activities for the rest of his life. This evidence included the fact that Mr. Rohan’s cognitive skills are severely impaired and are continuing to decline. The sleep problems continue despite the medication, as do the headaches, the fatigue, the memory problems, and the inattention. The myriad of symptoms and impairments related to the objectively documented brain injury persist and cannot be mitigated. The record before the trial court unquestionably demonstrated that Rohan is presently, not potentially or hypothetically, substantially limited in any number of major life activities ranging from thinking, to memory, to attentiveness, to staying awake, to staying asleep and even to dreaming. The disability produced by the brain injury has altered every aspect of his personal and professional life. Rohan is unquestionably "substantially limited" in every major life activity and is disabled as provided by the ADA.

**2. Rohan is a qualified individual with a disability as defined by the ADA.**

Once a individual demonstrates that he is disabled, the individual must then show that he is a qualified individual with a disability in order to receive the protections of the ADA

Under Title II, a “qualified individual” is an individual with a disability who “with or without reasonable modifications to rules, policies, or practices, . . . meets the essential eligibility requirements for the receipt of services or participation in the programs or activities provided by a public entity. 42 U.S.C. § 12131(2). (Emphasis Added).

Mr. Rohan, as a litigant seeking redress through the state courts for the injuries he suffered in an accident, unquestionably meets the essential eligibility requirements for participation in the judicial process. The accommodation of a continuance or voluntary dismissal was a reasonable modification to the rules of procedure permitting access to the courts by Mr. Rohan and should have been granted.

The ADA was enacted to eliminate discrimination against “individuals” with disabilities, and to that end the Act requires without exception that rules, policies, practices or procedures of a private or public entity be reasonably modified for disabled “individuals” as necessary to afford access, unless doing so would fundamentally alter what is offered. To comply with this command, an individualized inquiry must be made

to determine whether a specific modification for a particular person's disability would be reasonable under the circumstances as well as necessary for that person, and yet at the same time not work a fundamental alteration to the process. PGA., 121 S.Ct. at 1896. As with the mandate that the trial court must make a individualized inquiry as to Rohan's claims that he is disabled, the trial court was also mandated to conduct a individualized inquiry into the nature of the accommodation he was requesting. The trial could erred as a matter of law and discriminated against the plaintiff when it failed to do so.

The trial court made neither a individualized inquiry into the reasonableness of Rohan's request for an accommodation nor did it enter findings of fact and conclusions of law to support denial his request for a continuance or voluntary dismissal without prejudice. As a matter of law, because the trial court failed to conduct the individualized inquiry required by the act, the only conclusion this Court can reach is given the evidence and the circumstances surrounding his disability, the accommodation requested by Rohan was reasonable, it was necessary to enable meaningful access to the judicial process, and because the request was made within the frame work of currently existing rules of procedure his request would not fundamentally alter the nature of the judicial process.

**(B.) Rohan was excluded from participation in or denied the benefits of the Courts services, programs or activities, or was otherwise discriminated against.**

Once it had been shown that Rohan was a qualified individual with a disability, the second requirement that he must meet to state a claim is to show that he was excluded from participation in or denied the benefits of the Courts services, programs or activities, or was otherwise discriminated against.

Title II is violated when a qualified individual is prevented from participating in or benefitting from a public service, program, or activity, by reason of a qualifying disability, regardless of whether the entity intended to discriminate against the disabled person. Patton v. TIC United Corp., 77 F.3d 1235, 1245 (10th Cir.1996). Under the plain meaning of the ADA exclusion from participation in or denial of the benefits of a public entities, services, programs or activities, to a qualified individual is discrimination.

Congress enacted the ADA in 1990 to remedy widespread discrimination against disabled individuals. In studying the need for such legislation, Congress found that "historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem." 42 U.S.C. § 12101(a)(2); see § 12101(a)(3) ("[D]iscrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services"). Congress

noted that the many forms such discrimination takes include "outright intentional exclusion" as well as the "failure to make modifications to existing facilities and practices." §12101(a)(5). Congress concluded that there was a "compelling need" for a "clear and comprehensive national mandate" to eliminate discrimination against disabled individuals, and to integrate them "into the economic and social mainstream of American life." PGA at 1889.

