

1995

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

Utah Court of Appeals

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Gordon K. Jensen; Lehman, Jensen & Donahue; attorney for appellant.

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BRIEF

UTAH COURT OF APPEALS
BRIEF

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1286CA

IN THE UTAH COURT OF APPEALS

JOHN PANOS,

Plaintiff and Appellant,

vs.

SMITHS FOOD & DRUG
CENTERS, INC.,

Defendant and Appellee.

:
:
:
: District Court No. 910901425PI
: 940904176PI
:
:
: Court of Appeals No. 950286-CA
:
: Priority No. 15

ADDENDUM TO BRIEF OF APPELLEE

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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FILED

OCT 06 1995

COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

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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not to grant a continuance. *Griffiths v. Hammon*, 560 P.2d 1375 (Utah 1977).

—**New theory of case.**

Continuance could be obtained to develop a theory of the case suggested after issue joined and before trial. *Tiernan v. Trewick*, 2 Utah 393 (1877).

—**Procedural delays.**

Court properly denied motion for continuance in action based on credit card obligation which had been procedurally delayed for two and a half years by interrogatories and by various motions of the defendant; and although trial date had been set for four months, motion for continuance was not filed until nine days before trial. *First Sec. Bank v. Johnson*, 540 P.2d 521 (Utah 1975).

—**Supporting affidavits.**

Subdivision (b) does not require affidavits to accompany a motion for continuance. *Bairas v. Johnson*, 13 Utah 2d 269, 373 P.2d 375 (1962).

—**Unavailable witness.**

—**Lack of diligence.**

Where subpoena for absent witness was not placed in hands of an officer for service until the morning the case was called for trial, though it had been set for several weeks, and the witness had testified at a former trial, continuance was denied. *Corporation of Members of Church of Jesus Christ of Latter-Day Saints v. Watson*, 30 Utah 126, 83 P. 731 (1906).

In malpractice action, motion for continuance based on plaintiff's inability to serve subpoena on vacationing medical witness was properly denied, where plaintiff had made no effort to depose witness and had never contacted witness for the purpose of testifying. *Maxfield v. Fishler*, 538 P.2d 1323 (Utah 1975).

After plaintiff had been granted one continuance because of unavailability of her preferred expert witness, and her second request for a continuance several months later was solely due to her own failure to retain and designate a new expert witness in a timely manner, there was no abuse in the district court's denial of plaintiff's second motion. *Hill v. Dickerson*, 839 P.2d 309 (Utah Ct. App. 1992).

—**Need.**

Where the defendant's counsel had three weeks to prepare for trial, and where two of the witnesses, purportedly important to his case, were actually present at trial and thus subject to cross-examination, the purely speculative need for a third witness did not entitle the defendant to the granting of a motion for continuance. *State v. Humpherys*, 707 P.2d 109 (Utah 1985).

Cited in *Thorley v. Thorley*, 579 P.2d 927 (Utah 1978); *Holbrook v. Master Protection Corp.*, 883 P.2d 295 (Utah Ct. App. 1994).

COLLATERAL REFERENCES

Am. Jur. 2d. — 17 Am. Jur. 2d Continuance § 1 et seq.; 75 Am. Jur. 2d Trial §§ 76, 80, 83, 84.

C.J.S. — 17 C.J.S. Continuances § 1 et seq.; 88 C.J.S. Trial §§ 18 to 35.

A.L.R. — Admissions to prevent contin-

uance sought to secure testimony of absent witness in civil case, 15 A.L.R.3d 1272.

Continuance of civil case as conditioned upon applicant's payment of costs or expenses incurred by other party, 9 A.L.R.4th 1144.

Key Numbers. — Continuance ⇐ 1 et seq.; Trial ⇐ 1 to 7.

Rule 41. Dismissal of actions.

(a) Voluntary dismissal; effect thereof.

