

2005

# Harlan Ashby vs. Board of Education, South Sanpete School District : Brief of Appellee

Utah Court of Appeals

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No. 20050658-CA

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**IN THE UTAH COURT OF APPEALS**

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HARLAN ASHBY,

Plaintiff-Appellant,

vs.

BOARD OF EDUCATION, SOUTH SANPETE SCHOOL DISTRICT,

Defendant-Appellee.

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**BRIEF OF APPELLEE**

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Appeal from an Order granting a motion to dismiss of the Sixth Judicial District Court,  
Sanpete County, State of Utah, the Honorable David Mower presiding

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ORAL ARGUMENT AND PUBLISHED OPINION NOT REQUESTED

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UTAH APPELLATE COURTS  
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## List of All Parties

To the best of Defendant’s knowledge, all parties to the proceeding appear in the caption of this Brief.

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**BRIEF OF APPELLEE**

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Board of Education, South Sanpete School District (“School District”) submits this brief in answer to the Brief of Plaintiff-Appellant Harlan Ashby.

**Statement of Jurisdiction**

This matter comes within the appellate jurisdiction of the Utah Supreme Court under Utah Code Ann. § 78-2-2(3)(j) (West 2004) because this is an appeal from a judgment of a court of record over which this Court does not have original appellate jurisdiction. On August 5, 2005, the matter was transferred to this Court by the Utah Supreme Court pursuant to Utah Code Ann. §§ 78-2-2(4) and 78-2a-3(2)(j) (West 2004).  
R. 301.

## Issue Presented

Ashby sued the School District for breach of contract. Midway through Ashby's case in chief, he admitted facts which negated a necessary element of his breach of contract claim. The School District moved for dismissal based on Ashby's admission. After Ashby proffered no facts that would negate his admission, the district court dismissed the case. Was the district court correct?

### **A. Standard of review**

Whether dismissal was appropriate for failure to make a prima facie case is a question of law reviewed for correctness. Grossen v. DeWitt, 1999 UT App 167, ¶8, 982 P.2d 581. However, a trial court's factual findings based either on oral or documentary evidence will not be set aside on appeal unless clearly erroneous. Id. at ¶5.

### **B. Preservation of issue**

The School District raised this issue in an oral motion at the conclusion of Ashby's direct examination. Tr. 119. The School District renewed its motion after cross-examination of Ashby was complete. Tr. 255. The district court addressed this issue when it granted the School District's motion and dismissed Ashby's complaint. Tr. 280-81; R. 294-98.

## **Determinative Constitutional Provisions, Statutes and Rules**

The following provision is attached as an Addendum to this Brief:

Utah R. Civ. P. 41(b)

## Statement of the Case

### 1. Nature of the Case

This is an appeal from a final order in a breach of contract case granting a motion to dismiss of the Sixth Judicial District Court, Sanpete County, State of Utah, the Honorable David Mower presiding.

### 2. Course of the Proceedings Below

Plaintiff Harlan Ashby brought this action against Defendant Board of Education, South Sanpete School District (School District). R. 1-3. Ashby's complaint alleged that the School District had breached its employment contract with him when it terminated his employment in 1997. R. 1-2. The complaint specifically alleged that his employment was terminated based on the false claim that he had misrepresented to the School District that he had a master's degree when he only had a bachelor's degree. R. 1-2. The complaint also made a claim for attorney's fees associated with the alleged breach of contract. R. 2.

A two-day bench trial was held. R. 263-71. Ashby testified as the first witness. Tr. 23.<sup>1</sup> At the conclusion of Ashby's direct examination, the School District moved for directed verdict.<sup>2</sup> Tr. 119. Although Ashby had not finished his case in chief, the School District based its motion on the argument that no matter what Ashby's remaining

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<sup>1</sup>Although the two-volume trial transcript is not bates-stamped, the record index identifies the transcript as page 306 of the record. See final entry on the Judgment Roll and Index attached to the inside front cover of volume one of the record.

