

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 :  
Reply Brief

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca1](https://digitalcommons.law.byu.edu/byu_ca1)

 Part of the [Law Commons](#)

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

Alan S. Bachman; Attorney for Appellee State; Assistant Attorney General; J. Michael Hansen; Attorney for Appellee; Suitter, Axland, Armstrong & Hanson.

Steven C. Tycksen; Attorney for Appellant; J. James Clegg; Attorney for Appellee; Snow, Christensen & Martineau.

---

#### Recommended Citation

Reply Brief, *Hartford Leasing Corporation v. Rio Vista Limited*, No. 930612 (Utah Court of Appeals, 1993).  
[https://digitalcommons.law.byu.edu/byu\\_ca1/5541](https://digitalcommons.law.byu.edu/byu_ca1/5541)

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

IN THE UTAH COURT OF APPEALS

DOCKET NO. 930612 CA  
IN AND FOR THE STATE OF UTAH

---

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.	)	

---

REPLY BRIEF OF APPELLANT

---

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

---

Alan S. Bachman  
Attorney for Appellee State  
Assistant Attorney General  
Room 4120 State Office Building  
Salt Lake City, Utah 84114

STEVEN C. TYCKSEN (3300)  
Attorney for Appellant  
45 East Vine Street  
Murray, Utah 84107  
(801) 262-6800

J. Michael Hansen  
Attorney for Appellee La Sal Oil  
Sutiter, Axland, Armstrong  
& Hanson  
175 South West Temple #700  
Salt Lake City, Utah 84101

J. James Clegg  
ATTORNEY FOR APPELLEE RIO  
VISTA  
Snow, Christensen & Martineau  
10 Exchange Place, 11th Floor  
P.O. Box 45000  
Salt Lake City, Utah 84145  
**FILED**  
Utah Court of Appeals

FEB 17 1994

*Alan Hansen*

DAVID H DAY  
JAY V BARNEY  
ROBERT C LILJENQUIST  
PHILLIP B SHELL  
MARK T ETHINGTON  
SCOTT R SABEY

DAY & BARNEY

ATTORNEYS AT LAW

45 EAST VINE STREET  
MURRAY, UTAH 84107

(801) 262-6800

FEB 22 1994

OF COUNSEL  
STEVEN C TYCKSEN

FAX (801) 262-6758

February 18, 1994

Utah Court of Appeals  
230 South 500 East #400  
Salt Lake City, Utah 84114

Re: Hartford Leasing v. Rio Vista Oil, et al  
Case #930612-CA

Dear Sirs:

The reply brief of Appellant filed yesterday mistakenly contains a draft copy of page five (5) which was bound in the brief in error. Enclosed are a Notice of Errata to the Reply Brief and eight copies of the correct page which should be inserted in place of the page five (5) presently contained in the brief.

I apologize for the inconvenience and any confusion this may have caused. The clerical error in including the wrong page from a prior rough draft was unintentional and inadvertant. Thank you for your time and effort required to make the substitution of this page.

Sincerely yours,



Steven C. Tycksen

SCT/ts  
Enclosures  
cc:

Allan S. Backman (#5028)  
Assistant Attorney General for the State of Utah  
4120 State Office Building  
Salt Lake City, Utah 84114-0811

J. Michael Hansen (#1339)  
Claudia F. Berry (#5037)  
Attorneys at Law  
175 South West Temple #700  
Salt Lake City, Utah 84101

J. James Clegg  
Attorney at Law  
10 Exchange Place, Eleventh Floor  
Post Office Box 45000  
Salt Lake City, Utah 84145

Steven C. Tycksen (#3300)  
Attorney for Appellant  
45 East Vine Street  
Murray, Utah, 84107

FEB 21 1994

JUSTICE OF THE PEACE

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

---

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.	)	

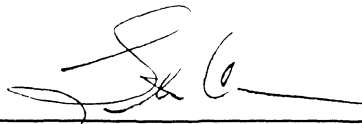
---

NOTICE OF ERRATA TO REPLY BRIEF OF APPELLANT

---

Please take notice that the Appellant's reply brief filed on February 17, 1994, mistakenly contains a draft version of page five (5) which was inadvertantly bound with the brief in place of the final version which should have been included. The correct version of page five (5) is attached hereto and should be substituted in place of the page five (5) presently bound in the brief.

