

1995

# John Panos v. Smiths Food & Drug Centers Inc. : Brief of Appellee

Utah Court of Appeals

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UTAH COURT OF APPEALS  
BRIEF

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IN THE UTAH COURT OF APPEALS

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JOHN PANOS,	:	
	:	
Plaintiff and Appellant,	:	
	:	District Court No. 910901425PI
vs.	:	940904176PI
	:	
SMITHS FOOD & DRUG	:	
CENTERS, INC.,	:	Court of Appeals No. 950286-CA
	:	
Defendant and Appellee.	:	Priority No. 15

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BRIEF OF APPELLEE

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Appeal from the Order  
Granting Defendant's Motion to Dismiss of the  
Third Judicial District Court of Salt Lake County, State of Utah  
Honorable Anne M. Stirba

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COURT OF APPEALS

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IN THE UTAH COURT OF APPEALS

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SMITHS FOOD & DRUG	:	
CENTERS, INC.,	:	Court of Appeals No. 950286-CA
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Defendant and Appellee.	:	Priority No. 15

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**STATEMENT OF JURISDICTION**

The Utah Court of Appeals has jurisdiction over this matter pursuant to Utah Code Ann. § 78-2a-3(2)(k) (Supp. 1994).

**STATEMENT OF THE ISSUES**

**I. Issue on Appeal**

Whether the trial court correctly concluded that the March 11, 1992 Order of Dismissal was a dismissal with prejudice pursuant to Rule 41(b) of the Utah Rules of Civil Procedure instead of a dismissal without prejudice pursuant to Rule 4-103(2) of the Utah Code of Judicial



Administration. Utah R. Civ. P. 41(b); Utah Code of Judicial Administration 4-103(2).

II. Standard of Review for Involuntary Dismissal  
Under Rule 41(b) of Utah Rules of Civil Procedure

The appellate court must give great weight to the findings made and the inferences drawn by the trial judge dismissing a case under Rule 41(b) of the Utah Rules of Civil Procedure. A lower court's dismissal of a case under Rule 41(b) will not be disturbed on appeal unless it is clear from the record that it has abused its discretion. On the other hand, the appellate court does not defer to conclusions of law but reviews them for correctness. Wilson v. Lambert, 613 P.2d 765 (Utah 1980); Maxfield v. Rushton, 779 P.2d 237 (Utah Ct. App. 1989); Southern Title Guar. Co., Inc. v. Bethers, 761 P.2d 951 (Utah Ct. App. 1988).

**DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES,  
ORDINANCES, RULES AND REGULATIONS**

Rule 41(b) of the Utah Rules of Civil Procedure and Rule 4-103 of the Utah Code of Judicial Administration. Rule 41(b) is attached in Addendum as Exhibit "A"; Rule 4-103 is attached in Addendum as Exhibit "B".

## STATEMENT OF THE CASE

### I. Nature of the Case

This case arose as the result of an alleged slip and fall of the Plaintiff and Appellant, John Panos ("Panos"), in a grocery store operated by Defendant and Appellee, Smith's Food & Drug Centers, Inc. ("Smith's"), on June 30, 1990. (Memorandum in Support of Defendant's Motion for Summary Judgment at 1-2; R. 40-41). The subject grocery store is located at 800 South and 900 East, Salt Lake County, State of Utah. (Id.).

### II. Course of Proceedings and Disposition in the Trial Court

On or about February 21, 1991, Panos filed his initial Complaint in the Third Judicial District Court, Civil No. 910901425 PI. (Complaint at 3; R. 4). On November 13, 1991, Judge Richard H. Moffat issued an Order requesting that the parties appear before the Court and show cause why Panos's Complaint should not be dismissed. (Order to Show Cause, attached in Addendum as Exhibit "C"; R. 8). Panos appeared at the Order to Show Cause hearing on December 11, 1991, and presumably argued that there was good cause not to dismiss the case. (Minute Entry dated

December 11, 1991, attached in Addendum as Exhibit "D"; R. 10). On December 11, 1991, Judge Moffat ordered that Panos either settle the case or file a Certificate of Readiness for Trial on or before March 11, 1992, or the action would be dismissed. (Id.). Panos did not comply with the Order and Panos v. Smiths Food King, Civil No. 910901425 PI, was dismissed. (Court's Order of Dismissal, attached in Addendum as Exhibit "E"; R. 11).

