

1994

William W. Morton v. Continental Baking Company : Brief of Appellant

Utah Court of Appeals

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IN THE COURT OF APPEALS
STATE OF UTAH

WILLIAM W. MORTON,)	
)	
Plaintiff/Appellant,)	APPELLANT'S BRIEF
)	
vs.)	
)	
CONTINENTAL BAKING COMPANY,)	No. 940747-CA
)	
Defendant/Appellee.)	Priority #15

BRIEF OF APPELLANT
APPEALS FROM ORDERS OF FOURTH DISTRICT COURT,
UTAH COUNTY, HONORABLE JUDGE HARDING,

UTAH COURT OF APPEALS

DOCKET NO. 940747

FILED

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COURT OF APPEALS

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APPELLANT'S BRIEF

Appellant, William W. Morton, submits this brief in the above appeal.

SECTION 1: LIST OF ALL PARTIES TO THE PROCEEDING BELOW:

The Plaintiff/Appellant:

William W. Morton

The Defendant/Appellee:

Continental Baking Company

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4. JURISDICTION OF THE COURT TO HEAR THIS MATTER:

The Utah Supreme Court had jurisdiction over this matter pursuant to Utah Code, Section 78-2-2, and authority to assign this case to the Court of Appeals pursuant to Utah Code, Section 78-2-2(4). This Court received this case by transfer from the Supreme Court on November 28, 1994, and has jurisdiction pursuant to Utah Code Section 78-2a-3(2)(j).

5. STATEMENT OF THE ISSUES PRESENTED FOR APPEAL:

The issues raised in this appeal are as follows:

A. Whether the lower court erred by allowing Defendant to conduct discovery after it had cut off all discovery by its prior orders?

The standard of review on this issue is: The Appellate Court reviews the decision for its correctness, and not based upon an abuse of discretion. The Appellate Court determines for itself the proper outcome based on the applicable Rule and does not defer in any degree to the trial judge's determination of law. State v. Pena, 869 P.2d 932, 936 (Utah 1994), citing State v. Deli, 861 P.2d 431, 433 (Utah 1993), and Kennecott Corp. v. State Tax Comm'n, 858 P.2d 1381, 1383 (Utah 1993).

B. Whether Appellant is allowed an additional three (3) days to file its answers to discovery requests pursuant to Rule 6 of the Utah Rules of Civil Procedure and, therefore, its answers on April 25, 1994, were timely?

The standard of review on this issue is: The Appellate

Court reviews the decision for its correctness, and not based upon an abuse of discretion. The Appellate Court determines for itself the proper outcome based on the applicable Rule and does not defer in any degree to the trial judge's determination of law. State v. Pena, 869 P.2d 932, 936 (Utah 1994), citing State v. Deli, 861 P.2d 431, 433 (Utah 1993), and Kennecott Corp. v. State Tax Comm'n, 858 P.2d 1381, 1383 (Utah 1993).

C. Whether Appellant is allowed an additional five (5) days to file an answer pursuant to the provisions of Rule 4-504 of the Code of Judicial Administration and therefore his answers of April 25, 1994, were timely?

The standard of review on this issue is: The Appellate Court reviews the decision for its correctness, and not based upon an abuse of discretion. The Appellate Court determines for itself the proper outcome based on the applicable Rule and does not defer in any degree to the trial judge's determination of law. State v. Pena, 869 P.2d 932, 936 (Utah 1994), citing State v. Deli, 861 P.2d 431, 433 (Utah 1993), and Kennecott Corp. v. State Tax Comm'n, 858 P.2d 1381, 1383 (Utah 1993).

D. Should Appellant be relieved from any obligation to file answers to the April 12, 1994 Order because it was not served upon Appellant?

The standard of review on this issue is: The Appellate Court reviews the decision for its correctness, and not based upon an abuse of discretion. The Appellate Court determines for itself the proper outcome based on the applicable Rule and does

not defer in any degree to the trial judge's determination of law. State v. Pena, 869 P.2d 932, 936 (Utah 1994), citing State v. Deli, 861 P.2d 431, 433 (Utah 1993), and Kennecott Corp. v. State Tax Comm'n, 858 P.2d 1381, 1383 (Utah 1993).

E. Assuming, arguendo, all of the actions of the lower Court were proper in entering an order of dismissal under the relevant rules, should Appellant be relieved of the onerous sanction of dismissal when he was unaware of the order requiring an earlier delivery and his answers to discovery were delivered one business day late?

The standard of review on this issue is: The lower Court's decision is reviewed for an abuse of discretion. Katz v. Pierce, 732 P.2d 92, 93 (Utah 1986), Boyce v. Boyce, 609 P.2d 928 (Utah 1980), Carman v. Slavens, 546 P.2d 601, 603 (Utah 1976).

F. Whether, under the circumstances, Defendant should be entitled to any sanctions, including the award of \$250.00 in attorney's fees?

The standard of review on this issue is: The lower Court's decision is reviewed for an abuse of discretion. Katz v. Pierce, 732 P.2d 92, 93 (Utah 1986), Boyce v. Boyce, 609 P.2d 928 (Utah 1980), Carman v. Slavens, 546 P.2d 601, 603 (Utah 1976).