(1) **By plaintiff; by stipulation.** Subject to the provisions of Rule 23(c), of Rule 66, and of any applicable statute, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

(2) **By order of court.** Except as provided in Paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

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

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

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

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

Compiler's Notes. — Subdivisions (a) to (d) of this rule are substantially similar to Rule 41, F.R.C.P.

NOTES TO DECISIONS

ANALYSIS

Costs of previously dismissed action.
 —Attorney fees.
 Counterclaim.
 —Lack of prosecution.
 Involuntary dismissal.
 —Appeal.
 —Standard of review.
 —Time limits.
 —Directed verdict distinguished.
 —Findings and conclusions.
 —Effect.
 —Evidence to be considered.
 —Federal rules.
 —Grounds.
 —Failure to establish prima facie case.
 —Failure to join indispensable party.
 —Failure to prosecute.
 —Failure to replace counsel.
 —Insufficient evidence.
 —Lack of jurisdiction.
 —Improper venue distinguished.
 —Procedure.
 —Reinstatement of dismissed count.

—Water appropriation cases.
 Voluntary dismissal.
 —Action pending in another state.
 —Conditions.
 —Appeal.
 —Payment of attorney's fees.
 —Court's discretion.
 —Laches.
 —Two-dismissal rule.
 —Second dismissal.
 —Quashing of previous summons.
 Cited.

Costs of previously dismissed action.

—Attorney fees.

Imposition of attorney fees as condition precedent to permitting filing of fourth amended complaint was not error. *Tebbs & Tebbs v. Oliveto*, 123 Utah 158, 256 P.2d 699 (1953).

Counterclaim.

—Lack of prosecution.

Where, in cause of action arising in 1956, the trial court's judgment was reversed by the Supreme Court in 1968 and the cause remanded

Tab B

tion with a case which has been assigned for all purposes to a particular judge shall be heard by the assigned judge.

(B) If the assigned judge is unavailable, the case shall not be assigned or transferred to any other judge for handling without the approval of the presiding judge.

(2) Notice and filing requirements.

(A) Orders to show cause and other matters requiring written notice shall be heard only after written notice served no less than five days prior to the date of the hearing, unless the court for good cause shown orders the period of time for notice of hearing shortened.

(B) Affidavits in support of law and motion matters must be filed with the motion or memorandum of points and authorities supporting or opposing the motion. Other documents filed in support of or in opposition to law and motion matters, including returns of service on supplemental orders, orders to show cause and bench warrants, must be filed in the clerk's office at least two working days before the hearing on the matter, together with a copy of the signed order showing the date and time of the required appearance.

(C) Proceedings based upon supporting documents which are not filed in accordance with this rule may be dismissed.

(3) Ex-parte matters, stipulated matters and supplemental proceedings.

(A) Ex-parte matters based upon stipulations may be presented at any time to the assigned judge. Proceedings on the law and motion calendar involving the taking of evidence may be heard after those not requiring the taking of evidence. Add-ons may be heard on the day set for hearing, provided proper notice has been given and the convenience of the court permits such hearing.

(B) Motions for supplemental proceedings may be set on the weekly supplemental proceedings calendar or before the judge assigned to the case on the assigned judge's regular law and motion calendar.

(Amended effective January 15, 1990.)

Rule 4-103. Civil calendar management.

Intent:

To establish a procedure which allows the trial courts to manage civil case processing.

To reduce the time between case filing and disposition.

Applicability:

This rule shall apply to the District and Circuit Courts.

Statement of the Rule:

(1) If a default judgment has not been entered by the plaintiff within 60 days of the availability of default, the clerk shall mail written notification to the plaintiff 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.

(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.

(3) Any party may, pursuant to the Utah Rules of Civil Procedure, move to vacate a dismissal entered under this rule.

(Amended effective January 15, 1990; May 1, 1993; May 15, 1994.)

Amendment Notes. — The 1993 amendment added Subdivision (3).
The 1994 amendment added the requirement

of mailing written notification in Subdivisions (1) and (2).

