

1993

Hartford Leasing Corporation v. Rio Vista Limited,
a Utah Corporation dba Moab U-Serve aka Stars
Food Store, LA Sal Oil Company, a Utah
Corporation, dba Gordon's Sinclair, State of Utah
Dependable Janitorial Service and John does I-X :
Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS
IN AND FOR THE STATE OF UTAH

02/17/02 - CA

HARTFORD LEASING CORPORATION,)	
)	
Plaintiff/Appellant,)	Case No. 930612-CA
)	
vs.)	Priority 15
)	
RIO VISTA LIMITED, a Utah)	
Corporation dba MOAB U-SERVE)	
aka STARS FOOD STORE, LA SAL OIL)	
COMPANY, a Utah Corporation, dba)	
GORDON'S SINCLAIR, STATE OF UTAH)	
DEPENDABLE JANITORIAL SERVICE)	
and JOHN DOES I-X,)	
)	
Defendants/Appellees.)	
)	

BRIEF OF APPELLANT

APPEAL FROM A DECISION FROM THE SEVENTH JUDICIAL
DISTRICT COURT, GRAND COUNTY, SALT LAKE COUNTY
HONORABLE LYLE R. ANDERSON

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Utah Court of Appeals

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PARTIES TO THIS ACTION

THE APPELLANT

The Appellant in this action is Hartford Leasing Corporation who is the owner of a commercial building situated in the City of Moab, Grand County, State of Utah.

THE APPELLEES

Appellee State of Utah entered into a leasing agreement with the Appellant to lease space in Appellant's commercial building in the City of Moab, Grand County, State of Utah.

Appellee Rio Vista Oil Company, is a Utah Corporation which operates in the City of Moab, Grand County, State of Utah a gas station known as Moab U-Serve and also known as Stars Food Store.

Appellee La Sal Oil Company is a Utah Corporation which operates in the City of Moab, Grand County, State of Utah, a gas station known as Gordon's Sinclair.

Defendant Dependable Janitorial Service has been dismissed from this action.

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STATEMENT OF JURISDICTION

The specific statutory authority that confers jurisdiction in this Court in this matter is 78-2-2(3)(j) Utah Code Annotated, 1993.

STATEMENT OF ISSUES PRESENTED AND STANDARDS OF REVIEW

ISSUE No. 1: Did the Trial Court abuse its discretion by accepting and ruling on the Appellees' Motion to Dismiss when the Appellees' failed to comply with the Notice provisions of Rule 4-506(3) of the Utah Code of Judicial Administration? The standard of review is whether the Trial Court abused its discretion by failing to comply with the Code of Judicial Administration. Sperry v. Smith, 694 P.2d 581 (Utah 1984).

ISSUE No. 2: Did the Trial Court abuse its discretion by granting the Appellees' Motion to Dismiss for Failure to Prosecute? The standard of review is whether the Trial Court abused its discretion in granting the Appellees' Motion to Dismiss. Charlie Brown Constr. Co. v. Leisure Sports Inc., 740 P.2d 1368 (Utah App. 1987), cert. denied 765 P.2d 1277 (Utah 1987).

ISSUE No. 3: Did the Trial Court abuse its discretion in granting the Appellees' Motion to Dismiss for Failure to Prosecute the action when the Appellant had engaged new counsel who had reactivated this litigation? The standard of review is whether the Trial Court abused its discretion in granting the Appellees' Motion to Dismiss for Failure to Prosecute. Country

Meadow Convalescent Center v. Utah Department of Health, 851 P.2d 1212, 1216 (Utah App. 1993).

ISSUE No. 4: Did the Trial Court abuse its discretion in granting the Appellees' Motion with Prejudice. The standard of review is whether the Trial Court abused its discretion in granting the Appellees' Motion with Prejudice. Charlie Brown Constr. Co. v. Leisure Sports Inc., 740 P.2d 1368 (Utah App. 1987), cert. denied 765 P.2d 1277 (Utah 1987).

ISSUE No. 5: Did the Trial Court abuse its discretion by failing to hold a hearing on the Appellees' Motions to Dismiss when a hearing was requested by the Appellant pursuant to Rule 4-501(3)(b) of the Utah Code of Judicial Administration. The standard of review is whether the Trial Court abused its discretion. Gillmor v. Cummings, 806 P.2d 1205 (Utah App. 1991).

ISSUE No. 6: Did the Trial Court err as a matter of law in interpreting Rule 4-501 of the Utah Code of Judicial Administration when it decided that Rule 4-501 did not permit the submission of Supplemental Memorandum which resulted in the Court failing to consider the Appellant's supplemental memorandum when deciding upon Appellees' Motions to Dismiss. The standard of review is to pay no deference to the legal conclusions of the lower court. Bettinger v. Bettinger, 793 P.2d 389, 391 (Utah App. 1990).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The following statutory provisions are reproduced in full and attached hereto in Appendix A:

Rule 4-501, Utah Code of Judicial Administration

Rule 4-506, Utah Code of Judicial Administration

Rule 103-3, Rules of Practice for the Federal District Court
for the District of Utah

Rule 41, Utah Rules of Civil Procedure (1993)

Section 286, California Code of Civil Procedure

STATEMENT OF THE CASE

PROCEDURAL HISTORY

This appeal is being taken from an Order of the Seventh Judicial District Court in and for Grand County, State of Utah, dated and entered on the 21st day of June, 1993, and signed by Judge Lyle R. Anderson, over the objections of the Appellant, granting the Appellees' Motion to Dismiss with prejudice for Failure to Prosecute. (R. 173-176 and R. 313-316). The notice of appeal was filed on the 3rd day of August, 1993 pursuant to Rule 4(a) of the Utah Rules of Appellate Procedure.

FACTUAL HISTORY

1. This action was filed on June 22, 1988. (R. 1-14).
2. The Plaintiff, as the owner of a building in Moab, Utah known as the Southwest Regional Center, brought action against the State of Utah for vacating the building prior to the expiration of the lease and against Defendant LaSal Oil and Rio Vista Oil for damages to its property occasioned by leakage of gasoline from underground storage tanks which were alleged to have created an underground plume, which invaded Plaintiff's and adjoining property owners land. (R. 1-14).

3. Appellee Rio Vista filed its answer on July 18, 1988. (R. 29-32).

4. Default Judgment was entered against Appellee La Sal on July 26, 1988. (R. 37).

5. Appellee State of Utah filed a Motion for a More Definite Statement on August 25, 1988. (R. 41-43).

6. The Trial Court granted Appellee State's Motion for a More Definite Statement on September 27, 1988. (R. 52).

7. On November 15, 1988 Appellant's counsel William Bannon executed a notice of withdrawal as counsel, which was not filed with the Trial Court until December 8, 1988. (R. 67).

8. On November 30, 1988, attorney Dale Gardner prepared a Notice of Appearance as Appellant's attorney. However, said Notice does not anywhere appear in the Court's record.

9. On December 1, 1988, Counsel for Appellant prepared but never signed nor filed Appellant's Amended Complaint in response to Appellee State's Motion for a More Definite Statement. (R. 242-254).

10. The Plaintiff filed for protection from its creditors under Chapter 11 of the Bankruptcy Code on December 1, 1988.

11. On December 6, 1988, Appellant and Appellee La Sal Oil stipulated to set aside the default judgment entered against Appellee La Sal. (R. 57-59).

12. On December 7, 1988, the Trial Court issued an Order setting aside the Default judgment entered against Appellee La Sal. (R. 60-61).

13. Appellee La Sal filed its answer on December 7, 1988. (R. 62-65).

14. On December 30, 1988, Appellant's Counsel Dale Gardner filed a Notice of Withdrawal of Counsel and Notice of Bankruptcy which informed the Trial Court that the Appellant had filed a petition for Chapter 11 Bankruptcy protection. (R. 69).

15. Appellant's Bankruptcy petition was closed on October 29, 1990. (R. 128).

16. At no time did any of the Appellees file a Notice to Appoint Counsel or Appear in Person pursuant to Rule 4-506 of the Utah Code of Judicial Administration. (R. 219-220 and R. 175-176).

17. Despite being forced into Bankruptcy by Appellees' own conduct, Appellant continued to pursue this litigation by obtaining, through the non-record discovery process, hundreds of relevant documents and several environmental reports. (R. 221-239).

18. Despite being forced into Bankruptcy by the Appellee's own conduct, Appellant unsuccessfully tried to retain other counsel who would represent Appellant in this litigation to its conclusion. (R. 256-286).

19. Appellees La Sal and Rio Vista have been involved as parties in collateral litigation in the Seventh Judicial District Court in and for Grand County, State of Utah under case #880705660 and said case dealt with their culpability for damages to adjoining property owners occasioned by a gas plume which

invaded property abutting the Appellant's land. (R. 296-308).

20. Appellees La Sal, Rio Vista and the State have been involved as parties in litigation in the Third Judicial District Court for Salt Lake County and said case dealt with the issue of whether or not a gas plume from La Sal and/or Rio Vista invaded Appellant's and/or other neighboring properties and who should be responsible for costs of remediation expended by the state. (R. 115-116).

21. Both of these case were concluded just prior to the filing of the Defendant's Motion to Dismiss. (R. 116).

22. Each of the Appellees were actively involved in the prosecution and defense of those cases and many scientific studies were produced on both sides to prove issues between them. These studies were conducted on the Appellant's property as well as the property of others. (R. 116).

23. On March 29, 1993, despite having not complied with Rule 4-506 of the Utah Code of Judicial Administration, Appellee State filed its Motion to For Lack of Prosecution or Strike and Points and Authorities. (R. 71-75).

24. On March 31, 1993, despite having not complied with Rule 4-506 of the Utah Code of Judicial Administration, Appellee La Sal filed its Motion to Dismiss Plaintiff's Complaint. (R. 76-105).

25. On April 12, 1993, Appellant's new counsel, Steven C. Tycksen filed his Notice of Appearance of Counsel. (R. 106).

26. On April 12, 1993, Appellant's new counsel, Steven C.

Tycksen. filed a Request for Scheduling pursuant to Rule 16(b). (R. 108).

27. On April 12, 1993, Appellant's new counsel, Steven C. Tycksen, without adequate time to evaluate the factual underpinnings of this complicated environmental litigation, prepared and submitted Objections to Defendants' Motion for Dismissal including a request for Oral Argument pursuant to Rule 4-501(3)(b) of the Utah Code of Judicial Administration (R. 112) and a Memorandum of Points and Authorities. (R. 110-125).