The ADA regulations provide that "a public entity shall operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities." 28 C.F.R. § 35.150(a). The regulations require public entities to "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity. 28 C.F.R. § 35.130(b)(7). Requiring the trial court to comply with the ADA by granting a continuance to conduct an individualized inquiry is a reasonable accommodation that does not fundamentally alter the nature of the judicial process.

Boseman in opposition to the motion for a new trial argued that Rohan was not in any way discriminated against or denied access to the courts, and in fact, the evidence showed the opposite. They argued that Rohan was permitted to initiate his lawsuit, conduct discovery and was given the opportunity to present his case, with or

without representation, to a jury, and it was his own conduct and decisions that prevented him from actually having the opportunity to go through with trial. Essentially the Boseman's argue that Mr. Rohan was not discriminated against because he was not treated any differently than any other litigant.

This argument misses the point and the mandate of the ADA. The United States Supreme Court has concluded that Congress had specifically authorized a more comprehensive view of the concept of discrimination than mere differential treatment in enacting the ADA. See Olmstead v. L.C., 527 U.S. 581 (1999). Title II specifies that no qualified individual with a disability shall, 'by reason of such disability,' be excluded from participation in, or be denied the benefits of a public entity's services, programs, or activities. It is the exclusion or denial of benefits to a qualified individual with a disability that forms the basis of the discrimination that is proscribed by Title II of the ADA, not differential treatment.

**(C.) That such exclusion, denial of benefits, or discrimination was by reason of the Plaintiff's disability.**

The final requirement to state a claim pursuant to Title II of the ADA, the individual must show the exclusion was by reason of the disability.

Rohan demonstrated to the trial court that he was a qualified individual with a disability with unrefuted objective medical evidence. The reason Rohan made the motions was because of his brain injury. The brain injury prevented he him from trying his own case. The trial court simply concluded that because Rohan was a licensed

attorney he could try his own case.

The fact that Rohan is a attorney would have been relevant to an individualized inquiry as to whether Rohan was a qualified individual with a disability and whether the accommodation he was requesting was reasonable. But because the trial court failed to inquire further and only considered the fact that he was an attorney, Rohan was discriminated against by reason of his disability.

## **II. Violation of Mr. Rohan's Due Process & Equal Protection Rights.**

Article I, section 7 of the Utah Constitution states: "No person shall be deprived of life, liberty or property, without due process of law." "Due process" is not a technical concept that can be reduced to a formula with a fixed content unrelated to time, place, and circumstances. Rather "the demands of due process rest on the concept of basic fairness of procedure and demand a procedure appropriate to the case and just to the parties involved." Rupp v. Grantsville City, Utah, 610 P.2d 338, 341 (1980).

The basic premise upon which our judicial system rests is the notion that the judiciary exists to afford litigants the opportunity to be heard and to do justice between them. This principle was articulated by United States Supreme Court in Wilson v. Iseminger, 185 U.S. 55 (1902). The Court noted the fundamental obligation of government is to provide reasonable remedies for wrongs done persons. "Every government is under obligation to its citizens to afford them all needful legal



remedies.” Wilson at 62. “The right to be [compensated] for personal injuries is a substantial property right, not only of monetary value but in many cases fundamental to the injured person's physical well-being and ability to continue to live a decent life.” Condemarin v. University Hospital, 775 P.2d 348, 360 (Utah 1989).

Rohan has shown that the trial court had uncontested evidence before it to conclude that the ADA may be applicable to his claims. He drew the trial court’s attention to the mandate of the United States Supreme court that an individualized inquiry into Rohan’s ADA claims was required. The trial court chose to ignore both the statute and the facts, thus denying Rohan his due process rights as guaranteed the Utah constitution and offending the fundamental principle of fairness that underpins the judicial process.

The opportunity to prepare for trial is core to the concept of due process. The trial courts myopic insistence that a brain injured Plaintiff who is also an attorney must try his own case, without even one continuance to properly prepare, violates the due process guarantees of the Utah constitution and the concept of basic fairness that the rules of procedure are supposed to embody .