After learning that the case was dismissed, Panos refiled his Complaint on June 30, 1994, in the Third Judicial District Court, Civil No. 940904176 PI. (Complaint and Jury Demand; R. 279-283). Smith's moved to dismiss Panos's Complaint under Rule 12(b)(6) of the Utah Rules of Civil Procedure asserting that the dismissal of Panos v. Smith's Food King, Civil No. 910901425 PI, was a dismissal with prejudice pursuant to Rule 41(b) of the Utah Rules of Civil Procedure. (Defendant's Motion to Dismiss; R. 286-287). Panos responded by arguing that the previous dismissal was without prejudice and did not dispose of the claim against Smith's. (Memorandum in Opposition to Defendant's Motion to Dismiss; R. 288-306).

At a hearing on January 23, 1995, Judge Anne M. Stirba listened to arguments on Smith's Motion to Dismiss. (Oral Argument and Ruling on Defendant's Motion to Dismiss, attached in Addendum as Exhibit "F"; R. 381-399). Judge Stirba concluded that the March 11, 1992, dismissal was a dismissal with prejudice pursuant to Rule 41(b) of the Utah Rules of Civil Procedure. (Id. at 16-18, Exhibit "F"; R. 396-98; Order Granting Defendant's Motion to Dismiss, attached in Addendum as Exhibit "G"; R. 354-55.). This appeal followed. (Notice of Appeal; R. 357-358).

### **STATEMENT OF FACTS**

1. This case arose as the result of an alleged slip and fall of Panos on a lettuce leaf in Smith's grocery store located in Salt Lake County, State of Utah. (Memorandum in Support of Defendant's Motion for Summary Judgment at 1-2; R. 40-41). The incident occurred on June 30, 1990. (Id.).

2. On or about February 21, 1991, attorney Anthony M. Thurber filed a Complaint on behalf of Panos for injuries arising out of the slip and fall occurrence of June 30, 1990. (Complaint; R. 2-5). The case

was assigned to the Honorable Richard H. Moffat of the Third Judicial District Court in and for Salt Lake County, Civil No. 910901425. (Id.).

3. After approximately nine months of inactivity on the case, Judge Moffat sent an order on November 13, 1991, requesting the parties to appear before the court on December 11, 1991, to show cause why the case should not be dismissed for failure to prosecute. (Order to Show Cause, Exhibit "C"; R. 8).

4. Mr. Thurber appeared at the Order to Show Cause Hearing on December 11, 1991, and presumably argued that there was good cause not to dismiss the case. (Minute Entry dated December 11, 1991, Exhibit "D"; R. 10). The Court ordered as follows in its Minute Entry of December 11: "Counsel have until March 11, 1992 to settle this case or file a Certificate of Readiness for Trial. If neither are done, the case will be dismissed without further notice to counsel." (Id.).

5. Panos failed to comply with the Court's Order of March 11, 1992. (Court's Order of Dismissal, Exhibit "E"; R. 11). The Court therefore ordered that Panos's case was dismissed because there was no

compliance with the Order of December 11, 1991. (Id.). The Court's Order of Dismissal read as follows:

This case came before the court on December 11, 1991 for a hearing on the Court's Order to Show Cause for dismissal. At that hearing, counsel were advised that this case had to be settled by March 11, 1992 or a Certificate of Readiness for Trial filed. If neither of these were done, then the court on it's own motion would dismiss this case without further notice to counsel.

The court finds that a Certificate of Readiness has not yet been filed and the file does not reflect that this case has been settled.

Therefore, the Court on it's own motion orders that this case is hereby DISMISSED.

(Id.).

