

1994

# William W. Morton v. Continental Baking Company, a Deaware corporation : Petition for Rehearing

Utah Court of Appeals

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Terry M. Plant; Hanson, Epperson & Smith; attorney for appellee.

Denver C. Snuffer, Jr.; Nelson, Snuffer & Dahle; attorneys for appellant.

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## STATE OF UTAH

Civil No. 910400454

**COURT OF APPEALS**

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IN THE SUPREME COURT

STATE OF UTAH

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WILLIAM W. MORTON,	)	
	)	PETITION FOR REHEARING
Plaintiff/Appellant,	)	
	)	
vs.	)	No. 940481
	)	
CONTINENTAL BAKING COMPANY,	)	
a Delaware corporation,	)	
	)	Civil No. 910400454
Defendant/Appellee.	)	

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APPEAL FROM THE FOURTH DISTRICT COURT, STATE OF UTAH  
HONORABLE RAY M. HARDING

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## I

### INTRODUCTION

The Utah Court of Appeals filed a Memorandum Decision in the above-entitled matter, case no. 940747-CA, on September 14, 1995. The Court ruled that the Appellant's arguments on appeal were meritless. However, the Court felt that the sanction of dismissal which was meted out by the district court was too harsh under the circumstances and reversed the court's dismissal calling it an abuse of discretion. See Appendix A, Memorandum Decision.

Defendant Continental Banking Company respectfully requests that a rehearing of this matter would be beneficial in light of facts which were not considered by this Court which would demonstrate that the district court did not abuse its discretion and that its decision in dismissing the action may be properly upheld. Defendant Continental Baking Company and its counsel specifically represent and aver that this Petition for Rehearing is presented in good faith and not for purposes of delay. Defendant believes rehearing will present the most efficient and efficacious resolution of this matter.

## II

### POINTS OF FACT AND LAW WHICH MERIT REHEARING

1. Defendant Continental Banking Company raised an argument in the court below that Appellant further violated the court's discovery order by failing to give full and complete

answers to interrogatory requests and document production requests. This Court declined to reach the issue, stating that the argument was not presented to the trial court. See Memorandum Decision, at n. 2.

2. The court failed to consider the fact that the sanction of dismissal was specifically known to Plaintiff as a consequence of his failure to respond to the court-ordered discovery. The facts also demonstrate a repeated and knowing failure to comply with the Rules of Civil Procedure, as well as the court's specific order compelling discovery.

### III

#### ARGUMENT

A. APPELLEE RAISED THE ISSUE OF THE ADEQUACY OF PLAINTIFF'S ANSWERS TO DISCOVERY IN THE COURT BELOW WHICH THE COURT DECLINED TO ADDRESS AND SHOULD BE ADDRESSED ON REHEARING.

In footnote 2 of the court's Memorandum Decision, this Court declined to address the alternative theory raised by Defendant that, in addition to being late, the Plaintiff's answers to interrogatories and requests for production of documents also violated the court's specific order because they were not full and complete answers justifying dismissal. See Appendix "A". The Court stated in footnote 2, "In addition, we do not reach appellee's argument that appellant further violated the court's discovery order by failing to give complete answers to the interrogatory requests. This argument was not presented to the

trial court, and we decline to reach it for the first time on appeal." See Memorandum Decision, fn. 2; Appendix "A". A review of the record on appeal demonstrates that the Defendant did in fact raise the issue with the trial court. In its Opposition to Plaintiff's Motion for Relief from Judgment, Defendant made specific arguments addressing the fact that the answers to discovery, even if deemed timely, were nonresponsive and violated the court's order, warranting dismissal. See R. 379, 365, Defendant's Memorandum in Opposition to Plaintiff's Motion for Relief from Judgment. See Appendix "B". The arguments set forth in that memorandum specifically address the fact that the court had required full and complete answers to the discovery by the court-imposed deadline. Id. The memorandum sets forth specifically that the answers were inadequate because they did not disclose any of the information which Plaintiff stated that he was ready to present at trial even though several months had passed. Instead, the answers to discovery merely indicated that information had been given to Plaintiff's experts and that Plaintiff was awaiting responses. Id. Therefore, if this Court would re-examine the record in this case, it would become apparent that the Defendant's argument on appeal in Section IV of the Brief merits consideration by the Court prior to conclusion of this matter in the Court of Appeals.

B. THE COURT, IN RECONSIDERING THIS MATTER, SHOULD ADDRESS THE FACT THAT PLAINTIFF WITTINGLY VIOLATED A COURT

ORDER WHICH EXPRESSLY STATED THAT THE SANCTION OF  
DISMISSAL WOULD BE THE RESULT OF FAILURE TO COMPLY.

