

1993

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

Utah Court of Appeals

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BRIEF

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DOCKET NO. 930716

FILED
Utah Court of Appeals

DEC 13 1993

IN THE UTAH COURT OF APPEALS


Mary T. Noonan
Clerk of the Court

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.:

ADDENDUM

RICHARD C. COXSON - A5933
Attorney for Plaintiffs
275 North Main
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FILED IN
4TH DISTRICT COURT
STATE OF UTAH
JUN 25 3 31 PM '93
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IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

JAMES A. JOHNSON and
JENNIFER L. JOHNSON,

Plaintiffs,

vs.

NIELSEN & SENIOR, a Utah
Corporation and PAT B. BRIAN,

Defendants.


NOTICE OF APPEAL


Civil No. 900400460CN

Notice is hereby given that Plaintiffs James A. Johnson and Jennifer L. Johnson, by and through their attorney, Richard C. Coxson, appeals to the Utah Court of Appeals the final judgment of the Honorable Judge Christofferson.

The appeal is taken from the entire judgment.

DATED this 25 day of June, 1993.


RICHARD C. COXSON
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FILED
Fourth Judicial District Court of
Utah County, State of Utah.
June 16, 1993
CARMA D. SMITH, Clerk
 Deputy

Arthur H. Nielsen (2405)
Marilynn P. Fineshriber (4571)
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IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR UTAH COUNTY
STATE OF UTAH

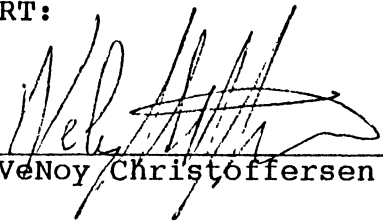
JAMES A. JOHNSON and)	
JENNIFER L. JOHNSON,)	
	)	ORDER
Plaintiffs,)	
	)	Civil No. 900400460CN
v.)	
	)	Judge VeNoy Christoffersen
NIELSEN & SENIOR, a Utah)	
Corporation, Pat B. Brian,)	
)	
Defendants.)	

Plaintiffs' Motion for New Trial as to Nielsen & Senior pursuant to Rule 59, U. R. Civ. P., having been submitted to the Court for decision and the Court having reviewed the relevant documents and papers of the respective parties and having rendered a memorandum decision, now therefore,

IT IS HEREBY ORDERED, that Plaintiffs' Motion for New Trial, pursuant to Rule 59 U. R. Civ. P., be and the same is hereby denied.

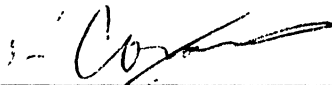
DATED this 15 day of June, 1993.

BY THE COURT:



Honorable VeNoy Christoffersen

APPROVED AS TO FORM:



Richard C. Coxson, Esq.
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of June, 1993, I served Defendant's ORDER by causing a true and correct copy of the same to be sent, through the United States mails, first-class postage prepaid, to the following:

Richard C. Coxson, Esq.
Attorney for Plaintiffs
275 North Main
Spanish Fork, UT 84660

Michael L. Dowdle
Attorney for Defendant Pat B. Brian
915 West 100 South
Salt Lake City, Utah 84104



IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
IN AND FOR UTAH COUNTY, STATE OF UTAH

JAMES A. JOHNSON, and
JENNIFER L. JOHNSON,

Plaintiffs,

vs.

NIELSEN & SENIOR, a Utah
Corporation, and PAT B.
BRIAN,

Defendants.

MEMORANDUM DECISION

Civil No. 900400460 CN

Plaintiffs through their counsel have filed a Motion For New Trial under Rule 59(b) U.R.C.P. The Motion For New Trial is based on the representations of the plaintiffs that the defendant intentionally misrepresented facts to the Court even though the Court was a party thereto and was aware that those facts were intentional misrepresentations. The facts intentionally misrepresented are set forth in a deposition of James Johnson and counsel for plaintiff's, Darwin Fisher. The Court found that the facts concerning the delay of trial were not misrepresentations by the plaintiff and the Court was certainly not aware of any misrepresentations if any were made. Plaintiffs had ample opportunity to file an objection to the Findings and Conclusions in the Court's Order of Dismissal of this case. They failed to do so.

Plaintiffs further state that they have moved this case forward and were ready for trial in November of 1992. This is contrary to the facts since prior to this time Darwin C. Fisher, who was then attorney for the plaintiff, filed a Motion to Withdraw based on a conflict of interest and on November 19, 1992, the Court signed a Memorandum Decision granting his request for withdrawal. Obviously the plaintiffs were not ready for trial as Mr. Richard Coxson had just entered as attorney for the plaintiff. After this Mr. Coxson filed a Motion for further discovery, many months after the cut-off date for discovery had been ordered and further represented that he needed this discovery in order to familiarize himself with the case in that he had just entered the same. Obviously he was not ready for trial at that time, and further the Court has never refused to set the matter for trial. The plaintiffs' argument on these grounds falls far short for support of their Motion for a New Trial under Rule 59(b) U.R.C.P. The Court is not again going to review the factors it set forth in its Memorandum Decision dismissing this case nor as to the cases supporting those factors and the law in the Court's Findings of Fact and Conclusions of Law. Mr. Brian's Motion to Dismiss Plaintiffs' Motion For New Trial on the grounds of failure to procedurally comply with services is denied on the grounds that they were served but failure to place their name on the Certificate of Service is not sufficient grounds. However, the Motion For Dismissal as to Mr. Brian by this Court in its prior decision will stand.

Counsel for defendants is directed to prepare the appropriate Orders.

DATED this 26th day of May, 1993.



VENOY CHRISTOFFERSON
SENIOR DISTRICT JUDGE

FILED IN
4th DISTRICT COURT
STATE OF UTAH
UTAH COUNTY

May 13 3 16 PM '93
[Signature]

RICHARD C. COXSON (A5933)
Attorney for Plaintiffs
275 North Main
Spanish Fork, UT 84660
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IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

JAMES A. JOHNSON and)	REPLY MEMORANDUM
JENNIFER L. JOHNSON,)	
)	
Plaintiffs,)	
)	
vs.)	
)	
NIELSEN & SENIOR, a Utah	)	Civil No. 900400460CN
Corporation and PAT B. BRIAN,	)	Judge VeNoy Christoffersen
)	
Defendants.)	

BACKGROUND

Plaintiffs have brought this Motion to Set Aside a dismissal in this action for failure to prosecute in as much as the dismissal was ill founded and an abuse of discretion.

FACTS

1. Defendants were substantially at fault for a significant amount of the delays in this action. See Affidavit of James A. Johnson.

2. Counsel for defendants agreed to notify the court of readiness for trial for November based upon their calendar availability after a phone conversation for prior counsel for plaintiffs, Darwin Fisher. See Affidavit of Darwin C. Fisher.

3. Prior counsel for plaintiffs, Darwin C. Fisher, attempted to verify the trial scheduled for November of 1992 with the court clerk, and was in fact informed that trial had been set for

November of 1992. See Affidavit of Darwin C. Fisher.

4. It was only just prior to the withdrawal of Darwin C. Fisher that he became aware that the trial was not scheduled for November of 1992, and therefore trial setting would not bar his request for withdrawal of counsel. See Affidavit of Darwin Fisher.

5. Defendants have on numerous occasions, including the Motion for Dismissal and this Rule 59 Motion to Set Aside Dismissal, intentionally misrepresented the facts. Those misrepresentations include:

- a. the existence of a policy of malpractice insurance;
- b. the actual ruling made by the Supreme Court with regard to the Interlocutory Appeal;
- c. the effect of the protective order decisions; and
- d. Judge Pat B. Brian's continued unavailability at numerous times when requests for discovery were made, which greatly inconvenienced plaintiffs, but which they acquiesced in simply to move this action along.

ARGUMENT

Plaintiffs are at present trying to have a dismissal set aside for failure to prosecute. It is contrary to law in the State of Utah, and which has been cited in prior memoranda, that a case which is ready for trial should be dismissed for want of prosecution on what is virtually the eve of trial. In this case, the trial court has abused its discretion and has dismissed a case which is ready to go to trial, the only reason for which it did not

go to trial being the failure of: 1) either the counsel for defendants to schedule with the court trial dates in November of 1992 as agreed to and which they made representations that they would; 2) or the administrative failure of court itself to calendar the trial. Under the circumstances, it is almost incredible that plaintiffs should be punished for a failure over which they had absolutely not control.


When it is further considered that counsels for defendants have intentionally misrepresented numerous facts in this case, the representations made by them in their Affidavit attached to the Memorandum in Opposition to this motion should be completely discounted due to their lack of credibility. In contrast, prior counsel for plaintiffs, Darwin Fisher, has not made any misrepresentation in this action, nor has he made "self-serving" or otherwise skewed or false statements. Mr. Fisher's Affidavit is clear, his recollection is unimpaired, and his statements firmly support the proposition that Mr. Whyte and Mr. Dowdle took upon themselves the responsibility in a conference call to set trial for November 2-13, 1992. It is equally clear that no such action was in fact taken. Dismissal should therefore be set aside since no failure to prosecute has in fact occurred.

CONCLUSION

Mr. Fisher has a very clear recollection of the events, and has never misrepresented them to the court for any reason. Counsel for defendants can not make the same claim in as much as they have

frequently misrepresented facts of many different types throughout this action. Mr. Fisher's Affidavit should therefore not be stricken, and dismissal should be set aside in as much as there was not failure to prosecute by plaintiffs.

DATED this 13 day of May, 1993.



RICHARD C. COXSON
Attorney for Plaintiff
275 North Main
Spanish Fork, UT 84660
(801) 798-3574

MAILING CERTIFICATE

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

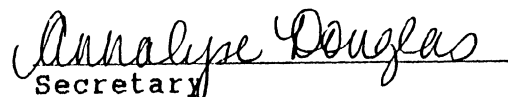
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Michael L. Dowdle
Attorney for Defendant Pat B. Brian
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Salt Lake City, UT 84104

A courtesy copy to:

Judge VeNoy Christoffersen
875 Rio Virgin Drive, #217
St. George, UT 84770

DATED this 13 day of May, 1993.



Annalysa Douglas
Secretary

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Telephone (801) 532-1900

IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR UTAH COUNTY
STATE OF UTAH

JAMES A. JOHNSON and)	
JENNIFER L. JOHNSON,)	
	)	MEMORANDUM OF DEFENDANT
Plaintiffs,	)	NIELSEN & SENIOR IN
	)	OPPOSITION TO PLAINTIFFS'
v.	)	MOTION FOR NEW TRIAL
)	
NIELSEN & SENIOR, a Utah	)	Civil No. 900400460CN
Corporation, Pat B. Brian,)	
	)	Judge VeNoy Christoffersen
Defendants.)	

Defendant Nielsen & Senior submits the following Memorandum in Opposition to Plaintiffs' Motion for New Trial, pursuant to Rule 4-501, Code of Judicial Administration.

OBJECTION TO PLAINTIFFS' STATEMENT OF FACTS

1. This Court made and entered its Findings of Fact and Conclusions of Law and entered a Judgment of Dismissal of Plaintiffs' Complaint pursuant to Rule 41(b), U. R. Civ. P. on April 6, 1993. Plaintiffs filed no objections to the proposed Findings and Conclusions, although they later submitted their own proposed Findings after the Court had entered the Findings of Fact and Conclusions of Law. Having failed to take advantage of

the opportunity to object, Plaintiffs now seek to set aside the Dismissal alleging intentional misrepresentation by Defendants and complicity by the Court. Nielsen & Senior denies that it has made any misrepresentation, and objects to Plaintiffs' allegations which are not supported by the record and are a reflection on the integrity of the Court and opposing counsel.

2. Defendant Nielsen & Senior objects to Plaintiffs' statement of "Facts Intentionally Misrepresented" in its entirety. In many instances, the Affidavit of Darwin Fisher does not support the facts asserted in Plaintiffs' Memorandum. See the Affidavit of Larry Whyte filed herewith and incorporated herein.

3. Defendant Nielsen & Senior objects to the Affidavit of Darwin C. Fisher and has filed a separate Objection to its admission on the ground that Mr. Fisher could not testify, if called, to its contents because the statements are largely hearsay and inadmissible under Utah Rule of Evidence 802. In the event that this Court determines to admit Mr. Fisher's Affidavit, Nielsen & Senior submits and requests the admission of the counteraffidavit of Larry L. Whyte.

ARGUMENT

POINT I

THERE IS NO SHOWING OF IRREGULARITIES IN THE PROCEEDINGS WHICH WOULD JUSTIFY A NEW TRIAL

Rulings on motions for new trials are addressed to the sound discretion of the Court but, absent a showing of one of the grounds set forth in Rule 59, U. R. Civ. P., the Court has no discretion to grant a new trial. Hancock v. Planned Development Corp., 791 P.2d 183, 185 (Utah 1990). Plaintiffs base their Motion, apparently, on a claim that Defendant Nielsen & Senior misrepresented facts to the Court so that entry of a judgment of dismissal based on those facts would constitute an irregularity entitling Plaintiffs to a new trial. Plaintiff's submitted affidavit fails, however, to make the required showing.

In the first instance, there is no evidence of any irregularity in the briefing of and oral argument on Defendants' Motion to Dismiss. In fact, the issues raised by Defendants' Motion to Dismiss were fully briefed and argued by the parties. Plaintiffs had full and complete opportunity to object to the proposed findings, if grounds therefor appeared in the record. The Judgment of Dismissal was entered after proceedings which were completely in accordance with the Utah Rules of Civil Procedure and the Code of Judicial Administration, and Plaintiffs have made no showing of irregularities.

In the second instance, the affidavit of Plaintiff's former counsel is inaccurate, unsubstantiated, self-serving, and inadmissible as hearsay under Utah Rule of Evidence 802. As such, the affidavit does not suffice to establish grounds for a new trial. Defendant particularly objects to Mr. Fisher's use of the November 2, 1992, trial setting to his personal advantage and then as a basis of accusation against the Court. Counsel for the parties discussed a trial setting following the denial of Plaintiffs' Petition for Interlocutory Appeal, and settled on the dates November 2-13, 1992. It was Plaintiffs' obligation to file with the Court a Pre-trial Order incorporating those dates. Despite the fact that Defendants drafted several proposed Pre-trial Orders and submitted them for Mr. Fisher's review, Mr. Fisher refused to cooperate and Plaintiffs never submitted to the Court a Pre-trial Order setting the trial dates.

