1990

Nancy Gee v. Angela M. Zuehlke : Petition for Writ of Certiorari

Utah Supreme Court

James C. Haskins; Haskins & Associates; Attorney for Plaintiff.
Terry M. Plant; Eric K. Davenport; Hanson, Epperson & Smith; Attorney for Appellant.

UTAH SUPREME COURT

BRIEF

IN THE SUPREME COURT OF THE STATE OF UTAH

NANCY GEE, Plaintiff/Respondent, v. ANGELA M. ZUEHLKE, Defendant/Appellant.	**APPELLANT'S PETITION FOR WRIT OF CERTIORARI** Case No. 900572

An appeal from the decision of the Utah Court of Appeals reversing an order granting Appellant's motion to dismiss of the Third Judicial District Court of Salt Lake County, State of Utah, the Honorable Richard Moffat presiding.

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IN THE SUPREME COURT OF THE STATE OF UTAH

NANCY GEE, Plaintiff/Respondent, v. ANGELA M. ZUEHLKE, Defendant/Appellant.	**APPELLANT'S PETITION FOR WRIT OF CERTIORARI** Case No. _____

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Utah Court of Appeals err in deciding, in effect, that the Utah Court of Appeals had jurisdiction of the proceedings when Respondent did not provide Appellant with a timely notice of appeal, in violation of Rule 3 of the Utah Rules of Appellate Procedure?

2. Did the Utah Court of Appeals err in deciding, in effect, that the brief filed by Respondent on March 1 was timely and should not be stricken, and that her appeal should not be dismissed, where the brief was not filed timely in light of the fact that the Court of Appeals denied Respondent's second request for an extension of time?

3. Did the Utah Court of Appeals err in deciding, in effect, that the Utah Court of Appeals had jurisdiction to consider the trial court's denial of Respondent's Rule 60(b) motion to set aside the order against Respondent, where Respondent failed to appeal such order?

4. Did the Utah Court of Appeals err in deciding, in effect, that the trial court abused its discretion in granting Appellant's motion to dismiss the lawsuit brought by Respondent, where, under the circumstances of this case, the trial court was justified in dismissing this suit?

OPINION OF THE COURT OF APPEALS

Gee v. Zuehlke, Slip Opinion, Case No. 890718-CA (dated November 21, 1990). See Appendix A.

JURISDICTION

This is a petition for a writ of certiorari to allow the Utah Supreme Court to review the Utah Court of Appeals' reversal, entered November 21, 1990, of an order granting Appellant's motion to dismiss, such order being granted by Honorable Richard Moffat of the Third Judicial District Court of Salt Lake County, State of Utah. The Utah Supreme Court has jurisdiction pursuant to Section 78-2-2(3) of the Utah Code. See, Utah Code Ann. § 78-2-2(3) (1987).

CONTROLLING PROVISIONS

Review by a writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for special and important reasons. The following, while neither controlling nor wholly measuring the Supreme Court's discretion, indicate the character of reasons that will be considered:

> (a) When a panel of the Court of Appeals has rendered a decision in conflict with a decision of another panel of the Court of Appeals on the same issue of law;
>
> (b) When a panel of the Court of Appeals has decided a question of state or federal law in a way that is in conflict with a decision of the Supreme Court;
>
> (c) When a panel of the Court of Appeals has rendered a decision that has so far departed from the accepted and usual course

of judicial proceedings or has so far sanctioned such a departure by a lower court as to call for an exercise of the Supreme Court's power of supervision; or

(d) When the Court of Appeals has decided an important question of municipal, state, or federal which has not been, but should be, settled by the Supreme Court.

Utah R. App. P. 46.

STATEMENT OF THE CASE

A. Nature of the Case.

This is a personal injury action based upon a traffic accident which occurred on or about June 23, 1984.

B. Course of Proceedings and Disposition Below and Statement of Facts.

Because the relevant facts in this particular appeal concern the course of proceedings and disposition below, these two sections will be combined into one section for the purposes of this appeal.

On or about July 15, 1985, Plaintiff/Respondent Nancy Gee (hereinafter "Respondent Gee") filed a complaint in the Third Judicial District Court against Defendant/Appellant Angela M. Zuehlke (hereinafter "Appellant Zuehlke"). On June 27, 1989, the trial court entered an order requiring Respondent Gee to submit to an independent medical examination scheduled for June 29, 1989. Respondent Gee unreasonably and

knowingly refused to cooperate with the independent medical examiner in the performance of the independent medical examination ordered by the Court. Thereafter, on or about July 3, 1989, counsel for Appellant Zuehlke filed a motion for sanctions and protective order and a memorandum supporting such, seeking, among other things, that Respondent Gee's complaint be dismissed for failure to comply with the order for examination. After Respondent Gee filed a memorandum in opposition to the motion for sanctions and protective order, an evidentiary hearing was held on such motion on July 14, 1989. The court heard testimony from Dr. Lincoln Clark and Respondent Gee, and entered, later that day, an order granting Appellant's motion to dismiss Respondent's complaint. On August 14, 1989, Respondent Gee filed a notice of appeal. On August 21, 1989, Respondent Gee filed a motion to set aside dismissal, pursuant to Rule 60(b) of the Utah Rules of Civil Procedure. On October 4, 1989, the trial court denied Respondent's motion to set aside dismissal. That decision was not appealed by Respondent Gee. On November 1, 1989, Appellant moved the Utah Supreme Court for an order for summary disposition, which was denied by the Utah Supreme Court in its order dated November 20, 1989. At that time, the Utah Supreme Court set January 2, 1990 as the due date for Respondent Gee's brief. After the case was transferred over to the Utah Court of Appeals for disposition in accordance with the order of the Utah Supreme Court dated December 15, 1989, counsel for Respondent Gee moved ex parte for an order allowing