NOTES TO DECISIONS

ANALYSIS

Good cause
Source of rule.

Good cause.

Implicit in "absent a showing of good cause" is the concept that plaintiff should have notice of a court's consideration of dismissal before a matter is dismissed and also should have an opportunity to show good cause why this

should not occur. *Preuss v Wilkerson*, 219 Utah Adv. Rep. 8 (1993) (decided before 1994 amendment requiring notification to parties)

Source of rule.

This rule merely codifies an inherent power of the trial court to dismiss a case sua sponte for lack of prosecution under R. Civ. P. 41(b). *Meadow Fresh Farms v Utah State Univ. Dept. of Agriculture*, 813 P.2d 1216 (Utah Ct. App. 1991).

Rule 4-104. Request for trial setting.

Intent:

To establish a procedure for the assignment of trial dates.
To provide firm and timely trial dates in civil cases.

Applicability:

This rule shall apply to the District and Circuit Courts.

Statement of the Rule:

(1) When a civil case is at issue, any party not in default as provided in the Utah Rules of Civil Procedure may file a written certification of readiness for trial.

(2) Upon oral or written stipulation or order of the court, a trial date may be obtained at any time and shall be set as soon as possible subject to the scheduling limitations of the calendar. Notice of the trial date shall be mailed by the clerk of the court to all counsel of record or parties who are not represented by counsel, advising them of the trial date. A copy of the notice shall be placed in the case file.

(3) Special trial settings are available only in matters of extraordinary urgency and only by application to the judge who has been assigned the case for trial or, absent assignment, the presiding judge after notice to all parties and upon a showing of good cause.

(4) Any certificate of readiness for trial which is served upon the opposing party and filed with the clerk of the court in cases in which discovery is not complete prior to filing the certificate or in which discovery is not complete prior to pretrial conference may be stricken and the trial date, if assigned, may be vacated.

(Amended effective January 15, 1990; May 15, 1994.)

Amendment Notes. — The 1994 amendment deleted former Subdivision (4), prescribing consequences for failure to serve and file a

certificate of readiness, and redesignated former Subdivision (5) as (4)

Rule 4-105. Continuances in special circumstances.

Intent:

To establish uniform procedures governing the granting and denial of continuances in civil and criminal cases.

Applicability:

This rule shall apply to the District and Circuit Courts.

Statement of the Rule:

(1) In civil law and motion matters, except orders to show cause and bench warrants, matters may be continued upon stipulation of the parties and notice

Tab C

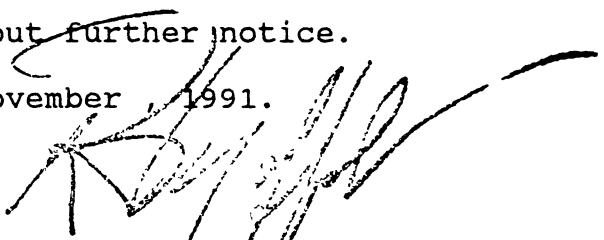
IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

PANOS, JOHN	:		
	:	ORDER TO SHOW CAUSE NO.	1
Plaintiff(s).	:		
VS.	:	CIVIL NO. 910901425 PI	
SMITHS FOOD KING	:		
	:	HON. RICHARD H MOFFAT	
Defendant(s).	:		

On it's own motion, the Court orders the parties in this case appear before the Court on: Wednesday, 12/11/91 at 09:00 AM, and show cause why this case should not be dismissed for failure to prosecute.

Failure to appear will be considered aquiescence in entry of an order of dismissal without further notice.

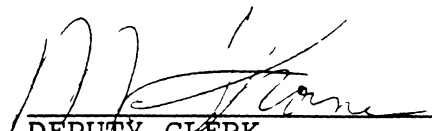
Dated this 13th day of November, 1991.