In its Memorandum Decision, the Court cited to cases such as Darrington v. Wade, 812 P.2d 452, 456 (Utah App. 1991), stating that the sanction of dismissal was improper absent multiple instances of abuse and repeated willful failure to respond to discovery. On reconsideration, the Court should examine the facts again with the understanding that Plaintiff had represented that it was ready to present new evidence and new expert theories on the eve of trial. As demonstrated in the record, trial was expressly continued so that discovery of the expert's opinion could be obtained from the Plaintiff. Request for production of documents and interrogatories were sent to Plaintiff four days after the trial was continued.

Thereafter Plaintiff completely failed to answer the Defendant's requests, failed to reply to counsel's correspondence and failed to file any response to Defendant's motion to compel discovery. Plaintiff completely failed to provide the answers as ordered by the court, knowing that the court had ruled that dismissal would be the result of his failure to respond as indicated in the court's order compelling discovery. Therefore, Plaintiff acted multiple times and knowingly failed to respond by (1) failing to provide answers to discovery in any manner, (2) failing to respond to the motion to compel, (3) failing to respond to the court's order, and (4) failing to provide full and

complete answers as required by the court order when the Plaintiff did in fact provide answers. This is precisely the type of conduct which merits the censure of dismissal. See Charlie Brown Construction Co. v. Leisure Sports Inc., 740 P.2d 1368 Utah App. cert denied 765 P.2d 1277 (Utah 1987).

Moreover, this Court failed to distinguish with any discussion, the fact that the sanction of dismissal was known to Plaintiff and contained in the order compelling discovery served upon him. The record shows Plaintiff was well aware that his failure to comply with the discovery order would result in dismissal of his case. This is a far cry from reviewing a case where a judge imposes the sanction of dismissal for a discovery violation after the fact. In this case, Plaintiff's acts were a direct violation of an order which expressly stated that failure to comply would be met with the sanction of dismissal. On appeal, this Court fails to address these facts in its analysis and should be considered by the Court in determining whether or not the trial court abused its discretion.

Appellee Continental Banking contends that once the district court makes an order, especially one which the Plaintiff knows the threatened sanction beforehand, the authority of the court to impose the sanction in managing its docket should be reviewed very deferentially under the abuse of discretion standard. Appellee believes that reconsideration of the facts relevant to



Plaintiff's knowledge that he would face the sanction of dismissal, mitigate the apparent harshness of the sanction.

Defendant further contends that the Court did not explain or consider how the trial court abused its discretion but merely felt that under the circumstances its collective judgment would have been different. This Court does not address the specific facts of this case or set forth why, given the facts of this case, "no reasonable man would take the view adopted by the trial court" necessary to find an abuse of discretion. See State v. Gerrard, 584 P.2d 885, 887 (Utah 1978); see also State v. Larson, 865 P.2d 1355, 1361 (Utah 1993).

#### CONCLUSION

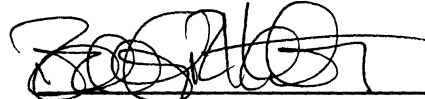
Defendant Continental Banking asserts that a rehearing of this matter is warranted to address Defendant's alternative argument that Plaintiff's answers to the discovery, even if deemed timely, were also violative of the court order.

Further, a review of the facts demonstrates that Plaintiff wittingly violated a court order, knowing that the consequence of the violation would be dismissal of the case. Re-examination of the facts will demonstrate that the Plaintiff's conduct in this matter was sufficiently repetitious, callous and egregious so that a reasonable court could have adopted the view taken by the trial court in this matter. Therefore, the Appellate Court should not substitute its judgment for that of the trial court and should make Plaintiff's burden on appeal to demonstrate that

the court did in fact abuse its discretion and that no reasonable court could have taken the view adopted by the trial court. Defendant requests rehearing of this matter in order to clarify the Court's holding and ensure that all factors, both legal and factual, are considered by this Court.

Respectfully submitted this 26 day of September, 1995.

HANSON, EPPERSON & SMITH

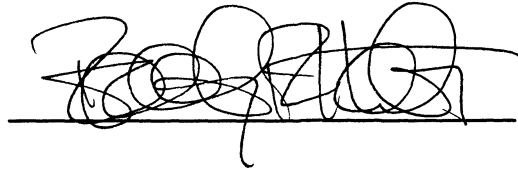
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TERRY M. PLANT  
BRADLEY R. HELSTEN  
Attorneys for  
Defendant/Appellee

**CERTIFICATE OF SERVICE**

I hereby certify that I served the foregoing motion by mailing a true and correct copy of the foregoing document, postage prepaid, this 26 day of September, 1995, to the following:

DENVER C. SNUFFER, JR.  
**MADDOX, NELSON, SNUFFER & DAHLE**  
Attorney for Plaintiff/Appellant  
William W. Morton  
10885 South State Street  
Sandy, Utah 84070

A handwritten signature in black ink, appearing to read "Denver C. Snuffer, Jr.", written over a horizontal line.