an extension of time to file her brief. This motion was filed on December 26, 1989, and was not objected to by Appellant Zuehlke. Respondent Gee's motion for an extension of time was granted, which gave her until February 2, 1990 to file her brief. On January 30, 1990, Respondent Gee once again moved ex parte for a motion for enlargement of time to file her brief. This second motion for an extension of time was objected to by Appellant Zuehlke on February 2, 1990. On February 22, 1990, the Utah Court of Appeals, by and through Judge Regnal W. Garff, denied Appellant's motion for a second 30-day extension, specifically noting that the reasons of Respondent Gee's counsel for such an extension were not sufficient. On March 6, 1990, Appellant Zuehlke submitted a motion to strike the brief of Respondent Gee and a motion to dismiss the appeal on the basis that since the Court had denied Respondent Gee's second request for an extension of time, Respondent Gee's brief served upon Appellant Zuehlke on March 2 was untimely and should be stricken. Further, in accordance with the Rules of this Court, Appellant Zuehlke submitted an order dismissing the appeal on the basis that a timely brief had not been filed. That motion was denied by the Honorable Regnal W. Garff in his order dated March 7, 1990. On November 21, 1990, the matter being before the court pursuant to Rule 31 of the Utah Rules of Appellate Procedure, the Utah Court of Appeals ordered that "the order granting defendant's motion to dismiss is reversed . . . ." This decision was issued without opinion.

ARGUMENT

Appellant Zuehlke petitions the Utah Supreme Court for a writ of certiorari to review various errors the Utah Court of Appeals made in reversing the trial court's order granting Appellant Zuehlke's motion to dismiss. The Utah Supreme Court has indicated in Rule 46 of the Utah Rules of Appellate Procedure that a writ of certiorari will be granted only for special and important reasons. Utah R. App. P. 46. Some of the reasons that indicate the character of reasons that will be considered by the Utah Supreme Court in reviewing a writ of certiorari are listed in Rule 46 and are set forth above in the section entitled "Controlling Provisions" of this brief.

In reversing the trial court's order granting Appellant Zuehlke's motion to dismiss, the Utah Court of Appeals, in effect: rendered a decision that is in conflict with other decisions of the Utah Court of Appeals and the Utah Supreme Court; departed from the accepted and usual course of judicial proceedings so as to call for an exercise of the Supreme Court's power of supervision; and decided an important question of state law which has not yet been, but should be, settled by the Supreme Court. These errors made by the Utah Court of Appeals are discussed below in separate points.

POINT I

RESPONDENT'S ORIGINAL APPEAL SHOULD HAVE BEEN DISMISSED FOR LACK OF JURISDICTION DUE TO DEFECTIVE NOTICE OF APPEAL.

The Utah Court of Appeals committed error by not dismissing Respondent Gee's original appeal for lack of jurisdiction due to Respondent Gee's defective notice of appeal. The applicable law on this point is found in Rule 3(e) of the Utah Rules of Appellate Procedure; it states that "[t]he party taking the appeal shall give notice of the filing of a notice of appeal by serving personally or mailing a copy thereof to counsel of record of each party to the judgment or order . . . ." Utah R. App. P. 3(e).

Turning to the facts of the case at bar, Judge Moffat entered his order granting Appellant Zuehlke's motion to dismiss on July 14, 1989. On August 15, 1989, Appellant Zuehlke received an unsigned, undated Notice of Intent to Appeal (attached as Appendix B), which was not the actual notice of appeal filed with the trial court. This Notice of Intent to Appeal was Appellant Zuehlke's only notice from Respondent Gee; and Appellant Zuehlke was unaware that Respondent Gee had actually filed a Notice of Appeal with the trial court until Appellant Zuehlke received a copy of Respondent Gee's Docketing Statement filed with the trial court on October 26, 1989.

A Notice of Intent to Appeal is not authorized or recognized at all in the Utah Rules of Appellate Procedure. An indication of an intent to appeal, by its very nature, only informed the Appellant Zuehlke that Respondent intended to appeal sometime, but did not place Appellant Zuehlke on actual notice of the Notice of Appeal.

Of particular concern is the fact that the notice contained in the record of the trial court, found at page 438, indicates that a Notice of Appeal was filed with the court. The notice is accompanied by a mailing certificate wherein counsel for Respondent Gee indicates that he caused a "true and correct copy of the foregoing Notice of Intent to Appeal to be mailed." A review of Appendix B, which is the actual Notice received by Appellant Zuehlke, indicates that, in spite of Respondent Gee's counsel's representation to the contrary, a true and exact copy was not mailed.

