

1992

Gina M. Hill v. Dr. Carl Dickerson : Reply Brief

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

David G. Williams; Terance L. Rooney; Snow, Christensen and Martineau; Attorneys for Appellee.
Douglas M. Durbano; Walter T. Merrill; Durbano and Associates; Attorneys for Appellant.

Recommended Citation

Reply Brief, *Hill v. Dickerson*, No. 920271 (Utah Court of Appeals, 1992).
https://digitalcommons.law.byu.edu/byu_ca1/3207

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

UTAH COURT OF APPEALS
BRIEF

UTAH
DOCUMENT
KFU
50

.A10
DOCKET NO. 920271

IN THE COURT OF APPEALS OF THE STATE OF UTAH

GINA M. HILL,	:	
Plaintiff/Appellant,	:	
vs.	:	Case No. 920271-CA
DR. CARL DICKERSON,	:	
Defendant/Appellee.	:	Priority No. 16

APPEAL FROM ORDER OF DISMISSAL
OF THE FIRST JUDICIAL DISTRICT COURT
BOX ELDER COUNTY, JUDGE W. BRENT WEST, PRO TEM

REPLY BRIEF OF THE APPELLANT

DOUGLAS M. DURBANO (#4209)
WALTER T. MERRILL (#6003)
DURBANO & ASSOCIATES
3340 Harrison Blvd., Suite 200
Ogden, Utah 84403
Telephone (801) 621-4111
Attorneys for Plaintiff/
Appellant, Gina M. Hill

DAVID G. WILLIAMS
TERANCE L. ROONEY
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, 11th Floor
P.O. Box 45000
Salt Lake City, Utah 84145
Attorneys for Defendant/
Appellee, Dr. Carl Dickerson

FILED

MAY 27 1992

COURT OF APPEALS

IN THE COURT OF APPEALS OF THE STATE OF UTAH

GINA M. HILL,	:	
Plaintiff/Appellant,	:	
vs.	:	Case No. 920271-CA
DR. CARL DICKERSON,	:	Priority No. 16
Defendant/Appellee.	:	

APPEAL FROM ORDER OF DISMISSAL
OF THE FIRST JUDICIAL DISTRICT COURT
BOX ELDER COUNTY, JUDGE W. BRENT WEST, PRO TEM

REPLY BRIEF OF THE APPELLANT

DOUGLAS M. DURBANO (#4209)
WALTER T. MERRILL (#6003)
DURBANO & ASSOCIATES
3340 Harrison Blvd., Suite 200
Ogden, Utah 84403
Telephone (801) 621-4111
Attorneys for Plaintiff/
Appellant, Gina M. Hill

DAVID G. WILLIAMS
TERANCE L. ROONEY
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, 11th Floor
P.O. Box 45000
Salt Lake City, Utah 84145
Attorneys for Defendant/
Appellee, Dr. Carl Dickerson

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
SUMMARY OF ARGUMENT	1
ARGUMENT	1
I. DEFENDANT HAS MISSTATED SOME CRITICAL FACTS IN HIS BRIEF.....	1
II. DEFENDANT'S BRIEF HAS PROVIDED NO LEGAL SUPPORT OF THE TRIAL COURT'S ABUSE OF DISCRETION IN GRANTING DEFENDANT'S MOTION IN LIMINE WHILE DENYING PLAINTIFF'S MOTION FOR CONTINUANCE.....	4
CONCLUSION	10

TABLE OF AUTHORITIES

CASES

	<u>Page</u>
<u>Bertram v. Harris</u> , 423 P.2d 909 (Alaska 1967).....	5
<u>Christenson v. Jewkes</u> , 761 P.2d 1375 (Utah 1988).....	9
<u>In re Estate of Gardner</u> , 505 P.2d 50 (Ct. App. Colo. 1972).....	5
<u>Kalmus v. Kalmus</u> , 230 P.2d 57 (Ct. App. Cal. 1951).....	4
<u>Mascaro v. Davis</u> , 741 P.2d 938 (Utah 1987).....	8
<u>Salazar v. Ehmann</u> , 505 P.2d 387 (Ct. App. Colo. 1972).....	5

INTRODUCTION

Pursuant to Rule 24(c), Utah Rules of Appellate Procedure, Plaintiff takes this opportunity to address facts and arguments raised by Defendant in his Brief of the Appellee.