28. On April 21, 1993, Appellee La Sal submitted its Reply Memorandum in Support of Motion to Dismiss Plaintiff's Complaint. (R. 126-135).

29. On April 21, 1993, Appellee State filed its Reply Regarding Motion to Dismiss for Lack of Prosecution with Prejudice or Strike. (R. 136-139).

30. On May 3, 1993, Appellee Rio Vista filed a Motion for Joinder in Motions to Dismiss. (R. 140).

31. On May 24, 1993, Appellant filed a Supplemental Affidavit in Support of its Objections to the Motions to Dismiss. (R. 142-146).

32. On June 7, 1993, Appellee La Sal filed a Notice to Submit for Decision. (R. 147-148).

33. On June 7, 1993, Appellant filed a Supplemental Memorandum of Points and Authorities in Opposition of Defendants' Motion to Dismiss. (R. 151-162).

34. On June 8, 1993, Appellant filed a Notice to Submit for

Decision. (R. 149-150).

35. On June 14, 1993, Appellee La Sal filed its Motion and Memorandum to Strike Plaintiff's Supplemental Memorandum of Points and Authorities in Opposition to Defendants' Motion to Dismiss. (R. 163-166).

36. On June 16, 1993, Appellee State filed its Motion and Memorandum to Strike Plaintiff's Supplemental Memorandum of Points and Authorities in Opposition to Defendants' Motion to Dismiss. (R. 170-172).

37. On June 21, 1993, Judge Lyle R. Anderson, without holding oral argument as requested by Appellant pursuant to Rule 4-501(3)(b) of the Utah Code of Judicial Administration, entered a minute entry ruling on the Motions to Dismiss. (R. 173-176).

38. A proposed Order based on the ruling was mailed to the Court on July 7, 1993 with an unsigned and undated mailing certificate.

39. On July 15, 1993, at 4:59 p.m., Appellant via facsimile transmission submitted its Objection to proposed Order and a Memorandum of Points and Authorities in Support of its Objections to the proposed Order. (R. 177-196). The court nonetheless time stamped the document as received July 16, 1993. (R. 177).).

40. On July 15, 1993, and without holding oral argument as requested by Appellant pursuant to Rule 4-501(3)(b) of the Utah Code of Judicial Administration, Judge Lyle R. Anderson signed an Order of Dismissal for Lack of Prosecution with Prejudice submitted by Appellee State. (R. 167-169).

41. A hard copy of Appellant's Objections to the Proposed Order and Memorandum of Points and Authorities was filed with the Trial Court on July 16, 1993. (R. 197-312).

42. On July 19, 1993, Judge Lyle R. Anderson entered his Ruling on Objections to Proposed Order through which he confirmed his earlier order granting Appellees' Motions to Dismiss For Failure to Prosecute with Prejudice. (R. 313-315).

43. From the foregoing, Appellant filed its Notice of Appeal and Cost Bond. (R. 316-319).

SUMMARY OF THE ARGUMENT

The Trial Court abused its discretion by proceeding in this matter despite its acknowledgement that the Appellees failed to comply with the terms of Rule 4-506 of the Utah Code of Judicial Administration. The Trial Court abused its discretion by granting Appellees' Motions to Dismiss because Appellant did not engage in dilatory conduct worthy of such a dismissal. The Trial Court further abused its discretion in granting the Appellees' Motions to Dismiss where Appellant had engaged new counsel who had reactivated the case. The Trial Court abused its discretion by failing to hold the hearing and oral argument requested by the Appellant pursuant to Rule 4-501 of the Utah Rules of Judicial Administration. Finally, the Trial Court erred as a matter of law in interpreting Rule 4-501 of the Utah Code of Judicial Administration.

Because the Trial Court abused its discretion, and to right the injustice that has resulted from that abuse, this Court must

vacate the Trial Court's decision and remand this case to the Trial Court for further proceedings.

ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION BY ACCEPTING AND RULING ON THE APPELLEES' MOTION TO DISMISS WHEN THE APPELLEES FAILED TO COMPLY WITH THE NOTICE PROVISIONS OF RULE 4-506(3) OF THE UTAH CODE OF JUDICIAL ADMINISTRATION.

A. Rule 4-506(3)

It is axiomatic that a party must comply with the rules contained in the Utah Code of Judicial Administration. Specifically, in the present case, Appellees filed their Motions to Dismiss in violation of Rule 4-506(3) of the Code of Judicial Administration. Further, upon filing the filing of the Appellees' Motions to Dismiss, the Trial Court did not require the Appellee's to comply with the terms of Rule 4-506(3). Because the Trial Court held proceedings in this case despite its own recognition of the Appellees' noncompliance with the Code of Judicial Administration (R. 175), the Trial Court abused its discretion. Therefore, this Court should reverse the Trial Court's granting of the Appellees' Motion to Dismiss.

Appellees violated Rule 4-506 of the Code of Judicial Administration. Rule 4-506(3) states

(3) When an attorney dies or is removed or suspended or withdraws from the case or ceases to act as an attorney, opposing counsel must notify, in writing, the unrepresented client of his responsibility to retain another attorney or appear in person before opposing counsel can initiate further proceedings against the client. A copy of the written notice shall be filed with the court and no further proceedings shall be held in the matter until 20 days have elapsed from the date of filing.

Rule 4-506(3), Code of Judicial Administration (emphasis added).

Thus, the rule contains a mandatory proscription against any further proceedings in an action until twenty days have elapsed following the date of filing the notice to obtain counsel or appear. The express language of the Rule precludes any exercise of discretion by the Trial Court with respect to whether a party must comply with the terms of the Rule.

Appellees violated Rule 4-506(3) by failing to serve Appellant with notice to obtain counsel or appear. The Trial Court abused its discretion by granting Appellees' Motion to Dismiss in light of their respective violations of the Code of Judicial Administration. In Sperry v. Smith, 694 P.2d 581 (Utah 1984), the Utah Supreme Court reviewed the question of whether a trial court abused its discretion in granting a party's Motion for Summary Judgment when the moving party failed to comply with the predecessor to Rule 4-506. In Sperry, the court said,

Since the judgment was entered after the failure of the court to follow one of its own rules, we conclude that the trial court abused its discretion.

Sperry at 582. The present case is analogous to Sperry. In Sperry, the attorney did not comply with the predecessor to Rule 4-506 (no Notice to Appear in Person or Obtain Counsel was mailed to the other party). As in Sperry, in the present case, counsel for the Appellees did not send notification to the Appellant of the need to obtain counsel or appear.

The Trial Court abused its discretion because it clearly found that the Appellees failed to comply with Rule 4-506(3), yet nonetheless accepted and ruled on Appellees Motion to Dismiss.

In its Ruling on the Motion to Dismiss, this Court expressly stated that the Appellees failed to comply with the rule when counsel for Hartford Leasing withdrew from the case. (R. 175-176). Yet in spite of this admission of noncompliance, the Judge Lyle R. Anderson granted Appellees' Motion to Dismiss.

The Trial Court abused its discretion because it erroneously created its own remedy for noncompliance with Rule 4-506 of the Utah Code of Judicial Administration. In its ruling, the Trial Court stated that "the remedy for such a failure is not necessarily denial of the motion. The remedy is to grant Hartford sufficient time after a pleading is filed in violation of Rule 4-506 to obtain counsel and adequately respond. It is evident here that Hartford has had that opportunity." (R. 175-176). The Trial Court's ruling is an abuse of discretion because it both ignores the plain language of the Rule and creates its own remedy which does not follow the precedent established in Utah and other jurisdictions.

The Trial Court's ruling on this matter is an abuse of discretion because it ignores the express language of the Rule which precludes the filing of any further proceedings against the party until such time as the notice is provided. Rule 4-506 does not vest the Trial Court with the discretion to permit proceedings despite noncompliance with the rule. In Sperry, supra, the Trial Court accepted a Motion for Summary Judgment, heard the matter and granted the Motion despite noncompliance

with the then existing version of Rule 4-506.¹ Sperry at 583. In Sperry, the Utah Supreme Court said, "Since the judgment was entered after the failure of the court to follow one of its own rules, we conclude that the Trial Court abused its discretion." Sperry at 583. This is precisely what occurred in the present case. The Trial Court accepted and ruled upon Appellees' Motions to Dismiss despite its express admission that Appellees failed to comply with Rule 4-506. (R. 175-176). Thus, the Trial Court abused its discretion.

The Trial Court abused its discretion in creating its own remedy which both ignored the express language of the rule and precedent. The Trial Court stated

the remedy for such a failure is not necessarily denial of the motion. The remedy is to grant Hartford sufficient time after a pleading is filed in violation of Rule 4-506 to obtain counsel and adequately respond. It is evident here that Hartford has had that opportunity.

(R. 175-176). The Trial Court's statement is an abuse of discretion. First, as mentioned above, the rule expressly states that no further proceedings shall be held until twenty days after the required notice has been given. See Rule 4-506, Utah Code of Judicial Administration (1993). Thus, the Trial Court abused its discretion in holding proceedings before such notice was filed.

¹ Rule 2.5 of the Rules of Practice of the District Courts of the State of Utah, in the relevant part, stated, "When an attorney dies or is removed or suspended or withdraws from the case or ceases to act as an attorney, the party to an action for whom such attorney was acting, must before any further proceedings as had against him, be required by the adverse party, by written notice to appoint another or to appear in person." Rule 2.5 of the Rules of Practice of the District Courts of the State of Utah as quoted in Sperry at 582.

Second, the appropriate remedy is expressly set forth in the Rule itself, i.e.; to not hold any further proceedings until compliance with the rule is satisfied. In Sperry, the Utah Supreme Court said, "the trial judge should have required plaintiff's attorney to then give notice . . . in accordance with Rule 2.5 before proceeding to hear and grant the motion." Sperry at 582.

Utah is not alone in its interpretation that the appropriate remedy for failure to comply with such Rules is to require the noncomplying party to comply prior to holding any further proceedings. California, in its Code of Civil Procedure, has a provision which is similar to Utah's 4-506.² In McMunn v. Lehrke, 155 P. 473, 476 (Cal. App. 3 Dist. 1915), the court held that where the court set a matter for trial and held the trial in the absence of the adverse party providing notice to the unrepresented party, the court was without the authority to hold a trial in this matter. In McMunn, the court stated, "It seems to us that the court was without the authority to proceed with the trial. We are further of the opinion that, if it was within the discretion of the court so to proceed, it was, under all the circumstances, an abuse of discretion." McMunn at 477.