Article I, section 11 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 no person shall be barred from prosecuting or defending before

any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

Article I, Section 11 was designed to accomplish several purposes. The clear language of the section guarantees access to the courts and a judicial procedure and is premised on basic concepts of fairness and equality. Section 11 also establishes that the framers of the [Utah] Constitution intended that an individual could not be arbitrarily deprived of effective remedies designed to protect basic individual rights. The constitutional guarantee of access to the courthouse was not intended by the founders to be an empty gesture, individuals are entitled to a remedy by "due course of law" for injuries to "person, property, or reputation." Berry v. Beech Aircraft Corp., 717 P.2d 670, 675(Utah 1985)

Rohan presented unchallenged evidence to the trial court that he is a qualified individual with a disability as defined by the ADA. 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. The trial court made the guarantee of access to the courthouse espoused by the Utah constitution an empty gesture for the individual litigant with a brain injury.

Article I, section 24 of the Utah Constitution states: "All laws of a general nature shall have uniform operation."

The section "protects against two types of discrimination. First, a law must apply equally to all persons within a class. Second, the statutory classifications and the

different treatment given the classes must be based on differences that have a reasonable tendency to further the objectives of the statute.” Malan v. Lewis, 693 P.2d 661, 670 (Utah 1984).

The uniform operation of laws provision establishes different requirements than does the Federal Equal Protection Clause. “[F]or a law to be constitutional under [Section 24], it is not enough that it be uniform on its face. What is critical is that the operation of the law be uniform. A law does not operate uniformly if ‘persons similarly situated’ are not ‘treated similarly’....” Malan, at 669.

Both Rule 4-105 and Rule 41 are uniform as applied to an individual with a disability only in that they can operate to uniformly exclude disabled individuals, with a qualified disability under the ADA from participation in the litigation process. The rules in effect grant the Court discretion to discriminate against disabled litigants.

Section 1 of the Fourteenth Amendment provides, in relevant part:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." In asserting a due process violation, Rohan must show the trial court acted in two ways. Rohan must show the trial court deprived him of his life, liberty, or property. Second, Rohan must show that deprivation was made without the required legal process.

Section 5 of the Fourteenth Amendment grants Congress the power to enforce the substantive guarantees contained in § 1 by enacting "appropriate legislation." See City of Boerne v. Flores, 521 U.S. 507, 536, (1997). Congress' power 'to enforce' the Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." City of Boerne, at 536. In passing the ADA and making it applicable to public entities Congress intended to protect the rights of all citizens against discrimination by the states. Rohan has shown that the trial court deprived him of his life, liberty, or property. Rohan has also shown that because the trial court acted in contravention of the ADA the deprivation was made without the legal process required by the United States Constitution.

The equal protection guarantees of the Fourteenth Amendment sanctions both "passive" and "active" discrimination. The Utah Supreme Court has noted that the equal protection guarantees of the Utah and Federal Constitutions "embody the same general principle: persons similarly situated should be treated similarly, and persons in different circumstances should not be treated as if their circumstances were the same." Malan v. Lewis, 693 P.2d 661, 669 (Utah 1984). The Plaintiff has demonstrated that he is a qualified individual with a disability. His circumstances as a disabled litigant appearing before the trial court were distinctly different than those of a litigant appearing before the same tribunal without a disability. However, 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, thus depriving him of equal protection of the laws as guaranteed by the United States Constitution.

## **POINT 2.**

**The trial court abused its discretion, when it denied Mr. Rohan's first motion for a voluntary dismissal pursuant to Rule 41(a)(2) of the Utah Rules of Civil Procedure;**

**The trial court erred as a matter of law, and abused its discretion when it denied Mr. Rohan's second motion for voluntary dismissal pursuant to Rule 41(a)(2) after Mr. Rohan had made a prima facie showing that he was a qualified individual with a disability under the ADA;**

**The trial court erred as a matter of law when it dismissed Mr. Rohan's case with prejudice pursuant to Rule 41(b).**

### **A. First Motion for Voluntary Dismissal pursuant to Rule 41(a)(2)(ii) of the Utah Rules of Civil Procedure.**

The trial court in a unsigned minute entry on June 14, 2000 (Order Signed June 20, 2000) ruled:

*1. Plaintiff's Motion for Voluntary Dismissal is denied for the reasons specified in the opposing memorandum.*

*2. Counsel for defendants to prepare the order.*

There are relatively few cases in Utah that deal with the application of Rule 41(a)(2)(ii). However the rule is substantially similar to the Federal Rule. The Utah Supreme Court has recognized the persuasiveness of federal interpretations when the state and federal rules are similar and few Utah cases deal with the rule. Pate v.

