

1993

James A. Johnson and Jennifer L. Johnson v.  
Nielsen & Senior, a Utah Corporation and Pat B.  
Brian : Brief of Appellant

Utah Court of Appeals

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#### Recommended Citation

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IN THE UTAH COURT OF APPEALS

James A. Johnson and Jennifer  
L. Johnson,

Plaintiffs-Appellants, :

vs. :

Case No. 930716 - CA  
900400460CN

Nielsen & Senior, a Utah  
Corporation and Pat B. Brian,

Priority 15

Defendants-Respondents.:

BRIEF OF APPELLANTS

APPEAL FROM THE JUDGMENT OF THE FOURTH  
DISTRICT COURT, UTAH COUNTY, STATE OF  
UTAH, THE HONORABLE VENNOY CHRISTOPHERSON, JUDGE, PRESIDING

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FILED

OCT 06 1994

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IN THE UTAH COURT OF APPEALS  
- - - - -

James A. Johnson and  
Jennifer L. Johnson, :  
  
Plaintiffs-Appellants, :  
  
vs. : Case No. 930340  
900400460CN  
Nielsen & Senior, a Utah :  
Corporation, and Pat B. Brian, :  
:  
Defendants-Respondents.

- - - - -  
I. JURISDICTION

This is an appeal from a dismissal by the Fourth District Court, Utah County, State of Utah of Appellant's action. The Supreme Court has jurisdiction pursuant to Utah Code Annotated Section 78-2-2. The Supreme Court have poured this case over pursuant to Utah Code Annotated Section 78-2a-3(2)(k).

II. STATEMENT OF THE ISSUES

1. Whether the court abused its discretion when it dismissed this action for failure to prosecute.

STANDARD OF REVIEW:

It is not to be doubted that in order to handle the business of the court with efficiency and expedition, the trial court should have a reasonable latitude of discretion in dismissing for failure to prosecute if a party fails to move forward according to the rules and the direction of the court, without justifiable excuse. Westinghouse Electric Supply Company v. Paul W. Larsen Construction, Inc., 544 P.2d 876 (Utah 1975).

2. Whether the trial court improperly dismissed plaintiffs' claims for intentional infliction of emotional distress and negligent infliction of emotional distress as a measure of damages with regard to causes of action for legal malpractice by defendants.

STANDARD FOR REVIEW:

A trial court's statements or conclusions of law are accorded no particular deference; we review them for correctness. Doelle v. Bradley, 784 P.2d 1176,1179 (Utah 1989).

3. Whether the trial court was without jurisdiction to dismiss while a request for Interlocutory Order was before the Utah Supreme Court.

STANDARD FOR REVIEW:

A trial court's statements or conclusions of law are accorded no particular deference; we review them for correctness. Doelle v. Bradley, 784 P.2d 1176,1179 (Utah 1989).

If there is any genuine issue as to any material fact, the motion should be denied. Young v. Filerenia, 121 Utah 646 244 P.2d 862 Cert. denied 344 U.S. 886 73 S.Ct. 186 97 L.Ed 685 (1952).

III. DETERMINATIVE PROVISIONS

1. Utah Constitution Article I Section 11:

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

2. Utah Constitution Article VIII Section 2:

The Supreme Court shall be the highest court and shall consist of at least five justices. The number of justices may be changed by statute, but no change shall have the effect of removing a justice from office. A chief justice shall be selected from among the justices of the Supreme Court as provided by statute. The chief justice may resign as chief justice without resigning from the Supreme Court. The Supreme Court by rule may sit and render final judgment either en banc or in divisions. The court shall not declare any law unconstitutional under this constitution or the Constitution of the United States, except on the occurrence of a majority of all justices of the Supreme Court. If a justice of the Supreme Court is disqualified or otherwise unable to participate in a cause before the court, the chief justice, or in the event the chief justice is disqualified or unable to participate, the remaining justices, shall call an active judge from an appellate court or the district court to participate in the case.

3. Utah Constitution Article VIII Section 3:

The Supreme Court shall have original jurisdiction to issue all extraordinary writs and to answer questions of state law certified by a court of the United States. The Supreme Court shall have appellate jurisdiction over all other matters to be exercised as provided by statute, and power to issue all writs and orders necessary for the exercise of the Supreme Court's jurisdiction or the complete determination any cause.

4. Utah Rules of Civil Procedure 41(b):

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.

5. Utah Rules of Civil Procedure 56(c):

Motion and proceedings thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions,



answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any of material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

#### IV. STATEMENT OF THE CASE

##### **A. NATURE OF CASE**

This case is an appeal from a dismissal with prejudice for failure to prosecute by the trial court and a summary judgment dismissing claims for emotional distress damages.