In Aldrich v. San Fernando Valley Lumber Co., 170 Cal. App.

² Section 286, C.C.P. states, "When an attorney dies, or is removed or suspended, or ceases to act as such, a party to an action, for whom he was acting as attorney, must, before any further proceedings are had against him, be required by the adverse party, by written notice, to appoint another attorney, or to appear in person."

3d 725, 216 Cal. Rptr. 300, (Cal App. 2 Dist. 1985) the California courts again addressed the question of whether it was an abuse of discretion to hold proceedings in the face of noncompliance with C.C.P. §286. In Aldrich, the court said

Section 286 means what it plainly says, 'that no proceedings may be had against him [the now unrepresented party] no judgment or order or other step in the action taken, until he appoints an attorney, unless the prescribed notice be first given.' [citing to Larking v. Superior Court, 171 Cal. 719, 154 P. 841 (1916)]. The term 'proceedings', used in its technical legal sense, refers to something done or to be done in a court of justice or before a judicial officer. [citing to Lister v. Superior Court, 98 Cal. App. 3d 64, 70, 159 Cal. Rptr. 280 (1979)]. **A motion in the superior court to dismiss an action for want of prosecution is a good illustration of what is meant by the term proceeding.**

Aldrich at 310 [emphasis supplied]. In both McMunn and Aldrich, the appellate courts vacated the judgments and remanded the case back to the trial courts for further proceedings. Thus, the California courts make it clear that a Motion to Dismiss is a proceeding included under the scope of a statute similar to Utah's 4-506 and that it is an abuse of discretion for the Trial Court to hold such proceedings in the absence of the required notice. Similarly, this Court should vacate the judgment granted by the Trial Court because the Trial Court abused its discretion.

B. Gardiner's Notice of Withdrawal

Appellees' raised arguments to the Trial Court, with which the Trial Court apparently agreed, stating that Appellant's previous attorney's Notice for Withdrawal relieved Appellees of their burden to comply with Rule 4-506(3) of the Code of Judicial Administration. (R. 127). As the language of Rule 4-506 makes clear, compliance with the rule is mandatory. There was never an

appearance in this case by any other counsel for or on behalf of Appellant until its current counsel filed a Notice of Appearance in April of 1993. (R. 115). Clearly, the Appellees were not in any way relieved of their burden to comply with this rule. Thus, the Trial Court abused its discretion in both accepting and granting Appellees' Motion to Dismiss.

Appellees failure to comply with Rule 4-506(3) was both in violation of the Code of Judicial Administration and unreasonable. The Trial Court erroneously excused the Appellees from the requirements of Rule 4-506(3) of the Code of Judicial Administration because the Notice of Withdrawal was allegedly ambiguous. (R. 175). However, upon a careful review of the notice (R. 69), it is apparent that the notice did not contain any information which would relieve the Defendants' of their burden to comply with the mandatory provision of Rule 4-506.

Specifically, the Withdrawal of Counsel and Notice of Bankruptcy contains two paragraphs. The first paragraph clearly states that Dale F. Gardiner was withdrawing as counsel in the present case. The second paragraph states

NOTICE is also given that on December 1, 1988, Hartford Leasing Corporation filed a Chapter 11 bankruptcy petition in the United States Bankruptcy Court for the District of Utah. Counsel for Hartford Leasing Corporation is George H. Speciale Esq., 5 Triad Center #585, Salt Lake City, Utah 84180.

See Exhibit 1. Clearly, the fact that naming Mr. Speciale as counsel for Hartford Leasing is contained in the same paragraph which informs the defendants of Hartford Leasing's filing a petition for bankruptcy indicates that Mr. Speciale was counsel

for Hartford Leasing in the bankruptcy proceeding. The World Book Encyclopedia, defines "paragraph" as "a division of written work, consisting of one or more sentences, all related to the same idea." World Book Encyclopedia, Vol. 13, Field Enterprises, Inc. (1957).³

The Notice of Withdrawal contains two separate paragraphs which clearly relate to two separate subject matters. Paragraph one simply informs the parties of Mr. Gardner's withdrawal as counsel for the Appellant. Paragraph two contains two sentences both of which related to Appellant's filing bankruptcy. Had the notice intended to convey that Mr. Speciale was counsel for the Appellant in the present matter, the reference to him would have obviously been placed in the first paragraph. Any other reading of this notice is both twisted and plainly erroneous.

Mr. Speciale never filed a notice of appearance in this case with this court. While the Utah Rules of Civil Procedure do not contain a rule which expressly requires a Notice of Appearance⁴

³ See Webster's New Collegiate Dictionary, defining paragraph as "a subdivision of a written composition that consists of one or more sentences, deals with one point or gives the words of one speaker and begins on a new usually line. See also The Harbrace College Handbook, Chapter 32, stating, "An essential unit of thought in writing, the paragraph usually consists of a group of related sentences In a unified paragraph, each sentence contributes to developing a central idea." The Harbrace College Handbook, Chapter 32, pp. 311-313, Harcourt Brace Jovanovich Publishers, 1986 and BLACK'S LAW DICTIONARY, 6th Edition (defining paragraph as a distinct part of a discourse or writing; any section or subdivision of writing or chapter which relates to particularly points, whether consisting of one or many sentences).

⁴ Rule 10 of the Utah Rules of Civil Procedure, in the relevant part, states, "Every pleading and other paper filed with the court shall also state the name, address, telephone number and

be filed, it is the understood practice of attorneys to file such Notices in cases where the attorney has replaced withdrawn counsel or to appeal generally in court or by filing a pleading. None of those things were ever done by Mr. Speciale in the State Court.

Further, while the Utah Rules of Civil Procedure do not contain an express rule requiring a Notice of Appearance, the Federal Rules of Practice of the United States District Court do contain such a rule. Rule 103-3(a) of the Rule of Practice for the Federal District Court, in the relevant part, states

If an attorney's appearance has not been established previously by the filing of papers in the action or proceeding, such attorney shall file with the clerk a notice of appearance promptly upon undertaking the representation of any party or witness in any court or grand jury proceeding.

Rule 103-3(a), Rules of Practice for the Federal District Court (1992). Thus, while the Rules of Practice are not binding on the State District courts, they do codify what has become the standard industry practice for attorneys who take over representation of a client after the withdrawal of previous counsel.

Appellees' failure to comply with Rule 4-506(3) of the Utah Code of Judicial Administration was not reasonable nor should it

bar number of any attorney representing the party filing the paper, which information shall appear in the top left-hand corner of the first page." Rule 10, U.R.C.P. (1992). It should be noted that many of the Utah Rules of Civil Procedure are copied exactly or patterned after the Federal Rules of Civil Procedure. Rule 10, U.R.C.P. is similar to Rule 10 of the Federal Rules of Civil Procedure. See Compiler's Note following Rule 10, U.R.C.P.

be excused. The Trial Court's decision to excuse noncompliance with this Rule effectively stated that the withdrawing counsel has the right to name any other attorney as a replacement (whether the same is true or not) and opposing parties are then excused from the requirements of the Rule. Such an interpretation is strictly contrary to the very purpose for which the Rule was enacted, protecting unrepresented parties from the harsh results which can occur as a result of that lack of representation. Withdrawing counsel is not and should not be vested with the authority to notify the court of replacement counsel. Further, nothing short of a notice of appearance from replacement counsel relieves the Defendants' from their affirmative duty to file with the Court and serve the Appellant with a Notice to Obtain Counsel or Appear as required by Rule 4-506 of the Code of Judicial Conduct.

Because the Appellees failed to comply with the provisions of Rule 4-506 of the Utah Code of Judicial Administration and because the Trial Court held proceedings in this matter despite that noncompliance, the Trial Court abused its discretion. Therefore this Court must vacate the decision of the Trial Court and remand this case to the Trial Court for further proceedings.

II. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT GRANTED APPELLEES' MOTION TO DISMISS FOR FAILURE TO PROSECUTE.

The Trial Court abused its discretion in granting Appellees' Motion to Dismiss because the factors which that court must consider favor denying Appellees' motion. In Maxfield v. Rushton, 779 P.2d 237, 239 (Utah App. 1989), this Court stated

There is more to consider in determining if dismissal for failure to prosecute is proper than merely the amount of time elapsed since the suit was filed. The factors which we consider include the following: (1) the conduct of both parties; (2) the opportunity which each party has had to move the case forward; (3) what each party 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.

Maxfield at 239, citing K.L.C., Inc. v. McLean, 656 P.2d 986, 988 (Utah 1982).

1. THE CONDUCT OF BOTH PARTIES.

The first factor, the conduct of both parties, after considering the record and informal discovery by the Appellant, weighs heavily to conclude that the only party who has made any effort to bring this case to fruition is the Appellant. On the record alone, the Appellant filed a complaint in June of 1988. (R. 1-15). The Appellees responded the shortly thereafter. (R. 29-33; 41-42; and 62-65). Nothing more of substance appears on the record. Thus, on the record, both parties pursued or appear to be dilatory in this action with equal vigor. However, does not reflect all of the activity on the case.

Dismissal with prejudice was inappropriate in this case. In its ruling of June 21, 1993, the Trial Court stated that "between December 30, 1988 and March 29, 1993, Hartford has done nothing to move this case forward." (R. 174). If that were in fact the case, then perhaps dismissal with prejudice would be justified in this case. Admittedly, the docket report for this case reflects a complete lack of activity to prosecute or defend this case by any party. (R. 217-220). In fact, there are not entries on the

docket at all from June 22, 1988 to March 29, 1993. (R. 219-220). However, the record does not accurately reflect the activities of any of the parties in either prosecuting or defending this action.

Appellant has diligently prosecuted this case from the date the case was filed to the present. The factual basis for Appellant's claims against Appellees Rio Vista and La Sal were the basis of numerous studies by governmental agencies surrounding an environmental waste discharge. Appellant diligently pursued this action through vigorously pursuing non-record discovery from governmental agencies and private entities who were not parties to this litigation. (R. 221-239).

From the date of filing the Complaint through the end of November 1988, Plaintiff's counsel Dale Gardiner actively pursued this litigation through record discovery (responding to interrogatories and attending depositions) and non-record discovery (seeking information about the source of the injuries suffered by Hartford Leasing from persons and entities who were not parties to this litigation).

Dale Gardiner filed a notice of withdrawal as counsel and Notice of Bankruptcy on December 26, 1988. (R. 69). However, prior to that date, and in response to this Court granting Defendant State of Utah's Motion for a More Definite Statement, Gardiner drafted an Amended Complaint. (R. 242-255). Unbeknownst to the Appellant and for reasons that Appellant can only speculate as to, Gardiner failed to file the Amended

Complaint or otherwise notify Appellant that he had failed to do so.