6. The Court's Order of Dismissal did not provide whether it was with or without prejudice. (Id.).

7. On or about October 30, 1992, Mr. Thurber withdrew as counsel for Panos. (Withdrawal of Counsel; R. 12).

8. On or about January 14, 1993, Gordon K. Jensen entered his appearance as counsel for Panos. (Entry of Appearance of Counsel; R. 15).

9. On or about June 20, 1994, Mr. Jensen filed on behalf of Panos a Motion to Vacate the Court's Order of Dismissal entered on March 11, 1992, pursuant to Rule 60(b)(7) of the Utah Rules of Civil Procedure. (Plaintiff's Motion to Vacate Dismissal; R. 198-199). On or about June 23, 1994, Smith's filed a Memorandum in Opposition to Panos' Motion to Vacate Dismissal. (Defendant's Memorandum in Opposition to Plaintiff's Motion to Vacate Dismissal; R. 220-239). After hearing argument from counsel for both parties, Judge Ronald O. Hyde, in an Order dated July 7, 1994, denied Panos' Motion for an Order Vacating the Order of Dismissal. (Order; R. 265-266).

10. Panos filed a second Complaint on June 30, 1994, for injuries arising from the slip and fall incident of June 30, 1990. (Complaint and Jury Demand ¶¶ 2, 9-12; R. 279-283). This second Complaint alleged the same facts and causes of action as Panos alleged in his original Complaint of February 21, 1991. (Id.). The case was assigned to the Honorable Anne M. Stirba of the Third Judicial District Court, Salt Lake County, Civil No. 940904176. (Id.).

11. On or about August 10, 1994, Smith's filed with the court a Motion to Dismiss Panos' Complaint on grounds that Panos' claims had been previously ordered dismissed with prejudice under Rule 41(b) of the Utah Rules of Civil Procedure by Judge Richard H. Moffat in his Order dated March 11, 1992. (Smith's Memorandum in Support of Motion to Dismiss; R. 288-306). Panos filed a Memorandum in Opposition to Smith's Motion to Dismiss arguing that Judge Moffat's Order of Dismissal was made pursuant to Rule 4-103 of the Utah Code of Judicial Administration and therefore was without prejudice. (Panos' Memorandum in Opposition to Defendant's Motion to Dismiss; R. 308-333).

12. A hearing on Smith's Motion to Dismiss was held before Judge Stirba on January 23, 1995. (Minute Entry dated November 1, 1994; R. 349). After hearing argument from counsel for both parties, Judge Stirba granted Smith's Motion to Dismiss. (Order granting Defendant's Motion to Dismiss, Exhibit "G"; R. 354-355; Oral Argument and Ruling, Exhibit "F"; R. 381-398). Judge Stirba stated in her order as follows:



The Court finds that the Order of Dismissal entered by Judge Richard H. Moffat on March 11, 1992, in John Panos v. Smith's Food King, Civil No. 910901425, was made pursuant to Rule 41(b) of the Utah Rules of Civil Procedure and operated as an adjudication upon the merits of the case . . . .

(Order Granting Defendant's Motion to Dismiss, Exhibit "G", R. 354-55).

13. Panos filed a Notice of Appeal on or about March 3, 1995. (Notice of Appeal; R. 357-358). Panos appeals from the Order entered on February 3, 1995, by Judge Stirba granting Smith's Motion to Dismiss Plaintiff's Complaint. (Id.). Panos also appealed from the order entered on July 7, 1994, by Judge Ronald O. Hyde denying Panos's Motion for an Order Vacating Judge Moffat's Order of Dismissal. (Id.) In a Memorandum Decision filed on May 25, 1995, this Court dismissed Panos's appeal from Judge Hyde's order on the basis that the appeal was not timely filed within 30 days and therefore the Court lacked jurisdiction over the appeal. (Memorandum Decision filed May 25, 1995).

### **SUMMARY OF THE ARGUMENT**

I. The trial court correctly concluded that the March 11, 1992 dismissal was a dismissal with prejudice pursuant to Rule 41(b) of the Utah Rules of Civil Procedure. Panos did not comply with a Court order

and only under Rule 41(b) and not Rule 4-103 can a case be dismissed for noncompliance with a court order. Furthermore, the dismissal is held to be with prejudice according to Rule 41(b) since the Court did not specify if it was with or without prejudice.