<sup>2</sup>Although the motion was in substance a motion to dismiss and not a directed verdict, this statement of case refers to the motion by the same label as that used by the district court and both parties.

witnesses said, no evidence could overcome Ashby's admission on direct examination that he misrepresented to the School District that he had a master's degree. Tr. 119. The court heard argument on the motion and took the motion under advisement. Tr. 119-47.

The School District then cross-examined Ashby. Tr. 147-217. Ashby was briefly excused from the witness stand to allow another witness to testify, but then returned and completed his testimony on re-direct and re-cross examination. Tr. 219-224; 229-54. After Ashby's testimony, the School District renewed its motion for directed verdict. Tr. 255. Both parties argued the motion for directed verdict. Tr.. 255-72.

The district court announced its tentative decision to grant the motion, agreeing with the School District that no evidence could overcome Ashby's admission. Tr. 275. Ashby then raised the issue of a proffer and the district court allowed him to proffer the testimony of his other witnesses. Tr. 277-80; R. 294. After considering the proffer, the district court stated that its initial ruling would stand because the proffered testimony was not enough to overcome Ashby's admission. Tr. 280-81. Finding that Ashby was properly discharged for misrepresenting his degree status to the School District, the district court concluded that Ashby's breach of contract claim failed. R. 298; Tr. 280-81. The court also dismissed the attorney's fees claim because it was a derivative of the breach claim. R. 298; Tr.

A formal order of dismissal was entered June 30, 2005. R. 294-98. Ashby filed his notice of appeal on July 29, 2005. R. 282-83.

### **3. Disposition Below**

By Judgment and Order on Directed Verdict entered June 30, 2005, the district court granted the School District's motion for directed verdict and dismissed Ashby's complaint. R. 294-98.

## **Statement of Facts**

The district court based its decision in part on oral and documentary evidence presented at trial and in part on Ashby's proffer of evidence. R. 294.

### **Evidence presented at trial**

Ashby was hired as a teacher by the School District in 1976. Tr. 26. At that time, he had a bachelor's degree and approximately 90 additional credit hours. Tr. 25. Ashby was placed in salary lane 3, a lane which was informally called the master's degree lane. Tr. 35, 37.

In 1986, the School District added a fourth salary lane for teachers with a master's degree, while lane 3 remained for teachers with a bachelor's degree plus 55 or more additional credit hours. Tr. 42; Ex. 7. In December of 1986, in keeping with normal practice, the School District sent Ashby two copies of his proposed contract for the 1986-87 school year. Tr. 179-80. The proposed contract placed Ashby in the newly created fourth lane designated for teachers with a master's degree. Ex. 6. With the copies of the contract, the School District superintendent also sent Ashby a memorandum, asking

Ashby to verify the salary lane and amount of the contract and, if correct, sign and return one copy to the School District. Ex. 6;<sup>3</sup> Tr. 179-81; 183.

Ashby signed the contract and returned it to the School District without correcting the salary lane designation. Ex. 6. Ashby received and signed employment contracts with the District for the next nine years, from the 1987-88 school term through the 1995-96 term, all with the improper lane designation. Ex. 10-19; Tr. 184-85. As a result, Ashby was overpaid for nine years.<sup>4</sup>

Over the years, Ashby implied to other teachers that he had a master's degree by telling them that he "had pursued a Master's Degree at the University of New Mexico." Tr. 76. He would, however, tell close friends that he did not have a master's degree, but was on Lane 4 for other reasons. Tr. 76. Sometime in 1995 or 1996, a School District secretary, Sherry Neeley, requested that Ashby provide the transcripts of his master's degree. Tr. 78. Ashby testified that he "panicked" and did not give Neeley an honest answer by not correcting the perception that he had a master's degree. Tr. 78. Instead, he stated that the information Neeley requested was in his personnel file. Tr. 79. Several School District personnel asked Ashby to provide his master's degree transcripts for the School District's files. Tr. 78, 195-97. At one point, Ashby's principal, in an effort to get Ashby's master's degree transcripts, even typed a letter for Ashby requesting his master's degree transcripts from the University of New Mexico. Tr. 197. Despite these repeated