Marathon Steel Co., 692 P.2d 765, 767 & n. 1 (Utah 1984).

In the Federal Circuits a decision to deny Plaintiff's motion for voluntary dismissal pursuant to Rule 41(a)(2) is reviewed for abuse of discretion. American Nat'l Bank & Trust Co. v. Bic Corp., 931 F.2d 1411, 1412 (10th Cir.1991). The Circuits have concluded that absent "legal prejudice" to the defendant, the district court normally should grant a dismissal. The Tenth Circuit has stated that although the parameters of what constitutes "legal prejudice" are not entirely clear, there are several relevant factors the court should consider, including: the opposing party's effort and expense in preparing for trial; excessive delay and lack of diligence on the part of the movant; insufficient explanation of the need for a dismissal; and the stage of litigation. Phillips U.S.A., Inc. v. Allflex U.S.A., Inc., 77 F.3d 354, 358 (10th Cir.1996). Each factor need not be resolved in favor of the moving party for dismissal to be appropriate, nor need each factor be resolved in favor of the opposing party for denial of the motion to be proper.

The court should endeavor to insure substantial justice is accorded to both parties. "A court, therefore, must consider the equities not only facing the defendant, but also those facing the plaintiff; a court's refusal to do so is a denial of a full and complete exercise of judicial discretion. In a complex case . . . it is critically important when considering a motion to dismiss, that the court give the equities of the plaintiff the attention deserved." Ohlander, v. Larson 114 F. 3d 1531, (10th Cir.1997).

Finally, when considering a motion to dismiss, a court must remember the important factors in determining legal prejudice are those involving the parties, not the court's time or effort spent on the case. Clark v. Tansy, 13 F.3d 1407, 1411 (10th Cir.1993). A court abuses its discretion when it denies a motion to dismiss under Rule 41(a)(2) based on its inconvenience. In sum, the district court was obligated to consider the novelty of the circumstances surrounding the case. Id.

The trial court clearly put its own convenience ahead of the concept of doing justice between the parties in this case. Boseman was not prejudiced by a voluntary dismissal, in that they opposed the certification of readiness for trial, nor did they oppose the original motion for a continuance. It was only after it became apparent that the trial intended to push the matter to trial and sanction Rohan that they jumped on the bandwagon and asserted prejudice. The trial court refused to consider the prejudice to Rohan, which is denial of a full and complete exercise of judicial discretion.

**B. Second Motion for Voluntary Dismissal pursuant to Rule 41(a)(2)(ii) after Mr. Rohan after Mr. Rohan had made a prima facie showing that he was a qualified individual with a disability under the ADA;**

The trial court denied Mr. Rohan's Motion to Continue Trial Setting To Consider Plaintiff's Claims under the ADA at the trial ruling

*The provisions of Title II of the Americans with Disabilities Act do no require that this court grant plaintiffs request for a continuance and/or a voluntary dismissal without prejudice;*

The trial court was required, once Rohan had presented a prima facie showing

that he was a qualified individual with a disability, to conduct an individualized inquiry. By failing to conduct the inquiry the trial court discriminated against the Appellant, erred as a matter of law, and abused its discretion by refusing to voluntarily dismiss the matter.

**C. The Trial Court's Involuntary Dismissal of Mr. Rohan's case with Prejudice Pursuant to Rule 41(b) of the Utah Rules of Civil Procedure.**

It is well established that the trial court may . . . dismiss an action for want of prosecution under Rule 41(b). Charlie Brown Constr. Co. v. Leisure Sports Inc., 740 P.2d 1368, 1370 (Utah Ct. App.1987). This authority is an “inherent power, governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.” Charlie Brown Constr. Co., 740 P.2d at 1370 (quoting Link v. Wabash R. Co., 370 U.S. 626, 630-31(1962)). The trial court has a “reasonable latitude of discretion in dismissing for failure to prosecute if a party fails to move forward according to the rules and the directions of the court, without justifiable excuse.” Westinghouse Elec. Supply Co. v. Paul W. Larsen Contractor Inc., 544 P.2d 876, 878-79 (Utah 1975).