**II.** A Rule 41(b) dismissal is a decision within the broad discretion of the trial court. The background of this case demonstrates that it is one which warrants a dismissal with prejudice under Rule 41(b) of the Utah Rules of Civil Procedure. Not only did Panos fail to take any action in the case for almost two years, he failed to comply with a Court order. The Utah appellate courts have consistently affirmed Rule 41(b) dismissals in cases similar to the instant case.

## **ARGUMENT**

### **I.**

**JUDGE STIRBA CORRECTLY CONCLUDED THAT THE MARCH 11, 1992 ORDER OF DISMISSAL WAS A DISMISSAL WITH PREJUDICE PURSUANT TO RULE 41(b) OF THE UTAH RULES OF CIVIL PROCEDURE.**

In bringing this appeal from Judge Stirba's Order granting Smith's Motion to Dismiss, Panos erroneously contends that this action was dismissed without prejudice by Judge Moffat under Rule 4-103(2) of the

Utah Code of Judicial Administration. Rule 4-103(2) provides in pertinent part:

(2) If a certificate of readiness for trial has not been served and filed within 180 days of the filing date, the clerk shall mail written notification to the parties stating that absent a showing of good cause by a date specified in the notification, the court shall dismiss the case without prejudice for lack of prosecution.

Utah Code of Judicial Administration Rule 4-103(2), Exhibit "B". The record of this case makes clear, however, that Panos's action could only have been dismissed with prejudice for failure to comply with a court order under Rule 41(b) of the Utah Rules of Civil Procedure. Order Granting Defendant's Motion to Dismiss, Exhibit "G"; R. 354-355.

The background of this case shows that on or about February 21, 1991, attorney Anthony M. Thurber filed a Complaint on behalf of Panos. Complaint; R. 2-5. After approximately nine months of inactivity on the case, Judge Richard H. Moffat ordered the parties to appear and show cause why the case should not be dismissed for failure to prosecute. Order to Show Cause, Exhibit "C"; R. 8. The Court did not dismiss the case because Mr. Thurber appeared at the hearing and presumably argued that there was good cause for the Court not to dismiss the case. Oral

Argument and Ruling at 17, Exhibit "F"; R. 397. Based on the discussion at the order to show cause hearing, the Court ordered that: "Counsel have until March 11, 1992 to settle this case or file a Certificate of Readiness for trial. If neither are done, the case will be dismissed without further notice to counsel." Minute Entry dated December 11, 1991, Exhibit "D"; R. 10.

Panos failed to comply with the Court's order and Judge Moffat dismissed the case on March 11, 1992. Court's Order of Dismissal, Exhibit "E"; R. 11. In his Order of Dismissal, Judge Moffat stated as follows:

This case came before the court on December 11, 1991 for a hearing on the Court's Order to Show Cause for dismissal. At that hearing, counsel were advised that this case had to be settled by March 11, 1992 or a Certificate of Readiness for Trial filed. If neither of these were done, then the court on it's own motion would dismiss this case without further notice to counsel.

The court finds that a Certificate of Readiness has not yet been filed and the file does not reflect that this case has been settled.

Therefore, the Court on it's own motion orders that this case is hereby dismissed.

Id.

The Court could only have taken this action under Rule 41(b) which provides in pertinent part: "For failure of the plaintiff to prosecute or comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him." <sup>1</sup> Utah R. Civ. P. 41(b), Exhibit "A".

Based on Rule 41(b), Judge Moffat dismissed this case because, not only did Panos fail to prosecute the case, but he failed to comply with an order of the Court. Court's Order of Dismissal, Exhibit "E"; R. 11. Rule 4-103 does not consider or allow a dismissal for failure to comply with an order of the Court. Utah Code of Judicial Administration Rule 4-103(2), Exhibit "B". An action can only be dismissed under Rule 4-103(2) where the party fails to show "good cause by a date specified in the notification." Id. Panos complied with Rule 4-103 by appearing at the hearing and showing good cause why the case should not be dismissed. Only after Panos failed to comply with the Court's order of December 11, 1991, did the Court dismiss the case. Court's Order of Dismissal, Exhibit "E"; R.