**APPENDIX**

- A.   Memorandum Decision**
- B.   Defendant's Memorandum in Opposition to Plaintiff's  
      Motion for Relief From Judgment**

Tab A

FILED

SEP 14 1995

IN THE UTAH COURT OF APPEALS

COURT OF APPEALS

-----ooOoo-----

William W. Morton,	)	MEMORANDUM DECISION
	)	(Not For Official Publication)
Plaintiff and Appellant,	)	
	)	
v.	)	Case No. 940747-CA
	)	
Continental Baking Company,	)	
	)	
Defendant and Appellee.	)	F I L E D
	)	(September 14, 1995)

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Fourth District, Utah County  
The Honorable Ray M. Harding

Attorneys: Denver C. Snuffer, Jr., Sandy, for Appellant  
Terry M. Plant and Bradley R. Helsten, Salt Lake  
City, for Appellee

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Before Judges Orme, Davis, and Jackson.

DAVIS, Associate Presiding Judge:

William W. Morton appeals from the trial court's order dismissing with prejudice his personal injury action based upon failure to comply with a discovery order. We reverse and remand.

We have reviewed each of the issues raised by appellant regarding excuses for noncompliance with the court's discovery order, or reasons for extension of the court imposed deadline, and have found them to be without merit. However, despite appellant's failure to timely comply with the trial court's order, we also note the well established proposition that dismissal "is an unusually harsh sanction that should be meted out with caution." Darrington v. Wade, 812 P.2d 452, 456 (Utah App. 1991); see also Utah Dep't of Transp. v. Osguthorpe, 892 P.2d 4, 7 (Utah 1995); Intermountain Physical Medicine Assocs. v. Micro-dex Corp., 739 P.2d 1131, 1133 (Utah App. 1987). Our

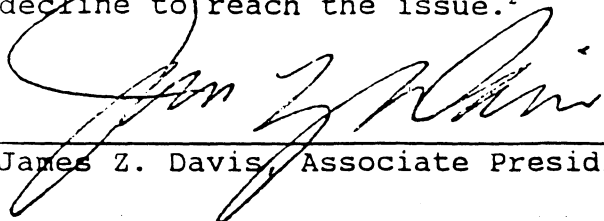
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1. We have determined that "[t]he facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument." Utah R. App. P. 29(a)(3).

review of the cases affirming a ruling of dismissal with prejudice or a ruling of default judgment indicates that such action is usually approved in cases involving more egregious neglect and misconduct than is present in the case at hand. See Osguthorpe, 892 P.2d at 9 (affirming default judgment because defendant "had multiple and repeated opportunities to assert his claims and positions and has flagrantly neglected to do so") (citation omitted); Arsen v. Collina, 684 P.2d 52, 54-55 (Utah 1984) (affirming default judgment in light of defendant's repeated wilful failure to respond to discovery or to continue to participate in the case in any way); America Mut. Ins. Co. v. Schettler, 768 P.2d 950, 962 (Utah App. 1989) (affirming default judgment in view of defendant's failure to comply with discovery orders, multiple instances of intimidation of witnesses, bribery attempts, and other "aggravated misconduct"); Charlie Brown Constr. Co. v. Leisure Sports, Inc., 740 P.2d 1368 (Utah App.) (affirming dismissal with prejudice due to multiple instances of failure to appear at court hearings and failure to timely prosecute the case), cert. denied, 765 P.2d 1277 (Utah 1987). We agree that appellant's conduct merited sanction and acknowledge the discretion given trial courts regarding the imposition of discovery sanctions. See Darrington, 812 P.2d at 457. We are constrained, however, to follow prior decisions approving dismissal under Utah Rule of Civil Procedure 37 only under circumstances much more egregious than those in evidence here. Therefore, we reverse the trial court's decision to dismiss the case with prejudice as an abuse of discretion and remand the matter for further proceedings.

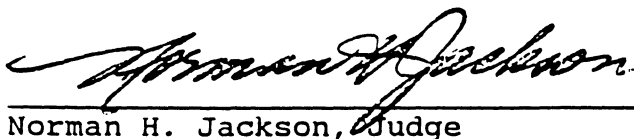
Further, due to appellant's utter failure to address the trial court's imposition of sanctions, including attorney fees,

arising from appellant's improper allegations of fraud, we decline to reach the issue.<sup>2</sup>

  
James Z. Davis, Associate Presiding Judge

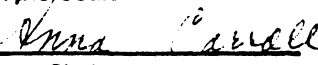
WE CONCUR:

  
Gregory R. Orme, Presiding Judge

  
Norman H. Jackson, Judge

I hereby certify that this is a true and correct copy of the judgment on this appeal, Clerk of Appeals. In testimony whereof, I have set my hand and affixed the seal of the Court.