SUMMARY OF ARGUMENT

Defendant has misstated some critical facts in his Brief. Defendant has also provided no legal support for the trial court's abuse of discretion in granting Defendant's Motion in Limine while denying Plaintiff's Motion for Continuance. Because of the abuse of discretion involved, the Order entered by the trial court October 7, 1991, should be reversed.

ARGUMENT

I. Defendant has Misstated Some Critical Facts in his Brief.

Defendant has asserted in his Brief that the witness list naming Plaintiff's expert was not transmitted to Defendant's counsel by facsimile on August 19, 1992, stating that Plaintiff's factual account of such transmission was incorrect. Upon receipt of Defendant's Brief, counsel undersigned reviewed his file on this matter once again, to ascertain the truthfulness of Defendant's claim, and through such procedure, counsel undersigned discovered that Defendant is correct in this assertion. Although counsel undersigned attempted to transmit the witness list to Defendant's

counsel on August 19, 1991, by facsimile, counsel undersigned was unable to do so because the facsimile equipment located at the office of Plaintiff's counsel was not compatible with the facsimile equipment located at the office of Defendant's counsel.

However, when counsel undersigned was unable to communicate the witness list to Defendant's counsel by facsimile, desiring that the information be received by Defendant's counsel as soon as possible, Defendant's counsel personally delivered the witness list to the main Salt Lake City post office located at 1769 W. 2100 S. in Salt Lake City, by 6:00 p.m. on August 19, 1991. Based upon past experience, the witness list would have been delivered to Defendant's counsel's office on August 20, 1991. Based upon past experience, it is absolutely impossible that the witness list not arrive at the office of Defendant's counsel until August 22, 1992, as alleged by Defendant in his Brief.

An additional fact that Defendant implies in his Brief is that Plaintiff did not make a Motion for Continuance until Monday, August 26, 1991, the morning of trial. On the contrary, Plaintiff's counsel made a motion for continuance during the telephone conference on Friday, August 23, 1991. However, Plaintiff is unable to establish this fact in the record, as the transcript of the telephone hearing has been inconveniently misplaced or erased. This is precisely the missing evidence from this hearing that would support Plaintiff's position, justifying the reversal of the Order entered October 7, 1991.

In paragraph 5 of the Statement of Facts in Defendant's Brief, he misstates that "on Friday, April 5, 1991 Dr. Larsen advised them he would not testify as an expert witness against Dr. Dickerson, or at least would not give them the opinions they desired." This is a total misstatement of fact. Dr. Larsen felt at the time, and still does to Plaintiff's knowledge, that Dr. Dickerson committed dental malpractice. The only reason Dr. Larsen reneged on his agreement to be Plaintiff's expert was his fear that testifying against a local dentist might have an adverse effect on his own practice. Another misstatement of fact is found in paragraph 10 of the Statement of Facts in Defendant's Brief, in which Defendant claims that the mediation conference was a culmination of the settlement discussions. There is absolutely no evidence on the record that the parties agreed that this was the culmination of settlement efforts. On the contrary, the evidence reflects that Plaintiff's understanding was just the opposite.

Finally, in paragraph 16 of his Statement of Facts, Defendant misstates that "plaintiff suggested and agreed that the trial court should dismiss the case rather than have plaintiff present her case without expert testimony and have the trial court direct a verdict against her." It is true that Judge West intended to direct a verdict against Plaintiff if she put on her case without expert testimony. However, Plaintiff never suggested or agreed that for that reason the case should be dismissed with prejudice.

II. Defendant's Brief has Provided no Legal Support of the Trial Court's Abuse of Discretion in Granting Defendant's Motion in Limine While Denying Plaintiff's Motion for Continuance.