##### **B. COURSE OF PROCEEDINGS**

1. **DISMISSAL FOR FAILURE TO PROSECUTE.** On October 5, 1992, former counsel for plaintiffs moved to withdraw since no trial date had been set in the matter. R at 1737. On October 26, 1992, R at 1756, and again on December 23, 1992, R at 1782(a), present counsel appeared due to confusion as to whether withdrawal of former counsel had been accepted by the court.

The court accepted the Motion to Withdraw of former counsel by Order filed January 15, 1993, (R at 1785).

Defendants immediately moved to dismiss the plaintiffs' Complaint for failure to prosecute on February 3, 1993, (R at 1802 and 1804).

Plaintiff opposed this motion by Memorandum filed February 19, 1993, (R at 1812). Defendants replied by Memorandum file March 1, 1993, (R at 1858). Judgment for Dismissal was granted March 11, 1993 and entered April 6, 1993, (R at 1879). Motion for New Trial

was filed April 16, 1993, (R at 1895). Memorandum in Opposition to Motion for New Trial was opposed by defendants by Memorandum filed May 3, 1993 (R at 1928). Reply Memorandum was filed by plaintiffs May 13, 1993, (R at 2101). The court issued a Memorandum Decision filed May 26, 1993 denying Motion for New Trial, (R at 2119). An Order Denying Motion for New Trial was filed June 16, 1993 by the Court, (R at 2167). Notice of Appeal was filed in this matter by plaintiffs on June 25, 1993, R at (2177).

2. **PARTIAL SUMMARY JUDGMENT REGARDING EMOTIONAL DISTRESS DAMAGES.** Defendants sought to dismiss all claims with regard to infliction of emotional distress and all damages of a like nature arising under other claims of plaintiffs. A Motion for Partial Summary Judgment on the matter was filed November 8, 1991, R at 1060. The Motion for Partial Summary Judgment was opposed by plaintiffs by Memorandum filed December 2, 1991, (R at 1110). Defendant Pat B. Brian joined in the Motion for Partial Summary Judgment by Motion filed December 9, 1991, (R at 1124), and Motion for Partial Summary Judgment filed December 9, 1992, (R at 1130). A Reply Memorandum was filed by defendant Nielsen & Senior December 11, 1991, (R at 1147). Defendant Nielsen & Senior supported Defendant Pat B. Brian's Motion by Memorandum filed December 30, 1991, (R at 1165).

Plaintiffs opposed, by memorandum, Defendant Pat B. Brian's Motion for Partial Summary Judgment on January 6, 1992, (R at

1242). Partial Summary Judgment was granted by Order filed January 23, 1992, (R at 1371).

**C. STATEMENT OF FACTS RELEVANT TO THE ISSUE PRESENTED FOR REVIEW**

This matter arose out of professional malpractice committed by defendant Pat B. Brian. In January of 1986, Plaintiffs hired Defendant Pat B. Brian to take care of all legal requirements with regard to a private placement adoption, (R at 1876). The baby was born on or about June 25, 1986 in Texas, (R at 10).

On or about June 27, 1986, Defendant Brian brought the baby from Texas to Salt Lake International Airport, but failed in any way to comply with the provisions of the Interstate Compact for the Placement of Children in any way shape or form, (R at 1875).

No consent to adopt or termination or parental rights was executed by the birth mother at any time when dealing with Defendants Brian and Nielsen & Senior.

On or about June 24, 1987, Chris Schmutz, successor counsel to Defendant Brian, informed plaintiffs that the birth mother was seeking to regain custody of the child, (R at 10). Following the retaining of different law firm on July 2, 1987, a termination of parental rights was agreed to with the birth mother and the adoption finalized on October 16, 1987, (R at 1875).

Between October 16, 1987 and the date of the filing of the petition in June of 1990, plaintiffs attempted to negotiate a settlement with defendants, (R at 1874).

Because defendant Brian was a sitting judge, (R at 1875), plaintiffs have had difficulty in retaining counsel, and filed the original complaint pro se, (R at 12).

Plaintiff James A. Johnson originally had depositions set for November 6, 1990, but such deposition was rescheduled until November 28, 1990, (R at 192 and 232). Plaintiff was subjected to such intense stress from the deposition over a three (3) day period of time that the stress he relapsed into the depression he is suffering from as a result of the original adoption. This caused him to be unable to continue the deposition, (R at 412) (letter from treating physician, Ralph W. Gant).

Mr. Johnson's depression was a direct result of Post-traumatic Stress Disorder which he suffered as a result of the malpractice of defendants, (R at 1177).

