

1994

William W. Morton v. Continental Baking Company a Delaware corporation : Brief of Appellee

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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WILLIAM W. MORTON,

Plaintiff/Appellant,

VS.

CONTINENTAL BAKING COMPANY,
a Delaware corporation,

Defendant/Appellee.

No. 940747-CA

Civil No. 910400454

Priority No. 15

APPELLEE CONTINENTAL BAKING COMPANY'S BRIEF IN OPPOSITION

Appeal from the Third District Court, Salt Lake County
Judge Ray Harding

UTAH COURT OF APPEALS
BRIEF

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DOCKET NO. 940747

TERRY M. PLANT
BRADLEY R. HELSTEN
HANSON, EPPERSON & SMITH, P.C.
Attorneys for Defendant/Appellee
Continental Baking Company
P. O. Box 2970
Salt Lake City, Utah 84110-2970
Telephone: (801) 363-7611

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

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COURT OF APPEALS

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Priority No. 15

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

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FACTUAL GROUNDS

NATURE OF THE CASE

This case involves a vehicular accident between Plaintiff William Morton and a vehicle owned by Defendant Continental Baking Company.

FACTS RELEVANT TO APPEAL

1. The Complaint in this matter was originally filed July 15, 1991. R. 3.
2. This matter has been set for trial four times. The first trial date was continued to give Plaintiff time to retain expert witnesses; the second due to the fact Plaintiff was scheduled for surgery. R. 59, 63.
3. The third trial date of January 11, 1994 was continued because Plaintiff attempted to introduce new evidence and new legal theories of an expert witness, Dr. Philip Hoyt, the day before the trial was to begin. R. 107; Memorandum Decision, p. 1, Appendix 5.
4. In dealing with Plaintiff's attempt to introduce this new evidence, the District Court held, "[r]ather than exclude the evidence, the Court reset the trial in order to give the Defendant time for discovery." Memorandum Decision, Appendix 5.
5. Three days after the trial was continued, Defendant served on Plaintiff interrogatories and a request for production of documents dated January 14, 1994 to obtain information about these new theories and evidence. R. 160, 142-138.
6. Defendant, among other questions, specifically requested in its interrogatories that Plaintiff identify the new evidence which Plaintiff was going to

introduce through the expert, Dr. Hoyt. The interrogatory requested and Plaintiff belatedly responded as follows:

(9) Please state whether the plaintiff anticipates that the previously identified expert, Dr. Philip Hoyt, will testify differently or in areas other than those specifically identified in his deposition previously taken in this case. If additional and/or different testimony is anticipated which is any way inconsistent with, supportive of, or addresses new areas of subject matter not fully and completely addressed in his deposition, state the following:

- (a) the new subject matter upon which Phil Hoyt will or may testify at trial;
- (b) the general substance of any new testimony or new areas which the expert will provide at trial, including opinions held by Mr. Hoyt concerning the issues in this action;
- (c) educational background, employment experience, or individual experience as an expert witness which the plaintiff believes qualifies Mr. Hoyt to provide such testimony; and
- (d) documents or other factual material (i.e., photographs, videotapes, etc.) relied upon by the expert to render new testimony or testify in new areas.

(9) 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.

(Emphasis added.) R. 145-146, Appendix 4.

7. Despite the fact that Plaintiff had represented to Defendant and the Court that the evidence was ready to be presented at trial on January 11, 1994, for over two months Plaintiff failed to respond to the discovery requests and failed to respond to Defendant's letters of inquiry. Finally, on March 18, 1994, Defendant filed a Motion to Compel Discovery. R. 137; see also Memorandum Decision, Appendix 5, p. 2.

8. Plaintiff did not file any response to Defendant's Motion to Compel. See Memorandum Decision, Appendix 5, p. 2.

9. A Notice to Submit Defendant's Motion to Compel for Decision, mailed to Plaintiff on March 29, 1994, was received by the Court and filed on March 31, 1994, pursuant to the mailing certificate attached to the notice. R. 161.

10. Plaintiff's counsel admitted that he was fully aware of the outstanding discovery requests and that a motion to compel had been filed. R. 239, ¶ 8.

11. In light of Plaintiff's complete failure to respond to the Motion to Compel, the Court contacted Defendant and directed counsel to prepare an Order giving Plaintiff ten days from the date of the Court's Order to provide answers to the discovery requests or face the sanction of dismissal of the case. R. 221; see Memorandum Decision, Appendix 5, p. 2; see also Order, Appendix 1.

12. Under the terms of the April 12, 1994 Order, Plaintiff had "10 days from the signing of this Order, until 5:00 p.m. on the tenth day, to deliver to Defendant full and complete responses" to the discovery requests. R. 164; Appendix 5.

13. The certificate of mailing attached to the Order indicates that the Order was mailed to Plaintiff on April 12, 1994. R. 163. Brian Hale, a member of Defendant's counsel's staff, also provided an affidavit in which he averred that he personally directed that the Order be placed in the U.S. mail. R. 296. Lynn Javadi, Defendant's counsel's secretary, also testified by affidavit that she personally placed the April 12, 1994 Order in the U.S. mail. R. 308.

14. Defendant did not receive answers to compelled discovery by the April 22, 1994 deadline. R. 218. See Memorandum Decision, Appendix 5, p. 2.

15. On April 25, 1994, Defendant filed and served upon Plaintiff, by hand-delivery, a Motion for Entry of Judgment to dismiss the case along with an Order of Dismissal. R. 226; See Memorandum Decision, Appendix 5, p. 2.

16. John Braithwaite, a partner in the law firm of Hanson, Epperson & Smith, personally delivered the Motion to Dismiss For Failure to Comply With Order Compelling Discovery to Plaintiff's counsel's offices on April 25, 1994. R. 290.

17. Plaintiff also claims that he did not receive either the hand-delivered Motion to Dismiss For Failure to Comply With Order Compelling Discovery which was hand-delivered by John Braithwaite (R. 239), or the Order granting motion to compel which was duly mailed to Plaintiff's counsel (see paragraph 13 above), or the Notice to Submit for Decision, mailed to Plaintiff on March 29, 1994. R. 162.

18. On April 28, 1994, the District Court signed the Order of Dismissal. R. 229.

19. After the Court dismissed the matter, Plaintiff sent to the Court a certificate of delivery, certifying that he had faxed discovery answers to Defendant on April 25, 1994 (the day that the Motion to Dismiss the case was hand-delivered to him) and had mailed them to Defendant on May 6, 1994. R. 237.

20. Plaintiff's response to the discovery requests which he represented to be ready to present at trial were completely non-responsive and did not comply with the

requirement of the April 12, 1994 Order which required Plaintiff to provide "full and complete responses".

21. In fact, Plaintiff's answers, belatedly faxed to Defendant on April 25, indicate that the interrogatories had not even been given to Dr. Hoyt at the time Plaintiff responded. Plaintiff responded to interrogatory no. 9 regarding the testimony of Dr. Hoyt (quoted in paragraph 6 above) as follows:

(9) 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.

(Emphasis added.) Answers to Interrogatories, Appendix 4.

22. On May 11, 1994, Defendant filed a Notice of Signing of Judgment (R. 232), and mailed a copy to Plaintiff's counsel. R. 239, ¶ 10. Plaintiff acknowledges receiving this notice which was sent in the same manner in which the previous pleadings had been served upon Plaintiff. R. 232.

23. On May 11, 1994, Plaintiff filed a Motion for Relief From Judgment and supporting memorandum asserting that the service of the Notice of Entry of Judgment received on May 9, 1994 was his first indication that an order had been entered, or that the case had been dismissed. R. 249.

24. Plaintiff admitted in his Memorandum that he "intended to answer those discovery requests" and that he was "aware of the Motion to Compel". R. 248, ¶ 6, R. 247, ¶ 8.

25. Plaintiff argued for relief from judgment because he was unaware of the outcome of the Motion to Compel or that an Order had been entered. R. 242-246. Plaintiff's counsel based his argument on his own excusable neglect in failing to act to respond to the motion in a timely manner. R. 242.

26. On May 20, 1994, Defendant filed its Memorandum in Opposition (R. 379), and on May 26, 1994, Plaintiff replied. R. 395.

27. The Court denied Plaintiff's Motion for Relief from Judgment on May 26, 1994, finding no reason to grant the motion. R. 398.

28. On June 9, 1994, Plaintiff filed a Motion to Set Aside Judgment Due to Fraud and to Extend Time for Appeal and memorandum in support. R. 405; Memorandum Decision, Appendix 5.

29. Plaintiff argued that Defendant's attorney had affirmatively defrauded the Court in obtaining the dismissal and that the Court had failed to follow procedural rules in dismissing the case. R. 405.

30. Despite the fact that the Plaintiff did not timely request oral argument of his first Motion for Relief from Judgment, on June 16, 1994, the Court vacated its earlier Memorandum Decision and granted Plaintiff the opportunity for oral argument on his several motions to set aside the judgment on July 5, 1994. R. 408.

31. On June 14, 1994, the Court signed an Order extending the time of appeal to 30 days after final resolution of Plaintiff's pending motions. R. 407.

32. On June 17, 1994, Defendant filed its Memorandum in Opposition to Plaintiff's Motion for Relief Due to Fraud (R. 419) and on June 20th Plaintiff replied. R. 436.

33. On June 20, 1994, Plaintiff filed a Motion to Strike Order of Dismissal dated April 28, 1994 and memorandum in support. R. 447.

34. On June 27, 1994, Defendant filed its Memorandum in Opposition. R. 468.

35. On June 20, 1994, Plaintiff also filed a Motion to Strike Order dated April 12, 1994 and a memorandum in support. R. 452.

36. On June 27, 1994, Defendant filed its Memorandum in Opposition. R. 472.

37. On July 5, 1994, the Court held oral argument on all of the motions filed by Plaintiff requesting relief from judgment. R. 477.

38. On August 29, 1994, the District Court authored a lengthy Memorandum Decision rejecting each and every request for relief brought by Plaintiff. R. 484; Appendix 5.