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<sup>3</sup>Because the trial exhibits, which are included in the Supplemental Record, are not bates-stamped, this brief cites to them by their original trial exhibit number. Defendant's exhibits are numbered 1-48 and 60-62, and Plaintiff's exhibits are numbered 49-59 and 63-67. A master exhibit list is included at the beginning of the Supplemental Record and also appears at R. 268-71.

<sup>4</sup>Ashby was not overpaid during the 1986-87 school year because lanes 3 and 4 were paid identical amounts for the step that Ashby was on. Ex. 7.

efforts to obtain Ashby's master's degree documentation, Ashby never stated that he did not have a master's degree. Tr. 197.

Ashby finally admitted to the School District in June or July of 1997 that he did not have a master's degree. Tr. 85. On August 13, 1997, the School District suspended Ashby without pay because of his false claim to have a master's degree and his continual misrepresentation when he was asked to produce transcripts showing he had a master's degree. Ex. 55. On August 28, 1997, the School District terminated Ashby for cause. Ex. 56. One of the four allegations supporting his termination identified in his termination notice was "[d]ishonesty or falsification of any information supplied to the school district." Ex. 56.

### **Ashby's proffer**

The superintendent had agreed to resolve the issue of Ashby's credentials by decreasing his pay to the correct amount but then abandoned the agreement and fired him instead. Tr. 278. Other employees found to be on the wrong pay track were not fired. Tr. 278. The School District was looking for a way to terminate Ashby's employment because of its displeasure with Ashby stemming from an audit two years before he was terminated. Tr. 279, 280. The School District used Ashby's dishonesty as a pretext for firing him. Tr. 279. When Neeley asked Ashby for his credentials, Ashby never directly told her that he had a master's degree, even if he may have been equivocal about it, but instead directed her to the personnel file. Tr. 280. It was the practice of smaller school districts to place teachers on a higher salary lane in order to compete with larger school districts. Tr. 280. When Ashby was hired in 1976, the School District was not deceived by Ashby about his academic credentials because Ashby truthfully stated that he only had

a bachelor's degree and Ashby was told not to tell other employees that he was on a higher salary lane. Tr. 279, 280.<sup>5</sup>

## Summary of Argument

Ashby's admission of dishonesty warranted dismissal of his case because it negated an essential element of his breach of contract claim, namely that he was fired based on a false allegation that he lied about his credentials. Because this was not a jury proceeding, the district court properly weighed Ashby's testimony, ultimately finding that his admission defeated his breach of contract claim because it showed that the allegation supporting his termination was true, that he had in fact lied about his credentials. Because the evidence in Ashby's proffer was irrelevant to his limited claim that his termination was based on a false allegation, the district court correctly concluded that Ashby could not prevail breach of contract claim even if he were allowed to finish his case in chief. Accordingly, this Court should affirm the district court's dismissal of this case.

Although the dispositive motion here was labeled a motion for directed verdict, it was in substance a motion to dismiss since this proceeding was a bench trial. Accordingly, the authority pertaining to directed verdict cited by Ashby does not apply. This Court should reject Ashby's invitation to weigh anew his trial testimony because the

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<sup>5</sup>Ashby embellishes his proffer on appeal. He states that the superintendent would have testified that one of the real reasons for firing Ashby was that Ashby was sick. Aplt. Brf. at 17. But the record reflects that Ashby did not mention sickness in his proffer of the superintendent's testimony. Tr. 278-89.

findings the district court made with respect to the live testimony it heard are entitled to deference on review. Furthermore, Ashby has not challenged the sufficiency of the district court's findings or demonstrated that the findings are clearly erroneous; in fact, he has argued that the clearly erroneous standard should not apply, based on inapposite directed verdict cases.