Appellant continued to actively pursue the case from December of 1988 through October of 1990. During this period of time, Appellant was under the protection of the bankruptcy court because it filed a petition for chapter 11 bankruptcy protection as a result of the economic stress which occurred to it as a result of the Appellee State of Utah vacating the building and also as a result of the gas plume which occurred due to leaking underground storage tanks allegedly owned by the other Appellees to this action who were abutting property owners. (R. 69). In October of 1990, Appellant's bankruptcy petition was dismissed. (R. 128). From December 1988 through October 1990, even if Appellant had done nothing to prosecute this action, such failure to prosecute would be protected under the United States Bankruptcy code.

However, despite their pending bankruptcy, Appellant continued to exercise diligence in prosecuting this case. Admittedly, most of the discovery activity which occurred during this period of time was non-record discovery (such as obtaining environmental reports from various governmental agencies or private entities which evaluated the area to identify the source of the gas plume which devaluated Appellant's building and resulted in the State of Utah vacating the premises). (R. 221-239). The mere fact that Appellant's activities were neither on the record (as are notices of deposition, for example) nor

directly involving an Appellee, does not mean that Appellant did nothing to prosecute this case. Appellant diligently prosecuted this case by engaging in settlement negotiations. Appellant was actively negotiating a settlement of this case with the State of Utah during the period of time from June 1989 through December 1990. (R. 236). Most courts which have considered the question have held that it is improper to dismiss with prejudice a case for failure to prosecute where the parties have actively engaged in settlement negotiations. See e.g. Utah Oil Co. v. Harris, 565 P.2d 1135 (Utah 1977) and Hazen v. Williams, 30 So.2d 522 (Fla 1947). Thus, under the better reasoned decisions, apparent delays in prosecuting a claim is not grounds for dismissal with prejudice where the delays resulted in significant part from settlement negotiations. Therefore, Appellant should be deemed to have actively and diligently pursued this case up to December 1990.

Appellant diligently prosecuted this case from December of 1990 to the present. Appellant retained counsel, actively communicated with them and waited for retained counsel to prosecute the case. (R. 256-286). Each time, the counsel retained would either develop a conflict of interest which precluded them from handling the complete case or would cease to work on the matter once they realized that Appellant could not pay the required hourly rate. (R. 256-286).

In late December of 1992, Appellant consulted with present counsel about the possibility of taking this case on a

contingency. Present counsel advised Appellant that after reviewing the documents, if he felt that Appellant had a case, he would accept the matter on a contingency fee basis. In early 1993, Appellant entered into a contingency fee agreement with their present counsel. (R. 284-286). Thus, Appellant continued to diligently pursue this action from the date it was initially filed.

2. THE OPPORTUNITY EACH PARTY HAS HAD TO MOVE THE CASE FORWARD.

The second factor, the opportunity each party has had to move the case forward favors the Appellant because the Appellant has had less opportunity to move this case forward than have the Appellees. In December of 1988, Counsel for Appellant filed a Notice of Withdrawal of Counsel and Notice of Bankruptcy. (R. 69). Appellant filed a petition for Chapter 11 bankruptcy. (R. 69). Appellant was financially devastated as a direct result of the injustices complained of in their complaint. The property in question experienced a gross devaluation, the tenants having vacated caused Plaintiff's cash flow to dry up, and the Appellant was materially threatened in its ability to survive let alone prosecute this action. During the pendency of that Bankruptcy action, Appellant was unrepresented in this case as a matter of the record. Appellant required time to regroup and reorganize its affairs so as to be able to properly prosecute its interests. As a result of these difficulties, Appellant had little record opportunity to move this case forward. Nonetheless, and despite its severe economic difficulties arising proximately from the

Appellees' conduct, the Appellant has diligently pursued informal discovery which is not reflected on the Court's docket and has repeatedly retained counsel who have stayed on the case just long enough to spend their retainer fees before discovering a previously unknown conflict of interest. In this case, Appellant has done everything within its power to diligently prosecute this case. It has executed every practical opportunity afforded to it to do so.

In contrast to Appellant's circumstances and efforts, Appellees' remained represented by counsel. Appellees' offered no debilitating financial starts and had every opportunity to continue to move this case forward and failed to avail themselves of any of those opportunities. Consequently, the second factor, the opportunity each party had to move the case forward, favors ruling against the Appellees' Motion to Dismiss.

3. WHAT EACH PARTY HAS DONE TO MOVE THIS CASE FORWARD.

The third factor, what each party has actually done to move this case forward, favors ruling against Appellees' on their Motion to Dismiss. Appellant was unrepresented by counsel, as a matter of record, in this action from December 1988 until April 7, 1993 when Appellant's new counsel filed a Notice of Appearance. (R. 69 and 106). Appellant's delay in obtaining new counsel to appear in the case related both to their bankruptcy petition and the inability to retain counsel who would carry this case to fruition in light of the Appellant's limited ability to pay counsel's hourly fees. (R. 256-286). However, Plaintiff did

continue consistency to gather discovery information and to pursue obtaining counsel. A summary of the activities in chronological order is set forth in the record.

When Appellant obtained new counsel in this matter, Counsel for Appellant immediately filed with the Trial Court a Request for Scheduling Order. (R. 108). Thus, as soon as Appellant obtained new counsel who would carry this case to fruition based on a contingency fee agreement, Appellant took steps to move this case to a resolution.

In contrast to Appellant's excusable inability to move this case forward, Appellees' have no excuse. Appellees' failed to move this case forward by filing the requisite Notice to Obtain Counsel or Appear as required by Rule 4-506 of the Code of Judicial Administration. (R. 175). Further, Appellees' did nothing to further this litigation other than take two depositions and subpoena records held by one of the other Appellees. (R. 25-28; 38-39; 44-46; and 47-51). Despite being constantly represented by the same counsel throughout the period of this litigation, Appellees never filed a certificate of readiness for trial, did not request a scheduling order or move to challenge the cause of action on the merits in summary proceedings, nor did they do anything else to move this litigation forward. Thus, on balance, this factor favors the Appellant and this court should rule that the trial court abused its discretion in granting Appellees' Motion to Dismiss.

4. WHAT DIFFICULTY OR PREJUDICE MAY HAVE OCCURRED TO THE OTHER SIDE.

The Trial Court abused its discretion in granting Appellees' Motions to Dismiss because Appellees have suffered no difficulty or prejudice as a result of the alleged delays in this litigation. The Trial Court's Ruling on the Motion to Dismiss states

The Defendants claim that they have suffered prejudice because the passage of time has affected their ability to gather evidence for the defense. The Court discounts some of those claims because most of the Defendants have had the opportunity and the incentive to gather much of the same evidence in related matters. However, the Court recognizes that witnesses become less available as time passes and that some tests, particularly on carpeting, cannot be performed now that the carpeting has been replaced.

(R. 175). The Trial Court's statement is an abuse of discretion because the Appellees have not been prejudiced in this matter.

As noted above, Appellant has not delayed in bringing this action to fruition. Appellees have been actively involved in litigation which is substantially similar to this litigation. (R. 129; 296-304; and 305-308). Both of these pieces of litigation centered around the very same underground gas plume leak which is the subject of this litigation. All of the litigation referred to herein has involved the issue of whether or not there was a gas plume in the vicinity of the Moab Regional Center, and whether it originated with La Sal Oil and/or Rio Vista Oil facilities. Extensive testing of the neighboring properties as well as the Appellant's property in the Moab Regional Center was done during these litigation efforts. In the related litigation, the Appellees were motivated to prove their respective innocence by performing extensive expensive scientific

studies which thereby preserved the factual record necessary to defend themselves in this case. In fact, as late as May 6, 1992, Appellee La Sal and Rio Vista designated their respective expert witnesses in these other cases. Thus, contrary to the Trial Court's statements, Appellees had no trouble obtaining witnesses in 1992 and will not have trouble obtaining the same witnesses now. Appellee LaSal and Rio Vista's claims of prejudice are without merit.

Appellee, State of Utah, will not be prejudiced insofar as they were a party to one of the proceedings in which LaSal was engaged. The State held exhaustive administrative proceedings against both Rio Vista and La Sal during which that Appellee attempted to apportion liability for environmental clean up of the Moab property damaged by Appellees La Sal and Rio Vista. Appellant's claim against Appellee State is for breach of contract. The claim amounts to a statement that if the property was not environmentally damaged, then the State is liable for breach of their lease with Appellant. If however, the property is environmentally damaged, and the damage rendered the building uninhabitable, the State is not liable for vacating the leased premises prior to the expiration of the lease. The majority of the State's defense is documentary in nature. Further, in determining whether the building was environmentally damaged, Appellee State has access to reports and studies performed by the Department of Environmental Quality, EPA, OSHA and a multitude of private consulting contractors who have investigated the site.

Therefore, Appellee State has in no way been prejudiced by the alleged delays in bringing this case to trial.

Further, the Trial Court abused its discretion by determining without any evidence at all, that necessary tests on the carpet could no longer be performed because the carpet had been removed from the building. The fact is that not one of the Appellees' has requested access to the carpet to perform such tests. Appellant has had and still has the original carpet that was removed from the building. (R. 288-289). The alleged prejudice that the Appellees' would suffer could easily be eliminated if merely one of the Appellees' had requested the Appellant produce the carpet for testing. Thus, the Trial Court abused its discretion in assuming the existence of facts, which not only were not in the record but were and are wholly untrue.

While none of the Appellees has in fact been prejudiced, the action of the Trial Court was an abuse of discretion because it constitutes the ultimate in prejudice to the Appellant who had a justifiable excuse for the alleged delays in bringing this case to trial. As stated in Jepson v. New, 792 P.2d 728, 735 (Ariz 1990), "there can hardly be any prejudice than the complete loss of a cause of action." Thus, while the prejudice to the Appellees' is at most minimal and in fact nonexistent, Appellant has now endured the greatest possible prejudice. Thus, balancing the equities, the Trial Court abused its discretion in granting Appellees' Motions to Dismiss.

5. WHETHER INJUSTICE MAY RESULT FROM DISMISSAL.

This final factor, considered to be the most important factor, heavily favors the Appellant. The Appellant has suffered severe economic injuries as a result of the conduct of the Appellees. In fact, Appellant was forced to file bankruptcy as a direct result of the injuries alleged against the Appellees. It would be grossly unjust to permit the alleged wrongdoers to escape the possible consequences of their actions merely because their actions were severe enough to economically ruin the Appellant thereby financially precluding it from prosecuting this case zealously on the record. In order to right an extreme and grave injustice, this Court should reverse the trial court's granting of Appellees' Motion to Dismiss.