When Mr. Fisher wished to withdraw as counsel in October, 1992, he relied on the fact that there was no trial setting to support his claim that there would be no delay of trial by his withdrawal. Using his failure to submit a Pre-trial Order to his advantage one more time, Mr. Fisher's present Affidavit speciously states that he thought the dates would be given to the Court and trial setting noticed by the Court. Based on Mr. Fisher's Affidavit, Plaintiffs now assert that the "Court

refused" to set the matter for trial, and that they were at all times ready to proceed.

These statements by Plaintiffs and their former counsel are inconsistent and do not provide reliable evidence to support Plaintiffs' claim of irregularity in the proceedings which resulted in the entry of the Judgment of Dismissal.

POINT II

THERE IS NO ERROR OF LAW IN THE ENTRY OF THE JUDGMENT OF DISMISSAL WHICH WOULD JUSTIFY A NEW TRIAL

As the second ground for their Motion for New Trial, Plaintiffs allude to an error in law. Defendant will not tax the patience of the Court to review, once again, the factors set forth in Westinghouse Electrical Supply Co. v. Paul W. Larsen Contractor, Inc., 544 P.2d 876 (Utah 1975) and Maxfield v. Rushton, 779 P.2d 237 (Utah App. 1989). The Findings of Fact and Conclusions of Law which supported the entry of the Judgment of Dismissal reveal the ample evidence in the record that Plaintiffs failed to proceed to prosecute their claims with the diligence required by the decision of this Court. By the submission of one Affidavit, replete with misstated dates and unsubstantiated by the record, Plaintiffs seek to persuade the Court that there is insufficient basis to sustain the Judgment. To the contrary, the papers and filings of record, including those attached as exhibits to Mr. Whyte's Affidavit, demonstrate the pattern of Plaintiffs' conduct with convincing clarity. Plaintiffs' conduct

is evidenced by every fact of record and supports the Judgment of Dismissal. There has been no error of law which would entitle Plaintiffs to have the judgment set aside.

The Court's decision that the facts of this case warranted dismissal of the action is buttressed by an April 21, 1993 decision of the Utah Court of Appeals. See, Country Meadows Convalescent Center v. Utah Department of Health, Case No. 920302-CA, (a copy of which is attached to this Memorandum). There the court affirmed the trial court's dismissal for failure to prosecute based upon Utah Rule of Civil Procedure 41(b). The court's decision acknowledged that "evaluation of a district court's decision to dismiss for failure to prosecute is fact sensitive . . ." Id. at 1, quoting from the prior case of Meadow Fresh Farms v. Utah State University, 813 P.2d 1216, 1219 (Utah App. 1991). Further, the appellate court "will not interfere with that decision unless it clearly appears that there is a likelihood an injustice has been wrought." Id. at 3, quoting Charlie Brown Construction v. Leisure Sports, Inc., 740 P.2d 1368, 1370 (Utah App. 1987).

Country Meadows argued that dismissal of its case was error on two grounds, one of which is pertinent to Plaintiffs' present motion. Country Meadows claimed that the Defendants' own failure to move the case forward negated its right to the dismissal. The Court of Appeals determined that it was the conduct of the

Plaintiff which was to be scrutinized. "Although inaction on the part of a defendant may contribute to the justifiability of the plaintiff's excuse for delay, the duty to prosecute is a duty of due diligence imposed on a Plaintiff, not on a defendant." Id. at 6, quoting Meadow Fresh Farms, 813 P.2d at 1218. Accordingly, Nielsen & Senior was not required to take the leading role in moving the case forward and, insofar as Plaintiffs' Facts allege lack of initiative on Defendants' part, such allegations are irrelevant.

Country Meadows provides further support for this Court's dismissal of the case:

In applying the Westinghouse factors, the Utah Supreme Court required that the "totality of the circumstances" be considered to determine "[w]hether delay is a ground for the dismissal of an action." Department of Social Services v. Romero, 609 P.2d 1323, 1324 (Utah 1980). Therefore, a plaintiff cannot isolate and argue facts relevant to only one or two of the Westinghouse factors to avoid its burden "'to prosecute a case in due course without unusual or unreasonable delay,'" Meadow Fresh Farms, 813 P.2d at 1218 (quoting Charlie Brown Construction, 740 P.2d at 1370).

Country Meadows, at 5.

Nielsen & Senior contends that Plaintiffs are attempting once again to do exactly what the Utah Supreme Court prohibits above. Plaintiffs have misstated certain facts regarding discovery and deposition proceedings in the case and then have used and re-used those to support their Motion. The "totality of the circumstances", however, is borne out by the Affidavit of

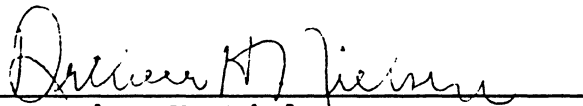
Larry L. Whyte and the entirety of papers and filings in this matter. Under the totality of the circumstances, there is no error of law in this Court's Dismissal of the case.

CONCLUSION

Defendant Nielsen & Senior submits that there were no irregularities in the proceedings and that the record before the Court amply supports the Judgment of Dismissal. Plaintiffs have failed to make the necessary showing and, thus, the Court has no discretion to grant a new trial. Plaintiffs' Motion should be denied.

RESPECTFULLY SUBMITTED this 29th day of April, 1993.

NIELSEN & SENIOR

By 
Arthur H. Nielsen
Marilynn P. Fineshriber
Attorneys for Defendant Nielsen &
Senior

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of April, 1993, I have served Defendants' MEMORANDUM OF DEFENDANT NIELSEN & SENIOR IN OPPOSITION TO PLAINTIFFS' MOTION FOR NEW TRIAL by causing a true and correct copy of the same to be sent, through the United States mails, first-class postage prepaid, to the following:

Richard C. Coxson, Esq.
Attorney for Plaintiffs
275 North Main
Spanish Fork, UT 84660

Marilynn P. Finckh

This opinion is subject to revision before
publication in the Pacific Reporter.

APR 21 1993

IN THE UTAH COURT OF APPEALS

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Country Meadows Convalescent)
Center, a Delaware)
corporation,)
)
Petitioner and Appellant,)
)
v.)
)
Utah Department of Health,)
Division of Health Care)
Financing,)
)
Defendant and Appellee.)

OPINION
(For Publication)

Case No. 920302-CA

F I L E D
(April 21, 1993)


Mary T. Noonan
Clerk of the Court

Third District, Salt Lake County
The Honorable J. Dennis Frederick

Attorneys: Dale E. Stratford, Ogden, for Appellant
Jan Graham, Douglas W. Springmeyer, and J.
Stephen Mikita, Salt Lake City, for Appellee

Before Judges Garff, Greenwood, and Orme.

GREENWOOD, Judge:

Petitioner, Country Meadows Convalescent Center, Inc.
(Country Meadows), appeals the district court's dismissal of its
petition for review of a decision by the Utah Department of
Health (UDOH) and its grant of summary judgment in favor of UDOH.
We affirm the dismissal for failure to prosecute based upon Utah
Rule of Civil Procedure 41(b).

BACKGROUND

Because evaluation of a district court's decision to dismiss
for failure to prosecute is fact sensitive, we present the facts
in some detail. Meadow Fresh Farms v. Utah State Univ., 813 P.2d
1216, 1219 (Utah App. 1991). In February 1978, Ms. Eva S. Barney
and her son, Carl W. Barney, formed a partnership to build the
Country Meadows Convalescent Center, a nursing home in South
Ogden, Utah, which would provide intermediate and skilled nursing
care to Medicaid recipients. Carl Barney's construction company,

Williams & Peterson, 685 P.2d 538, 538 (Utah 1984). An appellate court, therefore, "will not interfere with that decision unless it clearly appears that the court has abused its discretion and that there is a likelihood an injustice has been wrought." Charlie Brown Constr., 740 P.2d at 1370 (citing Department of Soc. Serv. v. Romero, 609 P.2d 1323, 1324 (Utah 1980)).

Dismissal for Failure to Prosecute

On appeal, Country Meadows argues that the district court erred in dismissing its petition for review on two grounds: (1) UDOH's own failure to move the district court appeal forward negated its right to the dismissal; and (2) the dismissal would create injustice by substantially prejudicing Country Meadows in subsequent Medicaid reimbursement matters.² Having reviewed the record, we conclude that the district court did not abuse its discretion in granting UDOH's motion for a dismissal of Country Meadows' petition, and that the dismissal did not cause substantial injustice.

UDOH based its motion to dismiss on Utah Rule of Civil Procedure 41(b) which provides in pertinent part:

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 any claim of action against him.

Although Utah courts "consider[] a motion to dismiss to be a severe measure," Burnett v. Utah Power & Light Co., 797 P.2d 1096, 1097 (Utah 1990), Rule 41(b) requires plaintiffs "to prosecute their claims with due diligence, or accept the penalty of dismissal." Charlie Brown Constr. Co. v. Leisure Sports Inc., 740 P.2d 1368, 1370 (Utah App.), cert. denied, 765 P.2d 1277 (Utah 1987) (quoting Maxfield v. Fishler, 538 P.2d 1323, 1325 (Utah 1975)). See also Hill v. Dickerson, 197 Utah Adv. Rep. 23, 24 (Utah App. 1992). "Rule 41(b) sets no deadline for

2. In its reply brief, Country Meadows also argued that Utah Rule of Civil Procedure 81(d) would foreclose the option of a Rule 41(b) dismissal as inconsistent with the "judicial review of a final determination of the executive director" of a state agency authorized by Utah Code Ann. § 26-23-1. Because presentation of this argument in a reply brief does not conform to "Rule 24(c) of the Appellate Rules of Procedure limit[ing] answers in a reply brief to new matter in the appellee's brief," we decline to consider this argument. Larson v. Overland Thrift and Loan, 818 P.2d 1316, 1321 n.5 (Utah App. 1991), cert. denied, 832 P.2d 476 (Utah 1992).

P.2d at 879)). See also K.L.C. Inc., 656 P.2d at 988; Utah Oil Co. v. Harris, 565 P.2d 1135, 1137 (Utah 1977).

In applying the Westinghouse factors, the Utah Supreme Court required that the "totality of the circumstances" be considered to determine "[w]hether delay is a ground for the dismissal of an action." Romero, 609 P.2d at 1324. Therefore, a plaintiff cannot isolate and argue facts relevant to only one or two of the Westinghouse factors to avoid its burden "to prosecute a case in due course without unusual or unreasonable delay," Meadow Fresh Farms, 813 P.2d at 1218 (quoting Charlie Brown Constr., 740 P.2d at 1370).

Nevertheless, Country Meadows' argument focuses on just two of the Westinghouse factors: (1) the injustice which would result from the dismissal of the case, and (2) UDOH's failure to independently move the case forward. Country Meadows points out that the injustice which might result from a dismissal is the most important of the Westinghouse evaluative factors. Romero, 609 P.2d at 1324 (discussing Westinghouse, 544 P.2d at 879). Country Meadows then claims that it would suffer manifest injustice as a result of dismissal because it refrained from moving forward on subsequent reimbursement claims submitted to UDOH, pending resolution of this matter.

However, we do not believe that Country Meadow's decision to compound one course of procrastination with another constitutes the type of injustice intended to be prevented by Westinghouse or Romero. In fact, even where a trial court finds facts indicating that "injustice could result from the dismissal of [a] case," it can dismiss when a plaintiff has "had more than ample opportunity to prove his asserted interest and simply failed to do so." Rushton, 779 P.2d at 240. Country Meadows has failed to offer any persuasive or legitimate reason for failing to take steps to advance its petition for over five years. It also has not demonstrated an inability to pursue the delayed reimbursement claims at this time. Therefore, in reviewing the dismissal of this case, we are not persuaded that Country Meadows' subsequent inaction on other reimbursement claims weighs compellingly in favor of our finding an abuse of discretion by the district court.

Country Meadows next asks this court to focus on the behavior of UDOH, claiming that UDOH had "every opportunity to move the case forward" including the potential to request the district court to either issue an order to show cause or calendar a scheduling conference. In support of this argument, Country Meadows quotes from Romero which noted "the important fact [] that the defendant himself did nothing to move the case forward, but appears to be quite contented to let it lie dormant."

inactivity prior to its motion to dismiss do not constitute a reasonable excuse for Country Meadows' lack of diligence in pursuing its petition for review. Further, Country Meadows' non-action for over five years indicates that the district court did not act unreasonably or arbitrarily in dismissing this action. When a "trial court has provided plaintiffs 'an opportunity to be heard and to do justice,' and that plaintiff abuses its opportunity through inexcusable neglect, the trial court does not abuse its discretion in dismissing the case." Charlie Brown Constr., 740 P.2d at 1371 (citations omitted).

Because the district court did not abuse its discretion in dismissing Country Meadows' case against UDOH, that dismissal "operates as an adjudication upon the merits" of the case." Maxfield v. Rushton, 779 P.2d 237, 239 (Utah App. 1989) (quoting Utah R. Civ. P. 41(b)⁵). See also Charlie Brown Constr., 740 P.2d at 1371 (affirming the dismissal of an action "with prejudice and on the merits"). Because dismissal of an action under 41(b) "is dispositive of the case," Maxfield, 779 P.2d at 241, we need not consider the district court's decision on the merits of UDOH's motion for summary judgment. See also Schoney v. Memorial Estates, Inc., 790 P.2d 584, 587 (Utah App. 1990) ("Because the court's entry of default judgment is fully supported . . . we need not address the issue of whether the entry of summary judgment was also proper in this case.").

CONCLUSION

Because Country Meadows failed to provide any reasonable justification for its failure to prosecute the case against UDOH for over five years, we affirm the district court's dismissal of that action based upon Utah Rule of Civil Procedure 41(b). The

5. The language in Rule 41(b) relevant to the effect of a dismissal 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 . . . operates as an adjudication upon the merits."

FILED IN
4TH DISTRICT COURT
STATE OF UTAH
UTAH COUNTY

APR 16 4 58 PM '93

JK


RICHARD C. COXSON (A5933)
Attorney for Plaintiffs
275 North Main
Spanish Fork, UT 84660
(801) 798-3574

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

TAMES A. JOHNSON and	)	MOTION FOR NEW TRIAL UNDER
JENNIFER L. JOHNSON,	)	RULE 59
)	
Plaintiffs,)	
)	
vs.)	
)	
NIELSEN & SENIOR, a Utah	)	Civil No. 900400460CN
Corporation and PAT B. BRIAN,)	
)	
Defendants.)	