RICHARD H MOFFAT
DISTRICT JUDGE

I certify that on 11/13/91, I mailed a copy of the order to show cause to:

S E E A T T A C H M E N T



DEPUTY CLERK

00008

A T T A C H M E N T

THURBER, ANTHONY M.
ATTORNEY FOR PLAINTIFF
8 EAST BROADWAY
SUITE 735
SALT LAKE CITY UT 84111

NAME NOT ENTERED
ATTORNEY FOR DEFENDANT

Tab D

THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

PANOS, JOHN	:	MINUTE ENTRY
	:	
Plaintiff	:	CASE NUMBER 910901425
VS	:	DATE DECEMBER 11, 1991
	:	HONORABLE RICHARD H. MOFFAT
SMITHS FOOD KING	:	COURT REPORTER NOT PRESENT
Defemdamt	:	COURT CLERK KBG
	:	

PRESENT:

P. ATTY. THURBER, ANTHONY M.

D. ATTY.

This case comes now before the Court for a hearing on the Court's Order to Show Cause for Dismissal. The appearances are as shown. Based upon discussions, the Court orders:

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.

Tab E

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR THE
COUNTY OF SALT LAKE CITY, STATE OF UTAH

JOHN PANOS

Plaintiff,

-VS-

SMITH'S FOOD KING

DEFENDANT

:

:

COURT'S ORDER OF DISMISSAL

:

CASE NO. 910901425 PI

:

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.



RICHARD E. MOFFAT, DISTRICT JUDGE

00011

Tab F

ORIGINAL

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, **FILED DISTRICT COURT**
STATE OF UTAH
Third Judicial District

* * *

MAY 1 1995

JOHN PANOS,

:

SALT LAKE COUNTY

By Stoch

Deputy Clerk

Plaintiff,

:

Case No. 940904176 PI

v.

:

Transcript of:

SMITH'S FOOD & DRUG CENTERS,

:

ORAL ARGUMENT & RULING

on Defendant's Motion

Defendant.

:

to Dismiss

* * *

BEFORE THE HONORABLE JUDGE ANNE M. STIRBA

Salt Lake City, Utah

Monday, January 23, 1995

APPEARANCES

For the Plaintiff:

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For the Defendant:

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FILED

Utah Court of Appeals

REPORTER: SUZANNE WARNICK, RMR, CSR

Official Court Reporter

240 East 400 South, #304

Salt Lake City, Utah 84111

Phone: 801-535-5470

MAY 12 1995

Marilyn M. Branch

Clerk of the Court

00381

950286-CA

1 MONDAY, JANUARY 23, 1995; 2:05 P.M.

2 P R O C E E D I N G S

3

4 THE COURT: We lost Mr. Jensen.

5 MR. RICE: He went to find his client who came in
6 the courtroom and left, and he is still outside.

7 THE COURT: This is past the time this was set to
8 begin and I have other matters set. I am going to call the
9 case of Panos versus Smith's Food & Drug Centers, Case
10 No. 940904176 PI. This is the time set for consideration of
11 the Motion to Dismiss --

12 Hello.

13 MR. JENSEN: Hello. Sorry.

14 THE COURT: And counsel would you state your
15 appearances.

16 MR. JENSEN: Gordon Jensen for the plaintiff.

17 MR. RICE: Mitchel Rice for the defendant Smith's
18 Food & Drug Centers.

19 THE COURT: Very well. This is the time set for
20 consideration of the Motion to Dismiss. I have had an
21 opportunity to read all the memoranda that were filed in
22 connection with this case.

23 You may proceed.

24 MR. RICE: Thank you, your Honor.

25 As you are aware, this case arose from a slip and

1 fall of the plaintiff at defendant Smith's grocery store here
2 in Salt Lake City, one of the locations. The plaintiff
3 originally retained Tony Thurber to represent him in his
4 claims against Smith's. On February 21, 1991 Mr. Thurber
5 filed a Complaint. On November 13, 1991, Judge Moffat sent
6 an order requesting the parties to appear on December 11th to
7 show cause as to why the case shouldn't be dismissed.
8 Mr. Thurber apparently appeared at that hearing, convinced
9 the Court there was good reason not to dismiss it and the
10 case was not at that time dismissed.