The only legal precedent which Defendant has cited in his Brief in an effort to support the trial court's abuse of discretion is an old case from the California Court of Appeals, Kalmus v. Kalmus, 230 P.2d 57 (Ct. App. Cal. 1951). In Kalmus, the Plaintiff sought a continuance for two reasons, illness and because another action was currently pending in a different state on the matter. In that case, the plaintiff's Motion for Continuance was denied as a result of evidence establishing that her illness was insufficient to preclude her travel to California, and that the second action in Massachusetts was only filed by the plaintiff after she received an adverse ruling in the California case filed earlier. Id. at 62-64. Thus, Kalmus is factually totally dissimilar from the case at bar.

Notwithstanding the dissimilarity, the Kalmus opinion, as quoted by Defendant in his Brief, supports Plaintiff's appeal. In Kalmus, the court stated that cases should be "determined with as great promptness as the exigencies of the case will permit." Id. at 63. In the case at bar, a continuance for a short period of time, for instance two weeks, to allow Defendant to depose Plaintiff's expert, in a case which had been pending for two years, should be considered prompt. Since the exigencies of the case at bar were such that the denial of such a short delay in the

trial has caused extreme prejudice to Plaintiff, the lower court should have granted Plaintiff's Motion for Continuance.

In his brief, Defendant goes on to cite two additional cases from Colorado and one from Alaska in an effort to support the trial court's abuse of discretion. In the first case, In re Estate of Gardner, 505 P.2d 50 (Ct. App. Colo. 1972), the Colorado Court of Appeals upheld the trial court's refusal to allow the testimony of a witness who was not identified until the trial had commenced. Id. at 51-52. In Salazar v. Ehmann, 505 P.2d 387 (Ct. App. Colo. 1972), the same court found no abuse of discretion when the trial court refused to allow a police officer to testify who also had not been identified until the commencement of trial. Id. at 390. The identical issue is discussed by the Alaska Supreme Court in Bertram v. Harris, 423 P.2d 909, 917 (Alaska 1967).

None of the above cases involve the denial of a Motion for Continuance in conjunction with the grant of a Motion in Limine precluding the testimony of witnesses. In addition, the decision in the cases cited above to preclude testimony of certain witnesses did not have the result of throwing the plaintiff out of court, denying the plaintiff in those cases the opportunity to present his or her case to the court. For that reason, none of the three cases cited above is dispositive in the situation at bar. Indeed, Plaintiff submits to this court that Defendant's inability to find legal support for the trial court's determination in this case is

easily explained. It is Plaintiff's belief that no trial court has ever abused its discretion in this manner, the appellate report of which would provide precedent for Defendant's position.

On pages 16 and 17 of his Brief, Defendant discusses the factors which the trial court allegedly considered in denying Plaintiff's Motion for Continuance. One of these factors is totally irrelevant to the denial of the Motion for Continuance, i.e. the time available, between Plaintiff's designation of witnesses and the trial, for Defendant to take depositions. While this factor is relevant in the court's determination on Defendant's Motion in Limine, such factor has no bearing whatsoever on the determination of a Motion for Continuance. An examination of some of the other factors Defendant has cited will help illuminate the trial court's abuse of discretion in denying Plaintiff's Motion for Continuance.

Defendant places great emphasis on Plaintiff's "violation" of the order of the lower court to designate expert witnesses by April 19, 1991, as a determining factor in the lower court's denial of Plaintiff's second Motion for Continuance. From the transcript of the proceeding on August 26, 1991, it appears that the trial court placed great emphasis on this factor as well. This emphasis would be well placed, except for the fact that Defendant reached an agreement with Plaintiff that she would not be required to comply with that order until settlement negotiations failed. It is no

wonder that Defendant opposed so vigorously Plaintiff's Motion to Supplement the Record on Appeal to include the letter confirming this arrangement. Defendant should not be allowed to enter into such an agreement, and then to have Plaintiff's cause of action dismissed with prejudice because the agreement "violated" the court order. Due to this agreement, the trial court abused its discretion in factoring this "violation" into its determination to deny Plaintiff's Motion for Continuance.

Defendant also argues that, even if an agreement was reached, it terminated at the time the mediation conference was held. However, there is absolutely no evidence in the record of the parties' agreement that the mediation conference was the culmination of settlement efforts. On the contrary, the record reveals that Plaintiff never considered the mediation conference to be the culmination of settlement negotiations. Thus, Plaintiff's efforts to name her expert witness two weeks prior to trial was in accord with the agreement between the parties, and due to Defendant's refusal to cooperate, Plaintiff's Motion for Continuance should have been granted.