Defendant Brian originally had a deposition set for October 27, 1990, (R at 1901). Defendant Brian changed and rescheduled his deposition for November 30, 1990, (R at 229). Defendant Brian finally had his deposition actually taken, November 30, 1993, (R at 1225), more than one year from the original date scheduled. Defendant Brian's extension and rescheduling was not due to the unavailability of the plaintiffs nor their counsel.

The continuance of Mr. Johnson's deposition following the appearance of Darwin Fisher in this matter on April 16, 1991, (R at 867), was entirely due to the procrastination of defendants, (R at 1901).

The continuance and delay with regard to Defendant Brian's deposition was due to his request for delay, R at 1901.

It was not until October 17, 1991, that Defendant Brian proposed a Counterclaim in this matter, sixteen (16) months after initiation of the action and after trial had been set for February 17-28, 1992, (R at 897).

On January 17, 1992, one (1) month prior to trial, the trial court granted leave to Defendant Brian's to file his Counterclaim (R at 1729). Counterclaim was filed by Defendant Brian on February 4, 1992, (R at 1484). Because of Defendant Brian's tardy filing of a Counterclaim, new trial was set by the court for May of 1992, (R at 1490).

At the same time that the Counterclaim for Defendant Brian was allowed, partial summary judgment was granted with regard to emotional distress damages of plaintiffs by the court, denying the same, (R at 1371). This order was filed January 23, 1992.

Based upon the denial of a major portion of plaintiffs' claim for damages, those due to the emotional distress suffered by plaintiffs, (R at 1177), plaintiffs requested an interlocutory opinion by the Utah Supreme Court on April 7, 1992, (R at 1645). The trial court continued the trial without date by Order entered April 7, 1992, (R at 1647). No trial date was set thereafter by the court, (R at 1737), although the impression of the parties was that the court was to set a date in November, (R at 1745 and 1899).

No response to the Motion for Interlocutory Order was ever

entered by the Utah Supreme Court in this matter prior to the dismissal of this case with prejudice.

Defendants, as well as plaintiffs, have both been compelled by the court to respond to discovery, (R at 859 and 863). In addition, defendants expert witnesses have been unavailable prior to the end of scheduled discovery, (R at 1547, 1657 and 1666). For this reason, the court granted an Order Extending Discovery (R at 1584 and 1687).

In addition, defendant Nielsen & Senior sought protective orders which the court denied, (R at 1700).

Finally, Defendant Brian was extremely uncooperative with regard to response to Request for Production of Documents, his refusal being found to without substance (R at 530 and 555). It was this meretricious conduct that caused the court to compel Defendant Brian to respond to discovery, (R at 859).

## **VI. SUMMARY OF THE ARGUMENT**

### **A. DISMISSAL FOR FAILURE TO PROSECUTE WAS IMPROPER**

Although trial courts have discretion with regard to the control of their calendar, it is an abuse of discretion to deprive a party of its right to an adjudication except in the most egregious circumstances. Although the trial court followed the format for dismissal as set forth in the cases of this court, it intentionally ignored significant facts which are undisputed on the record in reaching its conclusion to granting dismissal. Both parties have acted in a manner that delayed the proceedings and

both parties have also moved the case along with a view to judicial economy and a resolution of all questions before the court. The trial court's dismissal for failure to prosecute unfairly punishes plaintiffs in this matter and ignores defendant actions.

**B. THE TRIAL COURT WAS WITHOUT JURISDICTION TO DISMISS**

The trial court is an inferior court to the Utah Supreme Court. A Motion for Interlocutory Order was before the Supreme Court, (R at 1745) when the order to dismiss was entered, (R at 1879). Because the district court is an inferior court to the Supreme Court of Utah, it is without jurisdiction to divest the Utah Supreme Court of jurisdiction over a question before it, and is obligated to wait until the Utah Supreme Court returns jurisdiction before continuing to act.

**C. EMOTIONAL DISTRESS DAMAGES ARE PROPER.**

For almost forty (40) years the law in Utah has recognized damages for emotional distress when the conduct of a party is outrageous and he either intended to cause emotional distress, or acted with reckless disregard of the facts. Defendant Brian violated the Interstate Compact for the Placement of Children when he brought Baby Johnson to Utah. He has provided no information of mitigation of his actions. He also failed for over one (1) year to achieve a consent to terminate parental rights from the birth mother. It is a question of fact as to whether or not his conduct was outrageous under the circumstances. There is no doubt that it is well recognized generally in society that family bond between

natural parents as well as adoptive parents is highly emotional in nature and the disruption of that bond, or the threatening of that relationship will result in an extremely high degree of emotional distress on the part of the party so threatened. Defendant Brian acted either with intent or reckless disregard of the facts when he failed to comply with statutes which protect the rights of both natural parents and adoptive parents with regard to their legal relationships to the child and each other. The court therefore acted improperly in as much as a genuine issue of material fact existed, and the Utah Supreme Court has recognized a cause of action for this type of activity for over forty (40) years.