  
Marilyn M. Branch  
Clerk of the Court

By   
Deputy Clerk

9-14-95  
Date

2. In addition, we do not reach appellee's argument that appellant further violated the court's discovery order by failing to give complete answers to the interrogatory requests. This argument was not presented to the trial court, and we decline to reach it for the first time on appeal. See Ong Int'l (U.S.A.) Inc. v. 11th Ave. Corp., 850 P.2d 447, 455 (Utah 1993) (general rule is to decline consideration of issues raised for first time on appeal).



Tab B

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

---

WILLIAM W. MORTON,	)	
	)	
Plaintiff,	)	DEFENDANT'S MEMORANDUM
	)	IN OPPOSITION TO
vs.	)	PLAINTIFF'S MOTION FOR
	)	RELIEF FROM JUDGMENT
	)	
CONTINENTAL BAKING COMPANY,	)	
a Delaware corporation,	)	
	)	
Defendant.	)	Civil No. 910400454PI
	)	Judge Ray M. Harding

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The defendant, Continental Baking Company, submits the following memorandum in opposition to Plaintiff's Motion for Relief from Judgment.

**STATEMENT OF MATERIAL FACTS**

1. As stated by Plaintiff in his Motion for Relief from Judgment, this matter has been set for trial on two different occasions and was continued initially due to medical problems being experienced by the plaintiff.

2. This matter was again set for trial on January 11, 1994. On January 10, 1994, Defendant's counsel received a call from Plaintiff's counsel with Mr. Phil Hoyt, Plaintiff's expert witness, present on the telephone line explaining to Defendant's counsel that Plaintiff would be offering new evidence through

Mr. Hoyt and a new theory of liability against the Defendant. In response, Defendant's counsel instructed Plaintiff's counsel that new evidence at that late hour was unacceptable, and a telephone conference was initiated with the Court. After discussing this matter with the Court, it was decided that in order that Plaintiff be given the opportunity to present this evidence fairly, the trial date be continued and was, in fact, continued until August 1994. It is important to remember and particularly relevant to Plaintiff's motion for relief that the reason the trial date was continued was because of new evidence that was going to be introduced through Plaintiff's expert, Phil Hoyt. Further, that evidence was represented to be prepared and ready to be presented at the January 11, 1994 trial.

3. Four days later, on January 14, Defendant served upon Plaintiff's counsel various interrogatories and requests for production of documents which in large part sought to obtain the new evidence that Plaintiff was ready to utilize at trial and which was the reason the trial date was continued. Other information was requested; however, the purpose of these interrogatories and requests for production of documents was to give the Defendant the information that formed the basis for continuing the trial. (See interrogatories and requests for production of documents which were attached to Defendant's Motion to Compel filed June 16, 1994.)

4. After receiving no responses to the interrogatories or requests for production of documents, on February 25, 1994,

approximately 10 days after the answers to interrogatories and requests for production of documents were due, Defendant's counsel wrote a letter (a copy of which is attached hereto as "Exhibit A"), explaining to Plaintiff's counsel the need to receive an immediate response to the discovery requests and an explanation that if responses were not received on or before March 10, a motion to compel would be filed. The letter then goes on to indicate that before any depositions would be taken in this matter, it was necessary that answers to interrogatories and requests for production of documents be received. After receiving no response to the interrogatories or requests, on March 16, 1994, the Defendant filed its Motion to Compel, 6 days beyond the time that was set forth in the letter of February 25, 1994.

5. Having received no word whatsoever from the Plaintiff or responses to the outstanding discovery requests, on March 29, thirteen days after the Motion to Compel was filed, Defendant submitted to Plaintiff a Notice to Submit for Decision and a proposed Order which would have given Plaintiff up to April 8 to provide answers to the interrogatories and requests for production of documents. This Notice to Submit for Decision and proposed Order were mailed to Plaintiff's counsel at 10885 South State Street, Sandy, Utah 84070, on March 29, 1994. (See Certificate of Mailing and attached Affidavit of Lynn Javadi.) Again, nothing was received from the plaintiff in response to the Notice to Submit for Decision.

6. On April 12, 1994, Defendant's counsel called the Clerk of the Court to inquire regarding the status of the Court's entry of the proposed Order submitted with the Notice to Submit for Decision. Defendant's counsel initially spoke with the Court's Clerk, Joe Morton, concerning the status of the Order and later that same day received a telephone call from Mr. Morton, wherein he explained that the Court would not sign the Order submitted with the Notice to Submit for Decision, but rather requested that counsel prepare a new Order giving the Plaintiff 10 days from that date to respond to the discovery and upon failure to do so, the Order was to include specific language that the matter would be dismissed with prejudice. (See Order Granting Defendant's Motion to Compel and Awarding Attorney Fees, dated April 12, 1994.)