Although the Utah Supreme Court has not addressed the issue regarding the failure of a party to notify the opposing party of notice of appeal, the Oregon Court of Appeals has dealt specifically with that issue in the case of Thornton v. Slack, 719 P.2d 66 (Or. Ct. App. 1986). Based upon the Oregon Rules, which appear to be similar to Rule 3(e) of the Utah Rules of Appellate Procedure, the Court held that the failure to serve actual notice on all parties who have appeared in the action was jurisdictional, thus requiring a dismissal of the appeal. Id. at 67.

There is no dispute that the only indication of the appeal received by Appellant Zuehlke was an unsigned, undated Notice of Intent to Appeal, which was not the actual notice filed with the court. Under these circumstances, the Utah Court of Appeals should have dismissed Respondent Gee's original appeal for lack of jurisdiction. By reversing the trial court's

order granting dismissal, the Utah Court of Appeals, in effect, rendered a decision that was in conflict with Rule 3(e) of the Utah Rules of Appellate Procedure. However, even assuming that the Utah Court of Appeals did not err in this regard, which they did, the issue as to whether the failure of a party to notify an opposing party of notice of appeal requires the dismissal of the appeal for lack of jurisdiction is an important question of state law which has not been, but should be, settled by the Supreme Court. Accordingly, this Court should grant Appellant Zuehlke's petition for review by a writ of certiorari.

POINT II

RESPONDENT GEE'S ORIGINAL APPEAL SHOULD HAVE BEEN DISMISSED BECAUSE THE BRIEF FILED BY RESPONDENT GEE ON MARCH 1 WAS UNTIMELY AND SHOULD HAVE BEEN STRICKEN DUE TO THE FACT THAT THE COURT OF APPEALS DENIED RESPONDENT GEE'S SECOND REQUEST FOR AN EXTENSION OF TIME.

The Court of Appeals erred by failing to dismiss Respondent Gee's original appeal because the brief filed by Respondent Gee on March 1 was untimely and should have been stricken. The applicable law on this point is found in Rule 26 of the Utah Rules of Appellate, that rule provides, in pertinent part:

> (a) **Time for serving and filing briefs.** The appellant shall serve and file a brief within 40 days after date of notice from the clerk of the appellate court pursuant to Rule 13 . . . . By stipulation filed with the court, the parties may extend each of such periods for no more than 30 days in civil cases . . . .

. . . .

> (c) **Consequence of failure to file briefs.** If an appellant fails to file a brief within the time provided in this rule, or within the time as may be extended by order of the appellate court, an appellee may move for dismissal of the appeal.

Utah R. App. P. 26.

Turning to the facts of this case, the Utah Rules of Appellate Procedure, particularly Rule 26, require that Respondent Gee's brief to the Court of Appeals be filed within the time allotted by the Rules or such other further time as the court may allow. See, Id. As indicated in the Statement of Facts above, the Utah Court of Appeals denied Respondent Gee's second motion for an extension of time; accordingly, the brief filed by the Respondent Gee on March 2 was untimely and should have been stricken. Thus, the Utah Court of Appeals' decision to reverse the trial court was, in effect, in conflict with Rule 26 of the Utah Rules of Appellate Procedure.

Because Respondent Gee's brief should have been stricken, and because Rule 26(c) provides that if an appellant fails to file a brief within the time provided in this Rule, or within the time as may be extended by order of the appellate court, an appellee may move for dismissal of the appeal, and because Appellant Zuehlke did move the Court of Appeals for dismissal of the appeal, the Court of Appeals erred by failing to grant such dismissal. Filing a late brief, in accordance with Rule 26, has the same effect as if the appellant had filed

no brief. When no brief is filed, the appeal should be dismissed by operation of Rule 26. Thus, as indicated above, the Utah Court of Appeals erred in failing to dismiss Respondent Gee's original appeal. This error was in conflict with the laws of this state and is so far a departure from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision. Accordingly, this Court should grant Appellant Zuehlke's petition for review by a writ of certiorari.

POINT III

THE UTAH COURT OF APPEALS ERRED BY FAILING TO DISMISS FOR LACK OF JURISDICTION RESPONDENT GEE'S ORIGINAL APPEAL OF THE TRIAL COURT'S DENIAL OF RESPONDENT GEE'S MOTION TO SET ASIDE JUDGMENT.

Because the order of reversal of the Utah Court of Appeals was issued without an opinion, it is unclear as to whether or not they reversed the trial court's order granting Defendant's motion to dismiss or the trial court's denial of Respondent Gee's motion to set aside the dismissal under Rule 60(b) of the Utah Rules of Civil Procedure. This brief will show that it was error for the Utah Court of Appeals to reverse the trial court's denial of Respondent Gee's motion to set aside the dismissal under Rule 60(b) or the trial court's order granting Appellant Zuehlke's motion to dismiss. Point III of this brief is devoted to the argument that the Utah Court of Appeals erred in reversing the trial court's denial of

Respondent Gee's motion to set aside dismissal, assuming such was the basis of their reversal.