## **Argument**

**Ashby's admission of dishonesty warranted dismissal because it negated a necessary element of his breach of contract claim**

The district court correctly determined that Ashby's admission of dishonesty warranted dismissal because that admission negated an essential element of his breach of contract claim. The complaint only alleged that Ashby's employment was terminated based on a false allegation that he had misrepresented to the School District that he had a master's degree when he only had a bachelor's degree. R. 1-2. By admitting that he had in fact misrepresented his degree status, Ashby negated the essential claim that he was terminated based on a false allegation. Because the allegation of dishonesty was not false, by Ashby's own admission, the district court correctly concluded that no breach of contract occurred.

Although the district court and both parties characterized the dispositive motion as one for directed verdict, the motion was in substance a motion to dismiss under Utah R.

Civ. P. 41(b). Grossen v. DeWitt, 1999 UT App 167, ¶7, 982 P.2d 581 (stating that “[i]n the context of a bench trial . . . the directed verdict’s procedural counterpart is a motion to dismiss”). This court will review a motion thus mislabeled as a motion to dismiss. Id. at ¶8. Accordingly, the argument portion of this brief will refer to the School District’s motion as a motion to dismiss. Much of the authority cited by Ashby deals with directed verdict cases, where the trial court must not invade the jury’s role as fact-finder. These cases are of little help here where the judge acted as finder of fact.

The district court’s findings that Ashby misrepresented his degree status are entitled to a deferential standard on review. Although this Court reviews the legal conclusions supporting the granting of a motion to dismiss for correctness, the underlying findings of fact to which the law is applied are reviewed under the clearly erroneous standard. Grossen, 1999 UT App 167 at ¶5. This more deferential standard is applied to findings of fact that are based on either oral or documentary evidence *presented to the trial court*. Id. Ashby’s testimony and numerous documents were presented to the district court in its capacity as fact-finder. Ashby testified that he panicked and failed to give an honest answer when asked by the School District for his master’s degree credentials. Tr. 78. Ashby further testified that he implied over the years to other teachers that he had a master’s degree. Tr. 76. Ashby admitted signing ten successive annual contracts without correcting the improper master’s degree lane designation on each contract. Tr. 184-85. The contracts themselves were admitted into evidence. Ex. 10-19; Tr. 184-85. And Ashby testified that several School District employees asked him for his master’s degree transcripts but he never stated that he did not have a master’s degree. Tr. 78, 195-97. In addition to this evidence of Ashby’s dishonesty, the district court also heard the self-serving portions of Ashby’s testimony cited in the opening brief.

Nevertheless, as fact-finder, the district court weighed Ashby's credibility and found that Ashby was dishonest in representing his degree status to the School District. Because Ashby does not properly challenge the sufficiency of this underlying finding, this Court should assume that the record supports the finding and review only the accuracy of the district court's conclusions of law. Grossen, 982 P.2d 581 at ¶10 (quotation marks and citation omitted) (stating that "because appellants do not challenge the court's findings, let alone demonstrate they are clearly erroneous, we assume that the record supports the findings of the trial court").

Ashby now claims that he did not deceive the School District regarding his degree status but this argument fails because it is an improper attempt to revisit the district court's factual findings without marshaling the evidence. See Chen v. Stewart, 2004 UT 82, ¶76, 100 P.3d 1177 (stating that in order to challenge a trial court's finding of fact, an appellant "must first marshal all the evidence in support of the finding and then demonstrate that the evidence is legally insufficient to support the finding even when viewing it in a light most favorable to the court below") (quotation marks and citation omitted). This Court should reject Ashby's argument to the extent it asks this court to improperly weigh portions of his testimony against other portions of his testimony.