Dated and signed this 18th day of February, 1994.

  
\_\_\_\_\_  
Steven C. Tycksen

Court. (R.221-239). With clear evidence before the court that Appellant had not been ignoring the proceeding, it was an abuse of discretion for the trial court to dismiss this action, and a fortiori to do so with prejudice.

Hartford Leasing pursued it's causes of action by fighting battles on several fronts. Hartford worked to hold on to the building, investigate and gather evidence, attempt to negotiate a resolution of the dispute, and to keep attorneys employed and working on the case. The simple statement in Appellee's brief that all Hartford did was to try to retain an attorney is a gross over simplification and ignores the reality that litigation is much more than what appears of record on the court's docket.

From December of 1990 to the present Hartford fought to retain ownership of the building (which was then vacant as a result of rumors of a gas plume which had alledgedly permeated the ground beneath it). The damage from this gas spill was chargeable to the negligence of one or all of the Appellees, or in the alternative, to the State of Utah if it improperly vacated the building contrary to it's lease obligations. Since no revenue was flowing to pay the underlying indebtedness the debtor was forced to mitigate its damages through negotiations. Attorney Steven Call negotiated additional time and terms of repayment on the million dollar debt. (R. 236-237). Mr. Call also negotiated with the State concerning settlement of the claims arising out of the it's vacation of the building as late as July 31, 1992. (R. 238).

Following the close of its bankruptcy, Hartford Leasing

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

---

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.	)	
	)	

---

REPLY BRIEF OF APPELLANT

---

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

---

Alan S. Bachman  
Attorney for Appellee State  
Assistant Attorney General  
Room 4120 State Office Bldg.  
Salt Lake City, Utah 84114

STEVEN C. TYCKSEN (3300)  
Attorney for Appellant  
45 East Vine Street  
Murray, Utah 84107  
(801) 262-6800

J. Michael Hansen  
Attorney for Appellee La Sal Oil  
Sutiter, Axland, Armstrong  
& Hanson  
175 South West Temple #700  
Salt Lake City, Utah 84101

J. James Clegg  
ATTORNEY FOR APPELLEE RIO  
VISTA  
Snow, Christensen & Martineau  
10 Exchange Place, 11th Floor  
P.O. Box 45000  
Salt Lake City, Utah 84145

TABLE OF CONTENTS

Table of Contents.....	i
Table of Authorities.....	ii
Constitutional and Statutory Provisions.....	4
Statement of Issues Presented and Standard of Review.....	4
Argument.....	4-18
I.    IT IS AN ABUSE OF DISCRETION TO DISMISS WITH PREJUDICE WHERE HARTFORD LEASING PURSUED THIS ACTION CONTINUOUSLY FROM THE DATE OF FILING THE INITIAL COMPLAINT.....	4
II.   THE TRIAL COURT ABUSED ITS DISCRETION IN DISMISSING THIS ACTION BECAUSE NEW COUNSEL HAD BEEN RETAINED WHO REACTIVATED THIS CASE.....	7
III.  THE TRIAL COURT ABUSED ITS DISCRETION IN DISMISSING THIS ACTION WITHOUT GIVING ANY PRIOR WARNING OR DIRECTION TO HARTFORD LEASING TO PROSECUTE THIS ACTION OR FACE DISMISSAL.....	8
IV.   HARTFORD LEASING DID NOT WAIVE ITS REQUEST FOR A HEARING ON THE APPELLEES' MOTIONS TO DISMISS. THE TRIAL COURT'S RENDERING OF A DECISION ON THESE MOTIONS WITHOUT HOLDING A HEARING OR RULING ON THE REQUEST FOR A HEARING VIOLATED HARTFORD LEASING'S RIGHT TO PROCEDURAL DUE PROCESS.....	9
V.    THE RECORD FOR PURPOSES OF THIS APPEAL CONSTITUTES ALL OF THE RECORD TRANSMITTED TO THIS COURT BY THE LOWER COURT.....	13
VI.   RULE 4-506 OPERATES AS A STAY OF ALL PROCEEDINGS IN AN ACTION UNTIL THE REQUIRED NOTICE IS GIVEN AND THE TIME THEREAFTER HAS ELAPSED. PERMITTING ANY PROCEEDINGS IN THE ABSENCE OF SUCH NOTICE IS A CLEAR ABUSE OF DISCRETION.....	15
Conclusion.....	