As has been previously indicated, the only Notice of Appeal which appears in the court record is that notice appearing at page 438 of the record, dated August 14, 1989. The trial court below denied Appellant's Motion to Set Aside Dismissal by its order dated October 4, 1989. (Record 462.) After that denial, there is no notice of appeal or further indication of any intent to appeal the decision of the trial court denying relief under Rule 60(b).

This Court has previously dealt with the very issue of the appeal of orders entered pursuant to Rule 60(b). In the case of Baker v. Western Surety Co., 757 P.2d 878 (Utah Ct.App. 1988), the Utah Court of Appeals dealt with the issue of Rule 60(b) motions pending while the appellant simultaneously appealed the trial court's decision. The Baker court held that trial courts have jurisdiction to hear Rule 60(b) motions while an appeal is pending; the court specifically held that denial of Rule 60(b) relief constitutes a final order and that if that Rule 60(b) relief is denied, then the parties may appeal the Rule 60(b) relief sought.

Specifically in regards to this issue, the Utah Court of Appeals stated in Baker:

> We hold that if the district court finds the motion to be without merit, it may enter an order denying the motion, and the parties may appeal from that order.

Baker, 757 P.2d at 880.

The Utah Court of Appeals has also dealt with this issue in the case of Amica Mut. Ins. Co. v. Schettler, 768 P.2d 950 (Utah Ct.App. 1989). In the Amica case, the appellant appealed certain rulings of the trial court and then proceeded with a Rule 60(b) motion. The Court of Appeals specifically indicated that Schettler did not appeal the trial court's denial of his Rule 60(b) motion in a separate notice of appeal. Id. at 968. The Court went on to indicate:

> Finally we hold that the trial court's order of June 24, 1987, denying Schettler's 60(b) motion was a final appealable order, and since Schettler has not timely appealed that order, we need not address whether the trial court abused its discretion in denying his motion for relief from final judgment.

Id.

The same circumstances exist in this case as did in the Amica case, supra, in that Respondent Gee's only indication of an intent to appeal was a notice to appeal the dismissal of the initial order granting Appellant Zuehlke's motion to dismiss. There was no timely notice of appeal filed regarding the trial court's denial of Respondent Gee's attempted Rule 60(b) relief, and therefore, (as was the case in Amica), since the Rule 60(b) motion denial was not appealed, the Utah Court of Appeals erred in addressing this issue on appeal. Such error is in conflict with Utah law and warrants this Court's power of supervision. Accordingly, this Court should

grant Appellant Zuehlke's petition for review by a writ of certiorari.

POINT IV

THE UTAH COURT OF APPEALS ERRED IN REVERSING THE TRIAL COURT'S ORDER GRANTING APPELLANT ZUEHLKE'S MOTION TO DISMISS BECAUSE THE TRIAL COURT'S ORDER WAS JUSTIFIED AND WELL WITHIN THE TRIAL COURT'S DISCRETIONARY POWERS.

Assuming the Court of Appeals' reversal was a reversal of the trial court's order granting Appellant Zuehlke's motion to dismiss, the Court of Appeals erred in doing such because the trial court did not abuse its discretion in granting that motion. This is more fully discussed in the sub-points below.

A. The evidentiary hearing and personal contact with the parties gave Judge Moffat insight into these issues that the Utah Court of Appeals could not obtain on appeal. In considering the trial court's actions regarding Respondent Gee's conduct at the independent medical examination performed by Dr. Clark, it was important for the Utah Court of Appeals to note the order which required Respondent Gee's attendance at that examination. The order required Respondent Gee to appear at the independent medical examination in accordance with the provisions of Rule 35 of the Utah Rules of Civil Procedure and goes on to state, "failure to so appear will result in sanctions to the plaintiff, Nancy Gee, which may include dismissal of her action." Based upon the language of the order, Respondent Gee was placed on notice that if she did

not comply with the provisions of Rule 35, sanctions would be imposed which might include exactly what did happen. Further, the order is important in that the order stands as a basis for the court's dismissal of her action in conjunction with Rule 37 of the Utah Rules of Civil Procedure.

It is further important for the Utah Court of Appeals to keep in mind that Appellant Zuehlke's Motion to Dismiss was granted after an evidentiary hearing was held on the matter. In that hearing, the trial court had an opportunity to determine the demeanor of the witnesses, the attitude with which Respondent Gee approached this problem, the truthfulness of her testimony, and all those other components that go into a determination as to whether or not sanctions would be appropriate. Judge Moffat had an opportunity to hear the testimony of Dr. Clark and the responsive testimony of Respondent Gee. It was only after hearing that testimony that Judge Moffat arrived at his decision to dismiss the Respondent Gee's action for her failure to comply with the court's order.

Under Rule 37 of the Utah Rules of Civil Procedure, Judge Moffat is given discretion to impose sanctions for violations of discovery orders. The discretion is given to the trial court presumably due to the judge's ability to monitor the case, deal with the parties, and have personal contact with those parties. An appellate court loses the advantage of personal contact and is left to make its decisions by looking at a record only. For these reasons, appellate courts have

recognized that a trial court's discretion will be overturned only if there is clear reason to do so. G.M. Leasing Corp. v. Murray First Thrift & Loan Co., 534 P.2d 1244 (Utah 1975).