Plaintiffs move for new trial pursuant to Rule 59 of the Utah Rules of Civil Procedure for misconduct on the part of defendants and error in law. Plaintiffs more fully set out their grounds in the attached Memorandum.

DATED this 16 day of April, 1993.


RICHARD C. COXSON
Attorney for Plaintiffs
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Arthur H. Nielsen (2405)
Larry L. Whyte (4942)
Marilynn P. Fineshriber (4571)
NIELSEN & SENIOR, P.C.
Attorneys for Defendants Nielsen & Senior
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FILED IN
4TH DISTRICT COURT
STATE OF UTAH
UTAH COUNTY
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[Signature]

Michael L. Dowdle
Attorney for Defendant Pat B. Brian
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IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR UTAH COUNTY
STATE OF UTAH

JAMES A. JOHNSON and)	
JENNIFER L. JOHNSON,)	
	)	JUDGMENT OF DISMISSAL
Plaintiffs,)	
	)	Civil No. 900400460CN
v.)	
	)	Judge VeNoy Christoffersen
NIELSEN & SENIOR, a Utah)	
Corporation, Pat B. Brian,)	
)	
Defendants.)	

Defendants' Motion to Dismiss Plaintiffs' Complaint pursuant to Rule 41(b), U. R. Civ. P., came on for hearing before the Honorable VeNoy Christoffersen at 10:00 a.m. on Thursday, March 11, 1993. The hearing was conducted by telephone, pursuant to stipulation of counsel for the respective parties and as permitted by Rule 4-501(5), Code of Judicial Administration. The following appearances were entered: Richard C. Coxson for Plaintiffs; Arthur H. Nielsen, Larry L. Whyte and Marilynn P. Fineshriber of Nielsen & Senior for Defendant Nielsen & Senior; and Michael L. Dowdle for Defendant Pat B. Brian. Chris L.

Schmutz did not appear in person or by counsel, the action having previously been dismissed with prejudice as to him.

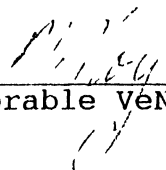
The Court, having reviewed the pleadings, motions, briefs and other records and papers in this matter, having heard the arguments of counsel, and being fully advised in the premises, made its oral ruling on the matter on March 11, 1993. The Court, having made and entered its Findings of Fact and Conclusions of Law, now

HEREBY ENTERS JUDGMENT that Defendants' Motion to Dismiss Plaintiffs' Complaint pursuant to Rule 41(b), U. R. Civ. P. is hereby granted and Plaintiffs' complaint and said action be, and it hereby is, dismissed in its entirety with prejudice and on the merits.

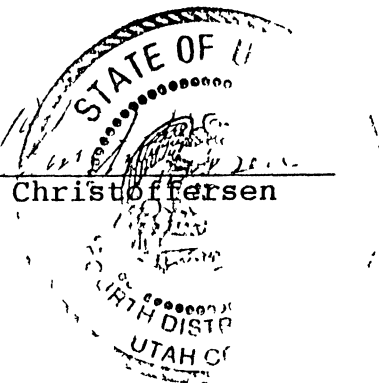
Costs are awarded to Defendants.

DATED this 7 day of April, 1993.

BY THE COURT:



Honorable Venoy Christoffersen



FILED IN
DISTRICT COURT
SALT LAKE CITY
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RJB

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IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR UTAH COUNTY
STATE OF UTAH

JAMES A. JOHNSON and)	
JENNIFER L. JOHNSON,	)	DEFENDANTS' REPLY TO
	)	PLAINTIFFS' MEMORANDUM IN
Plaintiffs,	)	OPPOSITION TO DEFENDANTS'
	)	MOTION TO DISMISS
v.)	
	)	Civil No. 900400460CN
NIELSEN & SENIOR, a Utah)	
Corporation, Pat B. Brian,	)	Judge VeNoy Christoffersen
)	
Defendants.	)	ORAL ARGUMENT REQUESTED

Pursuant to Rule 4-501, Code of Judicial Administration,
Defendants Nielsen & Senior and Pat B. Brian, by and through
their counsel of record, submit the following Memorandum of
Points and Authorities in reply to Plaintiffs' Memorandum in
Opposition to Defendants' Motion to Dismiss.

ARGUMENT

POINT I

THE ALLEGATIONS OF PLAINTIFFS' RESPONSE ARE FALSE AND IRRELEVANT TO THE CLAIMS BEFORE THE COURT

Plaintiffs allege, in Point I of their responsive memorandum, that Defendants have continued to harass and defame Plaintiffs by contacting government agencies, a mortgagee, Plaintiffs' neighbors and the defendants in the personal injury suit brought by Plaintiffs. Defendants deny each and every such allegation, with a single exception: Defendants openly contacted counsel representing the defendants of Plaintiffs' personal injury case to determine whether the emotional damages claimed by Plaintiffs in that action overlapped the emotional damages claimed by Plaintiffs in the instant case. Plaintiffs are obviously unable to document any of the remaining allegations, as they have not made a single citation to the record in support of their assertions. While Defendants have engaged in appropriate pre-trial discovery, Defendants deny that they have engaged in any conduct which has been improper or which could be construed to be harassment or defamation of Plaintiffs.

Plaintiffs' unsupported allegations are, moreover, irrelevant to the matters before this Court. Only two causes of action remain to be tried, framed as claims for breach of contract and for malpractice and springing from the same core of operative fact. Point I of Plaintiffs' response, however, contains the following language: "As Plaintiffs attempt to nail down all of the tortious conduct by Defendants, and resolve them

[sic] within this one action so that they can get on with their lives" It appears that Plaintiffs intend to assert additional claims against Defendants, presumably, by amendment of the Second Amended Complaint.

Defendants strenuously object to any proposal by Plaintiffs to amend their Complaint to include additional causes of action. Amendment to include such specious claims can only be for the purpose of pressuring defendants to settle with plaintiffs. It would result in precisely the delay Defendant Brian anticipated in his opposition to the Motion of Plaintiffs' counsel, Darwin Fisher, to withdraw, and would create additional support for Defendants' Motion to Dismiss for failure to prosecute. Any effort by Plaintiffs to expand their claims clearly indicates that Plaintiffs are not ready for trial. See concurring opinion of J. Orme, Maxfield v. Rushton, 779 P.2d 237, 241 (Utah App. 1989).

POINT II

PLAINTIFFS' COUNSEL HAS FAILED TO MAKE DILIGENT EFFORT TO FAMILIARIZE HIMSELF WITH THE CASE

Plaintiffs' counsel filed his Notice of Appearance not on December 22, 1992, as Plaintiffs alleged, but on October 26, 1992. A copy of the Notice is attached hereto as Exhibit "A". His appearance was acknowledged by the Court on November 19, 1992. A copy of the Memorandum Decision is attached hereto as Exhibit "B". Counsel has had nearly four months to become familiar with the posture of this case. Counsel should be aware that the discovery cut-off date was May 1, 1992, and that this

Court clearly stated, in its Memorandum Decision dated May 20, 1992 and Order of June, 1992, that no exceptions would be permitted. Instead, on February 17, 1993, Plaintiffs submitted to Defendants forty (40) requests for admissions, arguing that they will be prepared for trial after responses to the requests are received.

Defendants object to Plaintiffs' request for admissions and move for a protective order and for sanctions against Plaintiffs pursuant to Rules 26, 36, and 37, U. R. Civ. P. The requests are untimely, objectionable on the face, and the subject matter of each has previously been addressed by Defendants. For the purposes of this Reply, counsel's lack of diligence and complete lack of familiarity with the case is demonstrated by the filing of the discovery requests.

Since his entering the case on October 26, 1992, counsel has had ample time to ascertain the discovery cut-off date set by the Court. No discovery can be filed without obtaining leave of Court, which this Court has, on prior occasions, refused to grant. Counsel's failure to request leave of court indicates a lack of respect for the Court's orders or a total lack of familiarity with the case. There is no doubt that Plaintiffs' counsel filed these Requests for Admissions as a subterfuge, to cover up his failure to make a thorough review of the pleadings, motions and orders on file.

As a result of counsel's lack of diligence and familiarity with the case, Plaintiffs have filed motions without basis in fact or law, served objectionable discovery demands, and made

further unsupported allegations against defendants. Plaintiffs' conduct supports Defendants' Motion.

POINT III

DISMISSAL IS APPROPRIATE PURSUANT TO RULE 41(b), UTAH RULES OF CIVIL PROCEDURE

Without repeating the arguments of the Memorandum of Points and Authorities in Support of Defendants' Motion to Dismiss, Defendants point out that Plaintiffs' submission of discovery requests at this point in the case increases the factual similarity between the present case and Maxfield v. Rushton, 779 P.2d 237 (Utah App. 1989). In Maxfield, the plaintiff filed a Complaint and then amended it twice, each adding new theories of the case. Plaintiff moved for summary judgment three times and filed an interlocutory appeal for the trial court's refusal to grant it. The appeal was denied by the Supreme Court. Two of Plaintiffs' attorneys withdrew from representation. Plaintiff objected to all three of the trial dates set. When Plaintiff moved to amend the Complaint a third time and, at the same time, his third attorney moved to withdraw, the trial court dismissed the action for failure to prosecute the action in a timely manner. Maxfield v. Rushton, 779 P.2d at 239. The dismissal was affirmed on appeal.

The present case is factually indistinguishable from Maxfield. Plaintiffs' submission of extensive discovery requests at this late hour coupled with the suggestion that a motion for leave to amend the Complaint yet again to "nail down all of the tortious conduct by defendants, and resolve them [sic] within

this one action" is impending, places Plaintiffs squarely within the ambit of Maxfield. Because Plaintiffs' failure to proceed with diligence is inexcusable not only from the parties' standpoint, but also because it constitutes abuse of the judicial process, dismissal pursuant to Rule 41(b) is appropriate.

CONCLUSION


Resolution of this matter is long overdue. For the reasons set forth above and in Defendants' prior Memorandum, Defendants' Motion to Dismiss Plaintiffs' Complaint for failure to prosecute should be granted.

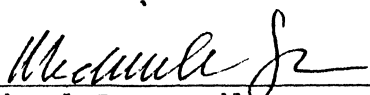
REQUEST FOR HEARING

Defendants request an opportunity to present oral argument at a time convenient to the Court and counsel.

RESPECTFULLY SUBMITTED this 26th day of February, 1993.

NIELSEN & SENIOR

By 
Arthur H. Nielsen
Larry L. Whyte
Marilynn P. Fineshriber
Attorneys for Defendant Nielsen &
Senior


Michael L. Dowdle
Attorney for Defendant Pat B. Brian

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ADD

RICHARD C. COXSON (A5933)
Attorney for Plaintiffs
275 North Main
Spanish Fork, UT 84660
(801) 798-3574

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

JAMES A. JOHNSON and JENNIFER	)	MEMORANDUM IN OPPOSITION
L. JOHNSON, (Probate No. PR-86-502,)	)	TO MOTION TO DISMISS
Fourth District),)	
)	
Plaintiffs,)	
)	
vs.)	
)	
NIELSEN & SENIOR, a Utah	)	Civil No. 90040460 CN
Corporation, PAT B. BRIAN, and)	
CHRIS L. SCHMUTZ,)	
)	
Defendants.)	

BACKGROUND

Present counsel has only recently begun representation in this matter. Prior counsel had to withdraw due to a conflict of interest which he determined existed between the interests of plaintiffs in other matters pending in his office and other clients whom he represents. Because of the complexity of this case, and the continued malicious acts of defendants, plaintiffs are entitled to further time to prepare for trial.

FACTS

1. Present counsel entered Notice of Appearance on December 22, 1992.

2. Prior counsel withdrew representation due to a conflict of interest between plaintiffs and other matters pending in prior

counsel's office.

3. Defendants are continuing to interfere with plaintiffs' business interests and are continuing to defame plaintiffs.

ARGUMENT

POINT I

There Has Been No Inaction In This Case

Defendants' Memorandum in Support of Motion to Dismiss is based upon an argument of inaction by plaintiffs. The problem with this argument is that they know that the argument is fallacious and is made in bad faith. Plaintiffs are continuing to receive harassment by defendants in the following forms: (1) The F.B.I. has been contacted by defendants regarding past business associations of the plaintiffs with other individuals; (2) The Small Business Administration has been contacted by defendants; (3) The Utah Department of Securities has been contacted by defendants regarding plaintiffs; (4) Ecclesiastical leaders of plaintiffs have been contacted by defendants to pressure them into dropping this action; (5) Mortgage lenders and trustee holders of plaintiffs' home have been contacted to foreclose on plaintiffs; (6) Opposing parties in personal injury actions have been contacted by defendants; and (6) Defendants have defamed plaintiffs to their neighbors and other associates.

The above well documented actions are malicious and are a direct outgrowth of this action. As plaintiffs attempt to nail down all of the tortious conduct by defendants, and resolve them within

Plaintiff's Seconded (SIC) Complaint, the facts are definitely disputed. The facts are not as set out and do not support defendants.

With regard to the first factor, defendants have undertaken to destroy plaintiffs' lives by attacking them both with the judicial system, the police, their business associates, their ecclesiastical relations, and their neighbors. Plaintiffs have tried to mitigate this damage as well as document what defendants have been doing, and involuntary dismissal would be to reward this egregious conduct.

Second, the opportunity to move the case forward. Both parties have had the opportunity to move the case forward, and both parties have moved the case forward during the last two and a half (2 1/2) years. Defendants have not shown candor by their statements to the contrary, and, unfortunately, taken in light of their inability to understand simple adoption laws, is to be expected.

Third, each party has moved the case forward. It is undisputed that both parties have conducted discovery, and that defendants are now ready for trial. However, defendants' readiness for trial does not indicate that plaintiffs are not entitled to complete preparations of their case. Plaintiffs will shortly be prepared for trial after response to discovery which has just been sent out.

Fourth, the difficulty or prejudice that may have been caused to the other side. Plaintiffs appreciate that the defendants have been greatly aggravated by being involved in this law suit and that

this one action so that they can get on with their lives, defendants blithely are claiming that they are without fault and that the progress of this action is entirely due to plaintiffs. Defendants, however, are acting with "unclean hands" which acts are intended to be harassing, and are certainly the type Rule 11 was meant to deal with. Plaintiffs are not intent on Rule 11 sanctions, but simply that they be allowed to resolve the issues in this case. Plaintiffs are moving as quickly as possible to resolve these issues, and have submitted their last discovery to defendants in order to be prepared for trial.