Appellant is entitled to its day in court. In Westinghouse Electric Supply Company v. Paul W. Larsen Contractor, Inc., 544 P.2d 876 (Utah 1975), the court said, "It is indeed commendable to handle cases with dispatch and to move calendars forward with expedition in order to keep them up to date. But it is even more important to **keep in mind that the very reason for the existence of courts is to afford disputants an opportunity to be heard and to do justice to them.**" Westinghouse at 878 [emphasis added].

As in Westinghouse, this Court should recognize that the Appellant has a right to be heard. The Trial Court's decision did handle this case with dispatch and thereby move its calendar forward, but it did so by foreclosing a cause of action that the Appellants have quietly and diligently pursued. The Trial Court's decision resulted in the ultimate injustice, denying the

Appellant its day in court. Further, the Trial Court's decision came without any prior warning to the Appellant. The Trial Court did not issue an Order to Show Cause or in any other way warn the Appellant that its allegedly dilatory conduct would result in dismissal of this action. Thus, this Court should vacate the Trial Court's granting of Appellees' Motion to Dismiss which thereby precluded Appellant from having their day in court because the Trial Court abused its discretion in so ruling.

III. THE TRIAL COURT ABUSED ITS DISCRETION IN GRANTING THE APPELLEES' MOTIONS TO DISMISS WHERE THE APPELLANT HAD OBTAINED NEW COUNSEL WHO HAD REACTIVATED THIS CASE.

The Trial Court abused its discretion in granting Appellees' Motions to Dismiss with Prejudice for Failure to Prosecute this action where the Appellant had obtained new counsel who obviously had reactivated this case. Because the Trial Court abused its discretion, this Court must vacate the Trial Court's decision and remand this case back to the Trial Court for further proceedings.

Utah case law is clear that it is an abuse of discretion to grant a Motion to Dismiss for Failure to prosecute where the party has obtained new counsel who has reactivated the case. In Johnson v. Firebrand, Inc., 571 P.2d 1368, (Utah 1977), the Utah Supreme Court considered a case wherein there was almost four years of inactivity on the part of both the Plaintiff and the Defendant. In Johnson, the Plaintiff's inactive counsel withdrew and new counsel made an appearance immediately prior to the trial court's granting the Defendant's Motions to Dismiss for Failure to Prosecute. In Johnson, the Utah Supreme Court said

The conduct of all of the parties cannot be readily explained; and in view of the fact that new counsel caused the case to be activated, it seems that the trial court abused its discretion in dismissing the case on a motion to dismiss

Johnson at 1370.

Johnson is still the law in Utah. As recently as April of 1993, in Country Meadows Convalescent Center v. Utah Department of Health, 851 P.2d 1212, 1216 (Utah App. 1993), this Court cited favorably to Johnson as standing for the proposition that it is an abuse of discretion for the Trial Court to grant a Motion to Dismiss for Failure to Prosecute where new counsel had been obtained and had reactivated the case. Country Meadows at 1216.

In the present case, the Trial Court abused its discretion by granting Appellees' Motions to Dismiss for Failure to Prosecute in light of the fact that Appellant had obtained new counsel who had reactivated the case. Appellant was without counsel of record from December 1988 through April of 1993. (R. 69 and 106). On April 16, 1993, when Appellant's new counsel made his appearance on the record, Appellant's new counsel also filed a Request for a Scheduling Conference. (R. 108). Clearly, Appellant's new counsel was reactivating the case. Thus, the Trial Court abused its discretion in granting Appellees' Motions to Dismiss for Failure to Prosecute in light of the efforts of Appellant's new counsel to reactivate this case. Therefore, this Court must vacate the Trial Court's decision and remand this case for further proceedings in the Trial Court.

IV. THE TRIAL COURT ABUSED ITS DISCRETION IN GRANTING THE APPELLEES' MOTION TO DISMISS FOR FAILURE TO PROSECUTE WITH

PREJUDICE.

The Trial Court abused its discretion by granting Appellees' Motions to Dismiss with Prejudice. Rule 41(b) of the Utah Rules of Civil Procedure in the relevant part, states

Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue or for lack of an indispensable party, operates as an adjudication upon the merits.

Rule 41(b), U.R.C.P. (1993). Thus, this Rule implies that the Trial Court has the discretion to dismiss an action without prejudice.

Utah case law recognizes that a dismissal with prejudice is a severe sanction that should only be imposed where a party neglects to prosecute an action without justifiable excuse.

Country Meadows Convalescent Center v. Utah Department of Health, 851 P.2d 1212, 1215 (Utah App. 1993). In the present case, the Appellant had a number of justifiable excuses for the record not reflecting the activity in which it had engaged to bring this action to trial.

The Trial Court abused its discretion in granting the Appellees' Motions to Dismiss because it had lesser sanctions available to it would have more fairly punished the Appellant for the alleged delay in bringing this action to trial. In Tolman v. Salt Lake County Attorney, 818 P.2d 23, 26-27 (Utah App. 1991), this Court defined an abuse of discretion as

By an as of discretion is meant a clearly erroneous conclusion and judgment . . . It is a legal term to indicate that the appellate court is of the opinion that there was a

commission of error of law in the circumstances. It is an improvident exercise of discretion.

Tolman at 26-27.

In the present case, the Trial Court improvidently exercised its discretion by granting the Appellees' Motions to Dismiss with Prejudice. The Trial Court had lesser sanctions available to it which would have permitted the Appellant its day in court while at the same time punishing it for its allegedly dilatory conduct. The Trial Court could have made the Appellant pay the costs and fees the Appellees' incurred in filing their Motions to Dismiss. The Trial Court could have set a scheduling order and trial designed to promptly resolve the matter. Finally, the Trial Court could have dismissed the action without prejudice. Because the Trial Court never warned the Appellant that its conduct might lead to dismissal and the Appellant had a justifiable excuse for the alleged delay in prosecuting this action, the Trial Court could have and should have imposed a lessor sanction than dismissal with prejudice upon the Appellant. Therefore, the Trial Court abused its discretion in granting the Appellees' Motions to Dismiss with Prejudice. Therefore, this Court must vacate the Trial Court's decision and remand this case to the Trial Court for further proceedings.

V. THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO HOLD A HEARING PRIOR TO DECIDING APPELLEES' MOTION TO DISMISS WHEN THE APPELLANT REQUESTED SUCH A HEARING PURSUANT TO RULE 4-501(3)(b) OF THE UTAH CODE OF JUDICIAL ADMINISTRATION.

The Trial Court abused its discretion by granting Appellees' Motions to Dismiss without holding a hearing and oral argument as

requested by Hartford Leasing pursuant to Rule 4-501(3)(b) of the Utah Code of Judicial Administration. Thus, this Court must vacate the Trial Court's decision and remand this case to the Trial Court for further proceedings.

Rule 4-501(3)(b) of the Code of Judicial Administration states

In cases where the granting of a motion would dispose of the action or any issues in the action on the merits with prejudice, either party at the time of filing principal memorandum in support of or in opposition to a motion may file a written request for a hearing

4-501(3)(b), U.C.A. (1993). Appellant requested oral argument its Objections to Defendants' Motions to Dismiss. (R. 112).

The Trial Court was required to grant a request for a hearing on the matter unless two narrow exceptions were present. Rule 4-501(3)(c) states

Such a request shall be granted unless the court finds that
(a) the motion or opposition to the motion is frivolous
or (b) that the dispositive issues governing the
granting or denial of the motion has been
authoritatively decided.

Rule 4-501(3)(c), U.C.A. (1993). Thus, the Trial Court was mandated either to grant the hearing or alternatively make findings that the hearing was not necessary because the motion is frivolous or that dispositive issues have been authoritatively decided.

In the present case, the Trial Court did not grant the hearing. Additionally, the Trial Court did not make findings that the hearing was denied because of frivolity of the motion or that the dispositive issues had been authoritatively decided.

The Trial Court's rationale for not granting the Appellant's hearing was expressed in the Trial Court's Ruling on Objections to Proposed Order wherein it said

It is true that plaintiff requested oral argument when its filed its original memorandum in opposition to the motion to dismiss. Under Rule 4-501, plaintiff would have been entitled to oral argument. However, plaintiff thereafter filed a Notice to Submit for Decision that reads in full as follows:

Plaintiff's objection to Defendants' Motion for Dismissal filed with the Court on or near the 7th day of April, 1993, by Steven C. Tycksen, Attorney for Plaintiff, is now at issue and ready for decision of the Court.

The natural interpretation of this notice that nothing remained to be done before the court rendered a decision, and that plaintiff had waived its right to oral argument. The Court accordingly ruled without oral argument.

(R. 313 and 314). Such rationale is not among the grounds for denying a requested hearing. Thus, the Trial Court abused its discretion in granting Appellees' Motions to Dismiss without holding the requested hearing.

The Trial Court did not provide Appellant with notice of whether the hearing was denied or granted. Rule 4-501(3)(d) states

when a request for a hearing is denied, the court shall notify the requesting party. When a request for a hearing is granted, the court shall set the matter for hearing or notify the requesting party that the matter shall be heard and the requesting party shall schedule the matter for hearing and notify all parties of the date and time.

Rule 4-501(3)(d), U.C.A. (1993). In the present case, the Trial Court never notified Appellant that its request for a hearing was denied. Additionally, the Trial Court did not notify Appellant that the matter would be heard. Consequently, the trial court failed to follow the very rules which govern judicial

administration in the State of Utah. Clearly, failure to follow these rules is an abuse of discretion. Therefore, Appellant requests this Court to vacate the Trial Court's grant of Appellees' Motion to Dismiss and remand this case back to the trial court for further proceedings.

VI. THE TRIAL COURT ERRED AS A MATTER OF LAW IN INTERPRETING RULE 4-501 OF THE UTAH CODE OF JUDICIAL ADMINISTRATION BY FAILING TO CONSIDER APPELLANT'S SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES WHICH APPELLANT SUBMITTED PRIOR TO THE COURT RULING OF APPELLEES' MOTION TO DISMISS FOR FAILURE TO PROSECUTE.