The Utah Court of Appeals' attention was directed to the exhibit submitted as part of Dr. Clark's testimony. This exhibit has been attached to this brief and is marked "Appendix C." This exhibit is a typewritten version of the notes taken by Dr. Clark during the examination. As he described in his testimony (see Transcript, page 4), this exhibit is a detailed version of what occurred during the examination. According to the exhibit, Respondent Gee failed to respond to virtually every question she was asked and in many cases not only refused to provide the information, but defied Dr. Clark's attempts to obtain it. A close review of Respondent Gee's testimony will indicate that she does not deny her failure to provide information, but rather she centers on the fact that she was present in Dr. Clark's office for a specific period time, as well as other matters which are irrelevant to whether or not she complied with the court's order to submit herself for an examination. Certainly, the facts indicate that Respondent Gee ignored the court's order, justifying the acts of the trial court.

B. The requisite "intent" to justify the imposition of sanctions was determined by Judge Moffat and supported by the record.

In her brief to the Court of Appeals, Respondent Gee argued that there was no "intent" to avoid the doctor's questions. A review of Dr. Clark's testimony and notes leads to the only possible conclusion that Respondent Gee intentionally withheld information and refused to cooperate with Dr. Clark. Respondent Gee obviously went to the examination with the intent not to provide Dr. Clark the information and thereafter set about to carry out her intent.

As Respondent Gee correctly pointed out in her brief to the Utah Court of Appeals, the decision regarding sanctions entered is a discretionary one with the trial court. The most recent case dealing with the discretionary powers given the trial court in conjunction with the dismissal of actions as a sanction under Rule 37 is Amica Mut. Ins. Co. v. Schettler, 768 P.2d 950 (Utah Ct. App. 1989). In Amica, a default judgment was entered against a defendant for failure to produce personal tax returns, among other things. The Amica court noted that "the imposition of sanctions is within the sound discretion of the trial court and will not be disturbed absent an abuse of discretion." Id.

The Amica court further stated that it is not necessary that the trial court make a specific finding of willfulness, bad faith or fault if a full understanding of the issues on appeal can nevertheless be determined by the appellate court. Id. at 962. It is the position of Appellant Zuehlke

that a specific finding of fault was entered by the trial court, but if not, the record herein certainly supports such a finding.

Appellant Zuehlke concedes that mere oversight or a non-willful violation of an order is not a sufficient basis to allow imposition of sanctions. However, in this case, while Judge Moffat did not use the word "willful," he did rule that Respondent Gee unreasonably failed to respond to questions posed to her by Dr. Lincoln Clark, thus expressly indicating fault. (See Findings of Fact and Conclusions of Law, Finding of Fact No. 2, Record 429.) Further, in the Minute Entry entered by the trial court after the hearing on July 14, 1989, Judge Moffat states, "It is perfectly apparent to the court that the defendant (sic) refused to cooperate in the ordered examination of her by Dr. Clark." (Record 425). The specific findings of fact, as well as the language of Judge Moffat's decision, indicate willful conduct or at least fault on the part of the Respondent Gee in intentionally and knowingly failing to cooperate in the conduct of the independent medical examination which had been ordered to take place in accordance with the provisions of Rule 35 of the Utah Rules of Civil Procedure. It was based upon that refusal of Respondent Gee, which the court determined to be "unreasonable," that the court granted Appellant Zuehlke's Motion to Dismiss.

In the case of First Federal Savings & Loan Ass'n. v. Schamanek, 684 P.2d 1257 (Utah 1984), the Utah Supreme Court stated:

> The general rule is that a party in a civil case who refuses to respond to an order compelling discovery is subject to sanctions pursuant to Utah R. Civ. P. 37(b)(2)(C). The sanctions are intended to deter misconduct in connection with discovery, and require a showing of "willfulness, bad faith, or fault" on the part of the non-complying party. The choice of appropriate discovery sanction is primarily the responsibility of the trial judge and will not be reversed absent an abuse of discretion.

Id. at 1266 (citations omitted).

The record in this case reveals more than sufficient information to demonstrate a willful intent of Respondent Gee's refusal to provide information and at a minimum, creates fault on her part. The failure to provide answers was not due to her lack of ability to give them, nor a lack of knowledge on her part. The answers were not given simply because Respondent Gee, for whatever reason, opted not to give those answers, which was in direct violation of the court's order. Judge Moffat had every opportunity to consider her testimony, to listen to her explanations, as well as to listen to the testimony of Dr. Clark. After doing so, Judge Moffat concluded that the appropriate sanction would be dismissal of Respondent Gee's case, which is within his discretionary power.