Given the district court's finding that Ashby misrepresented his degree status, the only legal question before this court, then, is whether the proffered<sup>6</sup> evidence overcame

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<sup>6</sup>Although the district court announced a tentative ruling on the motion to dismiss *before* plaintiff made a proffer of his remaining witnesses, the record is clear that the court allowed plaintiff to make a proffer and then considered the proffer before making a final ruling, even commenting on specific points raised in the proffer. Tr. 280-81. After considering the proffer, the court announced that its tentative ruling would stand because nothing in the proffer would have overcome Ashby's admission of dishonesty. Tr. 281.

Ashby's admission of dishonesty.<sup>7</sup> This is a purely legal question since an appellate court is in "as good a position to review the proffer as was the trial court, as no assessment of witness credibility occurred below." Hamby v. Jacobson, 769 P.2d 273, 278 (Utah 1989).

Even accepting as true everything in Ashby's proffer, nothing in the proffer is relevant to Ashby's claim that his termination was based on the false allegation that he misrepresented his credentials. Ashby's honesty with various individuals is irrelevant to his signing ten contracts without correcting the improper lane designation. Regardless of whether smaller school districts placed teachers on higher salary lanes to compete with large school districts, Ashby proffered no testimony to establish that the School District did in fact intentionally place Ashby on a higher track during the 1986-87 term or the following nine school years for that reason. And even if Ashby would have been able to prove that the School District used his dishonesty as a mere pretext for firing him, he never explained to the trial court why such proof was relevant to his breach of contract claim. Evidence of pretext was irrelevant to the only legal theory that Ashby pled or clearly articulated below -- that is, that the School District breached his employment contract by terminating based on the false allegation that he misrepresented his credentials. Nor has he provided any such explanation in his opening brief on this appeal. Because Ashby's proffer thus had no relevance to his narrow claim that the School District breached his employment contract by firing him based on a false allegation of dishonesty, the district court correctly dismissed Ashby's complaint.

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<sup>7</sup>By Ashby's own admission, the allegation of dishonesty supporting his termination was in fact true. Ashby could not have negated his admission of dishonesty without impeaching his own testimony, which would also have then called into question all of his self-serving testimony, throwing his case into chaos.

Additionally, although Rule 41(b) contains language suggesting that a motion to dismiss would not normally be granted until after plaintiff has concluded his case in chief, the obvious futility of Ashby's case weighs heavily in favor of the district court's decision to preserve judicial economy by avoiding additional unnecessary time in trial. Ashby concedes the general proposition that the language of Rule 41(b) does not necessarily preclude a dismissal midway through a plaintiff's case, as long as there is good reason. Further, the trend in federal authority supports the district court's decision to dismiss Ashby's case when the futility of continuing the trial is apparent. Fed. R. Civ. P. 41(b) was amended in 1991 to delete the phrase limiting a motion to dismiss to after a plaintiff concluded his case in chief. Even before this amendment, several cases illustrate the federal trend to allow dismissal midway through a plaintiff's case in situations similar to the present case where the futility of continuing with the trial was apparent. A Fourth Circuit case affirmed a trial court's dismissal of a case *after opening statements* when plaintiff's opening statement revealed beyond question the absence of a valid claim and the futility of a trial. Tuck v. Chesapeake & Ohio R.R. Co., 251 F.2d 180 (4th Cir. 1958). The First Circuit affirmed a dismissal midway through a plaintiff's case in chief when it became apparent that the only witness who could establish a material fact did not have personal knowledge of that fact. D.P. Apparel Corp. v. Roadway Express, 736 F.2d 1 (1st Cir. 1984). Moreover, because Ashby could not have prevailed even if he had been allowed to present his evidence as proffered, he suffered no prejudice from the district court's decision to grant the motion to dismiss and any error was harmless. Price v. Armour, 949 P.2d 1251, 1255 (Utah 1997).