6. STATUTES, RULES AND REGULATIONS APPLICABLE TO THIS APPEAL:

The Rules applicable to this appeal are as follows:

Rule 6(e) of the Utah Rules of Civil Procedure:

Additional time for service by mail. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is

served upon him by mail, 3 days shall be added to the prescribed period. (Emphasis added.)

Rule 4-504(2) of the Code of Judicial Administration:

Copies of the proposed findings, judgments, and orders shall be served upon opposing counsel before being presented to the court for signature unless the court otherwise orders. Notice of objections shall be submitted to the court and counsel within five days after service. (Emphasis added.)

Rule 4-501 of the Code of Judicial Administration:

[Copy of this rule is contained in an addendum in this brief pursuant to Rule 24(f) of Utah Rules of Appellate Procedure]

Rule 26(f) of the Utah Rules of Civil Procedure:

Discovery conference. At any time after commencement of an action, the court may direct the attorneys for the parties to appear before it in a conference on the subject of discovery. The court shall do so upon motion by the attorney for any party if the motion includes:

- (1) a statement of the issues as they then appear;
 - (2) a proposed plan and schedule for discovery;
 - (3) any limitations proposed to be placed on discovery;
 - (4) any other proposed orders with respect to discovery;
- and
- (5) a statement showing that the attorney making the motion has made a reasonable effort to reach agreement with opposing attorneys on the matters set forth in the motion. Each party and his attorney are under a duty to participate in good faith in the framing of a discovery plan if a plan is proposed by the attorney for any party. Notice of the motion shall be served on all parties. Objections or additions to matters set forth in the motion shall be served not later than ten days after service of the motion. Following the discovery conference, the court shall enter an order tentatively identifying the issues for discovery purposes, establishing a plan and schedule for discovery, setting limitations on discovery, if any, and determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the action. An order may be altered or amended whenever justice so requires.

Subject to the right of a party who properly moves for a discovery conference with a prompt convening of the conference, the court may combine the discovery conference with a pretrial conference authorized by Rule 6. (Emphasis added.)

7. STATEMENT OF THE CASE:

This is an appeal from an Order Dismissing with prejudice a personal injury law suit brought by Appellant in the Fourth District Court for the State of Utah based upon the Appellant's alleged failure to comply with a discovery order. (See Order of Dismissal dated April 28, 1994, in the Record at Page 229.) In the brief of Appellant, the Record shall be referred to as follows: "R. at p.--".) The facts relevant to this proceeding are as follows:

FACTS

1. Appellant, William Morton, is a 56-year-old male truck driver who was permanently and totally disabled by a vehicle accident which occurred on April 29, 1989. (See Complaint, R. at p. 3 - 1.) Appellant is commonly referred to as "Woody" Morton. He timely filed suit and prosecuted the action in the District Court, among other things, hired experts who were deposed by the Defendant. The parties both cooperated in discovery while the case was pending in the Fourth District Court and there was only one motion filed by either party which dealt with discovery. (R. at p. 137.)

2. That single motion was filed after the case had been pending for more than three (3) years with numerous depositions, interrogatories, and documents having been produced. (See court file referencing Depositions of William Morton (See R. at p. 20.), Rudolph Limpert (See R. at p. 31 and 36.), Donald Remington (See R. at p. 25, 29 and 34.), Dr. Philip Hoyt (See R. at p. 66

and 80.), Newell Knight (See R. at p. 45 and 56.), Greg Duval (See R. at p. 80 and 82.), and Steven Pelton (R. at p. 23 and 27).

3. The Fourth District Court entered a "Minute Entry/Pretrial Conference Trial Setting" on May 8, 1992, which ordered that discovery be completed by October 30, 1992. (See Minute Entry, R. at p. 32.) Subsequently, at the request of both parties, the trial was continued until January 11, 1994. A scheduling order was entered in May of 1993 which established a discovery cut-off date of December 8, 1993. (See Scheduling Order, R. at p. 73.)

4. In accordance with this schedule, Appellant Woody Morton and Defendant each prepared and submitted witness and exhibit lists, jointly signed and submitted a pretrial order, and exchanged trial exhibits in December of 1993. (See Pretrial Order, R. at p. 120 - 110.)

5. Just before the trial was scheduled to commence in January of 1994, Defendant requested the trial be continued and Appellant Woody Morton did not oppose the request. Although the trial was continued, discovery had been cut off on December 8, 1993 by order of the Fourth District Court. No scheduling order was entered, nor any other order entered which allowed Defendant to continue taking discovery. (See Minute Entry, R. at p. 107.) A day later, the District Court signed a Pretrial Order. This Order had signatures from Appellant's counsel and Defendant's counsel. This Order, submitted to the court and entered January

11, 1994, stated: "Discovery has been completed." (R. at p. 110.)

6. Although discovery was not permitted, Defendant propounded interrogatories and request for production of documents on January 14, 1994. While Appellant Woody Morton was under no obligation to do so, he undertook to answer the discovery requests by again interviewing witnesses listed on both Appellant's and Defendant's witness lists in the Pretrial Order. (See Certificate of Service, R. at p. 133; Request for Production of Documents, R. at p. 142 - 140; and Interrogatories, R. at p. 156 - 143.)