The Trial Court erred as a matter of law in its interpretation of Rule 4-501 of the Utah Code of Judicial Administration. Specifically, the Trial Court erred when it ruled that Rule 4-501 precludes a party from submitting supplemental memoranda in reply to a Motion to Dismiss. (R. 173). Because the Trial Court erred in its interpretation of Rule 4-501 of the Utah Code of Judicial Administration, this Court must reverse the Trial Court's grant of Appellees' Motions for Summary Judgment and remand this case to the trial court for further proceedings.

There is nothing in Rule 4-501 which precludes filing supplemental memoranda. In fact, the plain language of the rule expressly provides for the filing of supplemental memoranda. Rule 4-501(1)(a), in the relevant part states, "All motions . . . shall be accompanied by a memorandum of points and authorities." Thus, the Rule initially sets out a minimum requirement of at least one memorandum of points and authorities.

Rule 4-501(1)(a) then goes on to expressly contemplate the

filing of more than one memorandum of points and authorities along with a single motion, "**Memoranda** supporting or opposing a **motion** shall not exceed ten pages in length . . ." Rule 4-501(1)(a), U.C.A. (1993). This sentence expressly uses the plural of Memorandum while referring to a single motion. Thus, the plain language of this section of the rule permits filing more than one memoranda supporting or opposing a motion to dismiss.

Appellant asserts that this reading of the statute is bolstered by the language used in other subsections of this rule. For instance, Rule 4-501(3)(b) states,

In cases where the granting of a motion would dispose of the action . . . either party at the time of filing **the principal motion** in support or in opposition to a motion may file a written request for a hearing.

Rule 4-501(3)(b), U.C.A. (1993). Thus, the rule seems to expressly contemplate that more than one memoranda may accompany a single motion. Additionally, there is clearly nothing in Rule 4-501 which precludes filing more than one memorandum in support or opposition of a motion. Therefore, the Trial Court erred as a matter of law when it interpreted Rule 4-501 as precluding the filing of supplemental memorandum and therefore did not consider Appellant's Supplemental Memorandum in ruling on Appellees' Motions to Dismiss. Because the Trial Court erred as a matter of law, this Court must reverse the Trial Court and remand this case back for further proceedings.

CONCLUSION

The Trial Court abused its discretion by proceeding in this

matter despite its acknowledgement that the Appellees failed to comply with the terms of Rule 4-506 of the Utah Code of Judicial Administration. The Trial Court abused its discretion by granting Appellees' Motions to Dismiss because Appellant did not engage in dilatory conduct worthy of such a dismissal. The Trial Court further abused its discretion in granting the Appellees' Motions to Dismiss where Appellant had engaged new counsel who had reactivated the case. The Trial Court abused its discretion by failing to hold the hearing and oral argument requested by the Appellant pursuant to Rule 4-501 of the Utah Rules of Judicial Administration. Finally, the Trial Court erred as a matter of law in interpreting Rule 4-501 of the Utah Code of Judicial Administration.

Because the Trial Court abused its discretion, and to right the injustice that has resulted from that abuse, this Court must vacate the Trial Court's decision and remand this case to the Trial Court for further proceedings.

RESPECTFULLY submitted this 18 day of November, 1993.

STEVEN C. TYCKSEN

A handwritten signature in dark ink, appearing to read 'S. Tycksen', is written over a horizontal line.

Steven C. Tycksen
Attorney for Appellant


Mailing Certificate

This is to certify that I mailed a true and correct copy of the foregoing Appellant's Opening Brief, first class postage prepaid on this 18 day of November, 1993 to:

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APPENDIX "A"

Rule 10. Form of pleadings and other papers.

(a) **Caption; names of parties; other necessary information.** All pleadings and other papers filed with the court shall contain a caption setting forth the name of the court, the title of the action, the file number, the name of the pleading or other paper, and the name, if known, of the judge to whom the case is assigned. In the complaint, the title of the action shall include the names of all the parties, but other pleadings and papers need only state the name of the first party on each side with an indication that there are other parties. A party whose name is not known shall be designated by any name and the words "whose true name is unknown." In an action in rem, unknown parties shall be designated as "all unknown persons who claim any interest in the subject matter of the action." Every pleading and other paper filed with the court shall also state the name, address, telephone number and bar number of any attorney representing the party filing the paper, which information shall appear in the top left-hand corner of the first page. Every pleading shall state the name and address of the party for whom it is filed; this information shall appear in the lower left-hand corner of the last page of the pleading.

(b) **Paragraphs; separate statements.** All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.

(c) **Adoption by reference; exhibits.** Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading, or in any motion. An exhibit to a pleading is a part thereof for all purposes.

(d) **Paper quality, size, style and printing.** All pleadings and other papers filed with the court, except printed documents or other exhibits, shall be typewritten, printed or photocopied in black type on good, white, unglazed paper of letter size (8 1/2" x 11"), with a top margin of not less than 2 inches above any typed material, a left-hand margin of not less than 1 inch, a right-hand margin of not less than one-half inch, and a bottom margin of not less than one-half inch. All typing or printing shall be clearly legible, shall be double-spaced, except for matters customarily single-spaced or indented, and shall not be smaller than pica size. Typing or printing shall appear on one side of the page only.

(e) **Signature line.** Names shall be typed or printed under all signature lines, and all signatures shall be made in permanent black or blue ink.

(f) **Enforcement by clerk; waiver for pro se parties.** The clerk of the court shall examine all pleadings and other papers filed with the court. If they are not prepared in conformity with this rule, the clerk shall accept the filing but may require counsel to substitute properly prepared papers for nonconforming papers. The clerk or the court may waive the requirements of this rule for parties appearing pro se. For good cause shown, the court may relieve any party of any requirement of this rule.

(g) **Replacing lost pleadings or papers.** If an original pleading or paper filed in any action or proceeding is lost, the court may, upon motion, with or without notice, authorize a copy thereof to be filed and used in lieu of the original.

(Amended effective Jan. 1, 1983; April 1, 1990.)

Advisory Committee Note. — As a general matter, Rule 10 deals with the form of papers filed with the court — both "pleadings" as defined in Rule 7(a) and "other papers filed with the court," including motions, memoranda, discovery responses, and orders. The changes in the present rule were promulgated to clarify

ambiguities in the prior rule and to address specific problems encountered by the courts. Paragraphs (b), (c) and (e) of the rule were not changed, except that paragraph (e) was redesignated as (g) and new paragraphs (e) and (f) were added.

Paragraph (a). This paragraph specifies re-

ner, there was no abuse in the district court's denial of plaintiff's second motion. *Hill v. Dickerson*, 839 P.2d 309 (Utah Ct. App. 1992).

—Need.

Where the defendant's counsel had three weeks to prepare for trial, and where two of the witnesses, purportedly important to his case, were actually present at trial and thus subject

to cross-examination, the purely speculative need for a third witness did not entitle the defendant to the granting of a motion for continuance. *State v. Humpherys*, 707 P.2d 109 (Utah 1985).

Cited in *Thorley v. Thorley*, 579 P.2d 927 (Utah 1978).

COLLATERAL REFERENCES

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

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

A.L.R. — Admissions to prevent continuance sought to secure testimony of absent wit-

ness in civil case, 15 A.L.R.3d 1272.

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

Key Numbers. — Continuance ⇐ 1 et seq.; Trial ⇐ 1 to 7.

Rule 41. Dismissal of actions.

(a) Voluntary dismissal; effect thereof.

(1) **By plaintiff; by stipulation.** Subject to the provisions of Rule 23(c), of Rule 66, and of any applicable statute, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

(2) **By order of court.** Except as provided in Paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

(b) **Involuntary dismissal; effect thereof.** For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue or for lack of an indispensable party, operates as an adjudication upon the merits.

(c) **Dismissal of counterclaim, cross-claim, or third-party claim.** The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third-party claim. A voluntary dismissal by the claimant alone pursuant to Paragraph (1) of Subdivision (a) of this rule shall be made before a responsive

pleading is served or, if there is none, before the introduction of evidence at the trial or hearing.

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

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

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

NOTES TO DECISIONS

ANALYSIS

Costs of previously dismissed action.

—Attorney fees.

Counterclaim.

—Lack of prosecution.

Involuntary dismissal.

—Appeal.

—Standard of review.

—Time limits.

—Directed verdict distinguished.

—Findings and conclusions.

—Effect.

—Evidence to be considered.

—Federal rules.

—Grounds.

—Failure to establish prima facie case.

—Failure to join indispensable party.

—Failure to prosecute.

—Failure to replace counsel.

—Insufficient evidence.

—Lack of jurisdiction.

—Improper venue distinguished.

—Procedure.

—Reinstatement of dismissed count.

—Water appropriation cases.

Voluntary dismissal.

—Action pending in another state.

—Conditions.

—Payment of attorney's fees.

—Court's discretion.

—Laches.

—Two-dismissal rule.

—Second dismissal.

—Quashing of previous summons.

Cited.

Costs of previously dismissed action.

—Attorney fees.

Imposition of attorney fees as condition precedent to permitting filing of fourth amended complaint was not error. *Tebbs & Tebbs v. Oliveto*, 123 Utah 158, 256 P.2d 699 (1953).

Counterclaim.

—Lack of prosecution.

Where, in cause of action arising in 1956, the trial court's judgment was reversed by the Supreme Court in 1968 and the cause remanded

for a new trial, but neither party filed any pleading after remand until 1975, at which time plaintiff filed a motion to dismiss defendant's counterclaim for lack of prosecution, the trial court acted within its discretion in granting the motion. *Reliance Nat'l Life Ins. Co. v. Caine*, 555 P.2d 276 (Utah 1976).

Involuntary dismissal.

—Appeal.

—Standard of review.

In reviewing a dismissal which is granted against a plaintiff, the court must review all of the evidence, together with every logical inference which may fairly be drawn therefrom, in the light most favorable to the plaintiff. *Martin v. Stevens*, 121 Utah 484, 243 P.2d 747 (1952).

When a trial court has made findings and entered judgment thereon, it is the appellate court's duty to review the evidence in the light most favorable to the findings, which must be allowed to stand if reasonable minds could agree with them. *Lawrence v. Bamberger R.R.*, 3 Utah 2d 247, 282 P.2d 335 (1955); *Child v. Hayward*, 16 Utah 2d 351, 400 P.2d 758 (1965).

Where the trial court granted defendant's motion to dismiss on the grounds that plaintiff had failed to show any right to relief but no findings of fact as authorized by Subdivision (b) were made, the question on appeal was whether the plaintiff's evidence, when considered in the light most favorable to him, showed that he was entitled to relief. *Davis v. Payne & Day, Inc.*, 10 Utah 2d 53, 348 P.2d 337 (1960).