## VI. ARGUMENT

### **A. DISMISSAL WAS AN ABUSE OF DISCRETION**

#### STANDARD OF REVIEW:

It is not to be doubted that in order to handle the business of the court with efficiency and expedition, the trial court should have a reasonable latitude of discretion in dismissing for failure to prosecute if a party fails to move forward according to the rules and the direction of the court, without justifiable excuse. Westinghouse Electric Supply Company v. Paul W. Larsen Construction, Inc., 544 P.2d 876 (Utah 1975).

Plaintiffs brought a motion for new trial following dismissal with prejudice for failure to prosecute, (R at 1448). Rule 59 of the Utah Rules of Civil Procedure provides in material part as follows:

[A] new trial may be granted to all or any of the parties on all or part of the issues, for any of the following causes...(1) irregularity in the proceedings of the court, jury or adverse party, or any order of the court or abuse of discretion by which either party was prevented from having a fair trial.



Rule 41 of the Utah Rules of Civil Procedure grants the trial court discretion to dismiss actions for failure to prosecute and provides in material part as follows:

(b) Involuntary dismissal; effect thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of the court, defendant may move for dismissal of an action or of any claim against him.

In Westinghouse Electric Supply Company v. Paul W. Larsen Construction, Inc., 544 P.2d 876 (Utah 1975) the court held that:

It is not to be doubted that in order to handle the business of the court with efficiency and expedition, the trial courts should have a reasonable latitude of discretion in dismissing for failure to prosecute if a party fails to move forward according to the rules and the direction of the court, without justifiable excuse. Westinghouse Electric, 544 P.2d at 878-879.

Therefore, this court reviews with deference orders to dismiss for failure to prosecute. However, when that discretion is abused, no hesitation should be exercised in setting aside an improper dismissal.

In addition, the dismissal must be reviewed with all inferences in a light most to the plaintiff. Martin v. Stevens, 121 Utah 484, 243 P.2d 747 (1952).

**B. DISMISSAL FOR FAILURE TO PROSECUTE VIOLATED THE OPEN COURTS PROVISION**

**STANDARD FOR REVIEW:**

A trial court's statements or conclusions of law are accorded no particular deference; we review them for correctness. Doelle v. Bradley, 784 P.2d 1176, 1179 (Utah 1989).

This Court and the Utah Supreme Court has had numerous opportunities to review dismissals with prejudice for failure to prosecute. One reason that the discretion to dismiss is limited by Section 11 of Article I (the Open Court's Provision) of the Utah Constitution which provides as follows:

All courts shall be open, and every person, for an injury done to him in his person, property or reputation shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

Section 11 has been used to overturn limitations on actions; (Berry Ex Rel. Berry v. Beach Aircraft Corporation, 717 P.2d 670 (Utah 1986); Sun Valley Waterbeds of Utah, Inc. v. Herm Hughes & Son, 782 P.2d 188 (Utah 1989); Horton v. Gold Miner's Daughter, 785 P.2d 1087 (Utah 1989)), prevent unnecessary bars to action such as the doctrine of interspousal tort immunity. See (Stoker v. Stoker, 616 P.2d 590 (Utah 1980)), and prevent ambiguous waivers of rights to appeal to court. (Brackin v. Dahle, 68 Utah 486, 251 P.16 (1926)).

It is this constitutional right to adjudication of rights in open court which has undoubtedly been behind the distaste that the appellate courts have traditionally shown for motions for dismissal for failure to prosecute. In Johnson v. Firebrand, Inc., 571 P.2d 1368 (Utah 1977), four (4) years was found to insufficient time for a case to be before the court to support a motion for dismissal with prejudice. The court also found that a sixteen month lapse,

during which settlement negotiations were ongoing, was insufficient to support dismissal in Utah Oil Company v. Harris, 565 P.2d 1135 (Utah 1977). Where counsel for plaintiff did not appear for a hearing to set a trial, (but was ready willing and able to go forward therewith), a six month lack of activity was found insufficient in Polke v. Ivers, 561 P.2d 1075 (Utah 1977) to support dismissal. Finally, the court in Crystal Lime & Cement Company v. Robbins, 8 Utah 2d 389, 335 P.2d 624 (1959), the court held that where either party could have gone forward, but both chose to dally, that it was an abuse of discretion to dismiss with prejudice for failure to prosecute.