7. On April 12, 1994, the Order Granting Defendant's Motion to Compel and Awarding Attorney Fees was entered by the Court, which by its own terms made all responses to the discovery requests due on or before April 22 at 5:00 o'clock p.m. (10 days after the signing of the Order). In accordance with the Certificate of Mailing signed by Bryan Hale of Defendant's attorney's office, a copy of the Order was mailed to Plaintiff's counsel in the same manner that Defendant's counsel has always dealt with Plaintiff's counsel in providing him documents. It is interesting to note that Plaintiff's counsel acknowledges receipt of the Motion to Compel which was served upon him in this same

manner. (See Affidavits of Bryan Hale and Lynn Javadi attached hereto.)

8. As of April 22, 1994 at 5:05 p.m., no responses to the outstanding discovery requests had been received, nor had there been any communication from Plaintiff's counsel whatsoever concerning those discovery requests. (See Affidavit of Terry M. Plant dated April 22, 1994, previously submitted with motion for order of dismissal.)

9. On the next business day, which was April 25, 1994, Defendant's Motion to Dismiss for Failure to Comply with Order Compelling Discovery was hand delivered to the Court by Mr. John N. Braithwaite, an attorney at defense counsel's law firm. Mr. Braithwaite also personally hand delivered a copy of the motion, memorandum in support of motion to dismiss, order of dismissal and letter to the Court to the office of Plaintiff's counsel on that same day. (See Affidavit of John N. Braithwaite, attached hereto.)

10. Included with the Motion to Dismiss for Failure to Comply with Order Compelling Discovery and supporting memorandum, which documents were hand delivered to Plaintiff's counsel's law firm by Mr. Braithwaite, was a copy of the Order Granting Defendant's Motion to Compel and Awarding Attorney Fees attached to the memorandum as "Exhibit A" and a copy of the Affidavit of Terry M. Plant, setting forth the fact that no responses to the discovery requests had been received at the time the matter was submitted to

the Court. The hand deliveries were made to Plaintiff's counsel's office. (See Affidavit of John N. Braithwaite.)

11. On April 25, 1994, at approximately 2:15 p.m., Defendant's counsel received, by means of facsimile, answers to interrogatories and responses to requests for production of documents. A copy of those answers received on April 25, 1994 are attached hereto as "Exhibit B."

12. The Order of the Court dated April 12, 1994 not only required that the answers be received by April 22 at 5:00 o'clock p.m., but also required that "full and complete responses" to the interrogatories and requests for production of documents be received. The Court is directed to the responses to the interrogatories and particularly answers to Interrogatories Nos. 8, 9, 10, 11, 12, 13 and 14. Plaintiff's counsel essentially states that the interrogatories had been provided to his various witnesses and that on some unknown day in the future the interrogatories would be answered when his experts saw fit to provide him with the information. Further, the interrogatories talk about future site visits which will be made by Mr. Phil Hoyt, Plaintiff's expert, and which will require that the interrogatories be supplemented.

13. As to the request for production of documents, Answer No. 2 refers to photocopies of pictures that were being produced. No such pictures were attached. Answer no. 3 makes reference to notes, calculations and writings of various experts and the response is given that these notes have already been

provided as to Mr. Hoyt and Mr. Remington, in spite of the fact that Mr. Hoyt apparently is changing his testimony, and that they will be provided regarding Greg Duval, but were not at the time the responses were given. In response to Request No. 4, Plaintiff objects to the information requested without providing any information. Requests Nos. 5 and 6 are both answered by "See accompanying documents." No documents of any kind accompanied the faxed responses.

14. On or about May 5, 1994, after not hearing from the Court concerning this matter and having heard nothing from Plaintiff's counsel, counsel for the Defendant called the Court to inquire concerning whether the Order dismissing Plaintiff's case had been entered. It was then that Defendant's counsel was informed by the Clerk of the Court that the Order of the Court had been signed on April 28, 1994. On May 6, 1994, Defendant's counsel personally traveled to the Court to inspect the Court's file to make certain that all certificates of service pertaining to the various notices and motions at issue here were properly contained in the file. Every document sent to the Court concerning the issues raised by Defendant's Motion to Compel contained a certificate of mailing and/or hand delivery. (See Court file.)