POINT 11

Dismissal Is An Abusive Discretion

Westinghouse Electric Supply Company v. Paul W. Larsen Contractor, Inc., 544 P.2d 876 (Utah 1975) is the precedential case with regard to involuntary dismissal for failure to prosecute. The factors discussed in Westinghouse were set out in detail in Meadow Fresh Farms v. Utah State University, 813 P.2d 1216 (Utah App. 1991), which five factors are: first, the conduct of the parties; second, the opportunity each party has had to move the case forward; third, what each party has done to move the case forward; fourth, the amount of difficulty or prejudice that may have been caused to the other side; and fifth, most important, whether injustice may result from the dismissal.

Contrary to defendants' arguments in the Memorandum of Points and Authorities in Support of Defendant's Motion to Dismiss

it has been difficult to complete some aspects of the discovery. However, plaintiffs have also been aggravated in that defendants have continually sought protective orders and refused to provide relevant discovery so that plaintiffs' case might go forward. Plaintiffs believe that both sides are about even on this issue.

Fifth, injustice from dismissal, this would clearly fall in favor of plaintiffs in as much as they have been aggrieved by the incompetent representation of defendants which consequentially resulted in the destruction of their health, their business, and other relationships. The courts have consistently ruled that litigating the issues is much more important than simple administrative clean up when things are slow.

In Westinghouse, the court held that:


It is our conclusion that the trial court failed to give proper weight to the priority; and that under the circumstances described herein, the order of dismissal was an abusive discretion. It is therefore necessary that they were to be vacated and the case remain remanded forth for further proceedings. Westinghouse, 544 P.2d at 879.

Plaintiffs have nearly prepared their case for trial, and once discovery is completed are willing to proceed. In as much as there has been a continual movement forward for trial during the entire period, and defendants have not been prejudiced, dismissal is improper.

CONCLUSION

Dismissal is improper except in the most egregious circumstances. Defendants have failed to show that the present circumstances are egregious, and the facts are in dispute. Dismissal of this action is therefore improper and of abuse and discretion.

DATED this 16 day of February, 1993.



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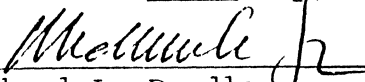
FILED IN
4TH DISTRICT COURT
STATE OF UTAH
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IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR UTAH COUNTY
STATE OF UTAH

JAMES A. JOHNSON and)	
JENNIFER L. JOHNSON,)	
	)	JOINDER OF DEFENDANT PAT B.
Plaintiffs,	)	BRIAN IN MOTION TO DISMISS
	)	PLAINTIFFS' COMPLAINT
	)	AND CONDITIONAL MOTION
	)	TO DISMISS COUNTERCLAIM
vs.)	
)	
NIELSEN & SENIOR, a Utah	)	Civil No. 900400460CN
Corporation, and Pat B. Brian,	)	Judge VeNoy Christofferson
)	
Defendants.)	

Defendant Pat B. Brian, by and through counsel, hereby joins in the Motion to Dismiss Plaintiffs' Complaint filed by Defendant Nielsen & Senior, and the Memorandum of Points and Authorities in Support of Motion to Dismiss Plaintiffs' Second Amended Complaint. Defendant Pat B. Brian further conditionally moves this Court, if and in the event that Plaintiffs' Complaint is dismissed, to dismiss the Counterclaim of Defendant Pat B. Brian in order to provide a final adjudication of all issues pending in this matter, conditioned that if Plaintiffs' Complaint is ever restored or reinstated, for any reason whatsoever, Defendant's Counterclaim shall automatically be restored and reinstated.

DATED this 4th day of February, 1993.



Michael L. Dowdle
Attorney for Defendant Pat B. Brian

Arthur H. Nielsen (2405)
Larry L. Whyte (4942)
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IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR UTAH COUNTY
STATE OF UTAH

JAMES A. JOHNSON and)	
JENNIFER L. JOHNSON,)	
	)	DEFENDANTS' MOTION TO
Plaintiffs,	)	DISMISS PLAINTIFFS'
	)	COMPLAINT
v.)	
	)	Civil No. 900400460CN
NIELSEN & SENIOR, a Utah)	
Corporation, Pat B. Brian,	)	Judge VeNoy Christofferson
)	
Defendants.)	

Pursuant to Rule 41(b), Utah Rules of Civil Procedure, and through its counsel of record, Arthur H. Nielsen and Larry L. Whyte, Defendant Nielsen & Senior moves the Court to dismiss with prejudice and on the merits Plaintiffs' Complaint for failure to prosecute their claim with diligence. This Motion is supported by the Memorandum of Points and Authorities filed herewith.

DATED this 3rd day of February, 1993.

NIELSEN & SENIOR

By Arthur H. Nielsen
Arthur H. Nielsen
Larry L. Whyte
Attorneys for Defendant Nielsen & Senior

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of February, 1993, I have caused to be sent, through the United States mails, first-class postage prepaid, a true and correct copy of the foregoing MOTION TO DISMISS PLAINTIFF'S COMPLAINT addressed as follows:

Richard C. Coxson, A5933
Attorney for Plaintiffs
275 North Main
Spanish Fork, UT 84660

Deleann H. Nelson

FILED IN
4TH DISTRICT COURT
STATE OF UTAH

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JS

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IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR UTAH COUNTY
STATE OF UTAH

JAMES A. JOHNSON and)	
JENNIFER L. JOHNSON,	)	MEMORANDUM OF POINTS AND
	)	AUTHORITIES IN SUPPORT OF
Plaintiffs,	)	DEFENDANT'S MOTION TO
	)	DISMISS PLAINTIFF'S SECONDED
v.	)	AMENDED COMPLAINT
)	
NIELSEN & SENIOR, a Utah	)	Civil No. 900400460CN
Corporation, Pat B. Brian,)	
	)	Judge VeNoy Christofferson
Defendants.)	

Defendant Nielsen & Senior submits the following Memorandum in Support of its Motion to Dismiss Plaintiff's Second Amended Complaint with prejudice and on the merits.

FACTUAL BACKGROUND

Defendants submit the following facts which are established by the record of this matter:

1. In November, 1987, Plaintiffs, through their counsel, Mark F. Robinson, contacted Defendants to assert claims for several thousand dollars allegedly spent by Plaintiffs to finalize the adoption at issue in this case. Shortly thereafter, Mr. Robinson discontinued his representation of Plaintiffs.

2. In August, 1988, D. David Lambert of Howard, Lewis and Petersen, made contact with Defendants to assert Plaintiffs' claims regarding the adoption. At this time, Plaintiffs were demanding payment of \$47,000.00. Defendants met with Mr. Lambert to discuss the possible resolution of Plaintiffs' claims. On February 17, 1989, Mr. Lambert's representation of Plaintiffs was terminated by Plaintiffs.

3. In 1989, Plaintiffs contacted officials of the Church of Jesus Christ of Latter-day Saints to bring pressure to bear upon Defendant Brian to capitulate to Plaintiffs' demands. Meetings were held between Plaintiffs, Defendant Brian, and Church officials. During this period, Plaintiffs alternated claiming that they were representing themselves or that they had retained counsel. At this time, Plaintiffs set their claims at an amount in excess of \$87,000.00.

4. Plaintiffs' original complaint in this matter was filed, pro se, on June 22, 1990. It contained claims for negligence, violation of child placement laws, breach of covenants of good faith and fair dealing, misrepresentation, intentional infliction and negligent infliction of emotional distress and breach of contract, and sought damages of an undisclosed amount. On or about July 2, 1990, Plaintiffs filed their first Amended Complaint, which contained the same claims for relief.

5. During the spring and summer of 1990, Plaintiffs claimed to be searching for legal counsel to represent them against Defendants. Plaintiffs publicized the matter by contacting scores of lawyers and law firms, sending out packets of information which contained, among other things, their claims against Defendant Brian then pending before the Utah State Bar.

6. On or about July 13, 1990, Defendants received a letter from D. Lanny Waite, a Las Vegas, Nevada, attorney who claimed to represent Plaintiffs in this matter. Mr. Waite's letter proposed settlement of the claims for \$180,000.00, and expressed his anticipation that the media attention already given to the case would increase due to Judge Brian's position. Plaintiffs later denied that Mr. Waite represented them.

7. Defendants answered the First Amended Complaint and on or about July 30, 1990, Defendant Nielsen & Senior noticed the Plaintiffs' depositions, to commence on August 17, 1990. On August 16, 1990, the day before the scheduled depositions, Jerold D. Conder and Peter L. Rognlie of the law firm of Conder & Wangsgard entered their appearance as counsel for Plaintiffs, and the scheduled depositions were postponed until they could become familiar with the case.

8. On or about September 12, 1990, Conder & Wangsgard filed Plaintiffs' Second Amended Complaint, alleging professional

malpractice, breach of contract, negligence and intentional infliction of emotional distress, and negligent misrepresentation.

9. The deposition of Plaintiff James Johnson finally began on November 28, 1990, more than three months after it was originally scheduled. The deposition lasted for three (3) days, until November 30, 1990, at which time a rift developed between Plaintiffs and their counsel over the course of the discovery and the case in general. The deposition was adjourned by Plaintiffs' counsel, indicating that Mr. Johnson was ill.

10. On or about January 16, 1991, Conder & Wangsgard withdrew as counsel for Plaintiffs, and Defendant Nielsen & Senior sent out a notice to appoint counsel or to appear in person on January 18, 1991.

11. On March 21, 1991, David R. Irvine wrote to Defendant Nielsen & Senior, indicating that he anticipated entering his appearance as counsel of record for Plaintiffs, and inquiring regarding a resolution of this matter by settlement. Notwithstanding the letter and preliminary discussions, Mr. Irvine did not enter an appearance for Plaintiffs as counsel in the case.

12. A scheduling conference was scheduled by the Court on

April 16, 1991. The conference was continued when Darwin C. Fisher of Nielsen, Hill & Fisher entered an appearance on behalf of Plaintiffs on April 15, 1991.

13. A new scheduling and settlement conference was scheduled by the Court on June 26, 1991, in Logan, Utah. This conference was held, however, on July 12, 1991, and Plaintiffs' counsel demurred on all discussions of a resolution of the case due to his need to familiarize himself with the case. A scheduling order was entered by this Court on August 13, 1991, setting discovery and motion cutoff, expert witness designation and pretrial conference dates, and a trial date of February 3-10, 1992.

14. Notwithstanding Defendants' numerous attempts to complete Plaintiffs' depositions, continuation of the deposition of Plaintiff James Johnson was delayed until October 10, 1991. The reasons given for the delay were that Mr. Fisher was unable to become sufficiently familiar with facts of the case before the deposition. The deposition examination was finally concluded on October 11, 1991, almost a year after it was begun.

15. A hearing was held in St. George, Utah on December 6, 1991, regarding Defendants' motions to dismiss, or in the alternative for summary judgment as to various of the causes of action in Plaintiffs' Second Amended Complaint. At the hearing, also, the parties discussed resolution of the case. Mr. Fisher

requested delay of the trial set for February 3-10, 1992, until later that month. Various scheduling dates were again set.

16. Pursuant to this Court's Order of January, 1992, Defendant Pat B. Brian was granted leave to file a Counterclaim. Upon motion of Plaintiffs' counsel, the trial date of February 18-28, 1992, was stricken and the trial set for May 5 through 14, 1992.

17. In February, 1992, this Court heard Defendants' motions to dispose of certain causes of action in Plaintiffs' Second Amended Complaint. Subsequent to this hearing, in April, 1992, counsel for Plaintiffs entreated the Court to strike the trial date set for May on the basis that discovery was still necessary to complete preparations for trial, that counsel could not be ready for the trial in so short a time, and that certain conflicts existed which necessitated that the date be re-set. Although opposed by Defendants, the motion to strike the trial date was granted by the Court. A new trial date was set for November 2-13, 1992, and the discovery cut-off date was extended through May, 1992.

18. In April, 1992, counsel for Plaintiffs filed with the Utah Supreme Court a petition for permission to appeal an interlocutory order of the trial Court with regard to its rulings dismissing certain causes of action in Plaintiffs' Second Amended Complaint. On April 7, 1992, this Court entered an order

striking the scheduling order, and continuing the trial, without date. The Utah Supreme Court denied the Plaintiffs' petition on May 21, 1992.

19. During discovery proceedings, Plaintiff gave notice of taking the deposition of Lizanne Magleby. On the date scheduled, Ms. Magleby did not appear. Counsel agreed to reschedule the deposition. Thereafter, Plaintiffs cancelled Ms. Magleby's deposition.

20. Thereafter, Defendants noticed the taking of the deposition of Ms. Magleby, whereupon Plaintiffs refused to cooperate in making Ms. Magleby available for the deposition. Defendants were required to obtain leave of the Court to depose Ms. Magleby after the discovery cut-off, notwithstanding that it was Plaintiff's dilatory conduct which delayed the scheduling of the deposition. The deposition was set for June 30, 1990. Plaintiffs moved, again, to delay on the grounds that their counsel would be unable to attend. The matter was argued to the court on June 25, 1992, and an Order entered that the deposition proceed as scheduled.

21. Plaintiffs have taken no action to move this case forward since Plaintiffs took the deposition of Brent Hoggan in February, 1992, approximately one year ago.

22. The deposition of Ms. Magleby, by Defendants, was the last action on the case.

23. On or about October 5, 1992, Darwin C. Fisher moved for a leave to withdraw as Plaintiff's counsel. Defendant Brian opposed the Motion, arguing that further delay, prejudicial to Defendants, would ensue. Mr. Fisher's Motion was granted and the appearance of Richard Coxson as counsel for Plaintiffs was acknowledged by the Court on November 19, 1992.

24. Defendants have not asked for a continuance at any time during these protracted proceedings and have consistently represented to the Court their readiness for trial.

ARGUMENT

I

PLAINTIFFS' DILATORY CONDUCT WARRANTS DISMISSAL OF THEIR CLAIMS WITH PREJUDICE AND ON THE MERITS

Rule 41(b), Utah Rules of Civil Procedure, empowers this Court to dismiss an action, with prejudice and on the merits, for failure of the Plaintiff to prosecute. "The burden is upon the Plaintiff to prosecute a case in due course without unusual or unreasonable delay." Charlie Brown Construction Co., Inc. v. Leisure Sports Incorporated, 740 P.2d 1368, 1370 (Utah App. 1987) (quoting Lake Meredith Reservoir Co. v. Amity Mutual Irrigation Co., 698 P.2d 1340, 1344 (Colo. 1985)). Plaintiffs must "prosecute their claims with due diligence, or accept the penalty of dismissal." Id., (quoting Maxfield v. Fishler, 538 P.2d 1323, 1325 (Utah 1975)). Dismissal for failure to prosecute is a decision within the broad discretion of the trial court. Id.