11 But the Court at that time did order that counsel
12 had until March 11, 1992 to settle the case or to file a
13 Certificate of Readiness for Trial, the two things, either
14 one of those two things counsel had to do. If they weren't
15 done, the case would be dismissed. Plaintiff's then attorney
16 did not comply with that order and the case was dismissed on
17 March 11, 1992. The Court specifically stated that the case
18 was dismissed because plaintiff did not do what was asked in
19 the order.

20 Now, after that happened there was no motion to
21 contest the order. There was no motion to vacate, until
22 October 30, 1992 when Mr. Thurber withdrew as plaintiff's
23 attorney.

24 Now, in January of 1993, that's when Mr. Jensen
25 made an appearance, he brought a motion to vacate that prior

1 order. That was brought before Judge Hyde sitting in for
2 Judge Moffat. Mr. Jensen then refiled a Complaint for the
3 same injuries on behalf of plaintiff Panos on June 30, 1994.

4 Now, in this case the plaintiff argues that that
5 March 11 Order of Dismissal was made without prejudice
6 pursuant to Rule 4-103(2) of the Utah Code of Judicial
7 Administration. If I could I would like to provide the Court
8 with a copy of that Rule. That Rule states that -- we are
9 looking at paragraph (2).

10 "If a certificate of readiness for trial has not
11 been served and filed within 180 days of the
12 filing date --" the clerk shall mail written
13 notification to the parties stating that --
14 "absent a showing of good cause --" by a date
15 specified in the notification -- "the court shall
16 dismiss the case without prejudice for lack of
17 prosecution."

18 Now the Rule provides that the case will be
19 dismissed if a party does not show good cause why it
20 shouldn't be dismissed. Now, the Court initially did that.
21 That was the November 13th notification. The request was
22 that the parties show up and show a reason why it shouldn't
23 be dismissed.

24 Mr. Thurber apparently appeared at that time,
25 convinced the Court that there was good cause why the case

1 shouldn't be dismissed and it wasn't. But the Court ordered
2 it at that time that the counsel had to do two things by
3 March 11th in order to save the case from being dismissed.

4 Now, Rule 4-103 does not apply because, you can
5 see if you examine the facts of this case in comparison to
6 that Rule, that that's not what happened. At the December 11
7 hearing, the Court orderd that two things must be done. Now
8 those things were not done and the Court said, if neither of
9 those things are done the case will be dismissed without
10 further notice. On March 11th the Court then ordered that
11 the case be dismissed because these things were not done.
12 The case was dismissed for failure to comply with that order.

13 The showing of good cause under Rule 4-103 had
14 nothing to do with dismissal. If Rule 4-103 applied, the
15 judge would have counsel show cause and show up and hear why
16 the case shouldn't be dismissed. That's not what the Court
17 was asking for. The Court asked for specific items in the
18 order.

19 Let me read, if I could, Rule 41(b) of the Utah
20 Rules of Civil Procedure, because this is the rule that
21 applies here. 41(b) starting with the heading,

22 "Involuntary Dismissal: effect thereof. For
23 failure of the plaintiff to prosecute or comply
24 with these rules or any order of court, a
25 defendant may move for dismissal of an action or

1 of any claim against him..."

2 That is what happened here. This case does not
3 fit within Rule 4-103. This is where it fits, for failure to
4 comply with a court order. Now, if you read down further,
5 the other material I have highlighted,

6 "Unless the Court in its order for dismissal
7 otherwise specifies, a dismissal under this
8 subdivision and any dismissal not provided for in
9 this rule, other than a dismissal for lack of
10 jurisdiction or for improper venue or for lack of
11 an indispensable party, operates as an
12 adjudication on the merits."