Where the trial court granted defendant's motion to dismiss and elected to make findings as authorized by Subdivision (b), review of the evidence on appeal would be in the light most favorable to the findings. *Petty v. Gindy Mfg. Corp.*, 17 Utah 2d 32, 404 P.2d 30 (1965); *Petrie v. General Contracting Co.*, 17 Utah 2d 408, 413 P.2d 600 (1966).

In reviewing involuntary dismissals, the appellate court must give great weight to the findings made and the inferences drawn by the trial judge, but must reject his findings if clearly erroneous. On the other hand, it does not defer to conclusions of law but reviews

(d) **Failure to Register.** Attorneys who do not register with the court, who fail to pay the required fee on an annual basis, or who otherwise fail to notify the court of their intentions shall receive notice via certified mail at their last-known address from the clerk of court that their right to practice in this court will be summarily suspended if they do not comply with the registration requirements within thirty (30) days of the mailing of such notice. Attorneys so suspended shall be ineligible to practice in this court until their membership has been reinstated under such terms as the court may direct, including application and payment of any delinquent registration fees and payment of such additional amount as the court may direct.

Rule 103-3. Attorneys — Appearances by Attorneys.

(a) **Attorney of Record.** The filing of any pleading, unless otherwise specified, shall constitute an appearance by the person who signs such pleading, and such person shall be considered counsel or party pro se of record in that matter. If an attorney's appearance has not been established previously by the filing of papers in the action or proceeding, such attorney shall file with the clerk a notice of appearance promptly upon undertaking the representation of any party or witness in any court or grand jury proceedings. The form of such notice shall follow the example included in these rules as Appendix A. An attorney of record shall be deemed responsible in all matters before and after judgment until the time for appeal from a judgment has expired or a judgment has become final after appeal or until there has been a formal withdrawal from or substitution in the case.

(b) **Notification of Clerk.** In all cases, counsel and parties appearing pro se shall notify the clerk's office of any change in address or telephone number.

(c) **Appearance by Party.** Whenever a party has appeared by an attorney, that party cannot appear or act thereafter in its own behalf in the action or take any steps therein unless an order of substitution first shall have been made by the court after notice to the attorney of each such party and to the opposing party. However, notwithstanding that such party has appeared or is represented by an attorney, at its discretion the court may hear a party in open court. The attorney who has appeared of record for any party shall

- (1) represent such party in the action;
- (2) be recognized by the court and by all parties to the action as having control of the client's case; and
- (3) sign all papers that are to be signed on behalf of the client.

Rule 103-4. Withdrawal or Removal of Attorney.

(a) **Withdrawal and Substitution.** No attorney shall be permitted to withdraw or be substituted as attorney of record in any pending action except by written application and by order of the court. All applications for withdrawal shall set forth the reasons therefor, together with the name, address, and telephone number of the client, as follows:

(1) With Client's Consent. Where the withdrawing attorney has obtained the written consent of the client, such consent shall be submitted with the application and shall be accompanied by a separate proposed written order and may be presented to the court ex parte. The withdrawing attorney shall give prompt notice of the entry of such order to the client and to all other parties or their attorneys. For attorneys representing the United States or any agency thereof, it shall not be necessary for the client's signature to appear on the application provided that the client's consent to the withdrawal and substitution of counsel is acknowledged by counsel for all parties.

(2) Without Client's Consent. Where the withdrawing attorney has not obtained the written consent of the client, the application shall be in the form of a motion that shall be served upon the client and all other parties or their attorneys. The motion shall be accompanied by a certificate of the

the decision. Judicial review shall be governed by the procedures set forth in Utah Code Ann. § 63-46b-15.

Amended effective January 15, 1990; April 15, 1991; January 1, 1992; February 1, 1993.)

Amendment Notes. — The 1990 amendment renumbered this rule, formerly Rule 4-405; added the phrase beginning "and to" under "Applicability"; added "Upon initial application, and thereafter" to the beginning of Subdivision (1); in Subdivision (1)(C), inserted the subdivision designation (i) and added Subdivisions (ii) through (vii); redesignated former Subdivision (1)(D) as Subdivision (1)(C)(xiii); redesignated former Subdivision (1)(E) as Subdivision (1)(D); redesignated former Subdivisions (1)(F) through (J) as Subdivisions (1)(C)(viii) through (xii) and in Subdivision (viii) substituted "existing in Utah or any other state" for "in any court of the state"; added Subdivisions (2)(A) through (C), (3), (4), and (5)(A) and the first two sentences in Subdivision (5)(B), making former Subdivision (3) the third sentence in present Subdivision (5)(B); deleted former Subdivision (4), providing for full faith and credit among courts for orders qualifying sureties; redesignated former Subdivisions (5) through (7) as Subdivisions (5)(C) and (D) and (6); substituted "circuit" for "court" in Subdivision (5)(C); substituted "presiding judge" for "court" in two places in Subdivision (5)(D); substituted "March 1st" for "February 28th" in Subdivision (6); added Subdivision (7); and made stylistic changes throughout.

The 1991 amendment in Subdivision (1) added "or if the statement is made on behalf of

a business or corporation, a statement that the business or corporation" to the introductory language of paragraph (C) and made stylistic changes; rewrote Subdivision (2) to delete language relating to appraisals and inserted "prepared by a certified public accountant"; redesignated former Subdivision (2)(C) as present Subdivision (3), added present Subdivision (4), and renumbered the remaining subdivisions accordingly, making appropriate reference changes throughout; in present Subdivision (3), deleted "audited" before "financial statement" and substituted "surety" for "company" in the first sentence and substituted "the value" for "a ratio of bond dollars to letter of credit dollars" in the second sentence; in present Subdivision (5), substituted "current assets" for "real assets" in two places; and rewrote present Subdivision (6) to delete a table setting out the ratio of bond dollars outstanding to net worth value.

The 1992 amendment substituted "Commercial" for "qualifications of" in the rule heading, inserted "re-qualification and disqualification" and "commercial" in the Intent section, and substantially rewrote the rule.

The 1993 amendment, effective February 1, 1993, in Subdivision (6) added the designation (A), deleted "the lesser of \$500,000 or" after "exceed" in Subdivision (A), and added Subdivision (B).

Rule 4-408. Locations of trial courts of record.

Intent:

To designate locations of trial courts of record.

Applicability:

This rule shall apply to all trial courts of record.

Statement of the Rule:

(1) Each county seat and the following municipalities are hereby designated as locations of trial courts of record: American Fork; Bountiful; Cedar City; Clearfield; Kaysville; Layton; Murray; Orem; Park City; Roosevelt; Roy; Salem; Sandy; Spanish Fork; West Valley City.

(2) Subject to limitations imposed by law, a trial court of record of any *subject matter jurisdiction may hold court in any location designated by this rule.*

(Added effective January 1, 1992.)

ARTICLE 5. CIVIL PRACTICE.

Rule 4-501. Motions.

Intent:

To establish a uniform procedure for filing motions, supporting memoranda and documents with the court.

To establish a uniform procedure for requesting and scheduling hearings on dispositive motions.

To establish a procedure for expedited dispositions.

Applicability:

This rule shall apply to motion practice in all district and circuit courts except proceedings before the court commissioners and the small claims department of the circuit court. This rule does not apply to petitions for habeas corpus or other forms of extraordinary relief.

Statement of the Rule:

(1) Filing and service of motions and memoranda.

(a) **Motion and supporting memoranda.** All motions, except uncontested or ex-parte matters, shall be accompanied by a memorandum of points and authorities appropriate affidavits, and copies of or citations by page number to relevant portions of depositions, exhibits or other documents relied upon in support of the motion. Memoranda supporting or opposing a motion shall not exceed ten pages in length exclusive of the "statement of material facts" as provided in paragraph (2), except as waived by order of the court on ex-parte application. If an ex-parte application is made to file an over-length memorandum, the application shall state the length of the principal memorandum, and if the memorandum is in excess of ten pages, the application shall include a summary of the memorandum, not to exceed five pages.

(b) **Memorandum in opposition to motion.** The responding party shall file and serve upon all parties within ten days after service of a motion, a memorandum in opposition to the motion, and all supporting documentation. If the responding party fails to file a memorandum in opposition to the motion within ten days after service of the motion, the moving party may notify the clerk to submit the matter to the court for decision as provided in paragraph (1)(d) of this rule.

(c) **Reply memorandum.** The moving party may serve and file a reply memorandum within five days after service of the responding party's memorandum.

(d) **Notice to submit for decision.** Upon the expiration of the five-day period to file a reply memorandum, either party may notify the Clerk to submit the matter to the court for decision. The notification shall be in the form of a separate written pleading and captioned "Notice to Submit for Decision." The notification shall contain a certificate of mailing to all parties. If neither party files a notice, the motion will not be submitted for decision.

(2) Motions for summary judgment.

(a) **Memorandum in support of a motion.** The points and authorities in support of a motion for summary judgment shall begin with a section that contains a concise statement of material facts as to which movant contends no genuine issue exists. The facts shall be stated in separate numbered sentences and shall specifically refer to those portions of the record upon which the movant relies.

(b) **Memorandum in opposition to a motion.** The points and authorities in opposition to a motion for summary judgment shall begin with a section that contains a concise statement of material facts as to which the party contends a genuine issue exists. Each disputed fact shall be stated in separate numbered sentences and shall specifically refer to those portions of the record upon which the opposing party relies, and, if applicable, shall state the numbered sentence or sentences of the movant's facts that are disputed. All material facts set forth in the movant's statement and properly supported by an accurate reference to the record shall be

deemed admitted for the purpose of summary judgment unless specifically controverted by the opposing party's statement.

(3) Hearings.

(a) A decision on a motion shall be rendered without a hearing unless ordered by the Court, or requested by the parties as provided in paragraphs (3)(b) or (4) below.

(b) In cases where the granting of a motion would dispose of the action or any issues in the action on the merits with prejudice, either party at the time of filing the principal memorandum in support of or in opposition to a motion may file a written request for a hearing.

(c) Such request shall be granted unless the court finds that (a) the motion or opposition to the motion is frivolous or (b) that the dispositive issue or set of issues governing the granting or denial of the motion has been authoritatively decided.

(d) When a request for hearing is denied, the court shall notify the requesting party. When a request for hearing is granted, the court shall set the matter for hearing or notify the requesting party that the matter shall be heard and the requesting party shall schedule the matter for hearing and notify all parties of the date and time.