39. An Order reflecting the Court's reasoning and decision was entered on September 22, 1994. R. 496; Appendix 6.

40. Notice of Appeal was filed on September 29, 1994. R. 498.

ISSUES PRESENTED FOR REVIEW

1. Whether the Court abused its discretion in denying Plaintiff's Motion for Relief from Judgment Dated May 11, 1994, based on Plaintiff's failure to show excusable neglect.

Standard of Review.

When ruling on a Rule 60 motion for relief from judgment, the district court will be given broad discretion and, on appeal, its determination will not be disturbed absent an abuse of discretion. Birch v. Birch, 771 P.2d 1114 (Utah App. 1989); Larsen v. Collina, 684 P.2d 52 (Utah 1984).

2. Whether the Court abused its discretion in denying Plaintiff's Motion to Set Aside Judgment Due to Fraud where Plaintiff failed to show any fraud on the part of Defendant's counsel.

Standard of Review.

When ruling on a Rule 60 motion for relief from judgment, the district court will be given broad discretion and on appeal its determination will not be disturbed absent an abuse of discretion. Birch v. Birch, 771 P.2d 1114 (Utah App. 1989); Larsen v. Collina, 684 P.2d 52 (Utah 1984).

3. Whether the Court abused its discretion in denying Plaintiff's Motion to Strike Order of April 12, 1994, compelling discovery.

Standard of Review.

The standard of review of a court's order granting a motion to compel is reviewed for an abuse of the court's discretion. Amica Mut. Ins. Co. v. Schettler, 768 P.2d 950 (Utah 1989).

4. Whether the Court abused its discretion in denying Plaintiff's Motion to Strike Order of April 28, 1994, dismissing the case.

Standard of Review.

The standard of review of a court's order dismissing a case for failure to comply with ordered discovery is reviewed for an abuse of the court's discretion. Amica Mut. Ins. Co. v. Schettler, 768 P.2d 950 (Utah 1989).

5. Whether the District Court abused its discretion in dismissing Plaintiff's claim for failure to respond to discovery, failure to file an opposition to a motion to compel and failure to respond to the Order compelling discovery within the time required by the Court Order.

Standard of Review.

A party's failure to comply with an order for discovery may be met with the sanction of dismissal by the court. Tucker Realty Inc. v. Nunley, 396 P.2d 410 (Utah 1964). The standard of review of a court's order dismissing a case for failure to

comply with ordered discovery is reviewed for an abuse of the court's discretion.

Amica Mut. Ins. Co. v. Schettler, 768 P.2d 950 (Utah 1989).

6. Whether the District Court abused its discretion by sanctioning Plaintiff's counsel for making accusations of fraud on the part of Defendant's counsel with no basis in fact.

Standard of Review.

The court's imposition of sanctions for a pleading made without any basis in fact will be reviewed for an abuse of discretion. Taylor v. Estate of Taylor, 770 P.2d 163 (Utah Ct. App. 1989).

SUMMARY OF ARGUMENT

The Court properly denied Plaintiff's 60(b) Motion for Relief from Judgment. Plaintiff failed to show mistake, inadvertence or excusable neglect justifying relief. Plaintiff also failed to show any fraud on the part of Defendant's counsel which would justify relief from the judgment.

The Court also properly found that the express purpose of continuing the trial was to permit Defendant to conduct further discovery regarding new theories which Plaintiff represented he had ready to present at trial.

The Court also properly rejected Plaintiff's claim that Rule 6 applied to extend the deadline for filing the discovery responses pursuant to the Court's Order compelling discovery.

Further, the Court properly found that Rule 4-504 did not apply to extend Plaintiff's time to respond to the Order compelling discovery. The Rule was rendered inapplicable because the Court did not allow review of the Order by Plaintiff but "otherwise ordered" it, thus excepting the Order in question from the application of the rule.

The Court was not persuaded that the Plaintiff was unaware that the Order compelling discovery had been entered. The Court properly ruled that Plaintiff was aware that the Order compelling discovery had been entered based on the certificate of mailing attached to the Order and the affirmative proof provided by affidavits submitted in the record.

The Court properly ruled that Plaintiff had failed to show any evidence that Defendant's counsel had committed fraud in procuring the dismissal. The Court's Order that Plaintiff's counsel personally pay Defendant's attorney's fees for such a serious allegation with no factual foundation should not be reversed on appeal.

Alternatively, the judgment may be affirmed because the Plaintiff's responses to the discovery which were served did not comply with the Court's Order. Specifically, the responses received were not "full and complete responses" as required by the language of the Court's Order.

The District Court, in its sound discretion, properly dismissed Plaintiff's Complaint for Plaintiff's failure to respond to discovery requests and Orders. Plaintiff not only completely failed to respond to the discovery requests of Defendant

which he represented to be ready to present at trial, but he also failed to respond to the motion to compel discovery knowing the Court would grant the motion. Plaintiff's conduct before and after the Judgment was entered merits the censure of dismissal which the Court imposed.

The following will show that each of the arguments raised on appeal are subsumed in the greater question of whether the Court abused its discretion in ordering the discovery, dismissing the case for Plaintiff's failure to provide the discovery and in denying his motions for relief from judgment.

ARGUMENT

I.

THE COURT PROPERLY DENIED PLAINTIFF'S MOTION FOR RELIEF FROM JUDGMENT DATED MAY 11, 1994, BASED ON PLAINTIFF'S FAILURE TO SHOW EXCUSABLE NEGLIGENCE.

When ruling on a Rule 60 motion for relief from judgment, the district court will be given broad discretion and on appeal its determination will not be disturbed absent an abuse of discretion. Birch v. Birch, 771 P.2d 1114 (Utah App. 1989); Larsen v. Collina, 684 P.2d 52 (Utah 1984).

Plaintiff filed a Motion for Relief from Judgment on May, 11, 1994. R. 249. He argued that his failure to serve the ordered discovery prior to the deadline was excused because he failed to receive notice of the Court's Order. R. 246. Plaintiff also repeats several of the arguments he made to the Court below which, although not technically before the Court, are addressed in I. A-E, below.

With respect to his claim of mistake, inadvertence or excusable neglect, Plaintiff admitted that he was aware of the discovery, but that he simply was unaware of the Order compelling discovery which imposed the April 22, 1994 deadline. R. 248. In response, the Court rejected the argument and his offer of excusable neglect stating, in the Court's opinion, based on the certificates of mailing, certificates of hand-delivery and his prior conduct, that Plaintiff, "knew of the order compelling the answers to the interrogatories and failed to answer them in the allotted time." R. 481.

With that finding in place, the Court was in a position to determine that Plaintiff's error was not caused by mistake, inadvertence or excusable neglect and that relief under Rule 60(b) would not be proper. Rather, the Court addressed each of Plaintiff's several theories for relief. See Memorandum Decision, Appendix 5. The Court held that Plaintiff's actions demonstrated a willing failure to respond to the discovery or the Court's Order and that none of the legal arguments were persuasive. While dismissal of the Plaintiff's claims for repeated failure to respond to discovery, motions and orders of the Court may be a harsh sanction, it was well within the discretion of the Trial Court and should not be disturbed on appeal.

A. The Trial Was Continued For The Express Purpose Of Obtaining Further Discovery By Defendant.

Primary to the appeal is Plaintiff's premise that discovery was not reopened. Plaintiff contends Defendant's service of the interrogatories and request for

production of documents was improper and required no response. This contention is an invention of desperation and is summarily rejected in the Court's Memorandum Decision. The Court stated:

This case was originally filed on July 15, 1991. It has been set for trial four times and has involved a significant amount of legal maneuvering. The last continuance was requested the day before trial was to begin because the Plaintiff purportedly had new evidence and theories to be given by expert witnesses at trial. Defendant's counsel argued that it would be unfair to proceed without an opportunity to discover the new evidence and become adequately prepared. Rather than exclude the evidence, the Court reset the trial in order to give the Defendant time for discovery.

Memorandum Decision, p. 1; Appendix 5 (emphasis added).

Notably absent from Plaintiff's Brief is the Court's Memorandum Decision which details these procedural facts and conclusions of the Court. (Appendix 5.) Also absent from the record is any objection to the discovery Defendant propounded within the time permitted by the rules. See U.R.C.P. 33(a). Plaintiff's assertion on appeal that discovery was not reopened flies in the face of the fact that the entire trial was continued based on "new evidence and theories to be given by expert witnesses at trial." See Memorandum Decision, Appendix 5, p. 1.

Further, Plaintiff has previously acknowledged that he "intended to respond" to the discovery and, in fact, had begun to put together responses to the request. R. 240, ¶ 6. Plaintiff's own admissions and conduct inconsistent with his argument demonstrate that he was fully aware of the requests and had no objection to them as being untimely or improper under any scheduling order.

Had Plaintiff truly believed the answers to be proper, his recourse was to file a timely objection to the requests or, at least, object to the Motion to Compel. See U.R.C.P. 33. The fact that he did nothing whatsoever to object to the propriety of the discovery requests is fatal to his claim on appeal, especially in light of the Court's specific holding that discovery was reopened to prevent Plaintiff's evidence from being precluded at trial.

Plaintiff's contention that the Court erred by dismissing the case because responding to the discovery was a gratuitous and optional gesture on his part illustrates the lack of substance to this appeal. With the express consent of the Court and lack of a new scheduling order setting a deadline, the discovery was properly propounded and Plaintiff's failure to respond to the discovery was the basis for the case being dismissed. The Court did not err below and the judgment dismissing the case must be affirmed.

B. U.R.C.P. Rule 6(e) Does Not Apply To Extend The Time To Respond To A Court Order With A Specific Deadline.

Plaintiff also asserts that Rule 6 of the Utah Rules of Civil Procedure should have operated to give him an additional three days to respond to the Order compelling discovery and that if the three days were applied, the answers were timely filed. Plaintiff, however, fails to explain to this Court the actual facts which render Rule 6(e) inapplicable.