## TABLE OF AUTHORITIES

### **UTAH STATUTES AND RULES**

Rule 11, Utah Rules of Appellate Procedure.....	13
Rule 4-501 Utah Code of Judicial Administration.....	9-11
Rule 4-504 Utah Code of Judicial Administration.....	14
Rule 4-506 Utah Code of Judicial Administration.....	15

### **UTAH CASES**

#### Utah Supreme Court

<u>Cornish Town v. Kohler</u> , 798 P.2d 753, 758 (Utah 1990).....	12
<u>Hartford Accident &amp; Indemnity Co. v. Clegg</u> , 103 Utah 414, 135 P.2d 919, 922 (Utah 1943).....	14
<u>Johnson v. Firebrand, Inc.</u> , 571 P.2d 1368 (Utah 1978).....	7
<u>Nelson v. Jacobsen</u> , 669 P.2d 1207, 1211-12 (Utah 1983).....	12
<u>Savage Industries v. Utah State Tax Commission</u> , 811 P.2d 664, 666-67 (Utah 1991).....	4.
<u>United Park City Mines v. Greater Park City Co.</u> , 220 Utah Adv. Rep. 3, 10 (Utah 1993).....	11
<u>Westinghouse Electric Supply Co. v. Paul W. Larsen Contractor, Inc.</u> , 544 P.2d 876, 879 (Utah 1975).....	8

#### Utah Court of Appeals

<u>Country Meadows v. Utah Department of Health</u> , 851 P.2d 1212, 1216 (Ut. App. 1993).....	8, 9
---	------

### **OTHER JURISDICTION CASES, STATUTES AND RULES**

#### STATUTES

§37-61-405 Montana Code Annotated.....	16
New York CPLR Rule 321(c).....	17

#### CASES

<u>Firemen's Fund Insurance Company v. Dietz</u> , 488 N.Y.S.2d 936, 937 (A.D. 4 Dept. 1985).....	17
<u>In re Van Barger's Estate</u> , 243 N.Y.S.2d 328, 329-330 (Surrogate Court 1963).....	17
<u>L. Johnson &amp; Sons v. Brighton Commons</u> , 569 N.Y.S.2d 40, 41 (A.D. 4 Dept. 1971).....	17
<u>McWilliams v. Clem</u> , 743 P.2d 577, 586 (Mont. 1987).....	16
<u>Montana Bank of Roundup v. Benson</u> , 717 P.2d 6, 7 (Mont. 1986)...	16



### CONSTITUTIONAL AND STATUTORY PROVISIONS

The following rules and statutes are determinative with respect to some of the issues raised by Hartford Leasing and are attached hereto as Exhibit "A".

### STATEMENT OF ISSUES PRESENTED AND STANDARDS OF REVIEW

Appellant concurs in the briefs of the Appellees' that the correct standard of review for Appellant's sixth issue is the correction of error standard. However, whether this Court applies a correction of error standard or reviews the Trial Court's conclusions as a matter of law, no deference should be paid to the interpretation of the statute by the Trial Court. Savage Industries v. Utah State Tax Commission, 811 P.2d 664, 666-65 (Utah 1991).