The Court of Appeals has held that it will not interfere with the trial court's decision unless it clearly appears that the Court has abused its discretion and that there is a likelihood that injustice resulted. Id.

The Utah Supreme Court provided the trial courts with guidance on Rule 41(b) dismissals in Westinghouse Electrical Supply Co. v. Paul W. Larsen Contractor, Inc., 544 P.2d 876, 879 (Utah 1975). In that case, the Court reviewed a Rule 41(b) dismissal for failure to prosecute and identified the factors to be considered in determining whether such a dismissal is appropriate. Those factors were articulated recently by the Court of Appeals as follows:

The Westinghouse court delineated five factors in addition to the length of time elapsed to determine the propriety of a dismissal for failure to prosecute: (1) the conduct of both parties; (2) the opportunity each party has had to move the case forward; (3) what each party has done to move the case forward; (4) the amount of difficulty or prejudice that may have been caused to the other side; and (5) "most important, whether injustice may result from the dismissal."

Meadow Fresh Farms v. Utah State University, 813 P.2d 1216, 1219 (Utah App. 1991). The following facts of Plaintiffs' conduct are undisputed and establish that dismissal is proper, pursuant to Westinghouse.

- A. Plaintiffs' conduct has repeatedly delayed the movement of this matter to trial while Defendants have consistently moved the case forward.

As the facts of this Memorandum illustrate, Plaintiffs have failed to move the case forward. Plaintiffs have been represented by numerous attorneys in this matter, the withdrawal of each resulting in delay. Plaintiffs have amended their Complaint twice, and have, three times, requested a continuance of a trial setting. Plaintiff James Johnson's deposition was rescheduled several times and finally completed more than a year after noticed. In April, 1992, Plaintiffs filed with the Utah Supreme Court a petition for interlocutory appeal, which required that the fourth trial setting for November, 1992, be stricken. Although the petition was denied and Plaintiffs were free to proceed with their case, Plaintiffs have taken no action at all since February, 1992.

Even this abbreviated listing of facts demonstrates the Plaintiffs' lack of determination to move the case forward to trial. Defendants, however, have proceeded with the case, pursuing discovery, narrowing the issues for trial by Motion, and consistently representing to the Court their readiness for trial. Defendants have moved the case forward whenever there has been opportunity to do so.

B. Plaintiffs' failure to prosecute the case with diligence caused difficulty and prejudice to Defendants.

Plaintiffs' numerous changes of counsel, amendments to pleadings, reluctant compliance with Defendants' discovery requests and inability to go forward with trial when set have greatly increased Defendants' burden of defending this action. Defendants have been deprived of the benefits of a prompt resolution of the claims against them. Delay has made the presentation of evidence at trial more difficult, prejudicing Defendants, whose defenses require the accurate testimony of third parties who may become unavailable with the passage of time. Further, delay has unnecessarily increased the cost of defense.

Defendants have lived more than five and one-half years with the Plaintiffs' threats and harrassment. Defendants have prepared to respond to Plaintiffs' claims on the merits but Plaintiffs have stalled every effort to place the matter before the Court.

C. Dismissal will not result in injustice to Plaintiffs.

Plaintiffs must diligently prosecute their claims or accept the penalty of dismissal. Charlie Brown Construction Co., Inc. v. Leisure Sports Incorporated, 740 P.2d at 1370. Such dismissal is not unjust when it is Plaintiffs' conduct alone that invites dismissal or could have avoided it. The Plaintiffs in this case have shown no determination to get their claims resolved on the

merits. Presumably, they are aware of the consequences of their lack of diligence.

Defendants acknowledge that this Court must "balance the need to expedite litigation and efficiently utilize judicial resources with the need to allow parties to have their day in court." Meadow Fresh Farms v. Utah State University, 813 P.2d 1216, 1219 (Utah App. 1991). Notwithstanding, when the facts of this matter are evaluated against the factors set forth in Westinghouse, dismissal is, clearly, just.

II

DISMISSAL OF THIS CASE WOULD BE CONSISTENT WITH PRIOR DECISIONS OF UTAH COURTS

In Maxfield v. Rushton, 779 P.2d 237 (Utah App. 1989), the Court of Appeals upheld the trial court's dismissal of Maxfield's Complaint for lack of prosecution. The facts considered by the Court were these: The plaintiff filed his Complaint in 1980 and amended it twice, each time adding new theories of the case. Id. at 239. Plaintiff moved for summary judgment three times and filed an interlocutory appeal for the trial Court's refusal to grant it. The appeal was denied by the Supreme Court. Two of plaintiff's attorneys withdrew from representation. Plaintiffs objected to all three of the trial dates set. When plaintiff moved to amend the Complaint a third time and, at the same time, his third attorney moved to withdraw, the trial court dismissed

the action for failure to prosecute the action in a timely manner. Id.

The Court of Appeals reviewed the facts in light of the Westinghouse factors, stating that "there is more to consider in determining if a dismissal for failure to prosecute is proper than merely the amount of time elapsed since the suit was filed." Maxfield v. Rushton, 779 P.2d at 237 (quoting Westinghouse Electrical Supply Co., 544 P.2d at 879). With regard to the issue of injustice, the court held:

[W]hile we recognize that injustice could result from dismissal of this case, in that Maxfield will lose whatever interest he may have in the disputed property without having the opportunity to argue his case on its merits, we conclude that he had more than ample opportunity to prove his asserted interest and simply failed to do so. Such nonaction is inexcusable, not only from the standpoint of the parties, but also because it constitutes abuse of the judicial process.

Maxfield v. Rushton, 779 P.2d at 240-241. It is apparent that the court did not equate the activity in the case with timely prosecution.

The special concurrence of Judge Orme is particularly pertinent to the case at hand. The concurring opinion identified the following conduct of plaintiff as determinative:

Maxfield's latest counsel's motion for leave to withdraw coupled with his motion for leave to file yet another amended complaint constituted, taken together, a concession by Maxfield that he was nowhere near being ready to try his case in the matter for a few days even though the action had been pending for the better part of a decade. It is the length of time this action had been pending, coupled with Maxfield's obvious

unreadiness that makes sua sponte dismissal appropriate in this case.

Maxfield v. Rushton, 779 P.2d at 241.

Plaintiffs began a course of threats and harrassment toward Defendants nearly five and one-half years ago. Defendants received demands for payment, by Plaintiffs or by counsel on their behalf, for nearly three years before the original Complaint was filed. The action has been pending for two and one-half years, during which time Defendants have diligently prepared for trial. Plaintiffs have not prepared for trial, but have pressed Defendants with their demands for ever increasing amounts of damages. Defendants are entitled to an end to threats, by resolution of this matter.

This Court is, also, entitled to relief. As in Maxfield, Plaintiffs' nonaction is inexcusable not only from Defendants' standpoint, but because it constitutes abuse of the judicial process. Dismissal, therefore, would be consistent with the precedents of the Utah Supreme Court and the Court of Appeals.

The Westinghouse factors remain the standard governing dismissal, whether the trial court dismisses, sua sponte, an action for failure to prosecute, pursuant to Rule 4-103, or upon motion, pursuant to Rule 41(b). Meadow Fresh Farms v. Utah State University, 813 P.2d 1216 1219 (Utah App. 1991). As Defendants have demonstrated above, an examination of the facts of this case in light of those factors supports dismissal of this action with

prejudice and on the merits. It is within this Court's discretion to grant Defendants' Motion to Dismiss.

CONCLUSION

Resolution of this matter is long overdue. For the reasons set forth above, Defendants' Motion to Dismiss Plaintiffs' Complaint for failure to prosecute should be granted.

Respectfully submitted this 3rd day of February, 1993.

NIELSEN & SENIOR

By Marilynn P. Fineshriber
Arthur H. Nielsen
Larry L. Whyte
Marilynn P. Fineshriber
Attorneys for Defendant Nielsen &
Senior

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of February, 1993, I have caused to be sent, through the United States mails, first-class postage prepaid, a true and correct copy of the foregoing MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S SECONDED AMENDED COMPLAINT addressed as follows:

Richard C. Coxson, A5933
Attorney for Plaintiffs
275 North Main
Spanish Fork, UT 84660

Marilynn P. Fineshriber

same church. Defendant contacted Mark Howard and Richard Stowe without the consent or knowledge of the Plaintiffs. See Defendant's Statement of Undisputed Facts No. 6.

2. In the meeting with Mark Howard, Defendant Pat Brian told Mark Howard that the Johnson's were not telling the truth and witnesses would be brought forth to prove that the Plaintiffs were not telling the truth, that the Plaintiffs have been involved in several law suits thus Defendant was implying that the Johnsons have brought this suit against Pat Brian only to gain money from Defendant Pat Brian through legal process to which they were not entitled and had done this not only to Pat Brian but to others.

3. Defendant Pat Brian, or an individual on behalf of Defendant Pat Brian contacted Alden Porter, a member of the Second Quorum of the Seventies in the Church of Jesus Christ of Latter Day Saints. As a result of the contact, Alden Porter contacted Mark Howard concerning the discussions Mark Howard had with the Johnsons.

4. As a result of the conversations between Mark Howard and Defendant Pat Brian and others on behalf of Pat Brian, Mark Howard informed the Johnsons that it was his opinion that they *should* settle the matter for the amount of \$30,000.00.

5. Mark Howard was contacted by Arthur Nielsen, a principle in the firm of Nielsen & Senior and told that Pat Brian had indeed made a mistake, but it was a small mistake.

6. Alden Porter, as a result of his contact with Pat Brian or a representative of Pat Brian contacted James Johnson and requested from him information regarding the law suit between the Plaintiffs and Defendant Pat Brian and encouraged the Plaintiffs to settle.

7. Defendant Pat Brian was fully aware of the bonding that was taking place between the Plaintiffs and the minor child and had frequent contact with Plaintiff James Johnson and was fully aware of the bonding that took place in the Plaintiffs family with the minor child.

8. Defendant Pat Brian informed the Plaintiffs that there were no problems with the adoption and the Plaintiffs need only to wait the period of six months for the adoption proceedings to be filed, when in fact, the Defendant Pat Brian had done nothing to secure the consent of the natural mother nor to finalize the adoption proceedings leaving the Plaintiffs in a situation where the minor child could be taken from their presence at any time by the natural mother.

9. The Plaintiffs have suffered severe emotional trauma.

10. Defendant Pat Brian personally or through representatives contacted representatives of the FBI and SBA in order to influence the Plaintiffs to dismiss their suit.

11. Plaintiffs did not write to or speak with Stuart Glazier

outrageous. The Samms' holding has been reaffirmed in White v Blackburn, 787 P.2d 1315 (Utah App. 1990), In Re Estate of Grimm, 784 P.2d 1238 (Utah App. 1989), and Beiser v Lohner, 641 P.2d 93 (Utah 1982).

POINT II

THERE ARE GENUINE ISSUES OF MATERIAL FACT AS TO WHETHER DEFENDANT INTENTIONALLY INFLICTED EMOTIONAL STRESS UPON THE PLAINTIFFS.

DISCUSSION

In order to support a Cause of Action for intentional infliction of emotional distress, the Plaintiff must show:

1. Outrageous conduct by the Defendant;
2. The Defendant's intent to cause, or the reckless disregard of the probability of causing, emotional distress;
3. Severe emotional distress;
4. An actual or proximate causal link between the tortuous conduct and the emotional distress. White v Blackburn, supra.

Plaintiff must show the offensive behavior to have been perpetuated by the Defendant with the purpose of inflicting emotional distress or where any reasonable person would have known that such would result and Defendants' actions are of such a nature as to be considered outrageous and intolerable in that they offend

on several occasions regarding Defendant Pat Brian during the Spring, Summer and Fall of 1989. See Defendants' Statement of Undisputed Facts No. 2.

12. Plaintiffs did not repeatedly insist during 1989 that Stuart Glazier arrange and participate in a meeting between Plaintiffs and Defendant Pat Brian regarding allegations by the Plaintiffs against him. See Defendant's Statement of Undisputed Facts No. 3.

13. Plaintiffs did not threaten to file a law suit against Defendant Brian if he did not pay a large sum of money to Plaintiffs in the meeting with Stuart Glazier. See Defendant's Statement of Undisputed Facts No. 5.

14. Plaintiffs, during the meeting with Stuart Glazier, did not confirm for Defendant Brian the business address of Richard Stowe in Draper, Utah and suggest the he meet with and discuss the Plaintiffs allegations with Richard Stowe. See Defendant's Statement of Undisputed Facts No. 7.

15. Mr. Mark Howard was requested by Defendants to encourage the Plaintiffs to settle this matter. See Defendant's Statement of Undisputed Facts No. 18, 19 and 20.

ISSUE I

IS DEFENDANT PAT BRIAN ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFF'S CAUSE OF ACTION FOR THE INTENTIONAL INFLICTION OF

EMOTIONAL DISTRESS?

LAW

A Motion for Summary Judgment should be denied where the evidence presents a genuine issue of material fact. Young v Felornia, 212 Utah 646, 244 P.2d 862, Cert. den., 344 U.S. 886, 73 S.Ct. 186, 97 L.Ed. 685, (1952); Ruffinengo v Miller, 579 P.2d 342 (Utah 1978).

POINT I

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS IS RECOGNIZED AS A TORT IN THE STATE OF UTAH.

DISCUSSION

The State of Utah allows recovery for the intentional infliction of emotional distress without a showing of physical injury.

"The best considered view recognizes an action for severe emotional distress though not accompanied by bodily impact or physical impact or physical injury, where Defendant intentionally engaged in some conduct toward the Plaintiff, (a) with the purpose of inflicting emotional distress, or, (b) any reasonable person would have known that such would result; and his actions are of such a nature as to be considered outrageous and intolerable in that they offend against the generally accepted standards of decency and morality." Samms v Eccles, 11 Utah 2d 289, 358 P.2d 344, 346-47 (1961); See also White v Blackburn, 787 P.2d 1315 (Utah App. 1990); In Re Estate of Grimm, 784 P.2d 1238 (Utah App. 1989).

The Samms' holding corresponds with Section 46(1) of the Restatement of Torts 2d and in addition provides a test for determining whether the Defendants actions were sufficiently

against generally accepted standards of decency and morality. Conduct to be outrageous must be so extreme as to exceed all bounds of that usually tolerated in a civilized community. White v Blackburn, supra.