13 Judge Moffat didn't say an order of dismissal one
14 way or the other. And under this Rule it has to be on the
15 merits and without prejudice. For these reasons we ask that
16 the Court find that Judge Moffat's order was made with
17 prejudice, and therefore the plaintiff is precluded from
18 filing this second Complaint and asserting the same claim
19 arising out of the same facts. And we would request that
20 Defendant's Motion to Dismiss be granted.

21 THE COURT: Thank you.

22 Mr. Jensen.

23 MR. JENSEN: Thank you, your Honor.

24 I apologize for running in late, your Honor. I
25 thought Mr. Panos was over in Judge Moffat's courtroom, so I

1 sprinted over there because he wanted to be here in
2 attendance.

3 There are a couple of facts that relate out that
4 give a clearer picture about what happened here. It's true
5 that the action was filed by Mr. Thurber in February of 1991.
6 No summons was ever issued and no complaint was ever served
7 upon the defendant. At no time did the defendant enter an
8 answer or appearance in that case until after I got involved
9 and we asked them to file their answer and let's engage the
10 issues and move forward.

11 After that time, I think it's clear from the
12 pleadings here, that neither party, including -- or neither
13 counsel nor the plaintiff himself knew anything that had
14 happened on the case as far as this order of dismissal that
15 had been entered in 1992. We jumped into depositions, did
16 discovery. We were at a hearing, in fact, on June 17th of
17 this year on a Motion for Summary Judgment that had been
18 filed by the defense on some liability issues. We were
19 preparing to argue the Motion for Summary Judgment on the
20 substantive factual issues on the case when Judge Harding
21 [sic] who was sitting in substituting for Judge Moffat, said,
22 Hey, something happened in this case back in 1992 that you
23 guys should be aware of, at which time we went up to the
24 bench and he showed us these documents.

25 It was Judge Harding's [sic] feeling at that

1 time --

2 THE COURT: Was that Judge Harding?

3 MR. RICE: Judge Hyde.

4 MR. JENSEN: I'm sorry, Judge Ronald Hyde.

5 His feeling at that time was the proper procedure
6 was to put the Motion for Summary Judgment on hold, to go and
7 move to vacate that dismissal and he would consider vacating
8 the previous dismissal. After vacating those issues and
9 having a hearing, he refused to vacate the dismissal but did
10 not rule on whether that dismissal was, in fact, with or
11 without prejudice, which is the subject of this particular
12 hearing.

13 When we got involved in the case and we filed and
14 moved forward, the important things to note, I believe, are
15 the indications that talk about dismissal for failure to
16 prosecute are essentially a penalty to the plaintiff or
17 inexcusable dilatory conduct for not moving a case forward.
18 Every case that has been cited by defense in their motions
19 talks about cases -- I think I tried to point that out in the
20 memo where there have been five years of inactivity or no
21 attempts at discovery for four and a half years or three and
22 a half years of inactivity and no designation of witnesses.

23 It is our position that Judge Moffat, however it
24 is phrased, if you look at the posture of the case, that it
25 was, in fact, dismissed pursuant to the provisions of Rule

1 4-103. It was done as a court management calendaring process
2 that says, We are going to send out orders to somehow cause
3 to keep these things moving. We receive them in our practice
4 all the time. Here comes Order to Show Cause No. 1; tell us
5 what you are doing and move the case forward. The purpose of
6 4-301 is to establish a trial procedure to allow trial courts
7 to manage their civil case processing.

8 It is our position that to dismiss a case after an
9 order to show cause falls within -- as Judge Moffat did in
10 this case -- falls within that court calendaring process, and
11 is not, in fact, a penalty to be assessed against the
12 defendant, or the plaintiff in this case for being dilatory
13 in its discovery or failing to prosecute or not comply with
14 an order of the Court. Rule 4-103 specifically provides that
15 the Court shall dismiss the case without prejudice for lack
16 of prosecution if these court calendaring procedures are not
17 followed. That's exactly what happened in this case.