(e) In those cases where a hearing is granted, a courtesy copy of the motion, memorandum of points and authorities and all documents supporting or opposing the motion shall be delivered to the judge hearing the matter at least two working days before the date set for hearing. Copies shall be clearly marked as courtesy copies and indicate the date and time of the hearing. Courtesy copies shall not be filed with the clerk of the court.

(f) If no written request for a hearing is made at the time the parties file their principal memoranda, a hearing on the motion shall be deemed waived.

(g) All dispositive motions shall be heard at least thirty (30) days before the scheduled trial date. No dispositive motions shall be heard after that date without leave of the Court.

(4) Expedited dispositions. Upon motion and notice and for good cause shown, the court may grant a request for an expedited disposition in any case where time is of the essence and compliance with the provisions of this rule would be impracticable or where the motion does not raise significant legal issues and could be resolved summarily.

(5) Telephone conference. The court on its own motion or at a party's request may direct arguments of any motion by telephone conference without court appearance. A verbatim record shall be made of all telephone arguments and the rulings thereon if requested by counsel.

(Amended effective January 15, 1990; April 15, 1991.)

Amendment Notes. — The 1990 amendment rewrote this rule to such an extent that a detailed description is impracticable.

The 1991 amendment deleted "and a copy of

the proposed order" following "supporting documentation" in Subdivision (1)(b) and made related stylistic changes and inserted "principal" in Subdivision (3)(b).

NOTES TO DECISIONS

ANALYSIS

When rule applies.
Cited.

When rule applies.

Because the defendants' Rule 56(e) objection to the plaintiff's first affidavit was framed as a separate, written motion to strike, the plaintiff

should have been given ten days to respond, as prescribed by Subdivision (1)(b) of this rule. *Gillmor v. Cummings*, 806 P.2d 1205 (Utah Ct. App. 1991).

Cited in *Huston v. Lewis*, 818 P.2d 531 (Utah 1991); *Lucero v. Warden of Utah State Prison*, 841 P.2d 1230 (Utah Ct. App. 1992).

Principal Amount of Judgment, Exclusive of Costs, Between:		Attorneys' Fees Allowed
1,500.01	2,000.00	325.00
2,000.01	2,500.00	400.00
2,500.01	3,000.00	475.00
3,000.01	3,500.00	550.00
3,500.01	4,000.00	625.00
4,000.01	4,500.00	700.00
4,500.01	5,000.00	775.00

(2) Reference to this rule and the amount of attorneys' fees allowed pursuant to paragraph (1) shall be stated with particularity in the body or prayer of the complaint.

(3) When a statute provides the basis for the award of attorneys' fees, reference to the statutory authority shall be included in the complaint.

(4) Clerks may enter civil default judgments which include attorneys' fees awarded pursuant to this rule.

(5) Attorneys' fees awarded pursuant to this rule may be augmented after judgment pursuant to Rule 4-505. When the court considers a motion for augmentation of attorneys' fees awarded pursuant to this rule, it shall consider the attorneys' time spent prior to the entry of judgment, the amount of attorneys' fees included in the judgment, and the statements contained in the affidavit supporting the motion for augmentation.

(6) Prior to entry of a judgment which grants attorneys' fees pursuant to this rule, any party may move the court to depart from the fees allowed by paragraph (1) of this rule. Such application shall be made pursuant to Rule 4-505.

(7) If a contract or other document provides for an award of attorneys' fees, an original or copy of the document shall be made a part of the file before attorneys' fees may be awarded pursuant to this rule.

(8) No affidavit for attorneys' fees need be filed in order to receive an award of attorneys' fees pursuant to this rule.

(Added effective March 31, 1992.)

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

Intent:

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

Applicability:

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

Statement of the Rule:

(1) Consistent with the Rules of Professional Conduct, an attorney may withdraw as counsel of record without the approval of the court except when (a) a motion has been filed and is pending before the court or (b) a certificate of readiness for trial has been filed. Under these circumstances, an attorney may not withdraw except upon motion and order of the court.

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

(3) When an attorney dies or is removed or suspended or withdraws from the case or ceases to act as an attorney, opposing counsel must notify, in writing, the unrepresented client of his/her responsibility to retain another attorney or appear in person before opposing counsel can initiate further

proceedings against the client. A copy of the written notice shall be filed with the court and no further proceedings shall be held in the matter until 20 days have elapsed from the date of filing.
(Amended effective January 15, 1990; April 15, 1991.)

Amendment Notes. — The 1990 amendment added "Consistent with the Rules of Professional Conduct" to Subdivision (1) and, in Subdivision (3), inserted "in writing" in the first sentence and added the second sentence. The 1991 amendment, in the Applicability section, substituted the present language for

"This rule shall apply to all trial courts of record and not of record"; and in Subdivision (1) substituted the present language beginning with "without the approval of the court" for "in all cases except for withdrawal would result in delay of trial. In that case, an attorney may not withdraw without the approval of the court."

NOTES TO DECISIONS

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

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

Intent:

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

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

Applicability:

This rule shall apply to all courts of record.

Statement of the Rule:

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

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

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

Rule 4-508. Unpublished opinions.

Intent:

To establish a uniform standard for the use of unpublished opinions.

Applicability:

This rule shall apply to all courts of record and not of record.

Statement of the Rule:

Unpublished opinions, orders and judgments have no precedential value and shall not be cited or used in the courts of this state, except for purposes of applying the doctrine of the law of the case, res judicata, or collateral estoppel.
(Added effective January 15, 1990.)

§ 285.1

ATTORNEYS

Part 1

cause, by filing a notice of withdrawal. Such notice shall state (a) date of entry of final decree or judgment, (b) the last known address of such party, (c) that such attorney withdraws as attorney for such party. A copy of such notice shall be mailed to such party at his last known address and shall be served upon the adverse party.

(Added by Stats.1963, c. 1333, p. 2856, § 1. Amended by Stats.1969, c. 1608, p. 3344, § 10, operative Jan. 1, 1970.)

Historical Note

The 1969 amendment substituted in the first sentence "dissolution of marriage, legal separation, or for a declaration of void or voidable marriage" for "divorce, separate maintenance or annulment."

Operative date of Stats.1969, c. 1608, see Historical Note under § 125.

Forms

See West's California Code Forms, Civil Procedure.

Law Review Commentaries

Background and general effect of 1963 addition. (1963) 38 S. Bar J. 661.

Library References

Attorney and Client ⇐76(1).
C.J.S. Attorney and Client §§ 221, 231.

Family Law Practice. Goddard, §§ 589, 590.

Notes of Decisions

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following procedure prescribed in §§ 284 and 285 for discharge of attorney, service of subsequent pleadings are nevertheless properly made on attorney. Forslund v. Forslund (1964) 37 Cal.Rptr. 489, 225 C.A.2d 476.

1. In general

Client can discharge attorney of record at any time and substitute another in his place, but to do so he must conform to §§ 284, 285 and this section. Forslund v. Forslund (1964) 37 Cal.Rptr. 489, 225 C.A.2d 476.

2. Appearance in propria persona

Where party who has appeared in action by attorney thereafter takes part in proceedings in propria persona without

3. Finality of judgment

While authority of attorney ordinarily ends with entry of judgment, except for purpose of enforcing it or having it set aside or reversed, judgment of divorce, insofar as it relates to custody and maintenance of minor children, is not final but litigation is regarded as still pending and service may yet be made on attorney. Forslund v. Forslund (1964) 37 Cal.Rptr. 489, 225 C.A.2d 476.

§ 286. Death, removal, etc.; new appointment or appearance in person

When an attorney dies, or is removed or suspended, or ceases to act as such, a party to an action, for whom he was acting as attorney, must, before any further proceedings are had against him, be re-

quired by the adverse party, by written notice, to appoint another attorney, or to appear in person.

(Enacted 1872. Amended by Code Am.1880, c. 35, p. 57, § 1.)

Historical Note

The reenactment of 1880 changed only the punctuation.

Forms

See West's California Code Forms, Civil Procedure.

Cross References

Suspension or removal of attorney, see Business and Professions Code § 6100 et seq.

Library References

Attorney and Client ⇐75, 76.

C.J.S. Attorney and Client § 231.

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3. Power of the court

If defendant's attorney exhibits objective evidence of physical incapacity to proceed with meaningful defense of client, such as illness, intoxication, or nervous breakdown, court should inquire into matter on its own motion and if necessary relieve affected counsel and order a substitution; yet even that action should be taken with great circumspection and after all reasonable alternatives, such as granting of continuance, have been exhausted; failure to observe these standards will compel reversal of ensuing judgment; and this result will follow regardless of whether substituted counsel was competent or whether defendant received "fair trial". *Smith v. Superior Court of Los Angeles County* (1968) 68 Cal.Rptr. 1, 440 P.2d 65, 68 C.A. 547.

Under this section trial court, in absence of written notice requiring defendant to appoint another attorney after his original attorney has ceased to act, and in absence of defendant or any attorney, was without authority to proceed with the trial. *McMunn v. Lehrke* (1915) 155 P. 473, 29 C.A. 298.

Though this section provides that, when an attorney dies, a party to an action, for whom he was acting, must be required by the adverse party, by written notice, to appoint another attorney, or appear in person, before any further proceedings are had against him, failure of a defendant to give such notice to a plaintiff whose attorney had died will not deprive the court of jurisdiction to dismiss an action for want of prosecution where plaintiff appointed another attorney before the commencement of the proceedings. *Nicol*

1. In general

This section applies only when attorney has died or ceased to be attorney and not when he ceased to act for his client in particular case. *California Water Service Co. v. Edward Sidebotham & Son, Inc.* (1964) 37 Cal.Rptr. 1, 224 C.A.2d 715.

This section does not apply where attorney has ceased to act for client in particular case. *Gion v. Stroud* (1961) 12 Cal. Rptr. 540, 191 C.A.2d 277.

The phrase "ceases to act as such," as used in this section providing that, when an attorney ceases to act as such, party for whom he was acting as attorney must be required by adverse party by written notice to appoint another attorney or appear in person, contemplates that notice be given when attorney ceases to practice as an attorney rather than when he ceases to act as an attorney in a particular piece of litigation. *Jones v. Green* (1946) 168 P.2d 418, 74 C.A.2d 223.

2. Purpose

Purpose of this section is to provide notice to a party who might otherwise be taken unawares. *California Water Service Co. v. Edward Sidebotham & Son, Inc.* (1964) 37 Cal.Rptr. 1, 224 C.A.2d 715.