15. On May 6, 1994, in accordance with Rule 58(A) of the Utah Rules of Civil Procedure, a Notice of Signing of Judgment was sent to Plaintiff's counsel. Again, the same certificate of delivery was signed as had been signed in all other mailings and



deliveries to Plaintiff. Plaintiff's counsel acknowledges receipt of this pleading, which was delivered in the same manner as the various other pleadings. (See Affidavit of Denver Snuffer, ¶ 10.)

16. On May 10, 1994, the Defendant received the enclosed Certificate of Delivery, Answers to Defendant's Interrogatories to Plaintiff and Plaintiff's Production of Documents ("Exhibit C"). The Court will note that the answers to the interrogatories are identical to those provided in the earlier facsimile on April 25 and that, for the first time on May 10, 1994, Plaintiff provided responses to requests for production of documents. However, those responses only include an Affidavit of Stan Holyoak, a statement of Gale Pike, a statement of Marvin Ainge, and some photocopies of photographs. No responses have been received in response to Requests Nos. 3 or 4, and as admitted in Plaintiff's own memorandum, all statements responsive to Requests Nos. 4 and 5 have not been provided.

#### **LEGAL ARGUMENT**

##### **POINT I**

PLAINTIFF HAS FAILED TO TIMELY RESPOND TO DISCOVERY AND HIS "EXCUSES" DO NOT RISE TO THE LEVEL OF EXCUSABLE NEGLIGENCE. THE PERTINENT DOCUMENTS WERE ALL SERVED IN ACCORDANCE WITH THE RULES OF PROCEDURE, AND THE MOTION TO DISMISS AND ORDER OF DISMISSAL WERE HAND DELIVERED, EFFECTIVELY PRECLUDING A CLAIM THAT THE DOCUMENTS WERE NOT RECEIVED.

- A. All relevant documents were received by Plaintiff's counsel.

At the outset, it should be noted that Plaintiff's attempt to avoid the various court orders is based upon an assertion that Plaintiff's counsel did not properly receive various pleadings. In other words, it appears that Plaintiff is attempting to explain his "excusable neglect" by alleging that the Defendant failed to provide proper notice of the various pleadings and other documents which have been submitted. Not only is such an approach offensive in that it attempts to cast the blame away from where it belongs, which is squarely on the shoulders of Plaintiff's counsel, but it is totally unfounded given the certificates of service and the supporting affidavits from various members of Defendant's counsel's office, including Mr. John Braithwaite, a partner in the firm of Hanson, Epperson & Smith, who has prepared an affidavit indicating that the crucial documents were served personally by means of hand delivery, as well as Lynn Javadi and Bryan Hale, other members of Defendant's attorney's law firm. These affidavits and certificates of service conclusively establish that all relevant documents were served upon Plaintiff in accordance with Rule 5(b) of the Utah Rules of Civil Procedure. Apparently, Plaintiff's counsel does not have a system within his office to ensure that he receives documents mailed or delivered to him. If so, it certainly cannot be "excusable neglect" when he does not receive those documents.

Further, it appears to be Plaintiff's position that somehow he received certain documents, i.e., the Motion to Compel

and the Notice of Signing of Judgment, and yet, for some reason, he did not receive the Notice to Submit for Decision, together with the proposed Order, the Order Granting Defendant's Motion to Compel and Awarding Attorney Fees, the Motion to Dismiss for Failure to Comply with Order, together with its supporting memorandum and the Order of Dismissal itself, as well as the cover letter dated April 25, 1994, which was hand delivered to the Court and to Plaintiff's counsel. All of these documents were either hand delivered or properly mailed. Plaintiff's counsel offers no explanation as to why he received some of the papers and not others, in spite of the fact that service was properly made on all documents.

Rule 5(b) of the Utah Rules of Civil Procedure specifically outlines the proper means of service of pleadings and papers such as those involved in this matter on a party. That rule specifically provides for service by mailing the papers to Plaintiff's counsel at his known address or by leaving the papers at the attorney's office with his clerk or other person in charge thereof. Both means of service have been utilized in this case to make certain that Plaintiff's counsel had notice of the proceedings concerning the Motion to Compel and orders relating thereto. Every communication with the Court was served upon the Plaintiff in accordance with Rule 5, and to ensure that Plaintiff's counsel obtained these documents, the Motion to Dismiss, together with the Order of Dismissal, was hand delivered by an attorney to the office

of Plaintiff's counsel. The Order Granting Defendant's Motion to Compel and Awarding Attorney Fees was attached as "Exhibit A" to the papers that were hand delivered with the motion to dismiss on April 25, 1994. Defendant's counsel does not know what he could have done beyond what was done in this case to properly ensure that Plaintiff received notice of the proceedings.

B. Given Plaintiff's counsel's notice of the pending Motion to Compel and overdue responses, his actions do not rise to the level of "excusable neglect."