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<sup>1</sup> Judicial authority in Utah has held that a dismissal under Rule 41(b) does not need to be made by the defendant; rather, the court on its own motion can take action under the rule. Charlie Brown Constr. v. Leisure Sports, Inc., 740 P.2d 1368 (Utah Ct. App. 1987).

11. Judge Stirba reasoned as follows in deciding that Judge Moffat's Order of Dismissal was a 41(b) dismissal with prejudice:

It appears to me that the second order of Judge Moffat, the order requiring the parties to settle or file a certification of readiness was not an order that . . . arose out of the 4-103 process . . . . I think the better-reasoned view is consistent with the defendant's view that it then fell under Rule 41, involuntary dismissal. Because that order then did not indicate whether it was with or without prejudice consistent with the language of that Rule, it had to be construed with prejudice.

Oral Argument and Ruling at 17-18, Exhibit "F"; R. 397-398.

Panos and his current counsel assert that they should not be punished because of previous counsel's failure to prosecute the case and for previous counsel's conduct in failing to notify Panos that the lawsuit was dismissed. Brief of Appellant at 7. These assertions are irrelevant to the issues of this appeal. The failure of a previous attorney to fully adjudicate a lawsuit and communicate with his client is not a reason to overturn a Rule 41(b) dismissal. In fact, Judge Stirba in her ruling that the March 11, 1992 dismissal was with prejudice noted:

The fact that Mr. Panos chose Mr Thurber as his attorney and Mr. Thurber dropped the ball and Mr. Thurber otherwise did not zealously represent his client in this case is not critical in the analysis. It's unfortunate.

Oral Argument & Ruling at 18, Exhibit "F"; R. 389.

The Utah Supreme Court case of Pitman v. Bonham, 677 P.2d 1126 (Utah 1984), illustrates the principle. In Pitman, the plaintiff filed his complaint against defendant in April of 1980. In June of that same year, defendant took plaintiff's deposition. In March of 1981, plaintiff's attorney withdrew from the case. In February of 1982, the court sent notice advising the parties of a pre-trial conference date and a trial date in March of 1982. When plaintiff did not appear for the trial, defendant moved to dismiss the case under Rule 41(b) and the trial court granted the motion with prejudice. After the case had been dismissed, plaintiff contacted new counsel who brought a Rule 60(b) motion to set aside the involuntary dismissal. The court denied the Rule 60 motion and plaintiff appealed.

On appeal, the plaintiff in Pitman argued that he was not at fault in allowing the case to be dismissed because he had no contact with his former counsel following his deposition and his counsel failed to notify

him of the proceedings in the case. Id. at 1127. The appellate court rejected this as a reasonable excuse for failing to prosecute: "[T]he trial court was not persuaded that plaintiff presented a reasonable excuse for failing to prosecute the case during the two year period he knew the action was pending. . . ." Id. at 1127. The Pitman court further reasoned that "[a]fter plaintiff filed the complaint, he took no further action, including keeping in reasonable contact with his own attorney." Id.<sup>2</sup>

Mr. Thurber was the attorney of record for Panos when the original complaint was filed, when the dismissal was ordered, and for approximately seven months following the dismissal. Withdrawal of Counsel; R.12. Panos did nothing during this time period to prosecute his claim, and, apparently, he did not keep in reasonable contact with his attorney. The appointment of new counsel does not allow Panos to escape the conduct of his previous attorney, nor is the lack of contact with

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<sup>2</sup> This Court has said that a party's "failure to communicate with its counsel does not satisfy the 'excusable neglect' standard required to set aside a judgment under Utah Rules of Civil Procedure 60(b)." Meadow Fresh Farms, Inc. v. Utah State Univ. Dep't. of Agric., 813 P.2d 1216, 1218 (Utah Ct. App. 1991).



his previous counsel an excuse for failing to prosecute his case or to have the dismissal overturned.