### ARGUMENT

#### **I. IT IS AN ABUSE OF DISCRETION TO DISMISS WITH PREJUDICE WHERE HARTFORD LEASING PURSUED THIS ACTION CONTINUOUSLY FROM THE DATE OF FILING THE INITIAL COMPLAINT.**

Appellant Hartford Leasing continuously and diligently pursued this action from the date the initial Complaint was filed to the date the Trial Court dismissed this action with prejudice. The actions taken by Hartford Leasing can be segregated into four categories which include: (a) efforts made to retain several attorneys; (b) efforts to salvage the building and mitigate damages; (c) informal discovery; and (d) efforts to negotiate a settlement. These efforts were all clearly defined in the record before the lower court and are a part of the record before this

Court. (R.221-239). With clear evidence before the court that Appellant had not been ignoring the proceeding, it was an abuse of discretion for the trial court to dismiss this action, and a fortiori to do so with prejudice.

The efforts of Appellant to retain and Appellant Hartford Leasing diligently pursued this action by seeking out and obtaining governmental records concerning investigations into the presence of a gasoline plume on Hartford Leasing's property. (R. 221-239). Contrary to Appellee Rio Vista's argument and characterization (Rio Vista Brief, p. 7), Appellant Hartford Leasing did more from December 1990 to the present than merely attempt to obtain legal counsel.

From December of 1990 to the present, Hartford vigorously attempted to retain ownership of the building, which was practically rendered worthless as a result of the damages alleged by the Plaintiff to be chargeable to the Appellees' conduct. Through negotiations with the mortgage holder and Hartford Leasing's newly retained attorney Steven Call of Ray, Quinney & Nebeker negotiated additional time and terms of repayment on a million dollar debt with no cash flowing from the leasehold tenancy of the State of Utah. (R. 236-237). Attorney Call was in communication with Attorney Clegg for Appellee State concerning the State's vacation of the building as late as July 31, 1992. (R. 238). Appellant also filed and pursued reorganization of its financial situation in United States Bankruptcy Court.

Following the close of its bankruptcy, Hartford Leasing

actively sought out new counsel to represent its interests in this action. Appellant retained counsel (Watkiss & Saperstein), who began investigating the matter seriously and billed Hartford Leasing \$8,420.00, but was forced to withdraw when a conflict of interest was discovered which prevented their being able to continue their representation of Hartford Leasing in this case. (R. 236-237). Hartford Leasing thereupon retained Steven Call of Ray, Quinney & Nebeker. (R. 235-238). Finally, in December of 1992 Hartford Leasing consulted with their present counsel and entered into a contract with him to represent their interest on a contingency fee basis. (R. 238).

All of the above efforts through counsel were going on simultaneously while Appellant continued to gather evidence informally, and to participate as an active non-party observer of the litigation that was progressing among the Defendants themselves over substantially the same issues. Hartford was in the enviable position of being able to claim that one of the three defendants was the cause of its damages while the defendants themselves were involved in separate but related litigation to decide who among them was responsible for the gas plume, and therefore the cleanup costs associated therewith. The evidence and proof submitted in that litigation was all directly applicable to its case. It was prudent for Hartford to make use of the development of those cases. Contrary to the position urged by the Appellees, Appellant Hartford Leasing diligently prepared its case. The Trial Court, by ignoring the fact that these efforts were proceeding outside it's docket

record, abused its discretion in dismissing this case with prejudice.

**II. THE TRIAL COURT ABUSED ITS DISCRETION IN DISMISSING THIS ACTION BECAUSE NEW COUNSEL HAD BEEN RETAINED WHO REACTIVATED THIS CASE.**

The Trial Court abused its discretion by dismissing this action because Appellant had obtained new counsel who had reactivated this case. Therefore, this Court should reverse the trial court and remand this case for further proceedings.

The law in this state is clear that it is an abuse of discretion to dismiss a case for failure to prosecute where a party has retained new counsel who has reactivated the case. This is clearly the holding in Johnson v. Firebrand, Inc., 571 P.2d 1368, 1370 (Utah 1977). In Johnson, the court found it to be an abuse of discretion to dismiss the action where "new counsel caused the case to be activated." Johnson at 1370.