A. OUTRAGEOUS CONDUCT BY DEFENDANT

The element of outrageous conduct is the distinguishing characteristic of intentional infliction of emotional distress. Whether Defendants conduct was sufficiently outrageous is a principle focus of the Court's inquiry in determining whether a valid cause of action exists.

Defendants outrageous conduct may arise in different ways but the acts complained of must offend against generally accepted standards of decency and morality. Mere insults, indignities, threats, annoyances, petty oppression or other trivialities are not sufficient to support a cause of action. Restatement 2d of Torts, Section 46, comment D (1964).

Outrageous conduct has been found where the circumstances of the case are unusually aggravated. In Samms v Eccles, supra, the Court found that Defendant's offensive solicitations to engage in sex over a period of months and where the Defendant also indecently exposed himself to the Plaintiff was conduct adjudged as extreme and intolerable. In addition, an abuse of a position of real or

apparent power or authority over the Plaintiff is frequently found to be outrageously offensive. Thus, the California Supreme Court held an insurance company liable for it's refusal to settle the claim within the policy limit where a subsequent jury award against the insured rendered the insured indigent. Unruh v Truck Ins. Exch., 7 Cal.3d 616, 498 P.2d 1063, 102 Cal.Rptr. 815 (1972). Also, a rubbish collectors association was held liable for intentional infliction of mental distress when it threatened to beat up the Plaintiff and put him out of business unless he paid a substantial sum to the association for its receipt of an account from one of its member. State Rubbish Collectors Assn. v Siliznoff, 38 Cal.2d 330, 240 P.2d 282 (1952).

There is a genuine issues of material fact as to whether or not there has been outrageous conduct by the Defendant Pat B. Brian. Those issues are:

1. Whether Defendant Pat Brian failed to obtain the written consent of the natural mother because he did not realize that the written consent that he had obtained from the natural mother prior to the birth of the child was not sufficient consent to finalize the adoption or that Defendant Pat B. Brian was too busy with other cases or otherwise occupied with becoming a judge to spend the time necessary to finalize the adoption.
2. Whether Defendant Pat Brian was required to comply with the Interstate Compact Act and failed to do so.
3. Whether Defendant Pat Brian failed to inform the Plaintiffs that he would not obtain the written consent of the natural mother, but would rely upon the theory of abandonment in order to finalize the adoption of the

minor child by the Plaintiffs.

4. Whether Defendant Pat Brian placed the minor child in the physical custody of the Plaintiffs stating that the child was now theirs and to take the child and raise it as their own.
5. Whether Defendant Pat Brian did not contact the natural mother to obtain her consent or finalize the adoption from the birth of the minor child until after being required to do so by the Plaintiffs in order to finalize the adoption.
6. Whether Defendant Pat Brian attempted to use Alden Porter and Richard Stowe to influence and/or coerce the Plaintiffs to drop their law suit.
7. Whether Defendant Pat Brian, through co-Defendant Nielsen & Senior, contacted the FBI representatives and SBA representatives in order to pressure Plaintiffs into dropping their suit against the Defendant Pat B. Brian.

Conduct to be outrageous must be so extreme as to exceed all bounds of that usually tolerated in a civilized community. Samms v Eckle, supra. Generally, conduct is outrageous where the recitation of the facts to an average member of the community would arouse his resentment against the actor and lead him to exclaim "outrageous". The conduct of Pat Brian would lead any member of the community to exclaim "outrageous" and arouse his resentment against the Defendant Pat Brian.

Defendant Pat Brian's actions are extreme and intolerable. To have placed a child in the physical custody of prospective adoptive parents without informing them that the natural mother may not give her consent to the adoption and that after bonding with the child,

the adoptive parents may lose that child is extreme and intolerable conduct on behalf of the Defendant. Also, Defendant Pat Brian, being an attorney, was in a position of authority over the Plaintiffs. He was required to understand the law of adoption and by informing the Plaintiffs that the child was theirs and to take the child home and to raise that child as one of their own and that there were no problems with the adoption, he used his position to place the Plaintiffs in a position where they may lose their adoptive daughter while believing that the Defendant had performed all the work that he was required to perform as their attorney, which included obtaining the consent of the natural mother and father and complying with all statutory requirements in order for the adoption to be finalized.

Therefore, there is an issue of material fact as to whether or not the Defendant's conduct was outrageous.

B. THE DEFENDANT'S INTENT TO CAUSE OR THE RECKLESS DISREGARD OF PROBABILITY OF CAUSING EMOTIONAL DISTRESS.

There are issues of material fact as to whether or not Defendant Pat Brian intended to cause or recklessly disregarded the probability of causing emotional distress to the Plaintiffs. The issues of material fact are:

1. Whether Defendant Pat Brian totally disregarded the bonding between the Plaintiffs and the minor child.

2. Whether Defendant Pat Brian placed the minor child in the physical possession of the Defendants stating that the child was now theirs and to take the child home and raise it as their own.
3. Whether Defendant Pat Brian placed the minor child in the physical custody of the Plaintiffs without informing them that he would not seek the written consent of the natural mother but would finalize the adoption on the theory of abandonment and Defendant failed to inform the Plaintiffs, after having the child in their physical custody that after caring for and loving the child and bonding to that child for a period of a year or more could loose that minor child if abandonment on the part of the natural mother could not be shown.
4. Whether Defendant Pat B. Brian and/or others representing him contacted the FBI and SBA causing further financial concerns and further Court proceedings to the Plaintiffs with the express intent to discourage the Plaintiffs from continuing to proceed with their law suit against the Defendant.
5. Whether Defendant Pat Brian and/or others representing him contacted church authorities to influence the Plaintiffs to dismiss their suit against the Defendant.

The Defendant is most clearly liable where he acts with the purpose of inflicting emotional distress. Samms v Eccles, supra. Even where the ultimate purpose is impersonal, such as infliction of emotional distress for the purpose of debt collection, if the intent of the result of the conduct is mental suffering, the Defendant will be found liable. Duty v General Fin. Co., 154 Tex. 16, 273 S.W.2d 64 (1954). Certainly the contacting of the representatives of the FBI and SBA and the representatives of the Church of Jesus Christ of Latter Day Saints by Pat Brian and/or his

representatives was an intentional act performed by the Defendant with the intent to cause the Plaintiffs mental suffering and persuade them to dismiss their law suit. Defendants acts in informing others that the Plaintiffs had been involved in many law suits is also an act by Defendant to deliberately cause the Plaintiffs mental suffering and influenced the Plaintiffs to dismiss their law suit. Defendant's acts to use the Plaintiffs name and to have the names made public is also a deliberate act by Defendant to cause Plaintiffs mental suffering and influence the Plaintiffs to dismiss their law suit. See Attached Exhibit A attached hereto and incorporated herein by this reference.

Reckless or wanton behavior may also result in liability whether the Defendants acts and deliberate disregard of a high degree of probability that the emotional distress will follow. Restatement 2d of Torts, Section 46, comment I (1964). There is no question that any reasonable person would have known that emotional distress would result where Plaintiffs were suddenly confronted or threatened with the loss of their adoptive daughter. The loss of an adoptive daughter is akin to the death of a natural child. Any reasonable person would have known that emotional distress would result from the death of a natural child. See Affidavit of Dr. Ralph Gant marked as Exhibit B attached hereto and incorporated herein by this reference.

All of the actions of the Defendant show that he intended to cause emotional distress or that he recklessly disregarded the probability of causing emotional distress to the Plaintiffs.

C. SEVERE EMOTIONAL DISTRESS.

Restatement 2d of Torts defines emotional distress as including all highly unpleasant mental reactions. Restatement 2d of Torts, Section 46, Comment J (1964). The California Supreme Court has held that mental suffering includes nervousness, grief, anxiety, worry, shock, humiliation, and indignity as well as physical pain. Criscy v Security Ins. Co. of New Haven, Conn., 66 Cal.2d 425, 426 P.2d 173, 58 Cal.Rptr. 13 (1967). Restatement 2d of Torts further states that the law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it. Restatement 2d of Torts, Section 46, Comment J (1964). This requirement of severity helps to ensure that the harm alleged by the Plaintiff is real. Nevertheless, in Utah the cause of action for emotional distress exists even where the Plaintiffs mental suffering is not accompanied by bodily impact or physical injury. Samms v Eccles, supra.

There are issues of material fact regarding the severity of the emotional distress of the Plaintiffs. The issues are:

1. Whether the Plaintiffs suffer from Post Traumatic Stress Disorder.

2. Whether Plaintiffs have been unable to live a normal life by living in constant paranoia, nausea, fear, etc.
3. Whether Plaintiffs have been unable to function as a result of the actions of the Defendant. Plaintiff James Johnson has been unable to obtain a meaningful position in order to support his family. Plaintiff Jennifer Johnson has been unable to care for her family, to provide for them the motherly love and attention that they require. See Exhibit B, Affidavit of James Johnson marked as Exhibit C attached hereto and incorporated herein by reference and Affidavit of Jennifer Johnson marked as Exhibit D attached hereto and incorporated herein by reference.

It is quite clear from the Affidavits of Dr. Gant that the Plaintiffs suffer from severe emotional distress, that Post Traumatic Stress Syndrome and major depression are clearly severe emotional distress.

D. AN ACTUAL OR PROXIMATE CAUSAL LINK BETWEEN THE TORTUOUS CONDUCT AND THE EMOTIONAL DISTRESS.

There is a dispute of material facts as to whether there is an actual or proximate casual link between the tortuous conduct of the Defendant and the emotional distress suffered by the Plaintiffs. The issues are:

1. Whether Defendants failure to inform the Plaintiffs that they may loose the child after the child had been placed in their physical custody and being informed by the Defendant that the child was theirs and they should take the child home and raise it as their own.
2. Whether the emotional distress of the Defendants began with the learning by Plaintiffs that the child that had been in their possession for nearly one year and they

believed to be their own could be taken from their possession at any time and that the natural mother did have the right to take that child from their possession.

3. Whether Defendant Pat Brian failed to inform the Plaintiffs at any time that the Plaintiffs may lose the custody of the minor child and that the natural mother had full right to take the child from their custody and raise the child.

Verdicts for personal injuries will not be sustained where there is no expert medical testimony establishing causation. W. Prosser, Handbook of the Law of Torts, Section 12 at 51, n. 40 (4th Ed. 1971). Dr. Gant states that the emotional distress suffered by the Plaintiffs is caused by the threatened loss of the adoptive daughter of the Plaintiffs.

There is no question that Defendant Pat Brian's conduct caused the emotional distress of the Plaintiffs.

POINT III

REASONABLE MEN MAY DIFFER AS TO WHETHER DEFENDANT PAT B. BRIAN IS LIABLE FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS.

DISCUSSION


Where reasonable men may differ, it is for the jury subject to the control of the court to determine whether in the particular case the conduct has been sufficiently outrageous to result in liability. Gygi v Storch, 28 Utah 2d 399, 503 P.2d 449, 450

(1972). Quoting Restatement of Torts 2d, Section 46, h. The facts in this matter support the assertion that reasonable men could differ as to whether the conduct of Defendant was so outrageous and extreme that it offended the generally accepted standards of decency and morality. Certainly, there is a dispute as to whether or not the Defendant intentionally or with reckless disregard failed to obtain the consent of the natural mother and placed the minor child in the custody of the Plaintiffs, assuring them that the child was theirs and to take the child home and raise it as their own and contacting FBI representatives and SBA representatives and church representatives in order to influence the Plaintiffs to dismiss their lawsuit against the Defendants.

CONCLUSION

Since there are issues of material facts, the Motion for Partial Summary Judgment should be denied.

RESPECTFULLY SUBMITTED this 2nd day of January, 1992.


DARWIN C. FISHER
Attorney for Plaintiffs


CERTIFICATE OF MAILING

I hereby certify that I personally mailed a copy of the foregoing on this 3rd day of January, 1992, by first-class, U.S. mail, postage prepaid, to the following:

Judge Pat B. Brian
c/o Mark Dowdle
915 W. 100 S.
Salt Lake City, UT 84104

Arthur Nielsen
Larry Whyte
Nielsen & Senior
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Chris Schmutz
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Telephone No.: (801) 532-1900

Fourth Judicial District Court
Office of the Clerk
12-30-91
9

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

JAMES A. JOHNSON and JENNIFER L. JOHNSON,)	
	)	MEMORANDUM IN SUPPORT OF
Plaintiffs,	)	MOTION TO DISMISS OR IN THE
	)	ALTERNATIVE FOR PARTIAL
v.	)	SUMMARY JUDGMENT
)	
NIELSEN & SENIOR, a Utah corporation; PAT B. BRIAN, and CHRIS L. SCHMUTZ,	)	Civil No.: 900400460CN
)	
Defendants.	)	Judge VeNoy Christoffersen
)	

Defendant Nielsen & Senior hereby submits the following Memorandum in Support of its Motion to Dismiss or in the Alternative for Partial Summary Judgment as to the Fifth Claim for Relief for negligent misrepresentation as contained in Plaintiffs' Second Amended Complaint.

STATEMENT OF UNDISPUTED FACTS

1. In January 1986, Plaintiffs retained Defendant Nielsen & Senior and Pat B. Brian in a private adoption matter.

2. On or about June 27, 1986, Plaintiffs obtained custody of the infant child.

3. From June 27, 1986 to date, the infant child has been in the continuous care and custody of Plaintiffs.

4. The natural mother did not give her formal written consent as required by law to Plaintiffs' adoption of the infant child until October 1987.

5. In July 1987, the natural mother initiated a Habeas Corpus proceeding allegedly for the purpose of regaining custody of the infant child.

6. In July 1987, Plaintiffs retained a new law firm in the private adoption matter.

7. In October 1987, the natural mother gave her formal written consent to the adoption and Plaintiffs' adoption of the infant child was finalized.

8. In June 1990, Plaintiffs initiated the instant action against this Defendant and others.

9. Pursuant to order of this Court, discovery cut-off period is December 30, 1991.

10. The allegations contained in Plaintiffs' Fifth Claim are not stated with particularity.

11. No evidence has been produced establishing or supporting Plaintiffs' Fifth Claim for Relief or any of the allegations contained therein.