C. Judge Moffat did not abuse his discretion in dismissing Respondent Gee's action.

The true issue in this point, therefore, is whether the Utah Court of Appeals erred in holding, in effect, that Judge Moffat abused his discretion in granting the Motion to

Dismiss of Appellant Zuehlke. In the case of G.M. Leasing Corp. v. Murray First Thrift & Loan Co., 534 P.2d 1244 (Utah 1975), the Utah Supreme Court, in attempting to determine whether an abuse of discretion had taken place in that case, indicated that:

> . . . we should not undertake to substitute our idea of what is proper for that of the trial court. The law is stated in 5 Am.Jur.2d, Appeal and Error, as follows:
>
> > . . . Decisions reached in the proper exercise of such discretion have frequently been said not to be within the proper scope of appellate review, and it is clearly the ordinary practice of the appellate courts to refuse to review the exercise of such discretion except for abuse.
> >
> > * * * * * *
> >
> > . . . [A] discretionary determination may be "reviewed" only in the case of "gross," "clear," "plain," "palpable," or "manifest" abuse of discretion . . . .

Id. at 1245.

There is ample evidence in the record to support the finding on the part of Judge Moffat that there was no abuse of discretion in deciding on the sanctions to be imposed and imposing them. As demonstrated by the record, Respondent Gee knowingly and unreasonably opted not to cooperate with Dr. Clark and, in doing so, suffered the very sort of sanction that the court warned her of in the order that required her appearance. There is no evidence that Respondent Gee was unable to conform

to the court's order, unlike many of the cases dealing with this subject. Respondent Gee simply chose not to cooperate with Dr. Clark.

The Utah Court of Appeals, by reversing the trial court's order granting Appellant Zuehlke's motion to dismiss, in effect, decided that the trial judge abused his discretion in granting such motion to dismiss. Since the trial court did not abuse its discretion in granting Appellant Zuehlke's motion to dismiss, the Utah Court of Appeals erred in reversing such order. Such error was in conflict with prior decisions of this Court and the Utah Court of Appeals and is a departure from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's power of supervision. Accordingly, this Court should grant Appellant Zuehlke's petition for review by a writ of certiorari.

CONCLUSION

Based on the authorities and discussion above, this Court should grant a writ of certiorari for the purposes of reviewing the errors made by the Utah Court of Appeals in reversing the trial court's order granting Appellant Zuehlke's motion to dismiss.

DATED this 21 day of December, 1990.

HANSON, EPPERSON & SMITH

TERRY M. PLANT
ERIK K. DAVENPORT
Attorney for Defendant/Appellant

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APPENDIX A

IN THE UTAH COURT OF APPEALS

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Nancy Gee,	)	
	)	
Plaintiff and Appellant,	)	ORDER OF REVERSAL
	)	
v.	)	Case No. 890718-CA
	)	
Angela M. Zuehlke	)	
	)	
Defendant and Appellee.	)	

Before Judges Jackson, Bench, and Orme (On Rule 31 Hearing).

This matter is before the court pursuant to Utah R. App. P. 31.

IT IS HEREBY ORDERED THAT the order granting defendant's motion to dismiss is reversed and the case is remanded for trial or such other proceedings as the court deems appropriate.

DATED this 21st day of November, 1990.

ALL CONCUR:

Norman H. Jackson, Judge

Russell W. Bench, Judge

Gregory K. Orme, Judge

APPENDIX B

James C. Haskins (1406)
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IN THE COURT OF APPEALS

STATE OF UTAH

NANCY GEE,	:
	:
Plaintiff,	: NOTICE OF INTENT TO APPEAL
vs.	: File No. _____
ANGELA M. ZUEHLKE,	: Civil No. C85-4553
	: Judge RICHARD H. MOFFAT
Defendant.	:

Plaintiffs/Appellants in the above-entitled matter hereby appeal from the provisions of the Order to dismiss entered by the Third Judicial District Court in and for Salt Lake County County, State of Utah, on the 14th day of July, 1989, wherein the Court granted the motion of defendant to dismiss District Court proceedings in this matter.

DATED this _____ day of _____, 1988.

JAMES C. HASKINS
Attorney for Plaintiffs

MAILING CERTIFICATE

I hereby certify that I caused a true and correct copy of the foregoing Notice of Intent to Appeal to be mailed, postage prepaid, to Terry M. Plant, HANSEN, EPPERSON & SMITH, attorneys for Defendant, 4 Triad Center, Suite 500 P.O. Box 2970 Salt Lake City, Utah 84110-2970 this ____ day of_____, 1988.

_____

APPENDIX C

Record 431

July 11, 1989

THE UNIVERSITY OF UTAH

Summary of Attempted IME with Ms. Nancy Gee

The IME with Ms. Gee was scheduled for 2:00 p.m. on 6/29/89. She arrived on that date at my office at the University of Utah Medical Center at about 2:20 p.m.