7. In addition to the witnesses previously identified as witnesses for both parties, Appellant was also able to interview a witness named Marvin Ainge. Although Mr. Ainge was identified in discovery as a potential witness, he had never been located for an interview. Mr. Ainge was a truck driver who arrived at the scene of the accident immediately after it occurred in April of 1989. He is a truck driver whose vocation regularly takes him outside Utah. (R. at p. 433.)

8. Mr. Ainge was unavailable to meet and be interviewed until Saturday April 9, 1994. He was recorded at Woody Morton's counsel's office on that Saturday, and the transcript was prepared of that interview Thursday April 14, 1994 and mailed to him for his review, approval, and signing on April 15, 1994. Mr. Ainge returned the signed statement on May 6, 1994. (R. at p. 433 and 474.)

9. Defendant filed a Motion to Compel answers to discovery requests. (See R. at p. 137.) On April 12, 1994 the Fourth District Court contacted counsel for Defendant *ex parte* and requested Defendant prepare an order which gave Appellant Woody Morton ten (10) days to answer the discovery requests and which threatened to dismiss the Appellant's complaint unless the answers were produced within ten (10) days. The lower Judge admits the *ex parte* communication in his Memorandum Decision of August 29, 1994. (See Order, R. at p. 164; Memorandum, R. at p. 376; and Memorandum Decision, paragraph 6, R. at p. 483.) When the lower Court called Defendant's counsel, Woody Morton's counsel was not included, and therefore did not know of the conversation or of the Order to be entered pursuant to the conversation.

10. Defendant prepared such an order the same day, April 12, 1994, and hand carried it to the Judge of the Fourth District Court on that same day. Also on the same day the District Court Judge signed the Order and the clerk entered the Order. (See Order, R. at 164; and Memorandum, R. at p.376.)

11. Defendant alleges it "mailed" a copy of the Order to Appellant on that same date. Appellant has no record of receiving such an order. (See Affidavits of Denver C. Snuffer, Jr., R. at p. 388 - 386; and Brenda Welch, R. at p. 385 - 382 and 490 - 488.)

12. The legal secretary responsible for opening mail and routing it to counsel as well as Woody Morton's counsel submitted

affidavits to the Court below attesting the Order was not received. (Id.)

13. Without knowing an order was entered compelling answers to be produced, Appellant finalized its answers to the discovery requests on approximately April 18, 1994. However, Woody Morton was in the hospital because of an emergency appendectomy at the time the answers were finalized and was unavailable to sign the answers. (Id.)

14. Woody Morton was available to sign the answers on April 21, 1994. However, since he was unaware of any order requiring the answers to be delivered, his answers were not delivered until Monday, April 25, 1994. (Id.)

15. Defendant filed a motion on April 25, 1994, asking for dismissal of Woody Morton's complaint with prejudice. No reply to the motion was permitted (cf. with CJA Rule 4-501(1)(b)) and a dismissal was entered three (3) days later based on the motion. (R. at p. 215, 229.) Although Defendant alleges it had "mailed" a copy of the April 12, Order on April 12, 1994, and although Rule 6 of the Utah Rules of Civil Procedure allows three (3) days to Appellant because of mailing, Defendant nonetheless insisted the answers came due on Friday, April 22, 1994, and they were delinquent when received on Monday, April 25, 1994. (See R. at p. 376 - 374.) If three days are added, the answers were due the day they were received. The Motion asking for dismissal of Appellant's complaint does not mention answers had been received.

16. The Court and counsel for Defendant ignored the

requirements of Rule 4-504 (2), which allowed five days after the submission of a proposed form of order for Appellant to object before its entry. Under the provisions of either Rule 6 of the Utah Civil Rules of Civil Procedure or Rule 4-504 of the Code of Judicial Administration, the answers filed by Appellant Woody Morton on Monday April 25, 1994 were timely.

17. Defendant alleges it delivered a copy of its April 25th Motion to Enter an Order of Dismissal to Appellant. Appellant has no record of ever receiving such a motion. Again, affidavits from a legal secretary and counsel attested to this. (See R. at p. 388 - 382 and 490 - 488.)

18. Notwithstanding the provisions of Rule 4-501 of the Code of Judicial Administration, which allows Appellant ten (10) days after service of a motion to file an opposition memorandum, the Court entered an Order of Dismissal on April 28, 1994, three (3) days after the motion was filed. (See R. at p. 229.)

19. On May 9, 1994, Appellant, for the first time, was notified of the Orders of April 12th and 28th. (See R. at p. 247.)

20. Appellant immediately filed a series of motions seeking relief including a Motion for Relief from Judgment (See R. at p. 249 - 233.), Motion to Set Aside Judgment (See R. at p. 405 - 400.), Motion to Strike Order of April 12 (See R. at p. 449 - 452.), and Motion to Strike Order of April 28, 1994. (See R. at p. 447 - 442.) On June 14th, the Court below extended time to appeal this matter until 30 days following its ruling on these

motions pursuant to Rule 4 of the Utah Rules of Appellate Procedure. (See R. at p. 407.)