18 The cases that we have cited in the memoranda, I
19 think the Westinghouse case is the closest to the facts of
20 this particular case. And there are just two things that the
21 Utah Supreme Court said in there that I think apply to this
22 particular case.

23 "It is not to be doubted that in order to handle
24 the business of the court with efficiency and
25 expedition, the trial court should have a

1 reasonable latitude of discretion in dismissing
2 for failure to prosecute if a party fails to move
3 forward according to the rules and directions of
4 the Court, without justifiable excuse. But that
5 prerogative falls short of unreasonable and
6 arbitrary action which will result in injustice."

7 The important things to determine in deciding
8 whether it would be a motion to dismiss or a dismissal with
9 or without prejudice is stated later in that case. And
10 that's the last thing I want to submit to the Court. It said
11 in the Westinghouse case again that,

12 "It is indeed commendable to handle cases with
13 dispatch and to move calendars with expedition in
14 order to keep them up to date. But it is even
15 more important to keep in mind that the very
16 reason for the existence of courts is to afford
17 disputants an opportunity to be heard and to do
18 justice between them."

19 That court case set out the specific things that a
20 court should look at in determining whether a dismissal
21 should be with prejudice for failure to prosecute.

22 "Some consideration should be given to the
23 conduct of both parties, and for the opportunity
24 each has had to move the case forward and what
25 they have done about it; and also what difficulty

1 or prejudice may have been caused to the other
2 side; and most importantly, whether injustice may
3 result from the dismissal."

4 It's our position that when you evaluate all those
5 considerations and apply them to the facts of this case, that
6 Mr. Panos the plaintiff, as soon as his previous lawyer
7 withdrew, retained new counsel. We jumped in and moved the
8 case forward efficiently to the point through discovery and
9 motions for summary judgment.

10 The defendants are certainly not prejudiced by
11 deeming this a dismissal without prejudice. They weren't
12 aware of it. They hadn't even filed an answer. Certainly
13 the prejudice to the plaintiff is severe. His case is lost.
14 He does not get an opportunity to submit these issues to a
15 finder of fact, to a jury for determination of those issues,
16 through no fault of his own.

17 It's our position that the Court should find that
18 the dismissal of Judge Moffat in March of '92 was in fact a
19 dismissal under Rule 4-103 under calendars of the Court. It
20 was a dismissal without prejudice, allowing Mr. Panos to file
21 his Complaint within the applicable statute of limitations or
22 saving statute, which he has done. And the case should move
23 forward and be determined on the merits in this Court.

24 THE COURT: Didn't you argue many of these same
25 arguments to Judge Hyde in your Motion to Set Aside the

1 Dismissal?

2 MR. JENSEN: Yes. And he specifically -- my
3 understanding, your Honor, is that the issue -- and he did
4 not decide and told us that is something -- he was just
5 deciding not to vacate that dismissal. He would let the
6 dismissal stand and the dismissal stands. And the question
7 that we are deciding is whether --

8 THE COURT: I understand.

9 MR. JENSEN: So yes. These arguments were raised
10 to vacate that because Rule 4-103 specifically says in it
11 that any party can move to vacate such dismissal. And it was
12 Judge Hyde's ruling that he was not going to vacate the
13 dismissal; he was going to let it stand and then brief the
14 issues as to what it means in this proceeding.

15 THE COURT: Interesting. All right.

16 MR. JENSEN: Thank you.

17 THE COURT: Thank you.

18 MR. RICE: May I, your Honor?

19 THE COURT: Yes.

20 MR. RICE: I have already talked about this. But
21 if you examine closely the rules, this situation had to fall
22 under Rule 41(b). And under 41(b) where the order doesn't
23 say with or without prejudice, it has to be prejudice. It
24 could not have fallen under Rule 4-103. It simply doesn't
25 fall under that rule if you read both of them closely. That

1 wasn't the situation at all.