On April 12, 1994, in response to the unopposed Motion to Compel discovery, the Fourth District Court contacted counsel for Defendant and requested that he prepare an Order giving Plaintiff ten days from the date of the signing of the Order to answer the discovery requests or face dismissal. Defendant prepared the Order at the request of the Court. The Order itself did not require Plaintiff to respond "within 10 days" but stated, "Plaintiff shall have 10 days from the signing of this Order, until 5:00 p.m. on the tenth day, to deliver to Defendant full and complete responses" See Order of April 12, 1994, Appendix 1; R. 164.

Rule 6(e) of the Utah Rules of Civil Procedure provides that three days will be added to the calculation, "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 on him." U.R.C.P. 6(e) (emphasis added). The plain language of the Rule applies to deadlines with a fixed number of days to respond, such as the time for filing an opposition to a motion (Code of Judicial Administration, 4-501) or the time to file answers to interrogatories. See U.R.C.P 33(a). However, where the court sets a specific deadline like a discovery cutoff, or specifically requires answers by a certain date, the parties are not entitled to enlarge the period simply because the court's order was mailed to them. See Bachman v. Lowenstein & Sons, Inc., 85 F.R.D. 10 (D.C. S.C. 1979).

The plain language of the April 12, 1994 Order compelling discovery required Plaintiff to respond by a specific time rather than within a fixed number of days after

service. R. 164. As a result, Rule 6(e) is entirely inapplicable to extend the period for response to the Order compelling discovery.

Plaintiff's selective memory of the events fails to present the full factual picture to this Court. Plaintiff's argument is merely an attempt to turn the focus away from his own failure to timely respond to discovery requests and the Motion to Compel by invoking rules of procedure which do not apply.

C. Plaintiff's Duty To Respond To Discovery Or A Motion To Compel Is Not Extended By Rule 4-504.

Plaintiff further argues that somehow Rule 4-504 makes the April 12, 1994 Order compelling discovery by April 22, 1994 ineffective because he did not have five days to approve or object to the Order.

Plaintiff's proposed application of this rule makes no sense. The fact that Plaintiff has five days to object to a proposed order of the court does not excuse the obligation to obey a signed order of the court. Furthermore, an objection to the signed order setting a specific deadline does not extend the deadline imposed by the order until the matter is resolved under the rule.

However, application of Rule 4-504 to this particular case need not be decided on appeal because the exception to the general rule set forth in Rule 4-504 directly applies to this case. Rule 4-504 generally requires an order be submitted to the other party, who then has five days to object before the order is submitted for the court's

signature. However, the rule does not apply when the court "otherwise orders". See Code of Judicial Administration, Rule 4-504.

In this case the Court specifically directed Defendant to prepare and submit the April 28, 1994 Order of Dismissal directly to the Court, thereby constituting an exception to Rule 4-504(2). See, Code of Judicial Administration, Rule 4-504(2). Plaintiff fails to distinguish or even address the exception in his brief.

Second, Plaintiff's failure to timely file discovery responses has nothing to do with the requirement that Plaintiff be notified of a signed judgment or order of the court dismissing the case. Once again, Plaintiff's argument is merely pretext to excuse Plaintiff's own failure to file discovery answers in a timely manner. The Court did not abuse its discretion and dismissal should be affirmed.

D. Plaintiff Received A Copy Of The April 12, 1994 Order As Reflected By The Certificate Of Mailing.

While it is unclear why Plaintiff believes he has the right to object or respond to the April 12, 1994 Order, Plaintiff still fails to rebut the presumption that he knew of the deadline based on the certificate of mailing dated April 12, 1994. R. 163. The certificate of mailing is corroborated by the affidavits of Bryan Hale and Lynn Javadi of Defendant's counsel's office. R. 296, 308.

Plaintiff further ignores the fact that he acknowledged he received the Motion to Compel and that he did not respond. Additionally, Plaintiff ignored the Notice to Submit for Decision, mailed to him on March 29, 1994. R. 162. This failure to

diligently pursue the case by filing a responsive pleading to the Motion to Compel left him the responsibility to find out what the Court had done, especially when he knew or should have known that the Motion to Compel had been submitted to the Court for decision. R. 162. See Affidavit of Plaintiff dated May 11, 1994. R. 239, ¶8. Plaintiff's bald assertion that he did not receive the Order is insufficient to rebut the affirmative evidence that the Order was mailed to him based on the certificate of mailing filed with the Court and the affidavits of Brian Hale and Lynn Javadi, which are in the record. R. 296, 308.

In a prior case before this Court, Mr. Snuffer attempted to argue that his general office procedure was sufficient to establish compliance with court requirements. See, Litster v. Utah Valley Community College, 881 P.2d 933, 940-41 (Utah App. 1994). This Court in Litster, rejected Mr. Snuffer's claims by holding that conclusory evidence of "general office policy" was insufficient to establish that he had complied with statutory notice requirements in that case.

Similarly here, Mr. Snuffer states only generally that he "at all times intended to aggressively pursue this claim, and to protect the claim of the Plaintiff." As in Litster, Mr. Snuffer does not forward any affirmative proof that the Order was not mailed by Defendant. As in Litster, he merely concludes that if his office would have received the various notices and orders, those pleadings would have been brought to his attention and responses would have been made because office procedure mandated it. In Litster, the Court did not allow Mr. Snuffer's office procedures to

overcome his obligation of providing affirmative proof of mailing notice. See Litster at 941. The Court here should hold that Mr. Snuffer's attempted reliance on general office procedures is insufficient to overcome the Defendant's affirmative proof of mailing of the March 29, 1994 Notice to Submit, the April 12, 1994 Order and the hand-delivery of Defendant's Motion for Entry of Judgment on April 25, 1994. R. 290. Significantly, Defendant has met the burden required in Litster by affirmatively establishing that documents were served upon Plaintiff by way of the certificates of mailing, a certificate of hand-delivery and the subsequently filed affidavits specifically averring service occurred. R. 296, 308.

Plaintiff's argument that he has diligently pursued this matter at all times and that he should not be punished for the failure of the post office or the system would have some credibility if Plaintiff had bothered to respond to the discovery requests in any manner. It would be entitled to some weight if he had filed an opposition to the Motion to Compel. However, where the Plaintiff did not even bother to respond to an informal inquiry from counsel regarding his failure to respond to the discovery, and where he completely failed to respond to a motion he knew would be granted since it was not responded to, his claims of clean hands and faultless conduct ring hollow.

Further, Plaintiff's counsel's conduct from entry of the judgment forward in blaming the mails, the Court, and finally accusing Defendant's counsel of affirmative fraud, all illustrate Plaintiff's counsel was unwilling to admit any fault, error or

oversight on his part. While the sanction of dismissal may be harsh, the District Court is in a much better position to determine whether the circumstances require such action. Because there is no indication that the Court abused its discretion, the rulings of the Court should be affirmed on appeal.

E. Plaintiff's Argument That Dismissal Is Too Harsh A Sanction Is Baseless In Light Of His Own Actions of Willful Refusal To Cooperate In Discovery.

Rule 37 provides that a party may be sanctioned by dismissal of its claim where it fails to cooperate in discovery. See, U.R.C.P. 37(2)(A)-(C). Plaintiff merely argues that dismissal is too harsh in light of his otherwise diligent efforts in prosecuting the action.

Plaintiff's counsel argues that it would be a grave injustice to deprive his client of a trial for the failure of the mail system to inform him of the Order which caused him to miss the deadline by one business day. The Plaintiff portends to have gone to herculean efforts to prepare and prosecute this matter. However, when it came time to respond to discovery which Plaintiff represented he was prepared to offer at trial, his diligent pursuit seems to have come to an abrupt halt. The Court asked the following questions to which Plaintiff could not provide an answer:

With all this at stake, why would counsel fail to answer the interrogatories or at least provide partial answers to opposing counsel when they were due? Why would counsel, knowing a motion to compel was filed, not respond to the Court in any way? Why would he not provide the answers he had? Why would he not seek an extension of time from the Court if he were having difficulty obtaining the information? Why, if he were ready to present at least part of the

information at trial on January 11, 1994 could he not produce it to counsel within the time limits of the rules.

R. 480 (emphasis added); Memorandum Decision, Appendix 5.

Plaintiff's appeal to this Court on the bare record cannot reflect the knowledge the District Court had, based on the representations of the parties and their conduct in the Court below. The Memorandum Decision reflects a careful synthesis of the Court's knowledge of the entirety of the events surrounding this case and should not be disturbed on appeal. Appendix 5.

II.

THE COURT PROPERLY DENIED PLAINTIFF'S MOTION TO SET ASIDE JUDGMENT DUE TO FRAUD WHERE PLAINTIFF FAILED TO SHOW ANY FRAUD ON THE PART OF DEFENDANT'S COUNSEL.

When ruling on a Rule 60 motion for relief from judgment, the district court will be given broad discretion and on appeal its determination will not be disturbed absent an abuse of discretion. Birch v. Birch, 771 P.2d 1114 (Utah App. 1989); Larsen v. Collina, 684 P.2d 52 (Utah 1984).

Plaintiff filed another Rule 60(b) Motion with the Court on June 9, 1994 seeking relief from the judgment. R. 419. The Motion merely repeats the arguments made in the earlier Motion for Relief but adds specific arguments and allegations that Defendant's counsel committed fraud in obtaining the judgment. R. 405.

The Court, in its Memorandum Decision, specifically ruled that Defendant's counsel's conduct did not constitute fraud. R. 479. The Court also noted that the

serious nature of the accusations absent any basis in fact was sufficient to merit personal sanctions against Plaintiff's counsel. R. 479.

The factual premise of Plaintiff's Motion for Relief from Judgment based on fraud was unsupported by any reference to or basis in fact. As a result, the Court was well within its sound discretion in denying the Plaintiff relief from judgment due to fraud.

III.

THE SANCTIONS IMPOSED BY THE COURT WERE PROPER BASED ON PLAINTIFF'S NUMEROUS BASELESS MOTIONS AND ALLEGATIONS OF FRAUD AGAINST DEFENDANT'S ATTORNEY.