In his Motion for Relief from Judgment, Plaintiff's counsel acknowledges receipt of the Motion to Compel, which was sent by mail on March 16, 1994. (See Affidavit of Denver Snuffer, ¶ 7.) From that day forward, Plaintiff's counsel did nothing to respond to the motion. Rather, according to his own affidavit he waited an additional 40 days and then faxed incomplete responses to Defendant's counsel. Plaintiff's counsel then did nothing further, in spite of the fact that on April 25, 1994 the Motion to Dismiss for Failure to Comply with Order Compelling Discovery and the Order of Dismissal were hand delivered to Plaintiff's attorney's office. Plaintiff then claims his next notice was the Notice of Signing of Judgment, which was served upon the Plaintiff in a manner identical to the way the other pleadings had been sent to him.

Amazingly, Plaintiff comes before this Court seeking relief from the judgment based upon mistake, inadvertence, surprise or excusable neglect. Even if Plaintiff's assertions that he did

not receive the various papers were taken at face value, it cannot be excusable neglect for a party to be aware that answers to interrogatories are outstanding, that the opposing counsel has sent him a letter demanding answers to the discovery requests, and most importantly, that a motion to compel has been filed and in spite of all those things, do nothing. Here, Plaintiff's counsel made no attempt to contact Defendant's counsel to seek an extension or to provide any explanation as to why the answers were not provided to Defendant's counsel. Instead, he chose to ignore the motion to compel and now attempts to rely upon his contention that he did not receive the intervening papers. The fact is, his office did receive those intervening pleadings, which has been established irrefutably by affidavits submitted with this memorandum. If, in fact, he did not get those documents, the only plausible explanation is because of problems within the plaintiff's attorney's own office, which falls well short of the mark in establishing excusable neglect, especially in light of Plaintiff's knowledge of the ongoing demands to respond to the outstanding discovery requests and the actual filing of the motion to compel.

The Utah appellate courts have provided guidance in assessing whether Plaintiff is entitled to relief under Rule 60(b), given the circumstances presented. The Utah Supreme Court in the case of Larson v. Collina, 684 P.2d 52 (1984), has stated that it is within the trial court's discretion to determine whether a

movant has shown sufficient cause to obtain relief from judgment.

In that case, the Supreme Court stated:

A trial court has discretion in determining whether a movant has shown "mistake, inadvertence, surprise, or excusable neglect" and this Court will reverse the trial court's rulings only when there has been abuse of discretion.

684 P.2d at 54.

The plaintiff also attempts to argue the merits of his case, explaining to the Court the great injustice that will be done to his client due to the injuries sustained by his client in the accident in question. The defendant has vigorously disputed the plaintiff's claims and contends that the complaint is without merit. It is not appropriate, however, under Rule 60(b) to examine the merits of the claim. Id. at 55. In other words, the court in Larson indicated that the merits and/or the substance of a case is irrelevant to Rule 60(b) relief. Rather, it needs to be established that proper grounds have been shown under Rule 60(b) for relief from judgment to be granted. Here, no such grounds exist.

The cases which address this issue do not provide a definitive formula for the determination of excusable neglect. It must be examined on a case-by-case basis, greatly relying upon the discretion of the trial court, who has had dealings with the case and who knows the specifics of the case. See, State ex rel. Utah

State Dept. of Social Servs. v. Musselman, 667 P.2d 1053 (Utah 1983).

Here, Plaintiff's counsel knew that the trial date was continued because of a controversy regarding his expert witnesses and knew or reasonably should have known that the discovery at issue in large part went to that new evidence. He received the interrogatories, a letter from Defendant's counsel, and the motion to compel, and in spite of that did nothing to obtain an extension of time to answer, either by requesting such an extension from Defendant's counsel or by seeking an extension as would be allowed under Rule 33(a) of the Utah Rules of Civil Procedure. He then attempts to shift the blame for doing nothing by maintaining to this Court that he did not receive copies of the Notice to Submit for Decision, the Motion to Dismiss, supporting memorandum or Order of Dismissal. Even if counsel did not receive certain of the papers, doing nothing under the above-stated circumstances is not "excusable." Furthermore, the Motion to Dismiss for Failure to Comply with Order Compelling Discovery, the memorandum in support thereof, the Order of Dismissal and the cover letter to Judge Harding were, in fact, hand delivered to the office of Plaintiff's counsel. While it is possible that one of several mailings could have inexplicably become lost in the mail, it is impossible that all of these documents were lost, particularly since the latter documents were delivered by hand by an attorney from Defendant's counsel's office. Therefore, the fault for Plaintiff's counsel not

receiving these documents must lie on him and cannot reasonably be shifted to the defendant, as is attempted by Plaintiff's counsel.