ARGUMENT

A. Plaintiffs' Fifth Claim for Relief for Negligent Misrepresentation should be Dismissed.

Rule 9(b) of the Utah Rules of Civil Procedure requires that "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity" This requirement, that circumstances constituting fraud shall be stated with particularity includes not only allegations of common law fraud, of which negligent misrepresentation is an outgrowth, but reaches all circumstances where the pleader alleges the kind of misrepresentations, omissions, or other deceptions covered by the term "fraud" in its broadest dimension. Williams v. State Farm Insurance Co., 656, P.2d 966 (Utah 1982). It is undisputed that the averments contained within Plaintiffs' Fifth Claim for Relief for negligent misrepresentation do not contain the basic facts required by Rule 9(b) of the Utah Rules of Civil Procedure, and are not set forth with the requisite particularity. Therefore, Defendant Nielsen & Senior is entitled to an order dismissing Plaintiffs' Fifth Claim for Relief as a matter of law. Heathman v. Hatch, 13 Utah 2d. 266, 372 P.2d 990 (1962).

B. Defendant Nielsen & Senior is Entitled to Partial Summary Judgment as a Matter of Law.

It has long been recognized that the major purpose of summary judgment is to avoid an unnecessary trial by allowing the parties to pierce the pleadings to determine whether there is a

genuine issue to present to the fact finder. Reagan Outdoor Advertising, Inc. v. Lundgren, 692 P.2d 776 (Utah 1984).

The Utah Supreme Court in Christenson v. Commonwealth Land Title Insurance Company, 666 P.2d 302, 305 (Utah 1983) set forth the required elements to establish negligent misrepresentation.

Negligent misrepresentation is a tort which grew out of common-law fraud. We defined it in Jardine v. Brunswick Corp., 18 Utah 2d. 378, 381, 423 P.2d 659, 662 (1967), as follows: Where (1) one having a pecuniary interest in a transaction, (2) is in a superior position to know material facts, and (3) carelessly or negligently makes a false representation concerning them, and (4) expecting the other party to rely and act thereon, and (5) the other party reasonably does so, and (6) suffers loss in that transaction, the representor can be held responsible if the other elements of fraud are also present. [Subdivision added.] (Emphasis added.)

See Masters v. Worsely, 777 P.2d 499 (Utah Ct. App. 1989), for the other elements required to establish fraud.

The discovery period expires today. To date, no evidence has been forthcoming to support Plaintiffs' claim of negligent misrepresentation, or any of the allegations contained within Plaintiffs' Fifth Claim for Relief. Furthermore, no evidence has been forthcoming, and, in fact, none exists to support or demonstrate the existence of the required elements of negligent misrepresentation as set forth above. As a result, Defendant is entitled to partial summary judgment as to Plaintiffs' Fifth Claim for Relief as a matter of law, inasmuch as it is clear from the undisputed facts, answers to interrogatories, depositions, and all other discovery, that Plaintiffs are unable to prevail on

said cause of action. See Condor v. A.L. Williams & Associates, 739 P.2d 634 (Utah Ct. App. 1987); Bray Lines v. Utah Carriers, Inc., 739 P.2d 115 (Utah Ct. App. 1987). Aird Insurance Agency v. Zions First National Bank, 612 P.2d 341 (Utah 1980).

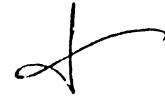
CONCLUSION

Plaintiffs have failed sufficiently to plead their Fifth Claim for Relief of negligent misrepresentation. However, even if properly pleaded, no evidence exists to support said claim or any of the required elements thereof. Therefore, Defendant Nielsen & Senior submits that it is entitled to an order either dismissing Plaintiffs' Fifth Claim for Relief or for an order of partial summary judgment in its favor against the Plaintiffs on Plaintiffs' Fifth Claim for Relief and respectfully requests that this Court enter an order to that effect.

DATED this 20th day of December, 1991.

By: Arthur H. Nielsen
Arthur H. Nielsen, Esq.
Larry L. Whyte, Esq.
of Nielsen & Senior, P.C.
Attorneys for Defendant
Nielsen & Senior

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Telephone No.: (801) 532-1900

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

JAMES A. JOHNSON and JENNIFER)	
L. JOHNSON,	)	DEFENDANT NIELSEN & SENIOR'S
	)	REPLY TO PLAINTIFFS'
Plaintiffs,	)	MEMORANDUM IN OPPOSITION TO
	)	DEFENDANTS' MOTION FOR PARTIAL
v.	)	SUMMARY JUDGMENT
)	
NIELSEN & SENIOR, a Utah	)	Civil No.: 900400460CN
corporation; PAT B. BRIAN, and)	
CHRIS L. SCHMUTZ,	)	Judge VeNoy Christoffersen
)	
Defendants.)	

Defendant Nielsen & Senior submits the following Reply to Plaintiffs' Memorandum in Opposition to Defendants' Motion for Partial Summary Judgment.

DISPUTED STATEMENT OF FACTS

Defendant Nielsen & Senior disputes Plaintiffs' Statement of Undisputed Facts as follows:

No. 3 - Pat Brian was an employee, but was not a principal of Nielsen & Senior during 1986.

- No. 5 - Defendants did obtain the consent of the natural mother to the adoption prior to the birth of the minor child. Thereafter, despite Defendants' attempts, the natural mother refused to give her written consent to the adoption of the minor child, until the matter was settled by the payment to the natural mother of more money.
- No. 6 - Defendants, not knowing the identity of the natural father, obtained, in January, 1987, a certificate from the Utah State Department of Health certifying that no notice of paternity had been filed by any person claiming to be the natural father of the minor child.
- No. 7 - Defendants contacted both the Utah and Texas Interstate Compact Directors. The requirements of the Interstate Compact Act were ultimately waived upon the request of the Utah Director of the Interstate Compact, William Ward.

ARGUMENT

I.

PLAINTIFFS MAY NOT AS A MATTER OF LAW, MAINTAIN A CAUSE OF ACTION FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS.

In 1988, the Utah Supreme Court in Johnson v. Rodgers, 763 P.2d 771, 782 (Utah 1988) recognized that a cause of action for negligent infliction of emotional distress could be maintained,

within the parameters of Section 313 of the Restatement (Second) of Torts (1965). To recover under Section 313, Plaintiffs must plead and prove that: (1) they witnessed a physical an injury to a closely related person; (2) they suffered mental anguish manifested as a physical injury; and (3) they were within the zone-of-danger so as to be subject to an unreasonable risk of bodily harm created by defendant's negligence. Contrary to their assertions, Plaintiffs have not met any of these three requirements.

In adopting Section 313 of the Restatement (Second) of Torts, the Utah Supreme Court in Johnson analyzed and rejected other theories of recovery for negligent infliction of emotional distress. See Johnson at pp. 780-82. Specifically, the court analyzed the case of Molien v. Kaiser Foundation Hospital, 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980) and rejected it.

Plaintiffs are unable as a matter of fact and law, to meet the criterion set forth in Section 313. Clearly the case law of Utah does not allow the maintenance of a cause of action for emotional distress or the recovery of damages therefore except in the limited circumstances set forth in those cases, which circumstances do not exist in the instant action. Plaintiffs' claims for recovery of damages for emotional distress are squarely contrary to Utah law and should be summarily rejected by this Court.

II.

PLAINTIFFS MAY NOT RECOVER DAMAGES FOR EMOTIONAL DISTRESS.

The case of Lambert v. Sine, 123 Utah 145, 256 P.2d 241 (1953) is distinguishable from the instant action. Lambert v. Sine involved intentional not negligent conduct or wrong. The Supreme Court, following previously established guidelines, properly awarded damages for emotional distress, although it is interesting to note they awarded only \$250.

Plaintiffs' use of and citation to California authority to support their theory of recovery for emotional distress damages absent any physical injuries, is further misplaced for at least two reasons: First and foremost, the case of Tara Motors v. Jasper, 226 Cal. App. 3d 640, 276 Cal. Rptr. 603 (1990), simply follows the earlier California decision of Molien, supra, which was affirmatively rejected by the Utah Supreme Court in Johnson, supra. It should be noted that the Utah Supreme Court, as recently as 1990, followed Johnson v. Rodgers in holding that a plaintiff's failure to meet the standard enunciated in Section 313 would bar recovery for negligent infliction of emotional distress. See Dalley v. Utah Valley Regional Medical Ctr., 791 P.2d 193, 201 (Utah 1990). See also White v. Blackburn, 787 P.2d 1315, 1318 (Utah App. 1990).

Second, Plaintiffs use of and citation to JuDay v. Rotunno & Rotunno, 276 Cal. Rptr. 445 (1990) is inappropriate. The California Supreme Court entered an order on April 25, 1991, that

the JuDay opinion not be officially published and Plaintiffs' citation to it is in violation of California Rules of Court, Rule 977, and Rule 4-508 of the Utah Code of Judicial Administration both of which prohibit use or citation of unpublished opinions absent circumstances not present in this case. Since the JuDay opinion has no precedential value it should be ignored.

Even if this Court were to follow California law on this issue, it is also significant to note that the very case upon which Plaintiffs rely, Tara Motors, supra, in n. 5 at p. 609, stated that in a legal malpractice action, emotional distress damages were not recoverable for breach of contract. Specifically, the court stated:

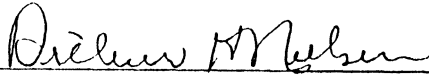
We do not reach [appellee's] somewhat novel argument emotional distress damages are recoverable for breach of contract. Nonetheless, we note that we have found no authority which supports her contention. Indeed, in Foley v. Interactive Data Corp., (1988) 47 Cal. 3d 654, 666-68, 254 Cal. Rptr. 211, 765 P.2d 373, upon which she relies, the Supreme Court took great care in drawing the distinction between contract-based causes of action, for which only contract remedies are available, and causes of action based upon the breach of obligations imposed by law for which traditional tort remedies are available.

CONCLUSION

For the foregoing reasons and for the reasons set forth in Defendants' Memorandum in Support of its Motion for Summary Judgment, Defendant Nielsen & Senior respectfully requests this Court to grant its Motion for Summary Judgment as to the Plaintiffs' Third Cause of Action in its Second Amended Complaint

for negligent infliction of emotional distress and for all the emotional distress damages or associated damages.

DATED this 5th day of December, 1991.



Arthur H. Nielsen
Larry L. Whyte
of Nielsen & Senior, P.C.
Counsel for Defendant Nielsen & Senior

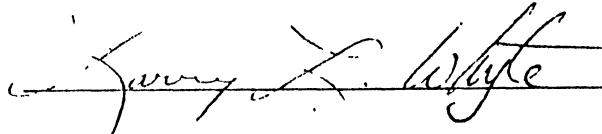
CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of December, 1991, I served upon Plaintiffs a true and correct copy of the foregoing DEFENDANT NIELSEN & SENIOR'S REPLY TO PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT by causing the same to be hand delivered to the following:

Darwin C. Fisher, Esq.
NIELSON, HILL & FISHER
3319 N. University #200
Provo, Utah 84604

Michael L. Dowdle, Esq.
915 West 100 South
Salt Lake City, Utah 84104

Chris L. Schmutz, Esq.
3760 Highland Drive, Suite 200
Salt Lake City, Utah 84106



Larry L. Whyte

FILED IN
4th DISTRICT COURT
STATE OF UTAH
UTAH COUNTY

Dec 9 12 59 PM '91



Michael L. Dowdle, Esq. (4025)
Attorney for Defendants
915 West 100 South
Salt Lake City, Utah 84104
Telephone: (801)531-0060

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

JAMES A. JOHNSON and JENNIFER	)	MOTION FOR PARTIAL SUMMARY
L. JOHNSON,	)	JUDGEMENT
)	
Plaintiffs,)	
)	
vs.)	
)	
NIELSEN & SENIOR, a Utah	)	Civil No. 90040046CN
Corporation, PAT B. BRIAN and)	
CHRIS L. SCHMUTZ,	)	Judge Venoy Christoffersen
)	
Defendants.)	

Defendant Pat B. Brian, by and through counsel in pursuant to Rule 56 (b) of the Utah Rules of Civil Procedure for an order granting partial summary judgement in favor of Defendant Brian and against Plaintiff's as to Plaintiff's Fourth Claim for Relief for intentional infliction of emotional distress.

This motion is based upon the fact that Defendant Brian is entitled to judgement as a matter of law and that no genuine as to any material fact exists with respect to such claim for relief. This motion is supported by the Affidavit of Pat B. Brian and the Memorandum of Points and Authorities in Support of Motion for

Michael L. Dowdle, Esq. (4025)
Attorney for Defendants
915 West 100 South
Salt Lake City, Utah 84104
Telephone: (801)531-0060

FILED IN
4TH DISTRICT COURT
STATE OF UTAH
UTAH COUNTY
DEC 9 12 59 PM '91
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IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY
STATE OF UTAH

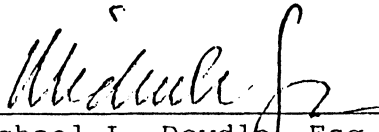
JAMES A. JOHNSON and JENNIFER)	
L. JOHNSON,	)	JOINDER IN MOTION FOR
	)	PARTIAL SUMMARY
Plaintiffs,	)	JUDGEMENT
)	
vs.)	
)	
NIELSEN & SENIOR, a Utah	)	Civil No. 90040046CN
Corporation, PAT B. BRIAN and)	
CHRIS L. SCHMUTZ,	)	Judge VeNoy Christoffersen
)	
Defendants.)	

Defendant, Pat B. Brian, by and through counsel, hereby joins in the motion for Partial Summary Judgement dated November 8, 1991, filed by Defendant Nielson and Senior, seeking summary Judgement dismissing Plaintiff's Third Claim for Relief for negligent affliction of emotional distress as well as summary judgement denying all damages associated with or arising out of any claim for emotional distress.

Defendant Pat B. Brian further joins in and adopts the reasoning and authorities set forth the Memorandum in Support of Motion for Partial Summary Judgement, dated November 8, 1991, filed by Nielson and Senior in support of its motion.

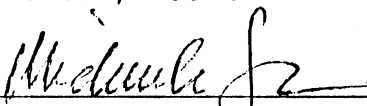
Partial Summary Judgement filed herewith, as well as the second Affidavit of Mark J. Howard previously filed in this matter.

DATED this 5th day of December, 1991.



Michael L. Dowdle, Esq.
Attorney for Defendant,
Pat B. Brian

DATED this 21 day of December, 1991.