At the beginning of the interview she informed me that the time available was limited by the fact that she had to be at home by 4:00 p.m. She then remarked that she was "legally advised not 1) to say anything about the law suit". She then said, "You will receive a subpoena from me that will hold you for four days". "You are going to be a witness for me". In response to a request to clarify the above statements she implied that it was her intent to subpoena me for four days at the time of the trial on her case and to hold me for a period of four days as a witness. Further efforts were made to clarify the conditions she was placing upon the examination. I then asked her what she meant by not talking about the law suit and she responded, "I don't know". I then asked "What can we talk about in this interview?" She again responded, "I don't know". I then suggested further areas which she might contribute information about. This included a question about how she had been, what her condition had been like since I last saw her, and her response 2) was "Subpoena it". I then asked if there had been any further testing done on her psychological status and she responded, 3) "Don't know, you will have to ask the doctors". When asked what her current day to day activities were, having in mind school or employment, she responded, "You can find out first of 4) next week". She then added, "If you want to know what is going on, you will have to find it out from my doctors". I then asked her what her present difficulties were in her current life situation and her response was, "Your opinions are not time 5) limited, therefore, there is no point in the examination". When asked if she still had any difficulties relating to the accident 6) she responded, "You will have to talk to my doctors about that". When asked, "Who are your doctors?", she responded "David Nielson, Page Heineman, and Milton Thomas". She added that Dr. Nielson had put her to work in his office to pay for her therapy and that she is in a head injury group of Page Heineman. I then 7) asked "Do you feel you are getting better"? She responded, "You'll have to talk to the doctors". She then made a series of remarks in a somewhat hostile vaguely threatening vein, as follows: "I wanted to be an attorney since childhood. I have expert opinions on childhood. I know more about you than you have on me. I have 2 1/2 boxes on you. Every defense and plaintiff's attorney in town has a book on you. There is a book floating around in the legal world about you".

Department of Psychiatry
School of Medicine
50 North Medical Drive
Salt Lake City, UT 84132

In reference to my previous IME with her in May 1986 during which she claimed to have no memory for two years before and six months after the accident, I asked, "Have you recovered any 8) memories from the period before the accident, have they come back"? Her answer was "You'll have to ask the doctors".

She then stated that she will only talk to me about what is 9) "public knowledge". "I will not talk to you about me or my family or the accident". She then demanded, "Can you cure head injury? I know I have had injury". She then added that she had to learn psychiatry and psychology and by inference this was in order to pursue her case. She then added she would not complete the evaluation. I asked her why she was not using an attorney to assist her with her case and she responded, "I know that is why 10) you wanted to see me to find out my strategy", and refused to answer the question further. She added, "I am here because I am ordered. You can look at me, the Court has ordered me to appear, has not ordered me to speak, just to appear". She then angrily remarked that I had spent only ten minutes with her at her previous IME. I responded that this was not correct and my records indicated otherwise. She then commented, "You can't say that my mother is a liar". At another point she added that an attorney had told her that she didn't have to talk to me but would not give me the name of the attorney when asked saying, "That is privileged information and furthermore my attorneys change from day to day". She then added, "You can find out from Hansen, Epperson, and Smith". She then added, "I can't talk about my case because I am doing it, I'm the lawyer".

At about 3:00 p.m. deciding that further efforts were futile, I indicated that we had best terminate the interview. At that point she busied herself removing some documents from her briefcase, pointing out that the reason she was late was that she had been down to the Court to obtain a subpoena oh me. She then busied herself writing on the back of the copies of the subpoena some statements that she would not permit me to look at or would not indicate what she was writing. I presume that it was a statement that she was officially serving the subpoena upon me because she added that I could expect the subpoena to be served more officially in due course. Her attitude throughout the interview was expressive of anger. She was vaguely threatening and at various points grandiose in her view of her control of the situation. My sense of futility in my efforts to engage her in a meaningful exchange of information had no impact upon her.

Sincerely,

Lincoln D. Clark, M.D.
Professor of Psychiatry
Adjunct Professor of Pharmacology

To Mr Terry Plant

From: LINCOLN D. CLARK, M.D.
Professor of Psychiatry
Adjunct Professor, Pharmacology and Psychology
University of Utah Medical Center

581-7986-58

Attached is a copy of my notes on the attempted IME.

On her own attorney, she seems to be working diligently to refuse to testify about anything relevant to her case!

She feels she complied with court order by appearing.

Thanks, Lincoln

Subpoena attached

Hanson, Epperson, and Smith
4 Triad Center, Suite 500
SLC, UT. 84110-2970

2:20 pm
How & half / to 4 pm

Nancy Gee Age Date: 6/29/89 Time

[illegible] and to talk a thing about law suit

Will receive subpoena from me for 4 days because I will sue you.

"You are going to be a witness for me."

What does talking about law suit mean, "don't know" — What can be talked about — don't know,

Any questions about clinical course, "subpoena it".

Any further testing, psych. etc.; don't know, you will have to ask doctor.

What test tool
26-27-28.

~~How~~ What are your current activities: "You can find out first of next week".

If you want to know what's going on, you will have to find it out from my doctor.

What are your present difficulties

"Your [illegible] opinions are out of time limits, therefore no point in answering.

Do you still [illegible] [illegible] [illegible] [illegible].

W do ar doctor

David Nielsen

Paige Hermann

Milton Thomas:

Dr. Nielsen put me to work on effort to pay for therapy.

Sh led injury group of Paige Herm

Do you feel you are getting better; you'll have to talk to doctor"

Challenge: ~~[illegible]~~ What is

"W are to do for attorney since childhood.

"I have expert opinion on childhood".

"I know more about you than you know me.