## POINT II

PLAINTIFF STILL HAS NOT COMPLIED WITH THE COURT'S ORDER TO "DELIVER TO DEFENDANT FULL AND COMPLETE RESPONSES" TO THE OUTSTANDING DISCOVERY. THIS CONTINUED FAILURE TO COMPLY WITH THE ORDER SHOULD NOT BE EXCUSED.

Perhaps the most upsetting aspect of this case is that Plaintiff still has not provided full and complete responses to the outstanding discovery, in direct contravention of the Court's Order of April 12, 1994. As set forth in the Statement of Facts hereto, the basis for the continuance of the trial in January 1994 was new testimony which was going to be propounded by Plaintiff's expert, Phil Hoyt, and possibly others. It is now four months later and the information has not been divulged. If it was to be presented at trial on January 11, there is absolutely no excuse for a failure to provide the information immediately in response to the discovery requests and even more inexcusable that the information has still not been divulged. The Court's attention is directed to Interrogatories No. 8 and 9, which specifically request information concerning different testimony than that identified in depositions seasonably taken of Plaintiff's experts Remington and Hoyt. Instead of providing the information sought concerning that new testimony, Plaintiff simply states as follows concerning Remington's testimony:



This answer requires direct information from the expert as to what his testimony will be. We will supplement this answer when Mr. Remington provides us answer. He is being provided with these answers to interrogatories and also with an accompanying production of documents and asked to provide an answer to this interrogatory.

In response to the same question concerning Mr. Hoyt, the answer is given as follows:

Just as Don Remington is being provided these answers and asked to respond to the preceding question, Dr. Hoyt will also be given these answers and asked to answer this question. When the answer is received, it will be forwarded to you.

A similar answer is given for Mr. Greg Duval, another expert anticipated to be called, in answer to Interrogatory No. 10. In addition, Plaintiff responded to Interrogatories Nos. 13 and 14 by stating that "it is anticipated that at some point Mr. Hoyt will go to the scene and that the findings of his site visit will be provided."

In other words, the very evidence which was primarily responsible for the continuance of the trial and which became the center of the focus of the interrogatories at issue, has still not been provided. Plaintiff's counsel apparently thinks that because he has filed something, he is in compliance with the Court's Order. The Court's Order required full and complete responses. To this date, the Plaintiff has still failed to comply and provide the information. Plaintiff's counsel has had the interrogatories since January 14, 1994. In May of 1994, he is still telling the Court

that he will at some point submit these answers to interrogatories and provide us the information requested from his experts. Under the circumstances of this case, considering the reason the trial in this case was continued, such an approach is simply untenable and should be offensive to the Court. The Plaintiff remains in violation of the Court's order. This continued violation of the order defeats any claim of excusable neglect or any other reason for relief under Rule 60(b) and further warrants dismissal at this point even assuming some failure of Plaintiff's counsel to receive certain papers.

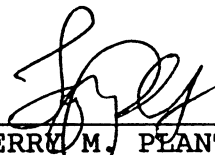
Mr. Snuffer goes through detailed apologies and attempted explanations as to why he did not respond to the discovery. Nowhere, however, does he explain to the Court why he still has not seen fit to provide the specific information concerning experts and the documents concerning that same testimony. Rather, he simply launches into a long discourse concerning the nature of the Plaintiff's injuries and the work that his firm has done on the case, and forgets to address the issues at hand. As previously stated, the case of Larson v. Collina, 684 P.2d 52 (Utah 1984), makes consideration of the merits of the case inappropriate when seeking relief from judgment.

In summary, even should the Court somehow believe that Plaintiff's counsel did not have proper notice of the Court's Order Granting Defendant's Motion to Compel and the Motion to Dismiss, Mr. Snuffer cannot explain why he has still failed to respond to

the outstanding discovery. Under these circumstances, the failure to respond simply cannot be excusable neglect. The information requested in discovery was the very information that the Plaintiff was prepared to present at trial within a day or two of January 10, when the Court ordered the trial beginning January 11 continued. Plaintiff's counsel has simply disregarded the motion to compel and ignored the Order of the Court and still continues to be in noncompliance with that Order. Under these circumstances and for the reasons set forth herein, Plaintiff's Motion for Relief from Judgment should be denied and the Order of April 28, 1994 dismissing all of Plaintiff's claims for relief, should be upheld.

DATED this 19<sup>th</sup> day of May, 1994.

HANSON, EPPERSON & SMITH



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**CERTIFICATE OF HAND DELIVERY**

I hereby certify that I served by hand delivery a true and correct copy of the foregoing DEFENDANT'S REPLY TO PLAINTIFF'S MOTION FOR RELIEF FROM JUDGMENT this 20<sup>th</sup> day of May, 1994, upon the following:

Denver C. Snuffer, Jr.  
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