It is therefore only upon the most telling signs of failure to prosecute, and an unequivocal showing of clean hands by the moving party, that a motion to dismiss for failure to prosecute should be granted.

**C. THE FACTS DO NOT SUPPORT A WESTINGHOUSE DISMISSAL**

**STANDARD FOR REVIEW:**

A trial court's statements or conclusions of law are accorded no particular deference; we review them for correctness. Doelle v. Bradley, 784 P.2d 1176, 1179 (Utah 1989).

If there is any genuine issue as to any material fact, the motion should be denied. Young v. Filerenia, 121 Utah 646 244 P.2d 862 Cert. denied 344 U.S. 886 73 S.Ct. 186 97 L.Ed 685 (1952).

The court, in Westinghouse Electric Supply Company v. Paul W. Larsen Constructions, Inc., 544 P.2d 876 (Utah 1975) identified several factors to be considered by a court considering dismissal.

In Maxfield v. Rushton, 779 P.2d 237 (Ut App. 1989), the court formulated those factors as follows: (1) lapse of time; (2) conduct of the parties; (3) opportunity to move the case forward; (4) actions of the parties to do so; (5) difficulty and prejudice of the parties; and (6) injustice which may result from dismissal.

(1) **LAPSE OF TIME.** This case was filed two and one-half years prior to motion to dismiss (R at 12 and 1802). Discovery had been completed except for defendant's deposition of Mrs. Johnson which they failed to reschedule. In fact, they showed no interest therein once Mr. Johnson's deposition had been completed, (R at 1898). The request for her deposition track with those of her husband, and none was scheduled following the completion of his deposition, (R at 192, 198, 230, 232, 889 and 943). At the time of dismissal, the case was ready for trial, with the exception that the Utah Supreme Court had not entered an order dismissing the Motion of Interlocutory Appeal, (R at 1902). The record does not show any return of jurisdiction to the trial court to set trial or act following the request for interlocutory appeal, (R at 1645)..

Notwithstanding the lack of the return of jurisdiction to the trial court to act in this matter, both counsel for plaintiffs and defendants were under the impression that a trial date was to be set by the court for November 2, 1992, (R at 1737 and 1745). However, the court did not set trial for November 2, 1992 notwithstanding the understanding of the parties on that point, (R at 1899). Regardless of the parties' understanding, however, the

fact that trial had not been set cannot be used against plaintiffs when both parties could have requested a trial setting from the court. See Crystal Lime & Cement Company v. Robbins. In fact, this factor, although determined to be of no importance by the trial court ought to support the position of appellants. The case with the closest resemblance to this is that of Maxfield v. Fishery, 538 P.2d 1323 (Utah 1975), wherein counsel for plaintiffs did absolutely nothing for two (2) years. Discovery was not responded to, bond had not been filed, and there was no pretense of preparation for trial. This is significantly different from the current case wherein discovery had been completed and the parties are ready for trial, (R at 1906-1907).

(2) CONDUCT OF THE PARTIES. The court found with regard to conduct of the parties that plaintiffs were delaying the matter by replacement of counsel and refusal to prosecute the case whereas defendants had consistently and continuously moved the case forward by conducting discovery, narrowing of the scope of the case through pretrial motions and cooperating with opposing counsel and adherence to court cut-off dates and deadlines, (R at 1865). In making that finding, the trial court ignored the effect of the actions of defendants and the effect of orders of the court in preparing for trial. Defendant Brian was not deposed until November 30, 1991, (R at 1225), although he was initially deposed October 27, 1990, (R at 222). Defendant Brian refused to respond to Request for Production of Documents on meretricious grounds, as well as to

interrogatories, (see R at 530 and 555). The trial court had to compel defendant Brian to comply with discovery, (R at 859). Defendant Nielsen & Senior sought a protective order in this matter to prevent plaintiffs from learning that a policy of malpractice insurance in fact did exist contrary to their representations with regard to the same, (R at 1700).

It is true that plaintiffs did request extensions of time to respond to discovery and to get counsel, (R at 79, 96, 139, 273, 280, 300 and 307). The court ordered responses by plaintiffs and compelled them to respond also. (R at 859 at 863). However, the court's record demonstrates that plaintiff James A. Johnson made himself available for deposition despite his medical condition, with the trial by combat lasting over a three (3) day period in November of 1990, (R at 1177). This was over a year before Defendant Brian willingly submitted to deposition, (R at 1177). Following the April 16, 1991 appearance of Darwin Fisher in this matter, (R at 867), no continuance of the deposition of James A. Johnson was made at his request, (R at 98).