A court's discretion, however, must be balanced against a higher priority: to “afford disputants an opportunity to be heard and to do justice between them.” Westinghouse Elec. Supply Co., 544 P.2d at 879. In Westinghouse, the Utah Supreme Court established five factors to be evaluated in conjunction with the amount of time



that elapsed since the suit was filed, the factors considered include the following: (1) the conduct of both parties; (2) the opportunity each party has had to move the case forward; (3) what each of the parties has done to move the case forward; (4) what difficulty or prejudice may have been caused to the other side; and (5) most important, whether injustice may result from the dismissal.

The burden is on the party “attacking a dismissal for failure to prosecute [to] offer a reasonable excuse for its lack of diligence.” Country Meadows Convalescent Center v. Utah Department of Health, Division of Health Care Financing, 851 P.2d 1212,1215 (Utah Ct. App.1993). Rohan’s explanation that he could not try his own brain injury case is certainly a justifiable excuse. Rohan had signed a fee agreement with Robert Orton to try the matter, but a week before the pre-trial he learned Orton would not try the case because he could not adequately prepare. In response, Rohan made a flurry of motions in an attempt to secure a short continuance or voluntary dismissal. Boseman only claimed prejudice when it became clear that the trial court was determined push the matter to trial in spite of any of motions Rohan might make or any facts presented to it. The record demonstrates that both parties had been moving the matter forward, in fact Boseman objected to the pace, filing a objection to court ordered certification of readiness for trial. There was no difficulty or prejudice caused to Boseman by a voluntary dismissal but there has been a great injustice to Rohan resulting from the dismissal.

### **POINT 3.**

**The trial court abused its discretion in contravention of Rule 40(b) of the Utah Rules of Civil Procedure, when it denied Mr. Rohan's first motion for a continuance;**

**The trial court erred as a matter of law and abused its discretion when it denied Mr. Rohan's second motion a continuance after Mr. Rohan after Mr. Rohan had made a prima facie showing that he was a qualified individual with a disability under the ADA.**

Rule 40(b) of the Utah Rules of Civil Procedure in its relevant parts provides that 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.

Rule 40 allows the trial court to postpone a trial upon a showing of good cause. A trial court has substantial discretion in deciding whether to grant continuances, Christenson v. Jewkes, 761 P.2d 1375, 1377 (Utah 1988). A party is not necessarily entitled to a continuance because counsel is unable to be present on the date set for trial. See Griffiths v. Hammon, 560 P.2d 1375, 1376 (Utah 1977); see also Lundgreen v. Lundgreen, 112 Utah 31, 34, 184 P.2d 670, 671-72 (1947).

Nevertheless, an abuse of discretion may be found if, a party has made timely objections, [has] given necessary notice, and has made a reasonable effort to have the

trial date changed for good cause. Brown v. Glover, 16 P.3d 540, 548-9 (Utah 2000).

As soon as Rohan realized that he was not represented for his upcoming trial he made a flurry of motions and timely objections including two motions to continue, two motions for voluntary dismissal, and a motion for a new trial, additionally, he gave notice to the trial court that he could not try his own case, and he made every reasonable effort possible to have the trial date changed for good cause.

**A. First Motion for a Continuance of Trial Setting.**

The trial court denied Rohan's first motion for a continuance ruling:

*1. Plaintiff has served his Motion for Continuance, etc. on June 5, 2000 seeking to continue the trial set for June 20, 2000 to allow substitution of counsel, to extend discovery deadline, etc. Plaintiff has had the same counsel since the matter was filed April 23, 1998.*

*2. Because this matter was not moved forward, this Court was required to impose a 60 day certification order pursuant to an Order to Show Cause hearing November 18, 1999.*

*3. Counsel for defendants while not actively resisting the instant motion, will not stipulate to it.*

*4. This Court after review of the matter denies the request for continuance/substitution as there is no good cause showing for such continuance. A decision to change counsel 15 days before the trial date under the present circumstances is too late.*

The trial court abused its discretion and reached the erroneous conclusion that Rohan was not diligent in pursuing his cause and in obtaining the services of substitute counsel. There is nothing in the record to support this conclusion.