21. On September 22, 1994 the Court denied all of Appellant's motions. The Court also sanctioned Appellant with attorneys' fees to Defendant of \$250.00. The Court mentioned, for the first time, retroactively, that Defendant was given more "time" for discovery by the continuance in January. (R. at p. 484.) This matter then became final and appealable, and Appellant timely filed his notice of appeal. (See R. at p. 498, 496.)

8. SUMMARY OF ARGUMENTS:

A. The lower Court erred by allowing Defendant to conduct discovery after it had Ordered an end to discovery. A Scheduling Order cut off discovery in December 1993. The Minute Entry continuing the case on January 10, 1994 does not reopen discovery. The Pretrial Order signed by the Court and Defendant's counsel on January 11, 1994 states "Discovery has been concluded." It was an error to enter a Dismissal of the case based on failure to answer discovery when discovery was no longer permitted.

B. Defendant alleges it "mailed" notice of an Order requiring answers within 10 days. Assuming the notice was actually mailed (Appellant has no record of it ever being received), Rule 6 of the Utah Rules of Civil Procedure allows an additional three (3) days for answers. The lower Court did not allow these additional days. If they had, the answers of Woody

Morton were timely. It was an error to not allow this additional time.

C. Rule 4-504 of the Code of Judicial Administration required Defendant to submit its Order to Appellant for review before submitting it to the Court. Appellant had five (5) days to review and approve the proposed order. Although the order was not submitted to Appellant, the five days allowed for objection should be added to the time for his answer under the Order. If the five days are added, his answers were early and it was an error to dismiss the case.

D. Appellant has no record of receiving the Order of April 12, 1994. The Defendant alleges it "mailed" a copy of the Order. In three affidavits below, Appellant testified he was unaware of the Order. Under these circumstances, an answer that is only one business day late should be excused.

E. Assuming all actions of the lower Court were procedurally correct, equity and fairness require a reversal of the dismissal of the case. This was the only motion dealing with discovery filed by either party below. Under Defendant's theory, the answers were one business day late. The dismissal was too harsh a remedy to impose. Answers were merely a courtesy, since discovery was not permitted by prior Order of the Court, and therefore dismissal for failure to participate in prohibited discovery is a manifest unjust result.

F. Under the circumstances of this case, no sanctions were proper. The award of attorney's fees was also inappropriate and

should be reversed.

9. ARGUMENT OF APPELLANT IN SUPPORT OF THIS APPEAL:

BACKGROUND

The lower court seemed to fault Appellant for the length of time this case had been pending below. However, Woody Morton had diligently prosecuted the case for over three years.

Initially, he was undergoing repeated major surgeries to correct injuries from the accident involved in this case. In one instance trial was continued to allow Woody to undergo another knee replacement surgery. (R. at p. 59, 63.) It was also continued once by the Court below due to its scheduling. The final continuance was at the request of Defendant.

Prior to the case being filed, the insurance company, on behalf of Defendant, Continental Baking Company, had an investigating adjuster. Continental Baking Company, its insurance adjuster, counsel for Defendant, as well as Woody Morton's counsel, exchanged, voluntarily and cooperatively, all of the physical evidence in this case. Most of the exchange of evidence took place before the lawsuit was filed.

The physical evidence consisted primarily of a series of photographs taken at the scene of the accident by the Utah Department of Transportation. There was a video tape made of scene of the accident by the Utah Department of Transportation. Although the Utah Highway Patrol took some photographs of the scene, their photographs were not or could not be developed and were therefore unavailable to either party. The investigating

officer at the accident scene prepared field notes and a report on the accident. Prior to the lawsuit being filed both parties had all the Department of Transportation's photographs, the police investigation report, field notes of the investigating officer, and the video made by the Department of Transportation.

After the law suit was filed the investigating police officer was deposed. Defendant hired an expert accident reconstructionist named Rudolph Limpert. His deposition was taken. Appellant hired an accident investigation expert named Don Remington, whose deposition was taken. Mr. Morton also retained an expert due to a dispute over the location of a fuel spill shown in the photographs. This expert was Dr. Philip Hoyt. Dr. Hoyt is a neighbor of the Defense attorney, and is acquainted with Defendant's counsel personally and socially. Dr. Hoyt was deposed. Mr. Morton also hired Greg Duval as an accident reconstructionist. He was interviewed and recorded by Defendant.

Before the lawsuit was filed, Woody Morton was interviewed by the insurance adjuster for Continental Baking Company and the interview was recorded. After the lawsuit, Mr. Morton was deposed and the recorded statement taken by the adjuster was made an exhibit to his deposition.

Over the course of several days of final trial preparation, Dr. Hoyt noticed skid marks in the photographs and video tapes in close proximity to the accident which he believed had a bearing on the reconstruction of the accident. The police officer testified in his deposition these skid marks were unrelated to

the accident. After carefully reviewing the photographs and video tape for several hours Dr. Hoyt had the conviction that skid-marks appearing in the photographs and video tape had to originate from Woody Morton's vehicle. When he reached this conclusion, Appellant's counsel telephoned Defendant's counsel on a speaker phone. Defense counsel was allowed to interview Dr. Hoyt regarding what he saw in the photographs and his view of the way in which the accident unfolded. There were no new photographs or video tapes being used. This was the same video tape which both parties had in their possession prior to and throughout the time the lawsuit had been pending. Defense counsel recognized the information in the photographs to which Dr. Hoyt made reference.