Plaintiff states that because the answers were timely and proper, Defendant should not have been entitled to sanctions or attorney's fees. The Plaintiff fails to set forth the reasoning of the Court in granting the attorney's fees below which clearly justifies their imposition. See Memorandum Decision, Appendix 5.

One of the several motions for relief asserted that Defendant's attorney affirmatively defrauded the Court in obtaining the Order compelling discovery and dismissal of the case. R. 419. After oral argument of the matter, the Court, in its Memorandum Decision, found none of the elements of fraud were present or shown and that Plaintiff had made serious allegations against Defendant's attorney without any factual basis. The Court stated:

the representation(s) of the Defendant were not false and no fraud was committed. . . . Further, because of the serious nature of the accusation by Plaintiff's attorney and the fact that Plaintiff's failure to respond was

rather the result of a basic error on his part, the Court will order Plaintiff's attorney to personally pay the Defendant's attorney's fees in litigating this motion.

R. 479; Memorandum Decision, Appendix 5.

Even if this Court were to reverse the matter, the baseless allegation of fraud in and of itself merits the censure imposed by the District Court. Plaintiff's conduct in accusing counsel of fraud as a result of Plaintiff's own conduct is beneath the dignity which should be present in the legal forum. There should be no tolerance for allegations which directly impugn the character of a member of the bar that have no basis in fact. The Court's decision regarding sanctions was clearly not abused and must be affirmed on appeal.

IV.

THE COURT PROPERLY DISMISSED PLAINTIFF'S CLAIMS FOR THE ALTERNATIVE REASON THAT THE RESPONSES PROVIDED TO DEFENDANT WERE NOT FULL AND COMPLETE ANSWERS TO THE DISCOVERY REQUEST AS ORDERED BY THE COURT.

A party's failure to comply with an order for discovery may be met with the sanction of dismissal by the court. Tucker Realty Inc. v. Nunley, 396 P.2d 410 (Utah 1964). A court's order dismissing a case for failure to comply with ordered discovery is reviewed for an abuse of the court's discretion. Amica Mut. Ins. Co. v. Schettler, 768 P.2d 950 (Utah 1989).

In this case the entire trial was continued based on the representation by Plaintiff that he had new expert reconstruction evidence of Dr. Hoyt to present at

trial the following day. R. 484, 480. To learn what testimony and conclusions the expert held, Defendant immediately requested the opinions and conclusions of the expert be identified by answers to interrogatories. R. 160; R. 273 (affidavit of Terry M. Plant indicating the failure of Plaintiff to provide full and complete responses to the discovery requests).

However, the April 25, 1994 answers which Plaintiff served on Defendant failed to provide any of the information sought in the requests, let alone "full and complete" answers as the Order compelling discovery required. Id. Plaintiff's responses merely indicated that the expert was going to be sent information on other witnesses and experts and that his conclusions and opinions were unknown to Plaintiff at the time. R. 256-58, Appendix 4.

Therefore, even if the answers, by some stretch of the imagination, can be deemed timely, they were incomplete and did not satisfy the requirements of the April 12, 1994 Order compelling "full and complete answers" to the discovery requests. Dismissal of the case may be upheld for the alternative reason that Plaintiff failed to supply complete answers to the discovery requests as ordered by the Court even though he represented to the Court that he was ready to proceed to trial over three months before.

The arguments in this area regarding Plaintiff's failure to provide complete answers to discovery illustrate that the Court was familiar with all of the procedural aspects of the case. The Court knew the positions of counsel prior to trial and what

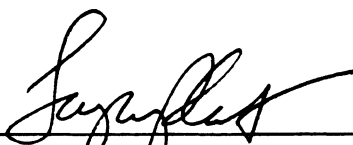
the Plaintiff had represented regarding the testimony of the experts Plaintiff was going to call. The Court's decision to dismiss the case was based on its intimate knowledge of the case and conduct of counsel and should not be disturbed on appeal based on an emotional plea for mercy.

CONCLUSION

Plaintiff's prosecution of the appeal without reference to the entire body of evidence upon which the District Court based its ruling illustrates the duplicitous nature of Plaintiff's assertions below and on appeal. Based on a review of all of the relevant papers submitted by the parties, the District Court's Memorandum and Order can only be reasonably seen in one light; that the Court did not abuse its discretion in denying Plaintiff's Request for Relief from Judgment, Plaintiff's Motion to Set Aside Judgment Due to Fraud, and Motion to Strike Order of Dismissal. To conclude otherwise would be to tolerate disregard of the rules of procedure and authority of the District Court to enforce its Orders. The judgment of the District Court dismissing Plaintiff's case should be affirmed.

Respectfully submitted this 10th day of Feb, 1995.

HANSON, EPPERSON & SMITH

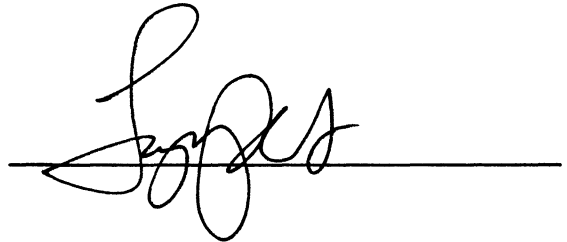


TERRY M. PLANT
BRADLEY R. HELSTEN
Attorneys for
Defendant/Appellee

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 10th day of FEBRUARY, 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.", is written over a horizontal line.

APPENDIX

1. Order Granting Defendant's Motion to Compel and Awarding Attorney Fees
2. Order of Dismissal
3. Notice of Signing of Judgment
4. Answer to Defendant's Interrogatories to Plaintiff
5. Memorandum Decision
6. Order Denying Plaintiff's Motion for Relief from Judgment, Plaintiff's Motion to Set Aside Judgment due to Fraud and to Extend Time for Appeal and Plaintiff's Motions to Strike Orders of Dismissal.

TERRY M. PLANT, #2610
HANSON, EPPERSON & SMITH, P.C.
Attorneys for Defendant
4 Triad Center, Suite 500 (84180)
P. O. Box 2970
Salt Lake City, Utah 84110-2970
Telephone: (801) 363-7611

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

WILLIAM W. MORTON,)	
	)	ORDER GRANTING DEFENDANT'S
Plaintiff,	)	MOTION TO COMPEL AND
	)	AWARDING ATTORNEY FEES
vs.)	
)	
CONTINENTAL BAKING COMPANY,)	
a Delaware corporation,)	
	)	Civil No. 910400454PI
Defendant.	)	Judge Ray M. Harding

The motion of the defendant to compel the plaintiff to respond to interrogatories and requests for production of documents which were served on the plaintiff on or about January 14, 1994 having been considered by the Court, and Plaintiff having filed no response to said motion or responses to the above-referenced discovery,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff shall have 10 days from the signing of this Order, until 5:00 o'clock p.m. on the tenth day, to deliver to Defendant full and complete responses to the interrogatories and requests for production of documents in question (copies of which were attached to the defendant's Memorandum of Points and Authorities in Support of Defendant's Motion to Compel) and upon failure to do so, will

suffer sanctions in accordance with Rule 37 of the Utah Rules of Civil Procedure, which will be the dismissal of all of Plaintiff's claims for relief. Further, IT IS HEREBY ORDERED that the defendant be granted its attorney fees and other costs incurred in bringing its motion to compel. Said costs and attorney fees are to be supported by an appropriate affidavit or other proof.

DATED this 12 day of April, 1994.

BY THE COURT:




HONORABLE RAY M. HARDING
District Court Judge

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing ORDER GRANTING DEFENDANT'S MOTION TO COMPEL AND AWARDING ATTORNEY FEES, postage prepaid, this 12th day of April, 1994, to the following:

Denver C. Snuffer, Jr.
MADDOX, NELSON, SNUFFER & DAHLE
Attorney for Plaintiff
10885 South State Street
Sandy, Utah 84070



TERRY M. PLANT, #2610
HANSON, EPPERSON & SMITH, P.C.
Attorneys for Defendant
4 Triad Center, Suite 500
Post Office Box 2970
Salt Lake City, Utah 84110-2970
Telephone: (801) 363-7611

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

WILLIAM W. MORTON,)	
)	
Plaintiff,	)	ORDER OF DISMISSAL
)	
vs.)	
)	
CONTINENTAL BAKING COMPANY,)	
a Delaware corporation,	)	Civil No. 910400454PI
	)	Judge Ray M. Harding
Defendant.)	

The Court, having considered the defendant's motion to dismiss for failure to comply with order compelling discovery and the memorandum and affidavit filed in support thereof, having previously ordered that the plaintiff would have ten (10) days from the date of the order compelling discovery, until 5:00 p.m. on the tenth day, to deliver to defendant full and complete responses to the interrogatories and requests for production of documents which were subject to the order, and having ordered that upon the plaintiff's failure to comply with the order, the plaintiff would suffer sanctions in accordance with Rule 37 of the Utah Rules of Civil Procedure, which would be the dismissal

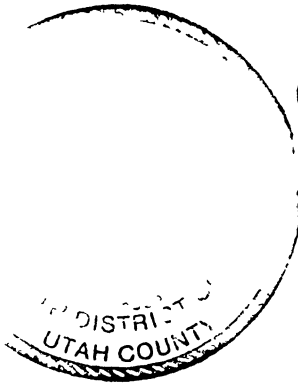
of all of the plaintiff's claims for relief, having reviewed this matter, being fully advised in the premises, and finding good cause therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the defendant's motion to dismiss for failure to comply with order compelling discovery is granted. The Court finds that the plaintiff has failed to comply with the Court's order dated April 12, 1994. Based upon the plaintiff's failure to comply, and the sanctions indicated in the order, all of the plaintiff's claims in this action are hereby dismissed with prejudice.

Dated this 28 day of April, 1994.

BY THE COURT:


Honorable Ray M. Harding
Fourth District Court Judge



CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing
Order of Dismissal was hand-delivered this 25th day of April,
1994, to:

Denver C. Snuffer, Jr.
MADDOX, NELSON, SNUFFER & DAHLE
10885 South State Street
Sandy, Utah 84070

John M. Braithwaite

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UTAH COUNTY, STATE OF UTAH

VS.