## Conclusion

Ashby's admission of dishonesty warranted dismissal of his case because it negated an essential element of his breach of contract claim, namely that he was fired based on a false allegation that he misrepresented his credentials. Because this was not a jury proceeding, the district court properly weighed Ashby's testimony, ultimately finding that his admission defeated his breach of contract claim because it showed that the allegation of Ashby's dishonesty was true. Because the evidence in Ashby's proffer was irrelevant to his limited claim that he was fired based on a false allegation, the district court correctly concluded that Ashby could not prevail breach of contract claim even if he were allowed to finish his case in chief. Accordingly, this Court should affirm the district court's dismissal of this case.

Dated this 6<sup>th</sup> day of April, 2006.

  
CLIFFORD PETERSEN  
Assistant Attorney General  
Attorney for Board of Education, South  
Sanpete School District

## CERTIFICATE OF SERVICE

This is to certify that I mailed TWO copies of the foregoing BRIEF OF  
RESPONDENT to the following this 6<sup>th</sup> day of April, 2006:

Randall C. Allen  
BARNES & ALLEN, LLP  
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A handwritten signature in black ink, appearing to read "R. Allen", is written over a horizontal line.

# **ADDENDUM 1**

## Rule 40

### Note 8

witness to be present. *Lancino v. Smith*, 1909, 36 Utah 462, 105 P. 914. Pretrial Procedure ⇨ 726

#### 9. Involuntary dismissal for want of prosecution

Case was properly dismissed in 1987 for lack of prosecution, where plaintiff filed complaint in 1980, plaintiff amended his complaint twice and tried to amend it a third time, plaintiff moved for summary judgment three times, attempted to appeal denial and filed numerous motions in an apparent attempt to circumvent denial of summary judgment, plaintiff objected to all three trial dates set, two of plaintiff's three attorneys withdrew from the case because plaintiff failed to pay them, plaintiff filed no certificate of readiness for trial and took no depositions, and defense witnesses became unavailable. Rules Civ.Proc., Rules 40(b), 41(b). *Maxfield v. Rushton*, 1989, 779 P.2d 237, certiorari denied 789 P.2d 33. Pretrial Procedure ⇨ 587

Where medical malpractice action was filed on October 18, 1972, trial date was set for October 24, 1974, where on trial date plaintiff's counsel moved for continuance after stating that person he had hoped would testify was absent, and where record showed that plaintiff or her counsel had been dilatory in responding to efforts of defendant to obtain discovery and had resisted defendant's attempts to resolve the issue by getting the case to trial, dismissal for failure to prosecute was not an abuse of discre-

## RULES OF CIVIL PROCEDURE

tion since plaintiff was not ready to proceed on trial date, such failure was the result of inexcusable neglect, and no justification for continuance was shown. Rules of Civil Procedure, rules 40(b), 41(b). *Maxfield v. Fishler*, 1975, 538 P.2d 1323. Pretrial Procedure ⇨ 597

#### 10. Review

Trial courts have substantial discretion in deciding whether to grant continuances, and their decision will not be overturned unless that discretion has been clearly abused. Rules Civ. Proc., Rule 40(b). *Brown v. Glover*, 2000, 16 P.3d 540, 408 Utah Adv. Rep. 12, 2000 UT 89, on remand 2000 UT App 52, 2001 WL 298577. Appeal And Error ⇨ 966(1); Pretrial Procedure ⇨ 713

Reviewing court should not reverse trial court's continuance ruling without a showing that trial court has abused its discretion. Rules of Civil Procedure, rule 40(b). *Bairas v. Johnson*, 1962, 13 Utah 2d 269, 373 P.2d 375. Appeal And Error ⇨ 966(1)

Granting or refusing a continuance is discretionary, and will not be reviewed except in cases of an abuse of discretion. *Sharp v. Canakis Gianoulakis*, 1924, 63 Utah 249, 225 P. 337. Appeal And Error ⇨ 966(1)

The denial of a continuance, sought for absence of witnesses or a party, will not be disturbed, in the absence of an abuse of discretion. *Lancino v. Smith*, 1909, 36 Utah 462, 105 P. 914. Appeal And Error ⇨ 966(2)