Panos further argues that the dismissal by Judge Moffat should not have been allowed since Smith's had yet to file an answer to the complaint. Brief of Appellant at 10 and 11. Panos cannot argue that Smith's is equally responsible with Panos for not moving the case forward. In responding to this same argument, this Court previously held that "[a]lthough inaction on the part of a defendant may contribute to the justifiability of a plaintiff's excuse for delay, the duty to prosecute is a duty of due diligence imposed on a plaintiff, not on a defendant." Country Meadows Convalescent Center v. Utah Dep't of Health, 851 P.2d 1212, 1216 (Utah Ct. App. 1993).<sup>3</sup>

Secondly, Judge Moffat dismissed Panos's case for Panos's failure to comply with a court order. Court's Order of Dismissal, Exhibit "E"; R. 11. The Court did not dismiss the case for Smith's conduct in failing to comply with a court order. Consequently, the fact that Smith's had not

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<sup>3</sup> "'The burden is upon the plaintiff to prosecute a case in due course without unusual or unreasonable delay.'" Charlie Brown Constr., 740 P.2d at 1370, quoting Lake Meredith Research Co. v. Amity Mtn. Irrigation Co., 698 P.2d 1340, 1344 (Colo. 1985)).

yet answered Panos's Complaint had nothing to do with Judge Moffat's dismissal.

Panos also argues that affirming the Rule 41(b) dismissal with prejudice would deprive him of his right to be heard and would be unjust. Brief of Appellant at 9. In response to this argument, the Utah Court of Appeals wrote:

Although dismissal with prejudice is a harsh penalty, there are numerous cases in which the Utah appellate courts have held that party's dilatory conduct justified such action. In Maxfield v. Fishler, 538 P.2d 1323 (Utah 1975), the Utah Supreme Court affirmed the trial court's dismissal with prejudice based on the plaintiff's "inexcusable neglect in failing to prepare and prosecute her claim with reasonable diligence." Id. at 1324-25. Similarly, in Charlie Brown Constr. v. Leisure Sports, Inc., 740 P.2d 1368 (Utah App.), cert. denied, 765 P.2d 1277 (Utah 1987), we held that, while a trial court must afford a plaintiff "an opportunity to be heard and to do justice," id. at 1371 (quoting Westinghouse Elec. Supply Co. v. Paul W. Larsen Contractor, Inc., 544 P.2d 876, 879 (Utah 1975)), it was not error for the trial court to dismiss the plaintiffs' case with prejudice due to their abuse of that opportunity through dilatory conduct.

Hill v. Dickerson, 839 P.2d 309, 312 (Utah Ct. App. 1992).

In this case, Panos had ample opportunity to prosecute his case but failed to do so. In fact, the Court granted an extension of time to Panos to allow him to either settle the case or file a Certificate of Readiness for

Trial. Minute Entry dated December 11, 1991, Exhibit "D"; R. 10.

Without any justifiable excuse, Panos' previous attorney did not comply with the court's order and the case was dismissed. Utah law requires plaintiffs "to prosecute their claims with due diligence, or accept the penalty of dismissal." Charlie Brown Constr., 740 P.2d at 1370.

Panos believes that this dismissal will not allow him his day in court.

However, Judge Stirba expressed an opinion to the contrary:

I think the better-reasoned view is consistent with the defendant's view that it fell under Rule 41, involuntary dismissal. Because that order then did not indicate whether it was with or without prejudice consistent with the language of that Rule, it had to be construed with prejudice. The party [Panos] was given his day in court in the sense that he was given a substantial period of time to prosecute the case.

Oral Argument & Ruling at 17-18, Exhibit "F"; R. 397-98.

Panos further contends that since the order of dismissal was on a form document sent out by the Court which did not specifically state that it was a dismissal with prejudice, the Court should rule that it was without prejudice. Brief of Appellant at 8-9. This claim is unfounded. First of all, There is no basis for Panos's contention that Judge Moffat's order of dismissal was on a form document. To the contrary, a review of the order

of dismissal shows that it reflects the facts of the case at hand and the matters that were discussed at the hearing on December 11, 1991. Court's Order of Dismissal, Exhibit "E"; R. 11.