Because Defendant's counsel believed he needed more time to prepare as a result of this new theory, he asked for a continuance of the trial. Appellant did not object. The primary purpose of the continuance, as Appellant's counsel understood it, was to give Defendant time to prepare for the additional theory. Defendant was to review the new theory with his own accident reconstructionist. For this, no discovery was needed and the requests propounded by Defendant were superfluous.

Dr. Hoyt's theory of the skid-marks was his opinion based upon photographs and video tapes. The theory would be greatly strengthened if the truck driver who arrived first at the scene from the same direction Woody Morton was traveling could be contacted and interviewed. Although the parties knew this

individual's name, Marvin Ainge, he had not been interviewed by Appellant. Mr. Ainge was previously identified in discovery as a potential witness. He could have been contacted by either party and interviewed. In checking Appellant's files, letters had been sent to Mr. Ainge and efforts had been made to interview him for several years without success. After the continuance, in an effort to bolster the opinion of Dr. Hoyt, Appellant renewed his effort to contact Mr. Ainge.

Mr. Ainge was a truck driver who was out of the State of Utah regularly with his employment. Although renewed efforts to contact him began in January, he was unavailable until Saturday, April 9, 1994, for Appellant to interview. Appellant does not know if Mr. Ainge was interviewed by Defendant before or since then. He was certainly as available to Defendant to interview as he was to Appellant. In fact, given Defendant's resources and the resources of its insurance company, it was in a better position to investigate and locate witnesses than Woody Morton. Defendant's insurance carrier had aggressively investigated the accident. They had even interviewed Woody Morton while he was in a hospital bed eight (8) days after the accident. Mr. Ainge was, in any case, not a surprise witness.

Appellant received discovery requests from Defendant in January of 1994. This was after discovery had been cut off by a prior Scheduling Order and by the Pretrial Order. Appellant did not object to answering the untimely discovery requests, but an objection is not required to untimely discovery. As a matter of

courtesy, Woody intended to answer the discovery. The quality of the information requested in the untimely discovery would be greatly improved if Mr. Ainge could be interviewed before the answers were supplied. Therefore, Appellant's counsel concentrated his efforts on getting Mr. Ainge interviewed and providing input from Mr. Ainge in the answers.

When Mr. Ainge was interviewed April 9, 1994, he was able to tell from the photographic evidence and video tape the skid-marks in close proximity to the accident were not created by his vehicle. Mr. Ainge consented to make a statement, which he allowed to be recorded as part of the interview. He was tape recorded as part of the interview.

A written transcript of Mr. Ainge's interview was completed on Thursday, April 14, 1994, and mailed to Mr. Ainge for his review, approval, and signing on April 15, 1994. He did not return the signed statement until May 6, 1994. However, the information he made available was incorporated into the Woody's answers to discovery, and those answers were completed on April 18, 1994.

Woody Morton was contacted by his counsel and asked to sign the answers to discovery on approximately April 18th. However, Woody was hospitalized for an emergency appendectomy and was unavailable to sign until his release from the hospital. He signed the answers on April 21, 1994. Appellant was unaware of any court imposed deadline and unaware answers were due at any set time. In spite of the fact Appellant was unaware of any

deadline, answers were received by Defendant on Monday, April 25, 1994.

All of the proceedings below were based solely upon the failure to provide the answers on Friday, April 22, 1994. Those answers could have been mailed on Friday and would not have arrived until Monday the 25th or thereafter, and still have been timely under Rule 6 of the Utah Rules of Civil Procedure.

The case was scheduled for trial in August, 1994. Answers delivered on Friday, April 22, or on Monday, April 25, would not in any way prejudice Defendant's preparation for trial in August. Further, the information about the new theory had been discussed fully by defense counsel with the witness testifying to the theory in a phone conference before the continuance was granted. Defendant was fully able to prepare its own expert witness with the information already provided prior to the continuance. To the extent Defendant wanted to interview Mr. Ainge, they had his name and the resources to contact him. The Defendant did not need more time for Woody Morton to interview known witnesses and report findings to them.

A. The District Court erred by Allowing Defendant to Conduct Discovery After it had Cut Off Discovery by its Prior Orders.

The District Court erred by allowing Defendant to conduct discovery after it had cut off discovery by its prior Scheduling Order. Rule 26 of the Utah Rules of Civil Procedure allows the District Court to enter a discovery order "establishing a plan and schedule for discovery..." The court cannot enter such an

order and then disregard it. Until the continuance of the trial in January, 1994, there had always been compliance with the Court's Scheduling Orders by the Court and the parties. There was a violation of that Order when Defendant propounded discovery requests on January 14, 1994. Defendant should not be entitled to ignore the Scheduling Order and then receive a dismissal against Woody Morton on the basis of Defendant's violation of that Order. If Defendant wanted further discovery, it should have asked to reopen discovery.