Immediately preceding the dismissal of this case, new counsel for Hartford Leasing had reactivated the case. In Johnson, the only action taken by new counsel prior to filing the motions was to file a notice of appearance. In the present case, new counsel for Hartford Leasing, in fulfilling his due diligence obligations as an attorney, went to the Court in Moab and inspected the building just days prior to both the filing of his Notice of Appearance and Appellees' Motions to Dismiss. New counsel for Hartford Leasing was clearly in the process of reactivating this case prior to the Appellees' filing of their Motions to dismiss. Because new counsel was reactivating this case, the trial court abused its discretion

in dismissing this action.

III. THE TRIAL COURT ABUSED ITS DISCRETION IN DISMISSING THIS ACTION WITHOUT GIVING ANY PRIOR WARNING OR DIRECTION TO HARTFORD LEASING TO PROSECUTE THIS ACTION OR FACE DISMISSAL.

The trial court abused its discretion in dismissing this action without giving any prior warning or direction to Hartford Leasing to either prosecute this action or face the possibility of dismissal. In Country Meadows v. Utah Department of Health, 851 P.2d 1212 (Ut. App. 1993), this Court, in discussing the exercise of a Trial Court's discretion in dismissing an action, stated

Therefore, within the above parameters, a trial court retains discretion to dismiss an action 'if a party fails to move forward according to the rules and the directions of the court, without justifiable excuse.'

Country Meadows at 1215 quoting Westinghouse Electric Supply Co. v. Paul W. Larsen Contractor, Inc., 544 P.2d 876, 879 (Utah 1975) [emphasis added]. Thus, under Country Meadows, a Court has the right to exercise its discretion in dismissing an action if the party has both ignored the rules and the directions of the Court. This holding, setting forth the standard in the conjunctive, implies that the Court has an affirmative duty to direct a litigant that unless action is taken, the case will be dismissed. The use of the conjunctive term "and" in this holding leaves no doubt of the intent of the appellate court in making this ruling. Such a reading comports with Utah law stating that dismissal is a severe sanction. Country Meadows at 1215. This is especially true where it is clear that lesser sanctions are available to the court, such as imposing costs and fees upon the party against whom such a

motion has been filed.

In the present case, the Trial Court did not issue any warnings or other directions to Hartford Leasing to pursue its action. Applying the standard set forth in Country Meadows, we are left to conclude that the Trial Court abused its discretion by failing to warn or otherwise direct Hartford Leasing to pursue its action or face dismissal.

**IV. HARTFORD LEASING DID NOT WAIVE ITS REQUEST FOR A HEARING ON THE APPELLEES' MOTIONS TO DISMISS. THE TRIAL COURT'S RENDERING OF A DECISION ON THESE MOTIONS WITHOUT HOLDING A HEARING OR RULING ON THE REQUEST FOR A HEARING VIOLATED HARTFORD LEASING'S RIGHT TO PROCEDURAL DUE PROCESS.**

The Trial Court abused its discretion by rendering a decision of the Appellees' motions to dismiss without holding a hearing as requested by Appellant Hartford Leasing pursuant to Rule 4-501 of the Utah Code of Judicial Administration. Hartford Leasing did not waive its right to such a hearing when it filed its Notice to Submit for Decision pursuant to that same rule. Finally, not only did the trial court abuse its discretion by rendering a decision on these motions without holding a hearing, such action constitutes a violation of Hartford Leasing's constitutional right to due process of law.

The trial court abused its discretion by rendering its decision on the Appellees' motions to dismiss without holding a hearing as requested by Hartford Leasing pursuant to Rule 4-501 of the Utah Code of Judicial Administration. Under this rule, when a party requests a hearing, the trial court must grant such hearing unless it 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), Utah Code of Judicial Administration (1993). Thus, under the rule, the trial court must make findings that one of the two afore stated exceptions applies. In the present case, the trial court did not make such findings. Therefore, the trial court abused its discretion by failing to follow Rule 4-501(3)(c) of the Utah Code of Judicial Administration.