Secondly, Rule 41(b) provides that an order of dismissal is with prejudice unless the order specifically states that it is without prejudice.

Rule 41(b) in part reads as follows:

Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue or for lack of an indispensable party, operates as an adjudication upon the merits.

Utah R. Civ. P. 41(b), Exhibit "A". Since the Court did not specify if it was with or without prejudice, the dismissal is held to be with prejudice according to Rule 41(b). Judge Stirba adds:

Judge Moffat did dismiss the case without making a reference of whether it was a dismissal with or without prejudice. It's really not an uncommon item of occurrence, at least in the state trial court.

. . . I think the better-reasoned view is consistent with the defendant's view that it fell under Rule 41, involuntary dismissal. Because that order then did not indicate whether it was with or without prejudice consistent with the language of that Rule, it had to be construed with prejudice.

Oral Argument & Ruling at 17-18, Exhibit "F"; R. 397-98.

The facts of this case show that Judge Moffat properly exercised his discretion in ordering the dismissal of Panos's action due to lack of diligence in prosecuting the claim and because Panos failed to comply with a court order. Judge Stirba correctly concluded that the March 11, 1992, order of dismissal was a dismissal with prejudice pursuant to Rule 41(b) of the Utah Rules of Civil Procedure, a ruling that should not be disturbed on appeal.

## **II.**

### **UTAH APPELLATE COURT OPINIONS SUPPORT THE TRIAL COURT'S DISMISSAL OF PANOS'S ACTION WITH PREJUDICE**

Panos seems to argue in his brief that a case must be pending for several years before a dismissal under Rule 41(b) is warranted. Brief of Appellant at 9-13. Panos states that this case does not fit the circumstances of those cases where orders of dismissal were affirmed because in those appellate court cases the parties had been engaged in ongoing litigation for years. *Id.* at 9.

The Utah appellate courts have held that a 41(b) dismissal is a decision within the broad discretion of the trial court. Wilson v. Lambert,

613 P.2d 765 (Utah 1980); Maxfield v. Rushton, 779 P.2d 237 (Utah Ct. App. 1989); Southern Title Guar. Co., Inc. v. Bethers, 761 P.2d 951 (Utah Ct. App. 1988). "[A] lower court's dismissal of a case under Rule 41(b) will not be disturbed on appeal unless it is clear from the record that it has abused its discretion." Rushton, 779 P.2d at 239.

Contrary to what Panos would have the Court believe, the length of time that elapses from the filing of the complaint is not a deciding factor in considering a Rule 41(b) dismissal. In Maxfield v. Rushton, 779 P.2d 237, this Court stated that "there is more to consider in determining if a dismissal for failure to prosecute is proper than merely the amount of time elapsed since the suit was filed." Id. at 239. The Utah Supreme Court has stated that "[r]ule 41(b) sets no deadline for the moving party to act; indeed, the court retains inherent power to dismiss an action for failure to prosecute pursuant to its own motion." Wilson, 613 P.2d at 768.

The case of Hill v. Dickerson, 839 P.2d 309, is instructive. The Plaintiff in Hill filed her dental malpractice complaint in March of 1990. After twelve months of no activity on the case, the court ordered the plaintiff to designate witnesses by April 19, 1991, which the plaintiff did

not do. On August 19, 1991, plaintiff finally produced a witness list and the defendant responded by filing a Motion in Limine to exclude plaintiff's witnesses. The court granted Defendant's Motion in Limine. At the same time the Motion in Limine was granted, the court dismissed plaintiff's action with prejudice, presumably because plaintiff failed to follow the court's order in naming witnesses and completing discovery. The Utah Court of Appeals affirmed the dismissal stating that plaintiff had ample opportunity to litigate her case but abused such opportunity. Id. at 312; See also Pitman, 677 P.2d 1126.