There was no order reopening discovery. The Minute Entry of January 10, 1994 which continued the case makes no reference to reopening discovery. (R. at p. 107) This is the document of the Court entered contemporaneous with the continuance. A day later, the Court signed a Pretrial Order. This Order also has the signatures of Defendant's attorney and Mr. Morton's attorney. This Pretrial Order states: "Discovery has been completed." (R. at p. 110)

In contrast to the Orders at the time of the continuance, months later the lower Court wrote it "reset the trial in order to give the Defendant time for discovery." (Emphasis Added. See, Memorandum Decision, R. at p. 484) This does not mean, however, Defendant did not need to move to reopen discovery. It does not follow that granting more time has the automatic effect of entering an order allowing discovery. The lower Court had previously always followed a practice of entering an Order outlining the discovery cutoff. (See, eg. Minute Entry, R. at p.

32; Scheduling Order, R. at p. 73.) In contrast to the Rules and established past practice, there is only passing mention, retroactively, in the final Memorandum Decision, that the Court wanted to give Defendant more "time" for discovery. Due Process requires notice in advance.

If it was the Court's actual intent to reopen discovery, it should have followed the Rules and its prior practice. Reopening of discovery is not mentioned in the Minute Entry of January 10th. Discovery is prohibited by the Pretrial Order of January 11th. This Pretrial Order could easily have been interlineated or amended by the Court if it really entertained the intent to reopen discovery. The Court had the responsibility to give Mr. Morton notice of that before the discovery was propounded, rather than telling him about it months after the fact. If it were actually the intent of the lower Court to reopen discovery, it could have been a great deal more clear on the matter. As the record stands, Defendant was not entitled to any further discovery. The answers given by Woody Morton were only a courtesy. His failure to tender the courtesy earlier is no reason to dismiss his case.

B. Appellant was Allowed an Additional Three (3) Days to Answer under Rule 6 of the Utah Rules of Civil Procedure, and Therefore, the April 25, 1994 Answers were Timely.

Assuming there was nothing improper about the discovery, Appellant is allowed an additional three (3) days to file his answers to discovery requests pursuant to Rule 6 of the

Utah Rules of Civil Procedure. Therefore, his answers on April 25, 1994, were timely. Defendant alleges it "mailed" to Appellant a copy of the Order. Therefore, under Defendant's version of the events, by mailing the notice to Appellant, Rule 6 added three days to the time requirements imposed by the Order. Once three days are added, the answers were not due until Monday, April 25, 1993. They were actually received at that time.

There was a manifest error by the lower Court when it failed to allow Mr. Morton these additional three days when computing whether he complied with the Court's Order. The Order of Dismissal should, therefore, be reversed.

It should be noted that if they had been mailed on Friday, and received on Monday they would have been timely even under Defendant's version of the facts and law. They were admittedly delivered on Monday.

C. Appellant is Allowed an Additional Five (5) Days to Object Before the Entry of an Order Under Rule 4-504 of the Code of Judicial Administration, and Therefore the April 25, 1994 Answers were Timely.

Woody Morton should be allowed an additional five (5) days to file an answer under the April 12th Order pursuant to the provisions of Rule 4-504 of the Code of Judicial Administration. Therefore, his answers of April 25, 1994, were timely. The ex parte communications between the court and Defendant's counsel which resulted in the April 12th order violated Rule 4-504. Mr. Morton should have been given five (5) days to object to the

proposed form of order before it was signed by the court. If this additional five day period is added to the time of the Order, the April 25th answers were two days early. For this reason, the lower Court should be reversed.

D. Should Appellant be Relieved from any Responsibility to File Answers on April 22, 1994, Because the Order Requiring Answers on that Date was not Served Upon Him.

Appellant should be relieved from any obligation to file answers to the April 12, 1994, Order because the Order was not served upon him. Appellant has no record of ever receiving the Order. Woody Morton filed answers as a courtesy on April 25th without knowing they were due. Assuming he is not entitled to any additional time under the Order based on Rule 6 URCP or Rule 4-504, because he never received the Order of April 12th, he should be relieved from failing to comply with the Order. In any event, Mr. Morton missed compliance by at most only one business day of an Order kept secret from him. Under these circumstances, the lower Court should be reversed.

Below, controlling weight was given to Certificates of Mailing and Delivery signed by Defendant. These Certificates alone were used to determine if Appellant received the documents in question, rather than a sworn affidavit of Woody Morton's counsel, and another two affidavits from a legal secretary who reviewed and calendared all incoming documents.

Counsel for the Defendant is not above errors in mailing. In one instance, Defendant's counsel mailed two copies of an

affidavit from one affiant, and failed to mail a copy of another affidavit from a different affiant. These were attached to motions made after the mailing certificates were drawn into question. (R. at p. 430.) Everyone makes a mistake on occasion. Here, the lower Court chose to deprive Woody Morton the opportunity to present the merits of his case based upon the presumed infallibility of the Defendant's mailing system and the U.S. Mail. That, too, while giving no weight to affidavits from an attorney and legal secretary who never received the documents.