Civil No. 910400454PI
Judge Ray M. Harding

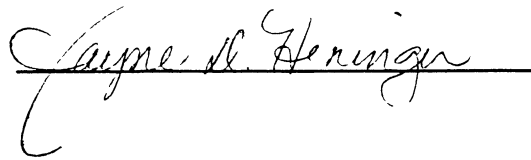
DATED this 6th day of May, 1993.

TERRY M. PLANT
Attorney for Defendant
4 Triad Center, Suite 500
P. O. Box 2970
Salt Lake City, UT 84110-2970

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing Notice of Signing of Judgment, postage prepaid, this 10th day of May, 1994, to the following:

Denver C. Snuffer, Jr.
MADDOX, NELSON, SNUFFER & DAHLE
Attorney for Plaintiff
10885 South State Street
Sandy, Utah 84070

A handwritten signature in cursive script, reading "Jayne R. Heninger", is written over a horizontal line.

FILED IN
4TH DISTRICT COURT
STATE OF UTAH
UTAH COUNTY

MAY 10 10 13 AM '94

Denver C. Snuffer, Jr. 3032
NELSON, SNUFFER & DAHLE
Attorneys for Plaintiff
10885 South State Street
Sandy, UT 84070
Telephone: (801) 576-1400

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

WILLIAM W. MORTON,
Plaintiff,

vs.

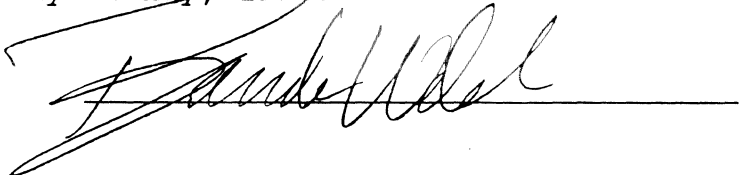
CONTINENTAL BAKING COMPANY,
Defendant.

CERTIFICATE OF DELIVERY

Civil No. 910400454PI
Honorable Judge Harding

I hereby certify that a true and correct copy of Plaintiff's Answers to Defendant's Interrogatories and Request for Production of Documents were facsimiled on April 25, 1994 and mailed postage prepaid with all attachments on May 6, 1994 to Mr. Terry Plant, HANSON, EPPERSON & SMITH 4 Triad Center, Suite 500, Salt Lake City, Utah.

DATED this 6 day of May, 1994.



Denver C. Snuffer, Jr. 3032
NELSON, SNUFFER & DAHLE
Attorneys for Plaintiff
10885 South State Street
Sandy, Utah 94070
Telephone: (801) 576-1400

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

WILLIAM W. MORTON,)	
)	
Plaintiff,	)	ANSWER TO DEFENDANT'S
	)	INTERROGATORIES TO PLAINTIFF
vs.)	
)	
CONTINENTAL BAKING COMPANY,	)	Civil No. 910400454PI
	)	Honorable Judge Harding
Defendant.)	

COMES NOW the Plaintiff and pursuant to the Utah Rules of Civil Procedure hereby answers Defendant's Interrogatories to Plaintiff as follows:

INTERROGATORY NO. 1: Identify each and every person known to the plaintiff or his representative who was at the accident scene in question on December 29, 1989, from an hour before the accident in question up to and including a week after the accident in question. This is meant to include all persons at the accident when it occurred, shortly thereafter, and all persons known by the plaintiff to have visited the accident scene during the 7 days after the accident.

ANSWER: To the best of Plaintiff's knowledge these are the following individuals who were at the accident scene shortly thereafter and up to one week after the accident: William Morton, Stan Holyoak, Marvin Clark, Gayle Pike, Marvin Ainge, Shane Drage,

Garn Hooley, Ken Zupon and Tim Hobbs.

INTERROGATORY NO. 2: For each person identified in response to Interrogatory No. 1, state the name, address, telephone number, social security number and employer of said person.

ANSWER:

Stan Holyoak: This information is already in the possession of the Defendant.

Marvin Clark: This information is already in the possession of the Defendant.

Gale Pike: Works for Savage Industries, can be contacted through them. His home address is 9949 Sego Lilly, Sandy, Utah.

Marvin Ainge: Works for Savage Industries. Plaintiff has learned that he has just moved to Payson, Utah.

Shane Drage: Worked for Savage Industries but is now an independent trucker working out of Idaho. We do not have a current address.

Garn Hooley: Works for Savage Industries. We have no address or phone number.

Ken Zupon: Works for Associated Foods. We have no address or phone number.

Tim Hobbs: Works for Associated Foods. We have no address or phone number.

INTERROGATORY NO. 3: For each person identified in response to Interrogatory No. 1, provide a detailed statement of the reason why said person was at the accident scene, the events observed or information gained by said person at the accident scene, and any testimony the plaintiff anticipates eliciting from

said witness as part of the evidence to be produced at trial in this matter.

ANSWER:

Plaintiff objects to this interrogatory because it is asking the Plaintiff to speak for witnesses that are not affiliated with nor controlled by the Plaintiff. The only information that the Plaintiff has in his possession is the best understanding that Plaintiff has of what these witnesses know. Therefore, Plaintiff cannot answer the question as propounded. However, without waiving such objection, Plaintiff answers as follows:

Stan Holyoak was a mechanic for Johnson Oil and was sent to inspect the damage to the tractor and to salvage parts from the tractor after the accident which were not insured. He also went to the accident scene sometime within the first week and inspected the scene. While we cannot speak for the witness, we anticipate that the witness will testify that he inspected the truck after the accident and saw that its transmisson had split, that the impact to the transmission was such that the main gear fell out the bottom of the broken transmission housing and that the entire transmission grease would have been immediately lost from the size of the crack. He will testify to the oil weight and volume in the transmission. He also has driven the same trailer-pup rig that was being driven by Woody Morton on the day of the accident. He worked on the trailer-pup vehicles and maintained them. When the brakes on these rigs are engaged the pup would engage its brakes first and the trailer would engage second and later. When the pup is empty, although it is a dual wheeled vehicle, it has a camber to its axle

and rides on its outside tires. When the pup is loaded with fuel, it rides on all of its tires. He has skidded the trailer-pup before when driving with them, and has seen the kind of mark that the vehicles leave on the roadway. He visited the scene of the accident and recognized skid marks that were left by the pup at the scene which can now be seen in several photographs of the scene.

Marvin Clark was the safety inspector for Johnson Oil and inspected the tractor as well as the scene of the accident. He took several photographs at the scene and will identify them. They show that highway department spread dirt into the lane of travel belonging to the Woody Morton vehicle after the accident to cover fluid spills, but there were no efforts to place dirt into the other lane of travel because of the absence of any significant fluid spills.

Gayle Pike is a driver for Savage Industries and was there prior to the arrival of police and medical personnel. He walked the accident scene prior to the arrival of the police and he, Marvin Ainge and Shane Drage were the drivers who spoke with Officer Pelton. Both he and the others can testify about statements made by Trooper Pelton prior to beginning his investigation to the effect that Woody Morton was responsible for causing the accident. Gayle Pike can testify as to the layout of the accident scene. He saw the paramedics remove Woody Morton from the vehicle and helped in that process. Since Gayle is not a party to the suit but a witness the Plaintiff does not control his testimony. To the extent that Plaintiff has any recorded statement from the witness, it is being provided with these answers.

Marvin Ainge: Marvin Ainge is a driver for Savage Industries and was the first driver who stopped at the scene of the accident. Mr. Ainge was traveling East. Mr. Ainge was there prior to the police and he also walked the accident scene. He can offer information as to the accident scene and the condition of Mr. Morton. Since Mr. Ainge is not a party to the suit but a witness the Plaintiff does not control his testimony. To the extent that Plaintiff has any recorded statement of Mr. Ainge, it is being produced. Mr. Ainge was the first vehicle stopped in the direction from which Mr. Morton was traveling and there were no other vehicles between his vehicle and the accident itself. He does not believe that the skid marks in Woody Morton's lane of travel were left by his vehicle. His truck-trailer-pup rig had an overall length of 92'3" and had eleven axles: the driving axle with two tires, followed by two driver axles with four tires each on the tractor, three axles with single tires on each on the rear of the trailer, two axles with super-single tires on each on the front of the pup-trailer and three axles with single tires on each on the rear of the pup. He is acquainted with the kind of skid mark left by the rig he was operating and the skid mark in Mr. Morton's lane of travel near the accident is not the type that his rig would leave on any of the three components to his vehicle. He can also recall talking with Trooper Pelton about the tracks left by a passing vehicle that had gone through the accident scene before anyone else arrived. That vehicle had tracked fuel and grease away from the accident scene leaving tracks that went from Woody Morton's lane of travel into the Wonder Bread truck's lane of

travel. Trooper Pelton said these were "skid" marks left by Woody Morton's truck and that they showed how Mr. Morton had traveled on the wrong side of the road at the time of the accident. Mr. Ainge argued with him saying that the marks were clearly diesel fuel tracks and not skid marks. Trooper Pelton also said that the truck of Mr. Morton had spun either 180 or 360 (he can't recall which) on the road after the accident, which Mr. Ainge also thought was not correct.

Shane Drage: At the time of the accident he worked for Savage Industries. He was one of the drivers who stopped at the scene of the accident. He walked the scene of the accident and was also the one who had discussion with Pelton upon his arrival. He can testify about statements made by Trooper Pelton prior to beginning his investigation to the effect that Trooper Pelton knew who was responsible for the accident without looking the scene over and that it was Mr. Morton's fault. Shane Drage has information as to the layout of the accident scene and the condition of William Morton. Since Mr. Drage is not a party to the suit the Plaintiff does not control his testimony.

Garn Hooley: Works for Savage Industries and was one of the drivers who stopped at the accident scene. He walked the scene of the accident. It is not determined at this time of any testimony will be elicited from Garn Hooley. If in the future Plaintiff intends to use Garn Hooley any testimony he may offer will be disclosed to the Defendant.