The trial court abused its discretion by ruling that Appellant Hartford Leasing's Notice to Submit for Decision constituted a waiver of its requests and right to a hearing under Rule 4-501 of the Utah Code of Judicial Administration. Subsection (3)(f) of this rule states, "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." Rule 4-501(3)(f), Utah Code of Judicial Administration (1993). The rule expressly contains a waiver provision which is applicable only where the parties fail to make such a request in their principal memoranda. In the present case, Appellant made a request for a hearing on the Appellees' motions to dismiss in it principal memoranda. (R. 112). Moreover Appellant Hartford Leasing did not expressly waive its right to the hearing.

Appellant Hartford Leasing argues that it did not waive its right to a hearing by filing its Notice to Submit for decision. Hartford Leasing's filing of a Notice to Submit for Decision was not a "waiver" as defined by Utah case law, because Hartford

Leasing did not intend to relinquish its right to the requested hearing. "Waiver requires the intentional relinquishment of a known right." United Park City Mines v. Greater Park City Co., 220 Utah Adv. Rep. 3, 10 (Utah 1993). Hartford Leasing was aware that it had a right to a hearing which is why it requested such a hearing. However, Hartford Leasing was not aware nor did it intend that by requesting that the matter be submitted to the court that this act would be construed as a waiver. Since the court had to rule to grant a hearing the notice to submit was simply requesting the court to do so.

The trial court abused its discretion by stating that Hartford Leasing's Notice to Submit for Decision constituted a waiver of its earlier request for a hearing. Rule 4-501(1)(d) states

(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.

Rule 4-501(1)(d), Utah Code of Judicial Administration (1993). The clear purpose of this rule is to inform the court that all of the memoranda concerning the issue have been or should have been filed and that the matter is ready for the court's further consideration. It does not alleviate the requirement that the Court hold a hearing if one has been so requested pursuant to Rule 4-501(3)(f) of the Utah Code of Judicial Administration. Thus, because Hartford Leasing did nothing more than inform the Court, pursuant to its own rule, that all of the memoranda had been or should have been



submitted, and because Hartford Leasing had requested a hearing in its principal memorandum, the trial court abused its discretion by ruling that Hartford Leasing had waived its right to the requested hearing.

The trial court's failure to hold the request hearing violated Hartford Leasing's right to due process under the law. The Utah Supreme Court, in Cornish Town v. Koller, 798 P.2d 753, 758 (Utah 1990), in discussing Rule 4-501's requirement that memorandum be served on the opposing party at least ten days prior to the holding of any hearing on the matter, stated,

Timely and adequate notice **and an opportunity to be heard in a meaningful way** are the very heart of procedural fairness . . . Many cases have held that where notice is ambiguous or inadequate to inform a party of the nature of a proceeding against him or not given sufficiently in advance of the proceeding to permit preparation, a party is deprived of due process.

Cornish Town at 756 citing to Nelson v. Jacobsen, 669 P.2d 1207, 1211-1212 (Utah 1983) [emphasis added; other citations on violation of due process footnoted at footnote No. 5 in Cornish Town at 756 omitted]. It is axiomatic that denying a party the opportunity to be heard, especially when that party has requested that opportunity pursuant to the Court's own rules, is a violation of due process which is more egregious than merely given that party inadequate time to properly prepare. Thus, because the trial court abused its discretion by rendering a decision of the Appellees' motions to dismiss without holding a hearing thereby violating Hartford Leasing's right to due process, this Court should remand this action to the trial court for further proceedings.

**V. THE RECORD FOR PURPOSES OF THIS APPEAL CONSTITUTES ALL OF THE RECORD TRANSMITTED TO THIS COURT BY THE LOWER COURT.**

The record for purposes of this appeal is the entire record as prepared by the lower court and transmitted to this Court for purposes of this appeal. The Appellees' arguments that this Court should disregard those portions of the record flies in the face of both the Utah Rules of Appellate Procedure and Utah Case law. Thus, this Court should consider the entire record as prepared by the lower court for purposes of this appeal.