Appellant has no history of ignoring any court order. Mr. Morton would not have ignored the April 12th Order if it had been received. The answers were ready on Thursday. He would not have delivered the answers on Monday if he knew they were due on Friday. He was not aware of the Order, and for that reason alone did not meet the deadline. He should be relieved from the harsh consequences imposed by the lower Court. No litigant should lose his opportunity for a day in court because a document was not received by his counsel.

It should be remembered the failure here is one within the control of the party benefiting from the failure. The Defendant failed to get a copy to Appellant. The Defendant did not call Appellant's counsel on the phone to alert him of the Order, although there was a good working relationship. That remains the greatest mystery to Appellant still. Appellant's counsel would not have sought a dismissal under the circumstances without first talking with the Defense attorney to confirm there was an

intentional abandonment of the case. Here, Defendant benefits from a dismissal on a technicality of procedure. None of the dispositive events were within the control of the Appellant or his counsel. Mr. Morton is the one burdened by the dismissal. It is fundamentally unfair to allow such inequities to remain.

It is also curious the Court and Defendant's counsel talked about the April 12th Order *ex parte* and entered the Order the same day as the conversation. If Appellant's counsel had been included in that conversation, there would be no question Appellant would have learned of the Order. Once again, Woody Morton lost substantive legal rights below which could have easily been protected by the Court with little additional effort. This cries out for correction on appeal.

E. Assuming the Lower Court Complied with all Procedural Requirements, the Order of Dismissal was Still Improper Because Appellant was Unaware of His Violation of any Order, and the Sanction of Dismissal is Too Harsh Under the Circumstances Here.

Assuming, *arguendo*, all of the actions of the lower Court were proper in entering an order of dismissal under the relevant Rules of Procedure, Woody Morton should be relieved of the onerous sanction of dismissal. He was unaware of the order requiring an earlier delivery and his answers were delivered at the most one business day late. As the Appeals court stated in Darrington v. Wade, 812 P.2d 452 (1991): "...default judgment is an unusually harsh sanction that should be meted out with caution." *Id.* at 456. The Supreme Court also looked at the

sanctions allowed under Rule 37 shortly after its revision in 1972. The court explained sanctions by a lower court must fit within fundamental concern for fairness and meeting the ends of justice. The Court wrote:

"It is true that where the authority to perform a proposed action rests within the discretion of the court we must allow considerable latitude in which he may exercise his judgment. But this does not mean that the court has unrestrained power to act in an arbitrary manner. Fundamental to the concept of the rule of law is the principle that reason and justice shall prevail over the arbitrary and uncontrolled will of any one person; and that this applies to all men in every status: to courts and judges, as well as to autocrats or bureaucrats. The meaning of the term "discretion" itself imports that the action should be taken within reason and good conscience in the interest of protecting the rights of both parties and serving the ends of justice. It has always been the policy of our law to resolve doubts in favor of permitting parties to have their day in court of the merits of a controversy." Carman v. Slavens, 546 P.2d 601, 603 (1976).

The result here is fundamentally unfair. The parties have not had their day in court to resolve the matter on its merits. Reason and good conscience require the court below be reversed and this matter remanded for decision on its merits.

This matter is now before the Appeals Court based solely on Defendant's allegation it delivered documents which Appellant has no record of receiving. Mr. Morton has verified the documents were not in his files by multiple affidavits. Even so, the answers were at the most one business day late under the Defendant's theory. Defendant's theory is also dependent upon ignoring various Rules of Civil Procedure and Judicial Administration. It requires the Court to believe Woody Morton,

after spending over 3 years of time and over \$20,000.00 in costs prosecuting this case would violate an order by one day when he could have complied. This proposition makes no sense. If the Order had been given to him, he would have complied. It made no difference to Mr. Morton whether he delivered the signed answers on Thursday, the 21st of April, when signed, Friday, the 22nd, or on Monday, the 25th of April. Since the alleged deadline was Friday, with the potential for violation of an Order if it was not met, Mr. Morton would surely have complied if the Order had been given to him. The harsh result below is too inequitable to let stand.

F. No Sanctions, Including Attorney's Fees, were Proper in This Case.

Appellant will not reiterate the matters compelling relief again here. It is apparent, however, under the circumstances, Defendant should not be entitled to any sanctions including the award of \$250.00 in attorneys' fees.

10. CONCLUSION:

Woody Morton was not required to answer discovery after December 1993. The discovery of January, 1994 was in violation of the Court's Scheduling Order and Pretrial Order. The Minute Entry continuing the case makes no mention of allowing further discovery. No dismissal should be based on a failure to answer inappropriate discovery.

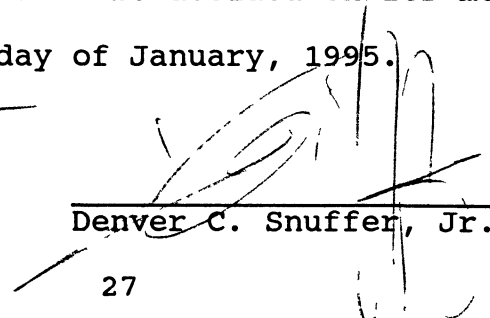
The answers on Monday, April 25th, were on time. Rule 6 of the Utah Rules of Civil Procedure allow an extra three days to

any deadline for mailing. Here, Defendant alleges he "mailed" a copy of the Order to Appellant. Once notice is served by mail, an additional three days is allowed by this rule.