The case of Charlie Brown Construction Company v. Leisure Sports, Inc., 740 P.2d 1368, is also helpful. In Charlie Brown, the court on its own initiative filed an order to show cause why the case should not be dismissed after eight months of inactivity on the case. After setting the case for a pre-trial hearing on several occasions, the court set a final pre-trial hearing on June 12, 1994. Three days before the hearing, the plaintiff's attorney explained to the judge that a settlement of the case was likely and therefore he did not attend the June 12 hearing. As a result, the judge dismissed the case after no appearances were made at the pre-trial

hearing. In affirming the trial court decision, the appellate court considered the plaintiffs' failure to comply with court orders and its delays in moving the case forward. The appellate court held that the trial court did not abuse its discretion in dismissing plaintiffs' action with prejudice under Rule 41(b).

Panos believes that Westinghouse Electric Supply Company v. Paul W. Larsen Contractor, Inc., 544 P.2d 876 (Utah 1975), is the case that is the most similar to the present case. A review of this opinion shows, however, that the two cases are very different. In Westinghouse, the defendant asked the plaintiff to produce an extensive number of documents for discovery. Because the plaintiff is a nationwide company, the request took nine months in which the plaintiff diligently searched for the requests in its archives and depositories throughout the country. When the documents were collected, the plaintiff then invited the defendant to look at the documents at plaintiff's place of business because of the voluminous number of documents. The defendants never responded to plaintiff's invitation to review the documents and moved to dismiss the case which the trial court granted. The Utah Supreme Court overruled stating that the



plaintiff was actively pursuing the adjudication of the suit and therefore the case should have not been dismissed. Id. at 879.

Westinghouse is not similar to the instant case. Unlike the plaintiff in Westinghouse, Panos was not diligently pursuing the adjudication of the claim. In fact, after filing the Complaint, Panos did nothing in the next two years to move the case forward. Furthermore, the plaintiff in Westinghouse did not ignore a court order which would warrant a dismissal of the case as Panos did in the instant action.

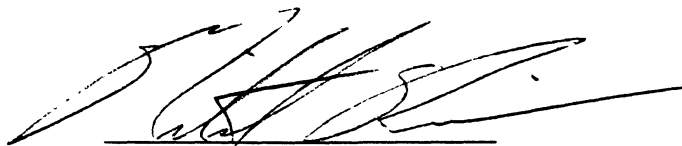
The background of the present case demonstrates that it is one which warrants dismissal with prejudice under Rule 41(b). Judge Moffat did not abuse his discretion in ordering a dismissal with prejudice of Panos's action. In addition, Judge Stirba also did not err in granting Smith's Motion to Dismiss. The order of the trial court should be affirmed.

## **CONCLUSION**

Based on the foregoing, Defendant and Appellee, Smith's Food and Drug Centers, Inc., respectfully requests that the Order of the trial court granting Smith's Motion for Dismissal be affirmed, the appeal of Panos be dismissed, and Smith's awarded its costs on appeal.

DATED this 6 day of October, 1995.

MORGAN & HANSEN

A handwritten signature in black ink, appearing to read 'S. G. Morgan', written over a horizontal line.

Stephen G. Morgan

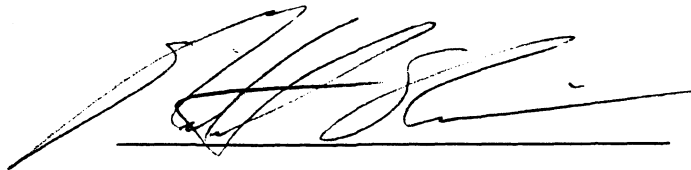
Mitchel T. Rice

Attorneys for Defendant and Appellee  
Smith's Food and Drug Centers, Inc.

**CERTIFICATE OF SERVICE**

I hereby certify that on the 6 day of October, 1995, I caused two  
(2) true and correct copies of the foregoing **BRIEF OF APPELLEE** to be  
hand-delivered to the following:

Gordon K. Jensen, Esq.  
LEHMAN, JENSEN & DONAHUE  
620 Judge Building  
8 East Broadway  
Salt Lake City UT 84111

A handwritten signature in black ink, appearing to read "GKJ", is written over a horizontal line.