**(3) THE TRIAL COURT ITSELF CONTRIBUTED TO THE DELAY IN THIS MATTER.**

Trial was initially set for February 17-28, 1992, (R at 897). The court on January 17, 1992 granted defendant Brian leave to file a Counterclaim, (R at 1329). This Counterclaim was not filed until two weeks before the scheduled trial date on February 4, 1992, (R at 1484). The court granted permission to file a Counterclaim by

defendant Brian even through sixteen months had elapsed since the filing of the case and defendant Brian was well aware of all facts necessary for a Counterclaim and did not rely upon the completion of James Johnson's deposition which occurred November 22, 1991. Counterclaim was filed October 17, 1991, (R at 929). Defendant Brian has never explained his reasons for delaying sixteen months before filing a Counterclaim for which he had all facts, and at least no later than November 30, 1991 when the original three (3) day deposition of Mr. Johnson was terminated due to depression, (R at 1177). It was due to the filing and the acceptance of the counterclaim by the court that the February trial date was continued until May of 1992, (R at 1490).

The court further modified the circumstances of this case by granting a summary judgment denying any and all damages for emotional distress suffered as a result of the tortious acts of defendants, (R at 1371). With the major element of damages in this matter dismissed by the court in its motion granting partial summary judgment, and because appeal would be taken in this matter regardless of the result in court, a request for interlocutory appeal was filed April 7, 1992, (R at 1645). The court then continued on its own motion the trial without date, (R at 1647). The purpose for the request for interlocutory order was specifically for judicial economy. Should the trial have occurred without emotional distress as an element of damage, and regardless of the outcome, an appeal would have been taken to this court to

determine whether or not plaintiffs were entitled to emotional distress damages in the circumstances. If the right to present evidence on emotional distress was found to be appropriate by this court, a second complete trial would have had to have been held. It made absolutely no sense to proceed further until an order was entered by the Court of Appeals or the Utah Supreme Court either granting the interlocutory appeal or denying the same. As of April 6, 1993, the date of the dismissal, no order with regard to the interlocutory appeal had been entered. The only purpose for the filing of the interlocutory appeal was to move this case forward and for judicial economy. The continuance from February to May was necessary because of defendant Brian's tardy counterclaim, which left plaintiffs with no time to prepare therefore. Plaintiffs actions were a direct result of rulings of the trial court based upon actions of defendants, and should not be charged to plaintiffs as improper.

Despite the foregoing, the trial court has ignored all of the dilatory actions of defendants in this matter which are of record, and concentrated on plaintiffs' actions. It has chosen to consider in its findings of fact settlement negotiations which occurred prior to the filing of the action, as well prior changes of counsel. The court has made unsupported findings that the change of counsel acted to delay the prosecution of this case. Discovery proceeded without any hinderance following the appearance Conder & Wangsgard. Depositions were held in November of 1990, and the



record shows that Conder & Wangsgard actively prosecuted this case following its appearance in August of 1990, (R at 184, 187, 218, 222, 224, 226, 288, (Answer to Interrogatories on November 19, 1990) and 273).

The court set a hearing for April 16, 1991, (R at 861), at which time Darwin Fisher appeared as new counsel, (R at 867). He then appeared at Settlement Conference schedule originally for June 26, 1991, (R at 871, which was eventually held July 12, 1991, (R at 887). Appellants fail to detect any indication from the record which shows that the case was not moved forward by their counsel. The only counsel which required time to become familiar with the case was current counsel, and that was due to the two (2) factors discussed hereinabove that the motion for interlocutory appeal had not been acted upon by the Utah Supreme Court and there was some confusion as to when Notice of Appearance was actually received and accepted by the trial court. In as much as Darwin Fisher continued to be counsel of record until January 15, 1993, it seems strange that two (2) weeks is considered sufficient time in a case of this magnitude to become fully conversant, see (R at 1785).

Defendants have sought to delay and prevent plaintiffs from gaining information. They have required orders to compel responses to discovery and deny their protective orders, (R at 859 and 1700). Their experts have continuously not been available and required plaintiffs to extend time in order to depose them, (R at 1647, 1657 and 1666). The court, for good cause, granted the extension to

depose this witness, and did not find that it was plaintiffs' lack of alacrity which was the reason therefore, (R at 1687). In as much as Mr. Johnson made himself available as much as possible in spite his condition for grueling trial by combat imposed upon him by defendants at the deposition held November 28-30, 1990, (R at 1177), Defendant Brian did not seem to be available at any time until after the completion of Mr. Johnson's deposition (R at 1225 and 1898), and the fact that both sides were attempting to deny information to the other, the court's findings that the conduct of the plaintiffs is entirely at fault for the delay herein is not supported. At best, the facts show that both parties acted in the same manner. Neither parties should therefore be punished.