Rule 4-504 of the Code of Judicial Administration allows five days for a party to review any order for approval before it is submitted to the Court for signing. That was not done. However, Mr. Morton should be given five additional days under this rule in computing whether the answers were due on Friday, April 22nd. When this additional time is taken into account, the answers were two days early when Defendant received them on Monday, April 25th.

This situation is fraught with potentially disastrous consequences for litigators. If any plaintiff can lose her right to have her case decided on the merits by unknowingly missing a deadline by one day, justice will become an increasingly elusive goal. If a defendant can intentionally or negligently fail to deliver notice of an order to her opponent and secure a dismissal of her adversary's case, what is to prevent abuse? Under the facts most favorable to Defendant, Woody Morton missed a deadline by one day. Justice should prevent the harsh result of dismissing his case after years of diligent prosecution for the want of one business day. The lower court should be reversed and this case should be remanded to be decided on its merits.

DATED this 12th day of January, 1995.



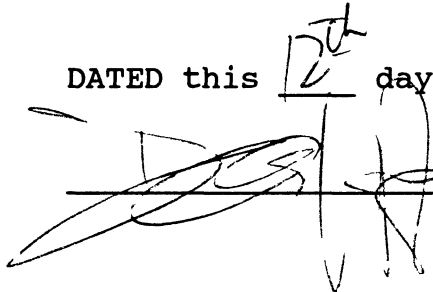
Denver C. Snuffer, Jr.

CERTIFICATE OF MAILING

I hereby certify that two true and correct copies of the foregoing Appellant's Brief was mailed, in accordance with Rule 26 of the Utah Rules of Appellate Procedure, postage prepaid to:

Mr. Terry Plant
HANSON, EPPERSON & SMITH
4 Triad Center, Suite 500
Salt Lake City, Utah.

DATED this 12th day of January, 1995.

A handwritten signature in dark ink, appearing to be "J. E. Smith", is written over a horizontal line. The signature is stylized and somewhat cursive.

S:\denver\mort.app

11. APPENDIX

Statement of the Rule:

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

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

(Added effective January 1, 1992.)

ARTICLE 5. CIVIL PRACTICE.

Rule 4-501. Motions.**Intent:**

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

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

To establish a procedure for expedited dispositions.

Applicability:

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

Statement of the Rule:**(1) Filing and service of motions and memoranda.**

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

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

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

(d) **Notice to submit for decision.** Upon the expiration of the five-day period to file a reply memorandum, either party may notify the Clerk to submit the matter to the court for decision. The notification shall be in the form of a separate written pleading and captioned "Notice to Submit for Decision." The notification shall contain a certificate of mailing to all

parties. If neither party files a notice, the motion will not be submitted for decision.

(2) Motions for summary judgment.

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

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

(3) Hearings.

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

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

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

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

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

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

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

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

(5) Telephone conference. The court on its own motion or at a party's request may direct arguments of any motion by telephone conference without

court appearance. A verbatim record shall be made of all telephone arguments and the rulings thereon if requested by counsel.

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

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

The 1991 amendment deleted "and a copy of

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

NOTES TO DECISIONS

ANALYSIS

When rule applies.
Cited.

When rule applies.

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

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

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

Rule 4-502. Discovery procedures in civil cases.

Intent:

To establish a procedure for the filing of discovery documents.

To establish a limitation on discovery procedures within 30 days of trial.

Applicability:

This rule shall apply to the District, Juvenile and Circuit Courts.

Statement of the Rule:

(1) Parties conducting discovery under Rules 33, 34 and 36 of the Utah Rules of Civil Procedure shall not file discovery requests with the clerk of the court, but shall file only the original certificate of service stating that the discovery requests have been served on the other parties and the date of service. The responding party shall file a similar certificate with the clerk of the court.

(2) The party serving the discovery request shall retain the original with a copy of the proof of service affixed to it and serve a copy of the discovery request and proof of service upon the opposing party or counsel. The party responding to the discovery request shall retain the original with a copy of the proof of service affixed to it, and serve a copy of the responses and the proof of service upon the opposing party or counsel. The discovery requests and response shall not be filed with the clerk of the court unless the court on motion and notice and for good cause shown so orders.

(3) Any party filing a motion to compel compliance with a discovery request or a motion which relies upon the discovery response shall attach a copy of the discovery request or response which is at issue in the motion.

(4) Depositions taken pursuant to the Rules of Civil Procedure shall not be filed with the clerk of the court except as provided in this Code or upon order of the court for good cause shown.

(5) All parties shall be entitled to conduct discovery proceedings in accordance with this rule. All discovery proceedings shall be completed, including all responses thereto, and all depositions and other documents filed with the court no later than thirty (30) days before the date set for trial of the case. The right to conduct discovery proceedings within thirty (30) days before trial shall be within the discretion of the court. Motions to conduct discovery within thirty (30) days before trial shall be presented to the judge assigned to the