The Utah Rules of Appellate Procedure clearly define what the record is for purposes of an appeal. Rule 11, Utah Rules of Appellate Procedure defines the composition of the record on appeal as

The original papers and exhibits filed in the trial court, the transcript of proceedings, if any, the index prepared by the clerk of the trial court, and where available the docket sheet, shall constitute the record on appeal in all cases.

Rule 11, Utah Rules of Appellate Procedure (1993). It is clear in the present case that the record as prepared by the lower court and transmitted to this Court includes both the Supplemental Memorandum in Opposition of Defendants' Motion to Dismiss (R. 151-162) and Hartford Leasing's Objections to Proposed Order (R. 197-199) plus the Memorandum of Points and Authorities in Support of Hartford Leasing's Objections to Proposed order (R. 217-312). Thus, these documents are a part of the record for purposes of appeal pursuant to Rule 11 of the Utah Rules of Appellate Procedure.

This Court should consider the entire record as prepared and transmitted by the lower court because Hartford Leasing preserved

its objections below. First, the trial court made a minute entry ruling on Appellees' motions to dismiss. A minute entry is "nothing more than a memorandum from which the . . . findings, conclusions and a decree were to be drawn and did not constitute a final order of the court." Hartford Accident & Indemnity Co. v. Clegg, 103 Utah 414, 135 P.2d 919, 922 (Utah 1943). Thus, the judgment was not final until the court signed the order as prepared by counsel for the State. Further, Hartford Leasing properly preserved its objections below by filing its objections to the proposed order and its basis for said objections in the form of a Memorandum of Points and Authorities within the period prescribed by Rule 4-504 of the Utah Code of Judicial Administration. Thus, Hartford Leasing's objections to the proposed order are properly before this Court as a part of the record on appeal.

Finally, the trial court abused its discretion by not considering Hartford Leasing's Memorandum of Points and Authorities in Support of its Objections to Proposed Order. (R. 314). Under Rule 4-504 and pursuant to order of the lower court, counsel for Appellee State was ordered to prepare a proposed order based on the trial court's minute entry granting Appellee's motions to dismiss. Pursuant to Rule 4-504 of the Utah Code of Judicial Administration, "Notice of objections shall be submitted to the court and counsel within five days after service." Rule 4-504(2), Utah Code of Judicial Administration (1993). It is clear from the record that Appellant Hartford Leasing submitted its objections to the proposed order as prescribed by Rule 4-504(2). It is clear from the rule

that one of the purposes for its enactment was to have the court review such objections prior to entering the final order. However, in the present case, it is clear from the record that the lower court refused to even consider the proposed objections. Such a failure to consider Hartford Leasing's objections to the proposed order renders this rule meaningless and is a clear abuse of discretion. Because the trial court abused its discretion, this Court should remand this case to the trial court for further proceedings.

**VI. RULE 4-506 OPERATES AS A STAY OF ALL PROCEEDINGS IN AN ACTION UNTIL THE REQUIRED NOTICE IS GIVEN AND THE TIME THEREAFTER HAS ELAPSED. PERMITTING ANY PROCEEDINGS IN THE ABSENCE OF SUCH NOTICE IS A CLEAR ABUSE OF DISCRETION.**

The trial court abused its discretion by permitting the Appellees' to file the motions to dismiss in violation of Rule 4-506. A fortiori, it was an abuse of discretion for the court to rule on these motions. Thus, this Court should reverse the trial court and remand this case for further proceedings.

The provisions of Rule 4-506 operate as a stay in the proceedings until the requisite notice has been given and the time thereafter has elapsed. Rule 4-506. in the relevant part, 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 very terms of the rule itself make it clear that opposing

counsel cannot initiate further proceedings against the client nor can the court hold such proceedings. It is clearly an abuse of discretion for the trial court to hold such proceedings in the absence of such notice having been given.

Utah has very little case law interpreting this rule. However, other jurisdictions including Montana and New York have ruled on the clear meaning of similar provisions. §37-61-405 of the Montana Code Annotated 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 appear in person.