Mr. Rohan served his first motion for a continuance on June 2, 2000, admittedly

shortly before the scheduled pretrial, but not on June 5,

The court ruled in the minute entry that because the matter was not moved forward, the court was required to impose a 60 day certification order. The docket refutes this contention A:1:1-2. There was activity in the case during 14 of 20 months elapsing since the filing of the Complaint. The parties were conducting discovery, depositions had been scheduled and the trial court had spent five months dealing with the motion of bar counsel to quash discovery. Although Rohan complied with the court's order and timely filed his notice of readiness for trial on January 19, 2000, the Boseman's filed an Objection to Plaintiff's Certificate of Readiness for Trial on the basis that there was ongoing discovery that had not been completed, and requested 120 days (until June 1, 2000) to complete discovery.

The record clearly shows that not only was the case being moved forward but the Boseman's were objecting to the pace at which it was being moved forward. The trial court's ruling that the matter was not moved forward is wrong, it is not supported by the record, and it is arbitrary and capricious.

The court ruled that "there is no good cause showing for such continuance. A decision to change counsel 15 days before the trial date under the present circumstances is too late." Again the record does not support this conclusion nor does it articulate the circumstances giving rise to the conclusion.

Good cause was shown Rohan had been diligently pursuing the case since it had

been filed. Rohan contacted and signed a fee agreement with Orton to try the case. From March of 2000 onward, Orton was representing Rohan and was actively involved in preparing the case for trial. As late as May of 2000, Rohan was attending the medical examinations conducted by the Boseman experts. The report from the Boseman neuropsychological expert was not provided to Rohan until June 6, 2000 the day after the trial court denied the first motion for a continuance and 10 days after the close of discovery, effectively foreclosing the ability to Mr. Rohan to depose the expert or adequately prepare for trial even if he could have tried the matter himself.

The trial court clearly abused its discretion in denying Rohan's first motion for a continuance based on a lack of good cause.

**B. Second Motion for a Continuance of Trial Setting**

The trial court denied Mr. Rohan's Motion to Continue Trial Setting To Consider Plaintiff's Claims under the ADA at the trial ruling.

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;*

4. *That plaintiffs 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 no require that this court grant plaintiffs request for a continuance and/or a voluntary dismissal without prejudice;*

The trial courts' ruling that Rohan failed to show good cause for a continuance, after he had made a prima facie showing that he was qualified individual with a disability pursuant to the ADA was erroneous as a matter of law.

"A district court by definition abuses its discretion when it makes an error of law." Koon v. United States, 518 U.S. 81, 100, 116 (1996). Once Mr. Rohan had brought a claim under the ADA, even if it was the day before trial, the trial court was required to make an individualized inquiry as to whether he was a qualified individual with a disability. However, this was an inquiry that the trial court refused to make.

In Rohan's memorandum in support of the motion, he set out the applicable provisions of Title II of the ADA. A:15:51-55. He specifically stated that the ADA is applicable to state courts and he was a qualified individual with a disability under the act in that his brain injury was a mental impairment, and he presented evidence that he was substantially limited in one or more of his major life activities. He provided objective documentation of his brain injury referring to the results of medical imaging, neuropsychological testing and a sleep study. He presented evidence that he was substantially impaired and that the brain injury had a profound affect on his activities of daily living, it was opined that the intellectual impairments suffered by Rohan had essentially resulted in a 100% disability with respect to the practice of law. These contentions were undisputed by the Defendants, therefore Rohan had made a prima facie showing that was a qualified individual with a disability.

The Boseman' in their Memorandum in Opposition, which was unsupported by either an affidavit or competent expert testimony, simply asserted that "Plaintiff has attempted to suggest that his disability consists of a brain injury which prevents him from competently practicing law, and therefore preventing him from representing himself in this trial. This claim is absurd in light of the fact he is a licensed member of the Utah State Bar. . ."

Therefore, the trial court by definition erred as a matter of law and abused its discretion by denying the second motion for a continuance.