#### **(4) ACTIONS OF THE PARTIES TO MOVE THE CASE FORWARD**

Although the court held that the defendants had narrowed the issues and sought to move the case forward in spite of plaintiffs dilatory tactics, the facts cited hereinabove simply do not support that. Appellants have combed the record for any indication that defendants have been golden haired children in this matter. Both parties have conducted discovery, and both parties have sought protection of the court with regard to certain matters. A reiteration of the facts as cited above should be unnecessary. The record does not support the findings of the trial court and this finding should therefore be set aside.

#### **(5) DIFFICULTY AND PREJUDICE OF THE PARTIES**

Contrary to the court's finding that defendants only narrowed

the scope of trial, the counterclaim filed by Defendant Brian in fact significantly expanded the scope of trial and required additional preparation and time by plaintiffs, R at 1329, 1474 and 1490. The prejudice caused by the counterclaim cannot be underplayed. What is apparent is that the trial court is punishing plaintiffs for the trial courts own failure to set trial November 2, 1992. It was the understanding of both parties that in fact such trial was to occur at that time, and when such trial was not set, counsel for plaintiffs at that time felt free to withdraw in as much as there would be no prejudice to any party. The court itself found that no prejudice was suffered thereby, (R at 1785). How the court could have decided between January 15, 1993 and February 4, 1993 that prejudice had suddenly happened due to change of counsel is beyond the comprehension of this counsel.

**(6) INJUSTICE WHICH MAY RESULT FROM DISMISSAL**

The court found that no injustice will result from dismissal, determining that no damages could have resulted which would be significant. The trial court was unfamiliar with current litigation costs which can rapidly accrue fees of astronomical proportions literally overnight. This was an element of damages. The court's finding was contrary to the evidence presented before it in the original Complaint, (R at 1-12) which in fact alleged significant damages. If this court determines that emotional distress is a valid damage for recovery in this type or action, there is no doubt that the emotional distress damages dues to Post-traumatic Stress

Disorder suffered by Plaintiffs will be of an extremely significant nature, (R at 1177). Mr. Johnson lost his business and was significantly impaired emotionally as a direct result of these acts. This is a significant question of fact as to the exact amount of that damage, and an out of hand dismissal that such damages cannot be great is a direct violation of Section 11, Article I of the Utah Constitution.

**(7) WESTINGHOUSE WAS NOT SATISFIED BY THE DISMISSAL IN THIS ACTION**

Contrary to the findings of the trial court, the record as a whole demonstrates that plaintiffs were at least as culpable as plaintiffs for the time lost prior to the filing of their motion for dismissal with prejudice for failure to prosecute in February of 1993. Neither side has acted as angels in this matter, but the time which has elapsed is so small, and the confusion which was caused both by the actions of defendants, the trial court, and the Utah Supreme Court (by failing to file an order denying motion for interlocutory appeal) significantly outweigh any prejudice caused by plaintiffs failure to request trial setting. Dismissal was therefore an abuse of discretion.

**D. THE TRIAL COURT DID NOT HAVE JURISDICTION TO DISMISS THIS ACTION**

Plaintiffs filed a Motion for Interlocutory Order regarding the emotional distress damage question on April 7, 1992, (R at 1645). The Utah Supreme Court did not act on the interlocutory

request prior to the motion to dismiss, April 6, 1993 (R at 1798). A substantial question of jurisdiction exists in this case in as much as grant of the interlocutory order would cause all of the time periods which apply to appeals from final orders to apply to this action. Utah Rules of Appellate Procedure 5(e) states "if the petition is granted, the appeal shall be deemed to have been docketed by the granting of the petition, and all proceeding subsequent to the granting of the petition shall be as, and within the time required, for appeals from final judgments". In as much as the court had not entered an order in this matter either granting the interlocutory request or denying the same, the question was before the Utah Supreme Court, and the case was subject to action thereby.

The Supreme Court is a superior court to the district court. Utah Constitution Article VIII Sections 2 and 3. It has jurisdiction over cases before it. The reason this divested in the trial court of authority to act is that if the Supreme Court granted the interlocutory request following the dismissal it would proffering an advisory opinion, and the trial court having the jurisdiction to dismiss the case would have the effect of giving the district court the power to control the docket of the Utah Supreme Court, and divest it of jurisdiction to review an order which was properly before it. In as much as the Utah Supreme Court had entered no order on the request for interlocutory order, the

district court could not have had jurisdiction, and therefore dismissal was void.