Defendant also states that a factor the lower court used in denying the Motion for Continuance was the "extreme prejudice" that the grant of the Motion would have had upon Defendant. Again, there is absolutely no evidence in the record of any prejudice, let alone any extreme prejudice, which would have resulted to Defendant

by a short continuance of the trial of this matter. If any party to this action has been extremely prejudiced, it is obviously Plaintiff, by the trial court's denial of her Motion for Continuance, precluding her from her day in court. Based upon the factors which the trial court should have applied in its determination of Plaintiff's Motion for Continuance, the Motion should have been granted.

On the morning of trial, August 26, 1991, the lower court also expressed a judicial economy argument against granting the Motion for Continuance, stating that the Motion should have been brought earlier. However, the Motion was not brought on the morning of trial but was brought the previous Friday, and if the Motion had been granted at that time, it would have allowed the clerk of the lower court sufficient time to contact the panel of proposed jurors who were scheduled to arrive at the court Monday morning. The missing transcript of the telephone hearing on Friday, August 23, 1991, might reveal the trial court's motivation in taking Plaintiff's Motion for Continuance under advisement at that time, whether it was an attempt to force the parties to settle or simply a power play by a Circuit Court Judge sitting pro tem on the District Court bench. Unfortunately, this court is now handicapped on this issue, because the record of the Friday telephone hearing is lost.

Defendant's argument that the missing transcript must be presumed to support the lower court's decision, citing Mascaro v. Davis, 741 P.2d 938 (Utah 1987), is misplaced. Under Mascaro, missing portions of the record are presumed to support the trial court's determination only when the items are missing from the record as a result of the fault of one of the parties. Id. at 943. Mascaro does not stand for the proposition that missing items in the record, which are missing due to the fault of the court, are presumed to support the trial court's determination. On the contrary, in the case at bar, the missing transcript of the telephone hearing, whether due to the negligence or intentional conduct of the lower court, strongly supports the reversal of the trial court's Order dated October 7, 1991.

Defendant's final argument in his Brief is that a dismissal without prejudice in this case would have been senseless. Plaintiff strongly disagrees that such a ruling would have been the equivalent of a continuance, because Plaintiff would have been required to refile and commence her lawsuit over again which, although prejudicial to her, would still have allowed her a day in court. On the contrary, the lower court abused its discretion in applying the harsh and permanent remedy of a dismissal with prejudice.


Defendant has wholly failed in his Brief to refute or distinguish the holding of the Utah Supreme Court in Christenson v. Jewkes, 761 P.2d 1375 (Utah 1988), in which the Court found that it

was not an abuse of discretion to allow testimony of an expert who was designated only five days before trial, but who was made available for interview or deposition, when the other party simply chose not to take advantage of either option. Id. at 1377-78. The factual similarities between Christenson and the case at bar lend great support to Plaintiff's appeal hereunder. In granting Plaintiff's Motion in Limine, precluding any expert testimony on behalf of Plaintiff, while denying Plaintiff's request for a short continuance, the trial court abused its discretion, and Plaintiff should be entitled to her day in court.

CONCLUSION

For the additional reasons set forth above, as well as those contained in Plaintiff's original Brief, Plaintiff respectfully requests that this court reverse the Order of the trial court entered October 7, 1991, denying her Motion for Continuance and dismissing this action with prejudice, remanding the matter back to the trial court to schedule a new trial date.

DATED this 26 day of May, 1991.



DOUGLAS M. DURBANO
WALTER T. MERRILL
Attorneys for Plaintiff/
Appellant

PROOF OF SERVICE

I DO HEREBY CERTIFY, that I mailed a true and correct copy of the foregoing Reply Brief of the Appellant to David G. Williams and Terance L. Rooney, SNOW, CHRISTENSEN & MARTINEAU, 10 Exchange Place, 11th Floor, P.O. Box 3000, Salt Lake City, Utah, 84110, postage pre-paid on this 26 day of May, 1992.

Walter Merrill

(1\wpfiles\pldgs\880598.wlt)