"I have 2 1/2 ~~bo~~ books on you"

~~Has~~ Every defense and plaintiff attorney in town has books on you

There is a book floating around in legal world about you.

"Have any memories you want to come back"
"You'll have to ask doctors.

II Attitude: Threatening, hostile, guarded,

Will only talk to you about what is public knowledge. Will not talk to you about my son or my family, or accidents.

"Can you cure head injury."

"I know I have head injury."

Went to Dr. psychiatry, psychology,

Will not complete evaluation

G.P. 3.5 —

"Why are you not using an attorney. I know that was why you were wanting to see me, to find out my strategy."

Observation — Nothing I saw says anything is wrong with her.

"The Dr. [illegible] I see others". You can look at one — [illegible] to understand, to speak, point to appear.

[illegible] I spent only 10 minutes with her in first IME —

"[illegible] her she didn't have to talk to me".

Refused to give name of attorney, "that is privileged information. Attorney changes day to day.

You can find out from Warren, Lyman, + Smith;

Can't talk about my case, because I am doing it, I'm the lawyer"

Ended up serving subpoena on me.
Was late because she was down in court getting subpoena.

OTHER RELEVANT ORDERS

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HANSON, EPPERSON & SMITH
A Professional Corporation
Attorneys for Defendant
4 Triad Center, Suite 500
P. O. Box 2970
Salt Lake City, Utah 84110-2970
Telephone: (801) 363-7611

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR

SALT LAKE COUNTY, STATE OF UTAH

NANCY GEE, Plaintiff, v. ANGELA M. ZUEHLKE, Defendant.	**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT** Civil No. C85-4553 Judge Richard H. Moffat

The Court having reviewed and considered the defendant's Motion to Dismiss Plaintiff's case for her failure to cooperate and comply with the Court's Order Granting Defendant's Motion for Further Medical Evaluation dated June 27, 1989, and having reviewed the memoranda submitted by the defendant and the plaintiff, as well as an affidavit and supplemental affidavit of the plaintiff and the affidavit of Dr. Lincoln Clark. Further, the Court, having considered the testimony of Dr. Lincoln Clark, as well as the testimony of the plaintiff, Nancy Gee, at the hearing held on July 14, 1989, makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. That the Court ordered the plaintiff, Nancy Gee, to appear at the office of Dr. Lincoln Clark for purposes of an independent medical examination on June 29, 1989, in accordance with the provisions of Rule 35 of the Utah Rules of Civil Procedure.

2. That the plaintiff, Nancy Gee, unreasonably failed to respond to questions posed by Dr. Lincoln Clark and otherwise failed to provide information necessary for Dr. Clark to complete his independent medical examination, thus rendering the examination meaningless.

CONCLUSIONS OF LAW

1. That Nancy Gee's failure to properly respond to questions posed to her by Dr. Lincoln Clark and provide information to Dr. Clark, who was acting as an independent medical examiner in accordance with Rule 35 of the Utah Rules of Civil Procedure, constitutes a violation of this Court's Order dated June 27, 1989 and of Rule 35 of the Utah Rules of Civil Procedure.

2. That as a result of the failure of Plaintiff Gee to properly comply with this Court's Order, as well as the general provisions of Rule 35, it is appropriate that sanctions be entered as allowed for under Rule 37 of the Utah Rules of Civil Procedure.

3. That as an appropriate sanction in accordance with this Court's Order of June 27, 1989, as well as Rule 37 of the Utah Rules of Civil Procedure, it is appropriate that the plaintiff's Complaint be dismissed.

WHEREFORE, based upon the foregoing, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that, as a result of Plaintiff's failure to cooperate and failure to comply with the Court's Order dated June 27, 1989, all claims against the defendant, Angela Zuehlke, and by the plaintiff, Nancy Gee, be dismissed with prejudice and on the merits.

DATED this 14 day of July, 1989.

BY THE COURT:

RICHARD H. MOFFAT
District Court Judge

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT, postage prepaid, this 14 day of July, 1989, to the following:

Nancy Gee
1709 East Creek Road
Sandy, Utah 84092

TMP:lrj
85-487.1

IN THE UTAH COURT OF APPEALS

----ooOoo----

Nancy Gee,	)	ORDER
	)	
Plaintiff and Appellant,	)	
	)	
v.	)	Case No. 890718-CA
	)	
Angela M. Zuehlke,	)	
	)	
Defendant and Respondent.	)	

This matter is before the Court upon appellant's motion for an extension of time to file appellant's brief, filed 2 February 1990.

On 28 December 1989, the Court granted appellant's initial 30 day extension request. Appellant now seeks a second 30 day extension, to 2 March 1990, to file the brief because counsel "has been involved in trials and hearings" and has not had the opportunity to complete the brief.

Pursuant to the Court's internal procedure governing extension requests, a second extension is granted upon a showing of cause. Extensions "for cause" are granted for reason of emergency or unanticipated circumstances. Workload and/or other commitments are not sufficient grounds for a second extension.

Now therefore, IT IS HEREBY ORDERED that the motion is denied.

Dated this 22 day of February 1990.

BY THE COURT:

Judge Regnal W. Garff