Michael L. Dowdle, Esq.
Attorney for Defendant
Pat B. Brian

DEC 2 3 30 PM '91

Darwin C. Fisher, Bar No. 1080
Attorney for Plaintiff
Jamestown Square, Suite 200
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Provo, Utah 84604
Telephone: (801) 375-6600

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY
STATE OF UTAH

JAMES A. JOHNSON and
JENNIFER L. JOHNSON,
Plaintiff,

vs.

NEILSON & SENIOR, a Utah
Corporation, PAT B. BRIAN,
and CHRIS L. SCHMUTZ,
Defendants.

MEMORANDUM IN OPPOSITION TO
DEFENDANTS' MOTION FOR PARTIAL
SUMMARY JUDGMENT

Civil No. 900400460CN
Judge VeNoy Christofferson

Plaintiffs, James A. Johnson and Jennifer L. Johnson, hereby submit the following Memorandum in Opposition to Defendant, Neilson & Senior's, Motion for Partial Summary Judgment to Plaintiffs' third claim for relief for negligent infliction of emotional distress as well as all damages associated with or arising out of any claim for emotional distress.

STATEMENT OF UNDISPUTED FACTS

1. In January, 1986, Plaintiffs retained Defendant Neilson & Senior in a private adoption matter.

2. On or about June 27, 1986, Plaintiffs obtained physical

custody of the infant child from Pat Brian.

3. Pat B. Brian was a principal and employee of Defendant Neilson & Senior during 1986 and through May 1987.

4. From June 27, 1986, three days after the birth of the minor child to the present time, the infant child has been in the continuous care and physical custody of Plaintiffs.

5. Defendant failed to obtain the consent of the natural mother for the adoption of the minor child.

6. Defendant failed to obtain the consent of the natural father to the adoption of the child by Plaintiffs and failed to take any action to prevent the natural father from exercising his rights to the minor child.

7. Defendant failed to comply with the Interstate Compact Act.

8. In approximately July 1987, the Plaintiffs sought the legal services of another law firm and attorney, Mark Robinson.

9. In July 1987, the natural mother initiated a habeas corpus proceeding for the purpose of gaining physical custody of the infant child.

10. In October, 1987, the natural mother gave her consent to the adoption and Plaintiffs' adoption of the infant child was finalized.

11. In June 1990, Plaintiffs initiated a malpractice action against defendant Neilson & Senior and others.

ISSUE I

WHETHER PLAINTIFFS' CAUSE OF ACTION FOR NEGLIGENT INFLICTION
OF EMOTIONAL DISTRESS CANNOT BE MAINTAINED AS A MATTER OF LAW.

LAW

(1) If the actor unintentionally causes emotional distress to another, he is subject to liability to the other for resulting illness or bodily harm if the actor:

(a) Should have realized that his conduct involved an unreasonable risk of causing the distress, otherwise than by knowledge of the harm or peril of a third person; and

(b) From facts known to him should have realized that the distress, if it were caused, might result in illness or bodily harm.

(2) The rule stated in subsection (1) has no application to illness or bodily harm of another which is caused by emotional distress arising solely from harm or peril to a third person, unless the negligence of the actor has otherwise created an unreasonable risk of bodily harm to the other.

POINT I

NEGLIGENT INFLICTION OF EMOTIONAL HARM IS AN INDEPENDENT CAUSE
OF ACTION RECOGNIZED IN THE STATE OF UTAH.

ARGUMENT

Utah recognizes a broad protected interest in mental tranquility. Johnson v. Rogers, 763, P.2d, 771, (Utah 1980), citing Jeppesen v. Jensen, 47 Utah 536, 155 P 429 (1960). Utah courts further recognize that an independent cause of action for negligent infliction of emotional harm exists in the State of Utah. Johnson, *supra*.

Utah courts have abandoned the "impact" rule and have adopted

the "zone of danger" rule set forth in the Restatement of Torts, 2d 1018 (1965). In addition, the court in Johnson has made it clear that other approaches will be considered:

"at some future date, we may determine that there is merit in some of the other approaches surveyed in Justice Durham's opinion. However, until we have had experience with the cause of action, I conclude that it is best to take the more conservative approach and adopt the restatement rule as written." Johnson, supra at 785.

To establish a cause of action under Section 313 (1) of the Restatement 2d of Torts (1965), the Plaintiff must show:

1. That Defendant unintentionally caused emotional distress to Plaintiff;
2. That Defendant should have realized that its conduct involved an unreasonable risk of causing the emotional distress; and
3. That from the facts known to Defendant, Defendant should have realized that the distress might result in illness or bodily harm.

This rule applies only where Defendant's negligent conduct threatens Plaintiff with emotional distress likely to result in bodily harm or illness because of Plaintiff's emotional disturbance. Restatement 2nd of Torts, section 313, note d.

In addition, Plaintiff may be the direct victim and need not be a bystander witnessing an injury to a third party. Restatement 2d of Torts, section 313.

Plaintiffs may maintain their cause of action under Section 313 (1) of the Restatement 2nd of Torts, (1965). Plaintiffs suffer

from Post Traumatic Stress Syndrome caused by the negligent actions of Defendants in failing to obtain the consent of the natural mother and fulfill the requirements of the Interstate Compact Act in order to promptly finalize the adoption of the minor child by the Plaintiffs. Defendants, by delivering the minor child to the Plaintiffs in June 1986, and allowing the child and the Plaintiffs to bond for a period in excess of one year, should have realized that their conduct involved an unreasonable risk of causing emotional distress to the Plaintiffs when Plaintiffs discovered that the adoption had not been finalized, the consent of the natural mother had not been obtained, and that the natural mother still had legal rights to the minor child. Certainly Defendants, having been frequently informed of the bonding taking place between the Plaintiffs and the minor child, should have realized that the Plaintiff's emotional distress, upon learning of the Defendant's negligence, might have resulted in illness and even bodily harm.

Plaintiffs are the clients of the Defendant. They are direct victims and as such are entitled to maintain their cause of action for negligent infliction of emotional distress against the Defendant.

In addition, Plaintiffs may maintain an independent cause of action for negligent infliction of emotional distress under Section 436(1) Restatement 2d of Torts (1965). Section 436(1) applies to situations where the Defendant's negligent conduct causes emotional distress but not the bodily harm which results from the emotional

distress. In order for Defendant to be liable to Plaintiff, Plaintiff must show:

1. That the Defendant's conduct is negligent as violating a duty of care to protect Plaintiff from emotional distress; and
2. Defendant should have recognized his conduct as involving an unreasonable risk of bodily harm.

The fact that the emotional harm results solely through the internal operation of the emotional distress does not protect Defendant from liability. Subsection (1) is applicable only where Defendant's conduct is intended or obviously likely to cause emotional distress, although not intended to cause the bodily harm which results from it. Restatement 2d of Torts, Section 436 n.a. This rule applies where Defendant intends to subject or should realize Plaintiff is likely to be subjected to emotional distress so severe that a reasonable man would realize the likelihood that might produce harmful physical consequences.

"Where such a duty exists, it would be deprived of all sanction and the purpose for which it was imposed would be defeated if recovery were denied because the harm was sustained solely through the operation of emotional distress." Section 436, Restatement 2nd of Torts, (1965)

Plaintiffs may also maintain their cause of action for negligent infliction of emotional distress under Section 436 Restatement 2nd of Torts (1965). Defendants failed to obtain the consent of the natural mother, to fulfill the requirements of the Interstate Compact Act, and as a result failed to protect Plaintiffs from emotional distress. Defendants should have

recognized that his failure to properly handle the adoption proceedings involved an unreasonable risk of bodily harm to the Plaintiffs. As a result of Defendant's negligent actions, Plaintiffs have suffered from sleeplessness, tears, loss of appetite, anxiety, headaches, fear of loss of the family, etc, depressions and Post-Traumatic Stress Syndrome. Though transitory non-recurring physical phenomena, harmless in themselves, such as dizziness, vomiting, and the like, do not make the Defendants liable, when such phenomena are in themselves inconsequential and do not amount to any substantial bodily harm, long continued nausea or headaches may amount to physical illness which is bodily harm. And even long continued mental disturbances, such as in the case of repeated hysterical attacks or mental aberration may be classified by the courts as illness, notwithstanding their mental character. This becomes a medical or psychiatric problem rather than one of law. Restatement 2nd of Torts, Section 436 (a) (1969) n.c.

ISSUE II

WHETHER PLAINTIFFS ARE ENTITLED TO RECOVER DAMAGES FOR EMOTIONAL DISTRESS.

LAW

MENTAL PAIN AND SUFFERING IN CONNECTION WITH A WRONG WHICH, APART FROM SUCH PAIN AND SUFFERING CONSTITUTES A CAUSE OF ACTION, IS A PROPER ELEMENT OF DAMAGES WHERE IT IS A NATURAL AND PROXIMATE CONSEQUENCE OF THE WRONG. Lambert v. Sine, 123 UT 145, 150, 256 P.2d 241, 244 (1953)

POINT I

PLAINTIFFS ARE ENTITLED TO RECOVER DAMAGES WHICH ARE A NATURAL OR PROXIMATE CONSEQUENCE OF DEFENDANTS' MALPRACTICE.

DISCUSSION

Legal malpractice constitutes both a tort and a breach of contract. When an attorney breaches a duty owed to his client, he is liable for all damages directly and proximately caused by his act or failure to act. Williams v. Barber, 765 P.2d 887 (Utah 1988).

In Lambert v. Sine, supra, the Utah courts recognize mental pain and suffering to be an element of damage where:

1. It is a natural and proximate consequence of the Defendant's wrongful act, and
2. There is a cause of action that exists apart from the pain and suffering.

Plaintiffs have a cause of action for breach of contract as well as a cause of action for the negligent infliction of emotional distress. The emotional distress suffered by Plaintiffs is clearly a natural and proximate consequence of Defendant's wrongful acts. Further, Defendants breached the attorney-client contract with Plaintiffs by failing to obtain the consent of the natural mother and natural father, failing to comply with Interstate Compact Act, and failing to file a petition for adoption. JuDay v Rotunno & Rotunno, No. B040006 (Cal. App.2d App. Dist. Div. 7, Dec. 10,

1990). Tara Moters v. Superior Ct., No. D012620, (Cal. App. 4th App. Dist. Div. One, Dec. 21, 1990).

Clearly the emotional distress suffered by Plaintiffs upon learning that they did not have the legal right to keep the minor child was foreseeable. Plaintiffs had the minor child in their home for more than one year prior to learning that they did not have the legal right to keep the minor child and Plaintiff's family had bonded with the minor child and had cared for, nurtured, and financially supported the minor child.

Recovery of damages for mental suffering has been permitted for breach of contract which directly concerns the comfort, happiness or personal esteem of one of the parties. Crisci v Security Insurance Company of New Haven, Conn., 426 P.2d 173, 58 Cal. Rptr. 13, 66 C.2d 425 (1967). To support emotional distress as an element of damages in a breach of contract case, the Plaintiff must show Defendants:

1. Intentional conduct; or
2. Wanton or reckless conduct; and
3. Defendant must have reason to know when the contract was made, that the breach of the contract would cause mental suffering for reasons other than pecuniary loss. Thomas v French, 638 P.2d 613, 30 Wash App. 811, review granted, reverse 659 P.2d 1097, 99 Wash 2d 95 (1981).

The actions of the Defendant in failing to exercise the skill, prudence and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of finalizing an adoption is certainly wanton or reckless conduct and perhaps rises

to the level of intentional conduct. Certainly, the Defendants had reason to know, when the contract was made, that a breach would cause mental suffering by the Plaintiffs for reasons other than pecuniary loss.

Therefore, Defendant's negligent infliction of emotional distress is a proper element of damages.

CONCLUSION

The "impact" rule is no longer applicable in the State of Utah. The Utah courts have adopted the "zone of danger" rule which does allow for an independent cause of action for the Negligent Infliction of Emotional Distress. Plaintiffs clearly have met the criteria set forth in Section 313 and Section 436 of the Restatement 2nd of Torts (1965). As such Plaintiffs may maintain their cause of action for negligent infliction of emotional distress and Defendant's motion for partial summary judgment should be denied.

It is also well established in Utah that mental pain and suffering is a proper element of damages in legal malpractice cases. Therefore, Defendant's motion for partial summary judgment should be denied.

RESPECTFULLY SUBMITTED this 1st day of December, 1991.



DARWIN C. FISHER
Attorney for Plaintiffs

Arthur H. Nielsen, USB No. A2405
Larry L. Whyte, USB No. 4942
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FILED IN
4TH DISTRICT COURT
STATE OF UTAH
UTAH COUNTY
Nov 8 2 01 PM '91

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

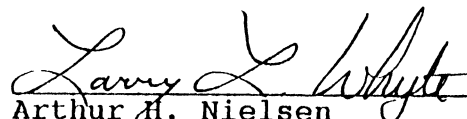
STATE OF UTAH

JAMES A. JOHNSON and JENNIFER)	
L. JOHNSON,	)	MOTION FOR PARTIAL SUMMARY
	)	JUDGMENT
)	
Plaintiffs,)	
)	
vs.)	
)	
NIELSEN & SENIOR, a Utah	)	Civil No. 900400460CN
Corporation, PAT B. BRIAN)	
and CHRIS L. SCHMUTZ,	)	Judge VeNoy Christoffersen
)	
Defendants.)	

Defendant Nielsen & Senior hereby moves this Court for an Order Granting Partial Summary Judgment in favor of Defendant Nielsen & Senior and against Plaintiffs as to Plaintiffs' Third Claim for Relief for negligent infliction of emotional distress, as well as all damages associated with or arising out of any claim for emotional distress.

Defendants are entitled to Summary Judgment as to this claim for relief as a matter of law. This Motion is supported by the accompanying Memorandum.

DATED this 8th day of November, 1991.


Arthur H. Nielsen
Larry L. Whyte
NIELSEN & SENIOR, P.C.
Attorneys for Defendant

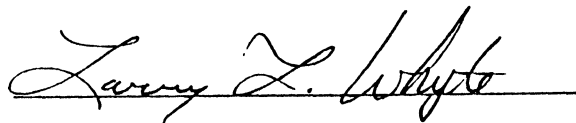
MAILING CERTIFICATE

I hereby certify that on this 8th day of November, 1991, I served a true and correct copy of the foregoing MOTION FOR PARTIAL SUMMARY JUDGMENT, by causing the same to be mailed, postage prepaid, to the following:

Darwin C. Fisher, Esq.
NIELSON, HILL & FISHER (Hand-delivered)
3319 N. University #200
Provo, Utah 84604

Michael L. Dowdle, Esq.
915 West 100 South
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