Ken Zupon: Works for Associated Foods. He was also another driver who stopped at the scene of the accident. Plaintiff

has not determined at this time if any testimony will be elicited from Ken Zupon. If Mr. Zupon can add any facts other than those already disclosed by other witnesses, that testimony will be provided to the Defendant.

Tim Hobbs: Was the first driver through the accident scene. Tim Hobbs did not stop but proceeded on and called the accident in at the cement plant. It is not anticipated that any testimony will be elicited from Tim Hobbs.

INTERROGATORY NO. 4: For each person identified in response to Interrogatory No. 1, state the time when Plaintiff or his agents became aware that said person was at the accident site in question, the method by which the plaintiff became aware of said person's presence at the accident site in question and the method by which the plaintiff learned of information known by each person who was at the accident site.

ANSWER: These individuals have become gradually known to Plaintiff and some have not yet been interviewed. Most of the savage drivers became aware to the Plaintiff by word of mouth. The first driver that Plaintiff became aware of was Shane Drage, the exact date of this conversation is not known but is believed to be sometime in mid-1993. Upon talking to Shane Drage he identified many of the other drivers who had stopped. The two drivers of Associated Food were disclosed through contact with associated food through their personnel director. Plaintiff believes her name was Nancy. Mr. Ainge was interviewed in April 1994 for the first time. Mr. Pike was interviewed just prior to the last date this matter was set for trial.

INTERROGATORY NO. 5: Identify all employees or representative of Savage Trucking Company who the plaintiff was aware were at the accident scene in questions for the time period specified in Interrogatory No.1. If not provided above, state all information concerning the representatives and employees of Savage Trucking Company sought as to other persons in Interrogatories 2, 3 and 4 above.

ANSWER: See answer to Interrogatory number 2 above.

INTERROGATORY NO. 6: Identify the dispatcher of Savage Trucking Company who was on duty at the time of the accident in question.

ANSWER: Plaintiff does not know at present.

INTERROGATORY NO. 7: Identify all persons known to the plaintiff or his representatives known to have heard police officers or other representatives of the State of Utah involved in the investigation of the accident in question make comments concerning the investigation and specifically comments suggesting that police officers were or may have been biased against the interest of the plaintiff and/or biased in favor of the deceased agent of the defendant, LeGrand Wilson.

ANSWER: At present Plaintiff is only aware of three of the drivers who heard those remarks and they are identified above in the prior answer to No. 2, above.

INTERROGATORY NO. 8: Please state whether the plaintiff anticipates that the previously identified expert, Don Remington, will testify differently or in areas other than those specifically identified in his deposition previously taken in this

case. If additional and/or different testimony is anticipated which is in any way inconsistent with, supportive of, or addresses new areas of subject matter not fully and completely addressed in his deposition, state the following:

(a) the new subject matter upon which Don Remington will or may testify at trial;

(b) the general substance of any new testimony or new areas which the expert will provide at trial, including opinions held by Mr. Remington concerning the issues in this action;

(c) educational background, employment experience, or individual experience as an expert witness which the plaintiff believes qualifies Mr. Remington to provide such testimony; and

(d) documents or other factual material (i.e., photographs, videotapes, etc.) relied upon by the expert to render new testimony or testify in new areas.

ANSWER: 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 an answer. He is being provided with these answers to Interrogatories and also with the accompanying production of documents and asked to provide an answer to this interrogatory.

INTERROGATORY NO. 9: Please state whether the plaintiff anticipates that the previously identified expert, Dr. Phillip Hoyt, will testify differently or in area other than those specifically identified in his deposition previously taken in this case. If additional and/or different testimony is anticipated which is in any way inconsistent with, supportive of, or addresses

new areas of subject matter not fully and completely addressed on his deposition, state the following:

(a) the new subject matter upon which Phil Hoyt will or may testify at trial;

(b) the general substance of any new testimony or new areas which the expert will provide at trial, including opinions held by Mr. Hoyt concerning the issues in this action;

(c) educational background, employment experience, or individual experience as an expert witness which the plaintiff believes qualifies Mr. Hoyt to provide such testimony; and

(d) documents or other factual material (i.e., photographs, videotapes, etc.) relied upon by the expert to render new testimony or testify in new areas.

ANSWER: 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.

INTERROGATORY NO. 10: Please state whether the plaintiff anticipates calling Mr. Greg Duval at the trial in this matter, either as a witness in their case in chief or as a rebuttal witness. If the answer to said interrogatory is yes, state in detail:

(a) the subject matter upon which Mr. Greg Duval will or may testify at trial;

(b) the general substance of his testimony which he will or may provide at trial, including opinions held by Mr. Greg Duval concerning the issues in this action;

(c) the educational background, employment experience, and the individual's experience as an expert witness, including each and every trial at which he has testified as an expert witness in the last 10 years, if any, and/or any other relevant information which the plaintiff contends qualifies Mr. Duval to provide expert witness testimony; and

(d) documents or other factual material (i.e., photographs, videotapes, etc.) relied upon by the expert to render new testimony or testify in new areas.

ANSWER: Yes, it is anticipated that he will be called as a rebuttal witness. As to the other matters, Mr. Duval is being provided with these answers and asked to review them and provide an answer to this interrogatory in light of the information provided. The witness' resume is being provided.

INTERROGATORY NO. 11: Please state the name of each and every additional expert witness not previously identified in your answers to these interrogatories whom the plaintiff anticipates calling at trial. This is meant to include all expert witnesses who will testify in any regard, including damages, liability or other issues involved in this matter.

ANSWER: Other than the experts already disclosed, including Paul Randall, and the two treating physicians, Plaintiff at present does not intend on calling any new experts.

INTERROGATORY NO. 12: For each expert identified, identify:

(a) the subject matter upon which each expert will or may testify at trial;

(b) the general substance of the testimony which each will or may provide at trial, including opinions held by each expert concerning the issues in this action;

(c) the educational background, the employment experience, and the individual's experience as an expert witness, including each and every trial at which the individual has testified as an expert witness in the last ten (10) years, if any; and

(d) document or other factual material (i.e., photographs, videotapes, etc.) relied upon by the expert to render new testimony or testify in new areas.

ANSWER: Not Applicable.

INTERROGATORY NO. 13: Of the expert witnesses identified, please state whether or not any of the witnesses so identified has visited the scene of the accident. If said witness has not yet visited the scene of the accident, please state whether the plaintiff anticipates having said witness visit the scene of the accident between now and the time of the trial in this matter.

ANSWER: The only experts which Plaintiff has disclosed that has not been to the scene of the accident is Dr. Philip Hoyt, the economist and the treating doctors. It is anticipated that Dr. Hoyt will at some point visit the scene of the accident.

INTERROGATORY NO. 14: If an expert witness identified in the preceding interrogatory had visited the scene of the accident in question, please state in detail the following:

(a) all measurements, testing or other investigative activities performed by the expert at the scene;

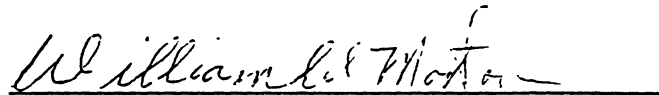
(b) the results of any testing or measurement, including a

statement of all items tested and/or measured;

(c) the date or dates of any and all visits to the accident scene were made.

ANSWER: These have been previously provided except for the future visit of Dr. Hoyt. This future material cannot, of course, be produced in these answers.

DATED this 21 day of April, 1994.


William Morton


NELSON, SNUFFER & DAHLE

DENVER C. SNUFFER
Attorney for Plaintiff
10885 South State Street
Sandy, Utah 84070

Denver C. Snuffer, Jr. 3032
NELSON, SNUFFER & DAHLE
Attorneys for Plaintiff
10885 South State Street
Sandy, UT 84070
Telephone: (801) 576-1400

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

WILLIAM W. MORTON,)	
)	
Plaintiff,	)	PLAINTIFF'S PRODUCTION
	)	OF DOCUMENTS
vs.)	
)	
CONTINENTAL BAKING COMPANY,	)	Civil No. 910400454PI
	)	Honorable Judge Harding
Defendant.)	

COMES NOW the Plaintiff and pursuant to the Utah Rules of
Civil Procedure hereby produces the following documents as follows:

REQUESTS FOR PRODUCTION

1. Copies of all plaintiff's drivers' logs and/or ICC
logs of any kind for the period of 11/29/89-12/29/89, including but
not limited to the logs referred to by the plaintiff in his
deposition taken March 3, 1992 on pages 23 and 24.

ANSWER: These documents do not exist any longer.

2. A complete copy of each and every document,
including photographs and/or other resource materials of any kind
relied upon by each of the plaintiff's experts identified in answer
to the interrogatories accompanying these requests. It is
anticipated that for each expert identified, the plaintiff will
produce to the defendant a complete and separate file of documents
relied upon.

ANSWER: These have already been provided to you for Don

Remington. As to the other witnesses, they have now reviewed all the State Highway photographs and video tape which is already in your possession. They have also reviewed the photos taken of scene thereafter by the Johnson Oil employee. Although you have these photos, a photocopy of these are being produced with these answers.

3. A complete of all notes, calculations and/or writings of any kind created by any of the expert witnesses identified by the plaintiff in answers to the interrogatories accompanying these requests, which were created by, relied upon or which pertain to any of the opinions reached by said experts. It is anticipated that the plaintiff will produce a separate file for each expert identified containing all notes, calculations or other writings of any kind prepared by said expert.

ANSWER: These have already been produced as to Dr. Hoyt and Don Remington. As to Greg Duval, they will be provided to the extent that they exist.

4. To the extent not previously produced in responses to requests number 2 and 3, copies of all file materials in possessions of the plaintiff's experts, including but not limited to resource material, research, material, and specifically all documents comprising the various files utilized by, relied upon, created by, or otherwise assisting the plaintiff's expert in reaching opinions in this matter.