## RULE 41. DISMISSAL OF ACTIONS

### (a) Voluntary Dismissal; Effect Thereof.

(1) *By Plaintiff.* Subject to the provisions of Rule 23(e), of Rule 66(i), and of any applicable statute, an action may be dismissed by the plaintiff without order of court by filing a notice of dismissal at any time before service by the adverse party of an answer or other response to the complaint permitted under these rules. Unless otherwise stated in the notice of dismissal, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

(2) *By Order of Court.* Unless the plaintiff timely files a notice of dismissal under paragraph (1) of this subdivision of this rule, an action may only be dismissed at the request of the plaintiff on order of the court based either on:

(i) a stipulation of all of the parties who have appeared in the action; or

(ii) upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for

independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

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

**(c) Dismissal of Counterclaim, Cross-Claim, or Third-Party Claim.** The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third-party claim. A voluntary dismissal by the claimant alone pursuant to Paragraph (1) of Subdivision (a) of this rule shall be made before a responsive pleading is served or, if there is none, before the introduction of evidence at the trial or hearing.

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

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

[Amended effective November 1, 1997.]

#### Cross References

Dismissal of action for review of informal adjudicative proceedings, water and irrigation, see § 73-3-15.

#### Library References

Pretrial Procedure	↔501 to 517, 551, 563, 581, 690, 693.	307Ak581; 388k384.	307Ak690;	307Ak693;
Trial	↔384			
Westlaw Key Number Searches	307Ak501 to 307Ak517; 307Ak551; 307Ak563;			C.J.S. Dismissal and Nonsuit §§ 2 to 34, 47 to 49, 51 to 62, 66 to 67, 69 to 73, 79.

# **ADDENDUM 2**

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BY *Sharon* DEPUTY

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

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HARLAN ASHBY,

Plaintiff,

v.

THE BOARD OF EDUCATION, SOUTH  
SANPETE SCHOOL DISTRICT,

Defendants.

COMPLAINT

Case No. 010600224

Judge K. L. Nicliff

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Plaintiff alleges:

1. In the year 1976, Harlan Ashby was hired as a teacher by the board of education for the South Sanpete School District. He continued in that employment through May 28, 1997.

2. On August 13, 1997, plaintiff was notified by letter that he was suspended without pay beginning August 18, 1997 for the specific reason that he claimed to have a Masters Degree and continued to misrepresent that fact during the years he was employed by the defendant.

3. The South Sanpete District Service Record states that the plaintiff had a B.A. Degree in Archeology and none of the documents submitted by the plaintiff state that he has a Masters Degree.

4. The plaintiff followed the appropriate administrative grievance procedure and the school district determined that the grievance policy had been met.

5. The charges against the plaintiff were falsely made and the plaintiff's contract with the defendant was terminated based solely on those charges.

**FIRST CAUSE OF ACTION  
(Breach of Contract)**

Plaintiff incorporates all of the previous allegations into his first cause of action and further alleges as follows:

6. The actions of the defendant constitute a breach of contract and plaintiff is entitled to damages in an amount to be proven at trial.

**SECOND CAUSE OF ACTION  
(Attorney's fees)**

Plaintiff incorporates all of the previous allegations into his second cause of action and further alleges as follows:

7. The statements of the defendant made in support of termination were false and untrue and are not supported by the documents and plaintiff takes the position that the defendant acted in bad faith and that plaintiff is entitled to a reasonable attorney's fee in an amount to be proven at trial.

WHEREFORE, it is the request of the plaintiff that he be entitled to damages at an amount to be proven at trial and also be granted attorney's fees in an amount to be proven at trial.

DATED this 16<sup>th</sup> day of August, 2001.

  
Karl H. Mueller

Plaintiff's Address:

3965 Rome Way  
Apple Valley, UT 84737