**E. DAMAGES FOR EMOTIONAL DISTRESS ARE PROPER IN THIS MATTER**

It is a question of fact what has caused the Post-traumatic Stress Disorder suffered by plaintiffs. An expert has diagnosed it as attributable to the adoption malpractice, (R at 1177). The trial court, however, as a matter of law determined that such damages are not assessable to defendants in Utah, (R at 1371). This is expressly contrary to the Utah Supreme Court findings in Samms v. Eccles, 11 Utah 2d 358 P.2d 344 (1961). In that case, the defendant phoned and visited plaintiff on numerous occasions seeking intimate relations with her. Plaintiff alleged that this caused her deep emotional distress. The Utah Supreme Court agreed finding that:

[T]he best considered view recognizes an action for severe emotional distress, though not accompanied by bodily impact or physical injury, where the defendant intentionally engaged in some conduct where plaintiff, (a) with the purpose of inflicting emotional distress, or (b) where any reasonable person would have known that such would result; and his actions are of such a nature to be considered outrageous and intolerable and that they offend against the generally accepted standards of decency and morality. Samms, 358 P.2d at 346-347

Without bodily injury Mr. and Mrs. Johnson have suffered acute Post-Traumatic Stress Disorder, (R at 1177). In the opinion of their treating physician, this was directly attributable to the adoption. In the mess created by Defendant Brian, now a sitting judge with a reputation for strict application of the law, defendant Brian did not comply with even one requirement of the Interstate Compact for the Placement of Children. Although he was

an experience adoption attorney, he simply went to Texas, picked the baby up from the mother after she had left the hospital, took the baby on the plane to Salt Lake City, and then handed the baby to plaintiffs, (R at 1-12). There is a significant disagreement as to what he told them at the airport, but it would seem even to a lay person that an attorney should comply with statutes of which he is aware, especially when we are dealing with rights as important as those of parents and the adoption process. It is a question of fact as to what Defendant Brian should have done in Texas and what was possible to have been done in Texas prior to his returning with the child. It is for this purpose that experts exist. It is not the purpose of plaintiffs to argue that they are entitled to summary judgment before this court with regard to the outrageous actions of Defendant Brian, but if he did as alleged, and he has presented no evidence in the record, in deposition, through interrogatories, or through request for production of documents, which indicates that he did anything to comply with the statutes, this would seem to be a very good example of "outrageous and intolerable conduct" which "offend[s] against the generally accepted standards of decency and morality".

Plaintiffs have alleged an extremely grievous breach of professional ethics by defendant Brian. If in fact he failed to turn in a professional performance in this matter, then at the very least he is in breach of conduct and has committed malpractice. Because of the universally recognized existence and character of

the family bond, and the love which both adoptive and natural parents hold for their children, it is beyond the comprehension of plaintiffs that he would not know that malpractice in this case would be outrageous. If he simply did not care, it would be reckless indifference to the effect of his actions, or imputable intent. On this point, expert testimony is appropriate and the summary judgment on this matter should be set aside in as much as a genuine issue of material fact exists.

A genuine issue of material fact exists in this matter and summary judgment was therefore improper. With regard to the trial court's conclusion of law, no particular deference may be granted to it and as such should be reviewed for correctness. Doelle v. Bradley, 784 P.2d 1176, 1179 (Utah 1989). The trial court's grant of summary judgment denying a right of recovery for emotional distress damages in this matter is clearly contrary to Samms v. Eccles, the trial court's conclusion of law deserves no particular deference, and as such must be set aside. Plaintiffs are entitled to recovery for emotional distress damages suffered in this matter.

#### VII. CONCLUSION

The trial court acted in haste when it dismissed for failure to prosecute, and its findings are not based upon the record as a whole. Its findings of fact and judgment of dismissal should therefore be set aside.

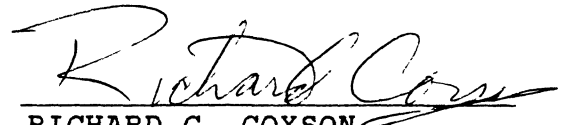
In addition to the above, the trial court was without jurisdiction to dismiss in as much as the Utah Supreme Court had



jurisdiction this case at the time of dismissal. Judgment of dismissal was therefore moot and without effect.

Finally, partial summary judgment on the issue of emotional distress was improper in as much as a genuine issue of material fact exists regarding the outrageous conduct of Defendant Brian and the intent in this matter. Dismissal of emotional distress damages was therefore contrary to Rule 56(c) of the Utah Rules of Civil Procedure.

DATED this 6 day of December, 1993.



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MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing, postage prepaid to:

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