ANSWER: This request is overly broad and inappropriately seeks to have produced work product that the Plaintiff has had to pay to obtain. The Defendant should not receive this information without compensating the Plaintiff for it.

5. Copies of all statements, affidavits and/or other records of testimony obtained by the plaintiff of any witness, including but not limited to all witnesses, both expert and lay, identified by the plaintiff in response to the accompanying interrogatories.

ANSWER: See accompanying documents.

6. All documents referred to or otherwise identified in your answers to the interrogatories accompanying these requests.

ANSWER: See accompanying documents.

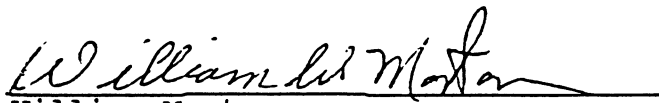
7. Copies of all pictures, photogramic studies or other material in the possession of plaintiff, his representatives or plaintiff's experts, which have been utilized by the plaintiff's experts in arriving at their opinions in this matter.

ANSWER: These have already been produced.

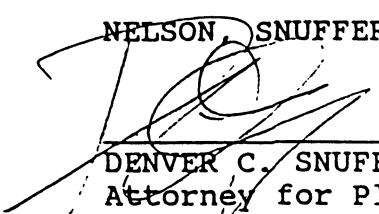
8. Copies of all exhibits not previously identified or produced which plaintiff anticipates offering at the trial herein.


ANSWER: These have been produced except for certain medical x-rays and implant devices that are available for inspection at counsels office.

DATED this 21-day of April, 1994.


William Morton

NELSON SNUFFER & DAHLE


DENVER C. SNUFFER
Attorney for Plaintiff
10885 South State Street
Sandy, Utah 84070

Fourth Judicial District Court of
Utah County, State of Utah.
Aug 29, 1994
CARMA B. SMITH, Clerk
 Deputy

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

<div>WILLIAM MORTON, vs. CONTINENTAL BAKING CO.,</div> <div>Plaintiff, Defendant.</div>	<div>MEMORANDUM DECISION</div> <div>CASE NO. 910400454</div> <div>DATE: August 29, 1994</div> <div>JUDGE: RAY M. HARDING</div> <div>LAW CLERKS: Joe Morton, Laura Cabanilla</div> <div>DEPUTY CLERK: Georgia Snyder</div>
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This matter came before the Court for ruling on a number of motions and objections filed in this case since the filing of the Defendant's Motion to Compel on March 18, 1994. Having received and considered the various motions and objections together with memoranda both in support and in opposition to such, having reviewed the file and having heard the argument of counsel on July 5, 1994, the Court makes the following findings:

1) This case was originally filed on July 15, 1991. It has been set for trial four times and has involved a significant amount of legal maneuvering. The last continuance was requested the day before trial was to begin because the Plaintiff purportedly had new evidence and theories to be given by expert witnesses at trial. Defendant's counsel argued that it would be unfair to proceed without an opportunity to discover the new evidence and become adequately prepared. Rather than exclude the evidence, the Court reset the trial in order to give the Defendant time for discovery.

2) Pursuant to this allowance for additional discovery, Defendant served Interrogatories and Requests for Production of Documents on Plaintiff on or about January

14, 1994, three days after the third trial setting was to have begun.

3) Plaintiff did not respond to the Defendant's Interrogatories and Request for Production of Documents, and on March 18, 1994, the Defendant filed a Motion to Compel and a Memorandum in Support of Points and Authorities of Defendant's Motion to Compel along with an order for the Court's signature.

4) In an affidavit filed May 11, 1994, Plaintiff's attorney admitted that he had received the Interrogatories and Request for Production of Documents as well as the Motion to Compel.

5) Plaintiff failed to respond to the Motion to Compel and on March 31, 1994, the Defendant filed a Notice to Submit for decision.

6) The Court reviewed the documents on April 12, 1994 and gave instruction that Defendant's counsel prepare an order giving the Plaintiff 10 days from the date of the signing of the order to fully and completely answer the interrogatories or face dismissal of the case. This order was prepared in accordance with the Court's instructions and was signed the same day. This signed order gave the Plaintiff until 5:00 p.m. on April 22, 1994 to complete the answers. A copy of the order was mailed to the Plaintiff.

7) The Defendant did not receive the answers by the deadline on the 22nd. On April 25, 1994, Defendant prepared a Motion to Dismiss for Failure to Comply with Order Compelling Discovery. A copy of this motion, its memorandum in support, and an affidavit of Defendant's attorney Terry M. Plant, were hand delivered to the Plaintiff. An Order of Dismissal was also submitted to the Court and a copy hand delivered to the Plaintiff.

8) Upon reviewing the affidavit of counsel on April 28, 1994, the Court signed the Order of Dismissal.

9) On May 6th the Plaintiff sent to the Court a Certificate of Delivery certifying that he had faxed answers to the interrogatories to the Defendant on April 25, 1994, and had mailed them on May 6, 1994.

10) On May 11, 1994, Defendant filed a Notice of Signing of Judgment, a copy of which was sent to the Plaintiff on May 6th. Plaintiff acknowledges receiving this document on May 9, 1994.

11) On May 11, 1994, Plaintiff began his response to the actions of the past month and a half by filing his Motion for Relief From Judgment and supporting memorandum. On May 20, 1994, Defendant filed his Memorandum in Opposition and on May 26th Plaintiff replied. Finding no reason to grant the motion, the Court denied it on May 26, 1994. Despite the fact that the Plaintiff did not timely request oral argument, on June 16, 1994, the Court vacated its earlier Memorandum Decision in order to grant Plaintiff the opportunity for oral argument on July 5, 1994. This motion will be addressed in this Memorandum Decision. The Court has also received objections from both sides as to the form of the other's submitted order. Since the Memorandum Decision has been vacated the Court will not address either objection.

12) On June 9, 1994, Plaintiff filed a Motion to Set Aside Judgment Due to Fraud and to Extend Time for Appeal and its memorandum in support. On June 14, 1994, the Court signed an order extending the time of appeal. On June 17, 1994, Defendant filed his Memorandum in Opposition and on June 20th Plaintiff replied. This motion will be addressed in this Memorandum Decision.

13) On June 20, 1994, Plaintiff filed a Motion to Strike Order of Dismissal dated April 28, 1994 and its memorandum in support. On June 27, 1994, Defendant filed his Memorandum in Opposition. This motion will be addressed in this Memorandum Decision.

14) On June 20, 1994, Plaintiff also filed a Motion to Strike Order dated April 12, 1994 and its memorandum in support. On June 27, 1994, Defendant filed his Memorandum in Opposition. This motion will be addressed in this Memorandum Decision.

I. PLAINTIFF'S *MOTION FOR RELIEF FROM JUDGEMENT* DATED MAY 11, 1994.

In this motion the Plaintiff makes four arguments: 1) that the interrogatories were answered on time, 2) that he was unaware that an order to compel had been signed or that a request for judgement had been submitted, 3) that any failure on the part of the Plaintiff was the product of mistake, inadvertence or neglect on the part of his attorney which should be excused, and 4) that the Defendant failed to comply with the service requirements of Rule 4-501, Code of Judicial Administration.

Plaintiff's first argument is simply incorrect. Rule 6, Utah Rules of Civil Procedure, covers the computation of time. "[T]he day of the act [April 12] . . . shall not be included." Thus, the 13th is the first day, the 14th the second and so on until the 22nd, which is the 10th day. The time for answering the interrogatories expired at 5:00 p.m. on April 22, 1994. Plaintiff admits the answers were received by the Defendant at the earliest on April 25, 1994. In short, the interrogatories were not answered in time.

Plaintiff next argues that he knew nothing of the Court's proceedings from the time the Defendant filed his Motion to Compel on March 18, 1994, until May 9, 1994, when he received the Notice of Signing of Judgment. During oral argument, counsel explained that he has been having some problem with the mail. The Court's records indicate that six documents were either mailed or hand delivered to the Plaintiff during that time. The Court is not convinced by Plaintiff's assertions and finds that the Plaintiff, through his attorney or his attorney's staff, knew of the order compelling the answers to the interrogatories and failed to answer them in the allotted time.

Plaintiff next argues that to the extent the Plaintiff has failed to respond timely, Plaintiff's counsel has done so mistakenly, inadvertently, or through neglect which should be excused by the Court. Plaintiff's counsel appeals to the Court's sense of logic. He points out that the case has been ready to go to trial on two prior occasions and that the Plaintiff and his counsel "have invested years of time and considerable out of pocket costs in

advancing this case." Plaintiff's counsel argues that he must have been unaware of the deadline because if he had known of the deadline he would have complied with it.

This Court has similar questions. With all this at stake, why would counsel fail to answer the interrogatories or at least provide partial answers to opposing counsel when they were due? Why would counsel, knowing that a motion to compel was filed, not respond to the Court in any way? Why would he not then provide the answers he had? Why would he not seek an extension of time from the Court if he were having difficulty obtaining the information? Why, if he were ready to present at least part of the information at trial on January 11, 1994, could he not produce it to counsel within the time limits of the rules?

The Court does not know the answer to any of these questions; however, it does know that it has not been offered any satisfactory explanation by Plaintiff's counsel. Any mistakes, inadvertence and neglect which may have occurred at the office of Plaintiff's counsel are not an excuse for the manner in which Plaintiff's counsel has handled this matter.

Plaintiff finally argues that the Defendant failed to comply with the service requirements of Rule 4-501 of the Code of Judicial Administration and claims that none of the documents requesting judgment, i.e. the Motion to Dismiss for Failure to Comply With Discovery, the supporting memorandum with exhibits, and the Order of Dismissal, were ever received by the Plaintiff. The Court notes that each has the required Certificate of Service attached and the further affidavit of John Braithwaite attesting that he personally delivered the documents to the office of Plaintiff's counsel. Plaintiff has offered no evidence to refute or call into question whether the documents were actually hand delivered as claimed. As such, the Court will take the Certificates of Service at face value and find that the documents in question were delivered to Plaintiff's counsel.

Not being persuaded by any of the arguments advanced by the Plaintiff, the Court will deny the Plaintiff's motion.