#### **POINT 4.**

**The trial Court abused its discretion and erred as a matter of law when it denied of Mr. Rohan's motions for a new trial or alternatively motion to amend when he had made a prima facie showing that he was a qualified individual with an disability under the ADA.**

On September 28, 2000 the trial court issued a two sentence minute entry in response to Mr. Rohan's motion for new trial ruling:

*1. Plaintiff's Motion for New Trial, etc. is denied for the reasons specified in the opposing memorandum.*

*2. Counsel for defendants to prepare order*

The general rule governing the grant of a new trial is that the trial court must find at least one of the seven grounds listed in Rule 59 to be met. Crookston v. Fire Insurance Exchange., 817 P.2d 789, 803 (Utah 1991).

Rule 59 of the Utah Rules of Civil Procedure Provides in the Relevant Parts:

***(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 . . .***

***(7) Error in law.***

The trial court abused its discretion by: (1) failing to identify or articulate any facts, in light of the Rohan's disability under the ADA, to support a showing of good cause to justify the denial of his motions for a continuance; (2) failing to identify or articulate any facts, in light of the Rohan's disability under the ADA, to support a finding that Rohan did not raise a justifiable excuse to denying the motions for voluntary dismissal as provided by Rule 41(a)(2)(ii) and in dismissing his cause with prejudice with the award of costs and fees; and (3) discriminating against the Rohan under the ADA and the Utah and United States Constitutions.

The trial court erred as a matter of law by: (1) failing to apply the provisions of the ADA to the facts of this case, by failing to make a determination whether the Rohan was a qualified individual under the ADA, and by discriminating against Rohan on the basis of his disability; (2) denying Rohan his rights under Article I, section 11,



Article I, section 24, Article I, section 7 Utah State Constitution, and Article XIV of the United States Constitution.

**POINT 5.**

**The award of costs and fees and attorney fees pursuant to U. C. A. §78-27-56 against Mr. Rohan was erroneous as a matter of law.**

The award of attorney fees under section 78-27-56 requires a two step analysis. The court must find that the party lacked good faith, this requires that the trial court must make a factual finding of a party's subjective intent. In addition, the trial court must conclude, as a matter of law, that the action was without merit. Pennington v. Allstate Insurance Co., 973 P.2d 932, 942 (Fn 3 ) (Utah 1998).

In order to find that a party acted in bad faith, the trial court must determine that at least one of the following factors existed: (i) The party lacked an honest belief in the propriety of the activities in question; (ii) the party intended to take unconscionable advantage of others; or (iii) the party intended to or acted with the knowledge that the activities in question would hinder, delay, or defraud others. Cady v. Johnson, 671 P.2d 149, 151 (Utah 1983).

Just as the trial Court failed to inquire into the Plaintiff's claims under the ADA, The trial court failed to make factual finding as to Mr. Rohan's subjective intent nor did it conclude as a matter of law that Mr. Rohan acted in bad faith. The award of costs and attorneys' fees is unjustified.

When a party who received attorney fees below prevails on appeal, "the party is also entitled to fees reasonably incurred on appeal." Utah Dep't of Social Servs. v. Adams, 806 P.2d 1193, 1197 (Utah Ct. App.1991). In the event the Appellant prevails in this appeal, he respectfully asks the court to award reasonable costs and attorneys' fees he has incurred in pursuing this appeal.

### **CONCLUSION**

The trial court erred and a matter of law and discriminated against Mr. Rohan by refusing to conduct an individualized inquiry into his claims pursuant to the ADA when he had made a prima facie showing that he was a qualified individual with a disability as defined by the act. The trial court also erred as a matter of law and abused its discretion in denying the motions for a continuance, voluntary dismissal and for a new trial.

The Appellant respectfully asks this Court to: reverse the trial court; to dismiss the action without prejudice; to vacate the judgment entered against Rohan; and to award Rohan the costs and fees he has incurred in bringing this appeal.

### **ADDENDUM**

Pursuant to Rule 24(a)11 of the Utah Rules of Appellate Procedure a separately bound addendum accompanies this brief. Due to it's bulk and cost, the addendum will be mailed to the parties under a separate cover and hand delivered to the Court of Appeals.

DATED this 20<sup>th</sup> day of August, 2001

Respectfully submitted,

By 

**JOSEPH W. ROHAN**

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**CERTIFICATE OF SERVICE**

I hereby certify that two true and correct copies of the foregoing  
APPELLANT'S BRIEF were mailed first class postage prepaid to the following  
parties of interest this 20<sup>th</sup> day of August, 2001.

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