§37-61-405, M.C.A. (1993). In the case of Montana Bank of Roundup v. Benson, the Montana Supreme Court stated, "This section means not more than it plainly states, vis, that no proceeding may be had against a party, no judgment or order or other step be taken, until he appoints an attorney, unless the prescribed notice is first given." Montana Bank of Roundup v. Benson, 717 P.2d 6, 7 (Mont. 1986). In another Montana decision wherein the unrepresented party was never notified pursuant to §37-61-405, the Court expressly stated that in the absence of such a notice, "the case is stayed by virtue of §37-61-405." McWilliams v. Clem, 743 P.2d 577, 586 (Mont. 1987).

The courts of New York similarly hold that where notice is not given pursuant to New York's version of 4-506, such action is stayed until both the notice is given and the time required thereafter has elapsed. New York's statute states

If an attorney dies, becomes physically or mentally incapacitated, or is removed, suspended or otherwise becomes disabled at any time before judgment, no further proceedings shall be taken in the action against the party for whom he appeared, without leave of the court, until thirty days after notice to appoint another attorney has been served upon that party either personally or in such manner as the court directs.

New York CPLR Rule 321(c) (1993). New York court's hold that this section applies to cases where an attorney has withdrawn from the case. In re Von Bargen's Estate, 243 N.Y.S.2d 328, 329-330 (Surrogate Court 1963). Further, in this same case, the court held that compliance with this rule is mandatory. Id. at 330. New York court's interpret this section to function as a stay of the proceeding until such time as the required notice has been given and thirty days thereafter have elapsed. Firemen's Fund Insurance Company v. Dietz, 488 N.Y.S.2d 936, 937 (A.D. 4 Dept. 1985). Finally, in L. Johnson & Sons v. Brighton Commons, 569 N.Y.S.2d 40, 41 (A.D. 4 Dept 1991), where the lower court dismissed an action on a motion to dismiss filed by a party who earlier had failed to serve the notice required under CPLR 321(c), the court said, "No notice was served upon the plaintiffs and thus the order dismissing plaintiffs' causes of action must be nullified and the case restored to the court's calendar."

The Appellees' violated Rule 4-506 by initiating proceedings against Hartford Leasing without first serving the notice to appear or appoint new counsel required by the rule. Appellees' argument that somehow the notice by Hartford Leasing's withdrawing counsel somehow relieved them of their burden to file such a notice is untenable. No notice of appearance was ever filed by any counsel

for Hartford Leasing until after Appellees' motions to dismiss were filed. As such, Appellees' violated the Code of Judicial Administration.


The trial court abused its discretion by violating the Utah Code of Judicial Administration. It is clear that the rule operates as a stay of any further proceedings in an action until compliance is secured. Further, because the requirements under the rule are both plain and simple, nothing short of strict compliance should be permitted. Because the trial court held further proceedings in this action in violation of one of its own rules, it abused its discretion and this Court must remand this case back to the trial court for further proceedings.

#### CONCLUSION

This Court should reverse the lower court's decision granting Appellees' motions to dismiss based not only on the Appellees' violations of the Code of Judicial Administration, but also on the repeated and serious abuses of discretion committed by the lower court. Because the lower court abused its discretion, the Appellant Hartford Leasing requests this Court to reverse the lower Court's decision and remand this action for further proceedings.

RESPECTFULLY submitted this 17 day of February, 1994.

STEVEN C. TYCKSEN

  
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 17 day of February, 1994 to:

Alan S. Bachman  
Attorney for Appellee State  
Assistant Attorney General  
Room 4120 State Office Building  
Salt Lake City, Utah 84107

J. James Clegg  
Attorney for Appellee Rio Vista  
Snow, Christensen & Martineau  
10 Exchange Place, 11th Floor  
P.O. Box 45000  
Salt Lake City, Utah 84145

J. Michael Hansen  
Attorney for Appellee La Sal Oil  
Sutiter, Axland, Armstrong  
& Hanson  
175 South West Temple #700  
Salt Lake City, Utah 84101



---

Steven C. Tycksen  
Attorney for Appellant