II. PLAINTIFF'S MOTION TO SET ASIDE JUDGEMENT DUE TO FRAUD AND TO EXTEND TIME FOR APPEAL DATED JUNE 9, 1994.

In this motion, Plaintiff argues that he failed to respond to discovery requests due to fraud and misrepresentations to the Court by Defendant. The representations of the Defendant were not false and no fraud was committed or attempted. As such, the motion is denied. Further, because of the serious nature of the accusation by Plaintiff's attorney and the fact that Plaintiff's failure to respond was rather the result of a basic error on his part, the Court will order Plaintiff's attorney to personally pay the Defendant's attorney fees in litigating this motion.

III. PLAINTIFF'S MOTION TO STRIKE ORDER OF DISMISSAL DATED APRIL 28, 1994 DATED JUNE 20, 1994.

Plaintiff argues that the Order of Dismissal was signed prematurely because the Court should have given the Plaintiff 10 days in which to respond, in accordance with CJA Rule 4-501, before it ruled on the motion.

While technically titled a motion, the purpose of the Defendant's documents was to inform the Court that Plaintiff had failed to comply with the Court's earlier order and to ask the Court to implement the sanctions prescribed in that order. The order signed on April 28, 1994, merely executes the sanctions of the earlier order.

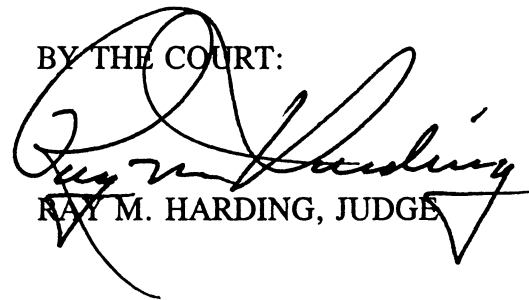
Plaintiff's failure to file any response to the motion eliminates any standing the Plaintiff has to claim that the memorandum was not considered. Moreover, in subsequent affidavits the Plaintiff admits that its answers to interrogatories were not submitted by the deadline imposed by the original order. Judicial economy and fairness are not furthered by allowing the Plaintiff to argue a point that it has not preserved and that it admits it did not comply with.

WHEREFORE,

Counsel for Defendant is to prepare an order within 15 days of this decision consistent with the terms of this memorandum and submit it to opposing counsel for approval as to form prior to submission to the Court for signature. This memorandum decision has no effect until such order is signed by the Court.

Dated this 29th day of August, 1994.

BY THE COURT:

A handwritten signature in black ink, appearing to read "Ray M. Harding", is written over the printed name. The signature is stylized with large loops and a long horizontal stroke at the end.

RAY M. HARDING, JUDGE

cc: Denver C. Snuffer, Jr., Esq.
Terry M. Plant, Esq.

TERRY M. PLANT, #2610
HANSON, EPPERSON & SMITH, P.C.
Attorneys for Defendant
4 Triad Center, Suite 500 (84180)
P. O. Box 2970
Salt Lake City, Utah 84110-2970
Telephone: (801) 363-7611

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

WILLIAM W. MORTON,	) ORDER DENYING PLAINTIFF'S
	) MOTION FOR RELIEF FROM
Plaintiff,	) JUDGMENT, PLAINTIFF'S MOTION
	) TO SET ASIDE JUDGMENT DUE TO
vs.	) FRAUD AND TO EXTEND TIME FOR
	) APPEAL AND PLAINTIFF'S MOTIONS
CONTINENTAL BAKING COMPANY,	) TO STRIKE ORDERS OF DISMISSAL
a Delaware corporation,)
	) Civil No. 910400454PI
Defendant.	) Judge Ray M. Harding

The following motions of the Plaintiff came before the Court for oral argument on July 5, 1994:

1. Plaintiff's Motion for Relief from Judgment dated May 11, 1994;
2. Plaintiff's Motion to Set Aside Judgment Due to Fraud and to Extend Time for Appeal dated June 9, 1994;
3. Plaintiff's Motion to Strike Order Dated April 12, 1994 dated June 20, 1994; and
4. Plaintiff's Motion to Strike Order of Dismissal Dated April 28, 1994 dated June 9, 1994.

The Plaintiff having been represented by Denver C. Snuffer, Jr. and the Defendant having been represented by Terry M. Plant, the Court having reviewed all memoranda and objections filed by the various

counsel concerning each of the motions, as well as oral argument of counsel, and good cause appearing therefor, the Court makes the following findings:

FINDINGS OF THE COURT

1. This matter was originally filed on July 15, 1991. The case has been continued four times. The last continuance was requested the day before trial was to begin because the Plaintiff purportedly had new evidence and theories to be given by expert witnesses at trial. Defendant's counsel argued that it would be unfair to proceed without an opportunity to discover the new evidence and adequately prepare himself. Rather than exclude evidence, the Court reset the trial to give the Defendant time for discovery.

2. Pursuant to the allowance for additional discovery, Defendant served interrogatories and requests for production of documents on or about January 14, 1994, three days after the third trial setting was to have begun.

3. Due to Plaintiff's failure to respond to the interrogatories and requests for production of documents, on March 18, 1994 the Defendant filed a motion to compel, together with a memorandum of points and authorities in support of its motion to compel.

4. In accordance with the affidavit of May 11, 1994 of Plaintiff's counsel, he admitted that he received the

interrogatories and requests for production of documents, as well as the motion to compel.

5. Plaintiff failed to respond to the motion to compel and on March 31, 1994, the Defendant filed a notice to submit for decision.

6. The Court reviewed the documents on April 12, 1994 and gave instruction that Defendant's counsel prepare an order giving the Plaintiff 10 days from the date of the signing of the order to fully and completely answer the interrogatories or face dismissal of the case. This order was prepared in accordance with the Court's instructions and was signed the same day. This signed order gave the Plaintiff until 5:00 p.m. on April 22, 1994 to complete the answers. A copy of the order was mailed to the Plaintiff.

7. The Defendant did not receive the answers by the deadline on the 22nd. On April 25, 1994, Defendant prepared a Motion to Dismiss for Failure to Comply with Order Compelling Discovery. A copy of this motion, its memorandum in support, and an affidavit of Defendant's attorney Terry M. Plant were delivered to the Plaintiff. An Order of Dismissal was also submitted to the Court and a copy delivered to the Plaintiff.

8. Upon reviewing the affidavit of counsel on April 28, 1994, the Court signed the Order of Dismissal.

9. On May 6, the Plaintiff sent to the Court a Certificate of Delivery certifying that he had faxed answers to the

interrogatories to the Defendant on April 25, 1994, and had mailed them on May 6, 1994.

10. On May 11, 1994, Defendant filed a Notice of Signing of Judgment, a copy of which was sent to the Plaintiff on May 6 by the Defendant. Plaintiff acknowledges receiving this document on May 9, 1994.

11. On May 11, 1994, Plaintiff began his response to the actions of the past month and a half by filing his Motion for Relief from Judgment and supporting memorandum. On May 20, 1994, Defendant filed his Memorandum in Opposition and on May 26, 1994, Plaintiff replied. Finding no reason to grant the motion, the Court denied it on May 26, 1994. Despite the fact that the Plaintiff did not timely request oral argument, on June 16, 1994, the Court vacated its earlier Memorandum Decision in order to grant Plaintiff the opportunity for oral argument on July 5, 1994. Because the Court vacated its Memorandum Decision of May 26, 1994, the objections to that order filed by both sides need not be considered.

12. On June 9, 1994, Plaintiff filed a Motion to Set Aside Judgment Due to Fraud and to Extend Time for Appeal and his memorandum in support.

13. On June 20, 1994, Plaintiff filed a Motion to Strike Order of Dismissal dated April 28, 1994 and his memorandum in support, and a Motion to Strike Order Dated April 12, 1994 and his memorandum in support.

ORDER OF THE COURT

Based upon the foregoing, IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. Plaintiff's Motion for Relief from Judgment dated May 11, 1994 is hereby denied.

2. Plaintiff's Motion to Set Aside Judgment Due to Fraud and to Extend Time for Appeal dated June 9, 1994 is hereby denied and further, for the reasons set forth in the Memorandum Decision of the Court dated August 29, 1994, Plaintiff's attorney is to personally pay Defendant's attorney's fees in litigating this motion in the agreed-upon amount of \$250.00.

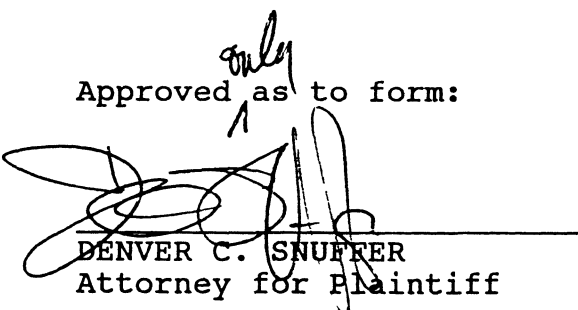
3. Plaintiff's Motions to Strike Orders of Dismissal Dated April 12, 1994 and April 28, 1994 are hereby denied.

DATED this 22 day of September, 1994.

BY THE COURT:


HONORABLE RAY M. HARDING
District Court Judge

^{only}
1
Approved as to form:


DENVER C. SNUFFER
Attorney for Plaintiff

CERTIFICATE OF HAND DELIVERY

I hereby certify that I caused to be hand delivered a true and correct copy of the foregoing ORDER DENYING PLAINTIFF'S MOTION FOR RELIEF FROM JUDGMENT, PLAINTIFF'S MOTION TO SET ASIDE JUDGMENT DUE TO FRAUD AND TO EXTEND TIME FOR APPEAL AND PLAINTIFF'S MOTIONS TO STRIKE ORDERS OF DISMISSAL, this 12th day of September, 1994, to the following:

Denver C. Snuffer, Jr.
MADDOX, NELSON, SNUFFER & DAHLE
Attorney for Plaintiff
10885 South State Street
Sandy, Utah 84070