2 Now, Mr. Jensen has mentioned throughout his
3 memorandum and throughout his argument that it was no fault
4 of his client or no fault of his own. And I agree with that.

5 THE COURT: With regard to 41(b), clearly there can
6 be involuntary dismissals based on the motions of the
7 parties. What about the Court acting sua sponte?

8 MR. RICE: Yes. I address that in the memorandum
9 and I can cite to the case. The case that addresses that is
10 Charlie Brown Const. v. Leisure Sports, Inc.. That's at
11 740 P.2d 1368. Okay? This is at page 1370. The language
12 from Rule 41(b) merely permits, not requires a motion by
13 defendant. The Utah Supreme Court in Brasher Motor &
14 Finance Co. v. Brown, states,

15 "In dismissing an action for want of prosecution,
16 the Court may proceed under Rule 41(b) or may of
17 its own motion take action to that end."

18 So under that holding, the Court of Appeals has
19 decided that that's something that the Court can do on its
20 own initiative.

21 THE COURT: Going back to where I left off, you're
22 not saying that the court did not have the authority to issue
23 an order requiring one of those two things to happen, and in
24 the absence of one of those two things happening, entering a
25 dismissal without prejudice; you're not saying the court

1 doesn't have that authority, are you?

2 MR. RICE: No.

3 THE COURT: Just merely that because Judge Moffat
4 did not specify a dismissal with or without prejudice, that
5 under Rule 41(b), then it has to be a dismissal with
6 prejudice.

7 MR. RICE: That's correct.

8 THE COURT: It has to specify "without prejudice"
9 if he is going to permit that to stand.

10 MR. RICE: That's correct. If it's going to be
11 without prejudice, it has to say. Otherwise it's with
12 prejudice.

13 I would agree that Mr. Jensen and his client have
14 not been at fault. As soon as they have taken this case,
15 they ran with the ball and proceeded in discovery and so
16 forth. But that's irrelevant.

17 The plaintiff hired his other attorney,
18 Mr. Thurber. Mr. Thurber didn't do anything on the case.
19 His inaction was such that Judge Moffat felt it was
20 appropriate to dismiss the case, and the plaintiff has to be
21 bound by the actions of his former attorney. He can't now
22 come in and say, Look, I didn't like that result so I am
23 getting a new attorney and I'm going to try it all over
24 again. That would be the same as if he got a no cause and
25 then refiled it and said, I didn't like my last result, now I

1 am getting a new attorney and I want to try it over again.

2 The fact that the plaintiff is not at fault,
3 Mr. Jensen is not at fault is irrelevant. The plaintiff is
4 bound by the actions of his former counsel who he retained.

5 Now, with regard to Mr. Jensen's discussions of
6 the case law, there are a lot of recent cases that have
7 upheld trial courts' orders to dismiss with prejudice where
8 the plaintiffs in those cases had an opportunity to litigate
9 but abused that opportunity. And I would cite to the case of
10 Hill v. Dickerson which is in our memorandum, and the case
11 of Charlie Brown Construction. Specifically the case of
12 Hill that was a dental malpractice action. And only 15
13 months elapsed after the action was filed and the trial court
14 dismissed the case with prejudice because plaintiff failed to
15 file the expert witness indication. The parties in that case
16 were litigating, there were just some delays. And the Court
17 held that the plaintiff had ample opportunity to litigate her
18 case but abused that opportunity. The same is true in the
19 Charlie Brown Construction case.

20 The Westinghouse case is distinguishable. In
21 that case the parties were actively engaged in discovery,
22 filing pleadings. The reason that Westinghouse had a
23 difficult time complying with the court's orders and with the
24 deadlines is because it's a big corporation, the documents
25 were all over the country and they just had a hard time

1 getting things together. The appellate court found they were
2 making the effort, and dismissal wasn't warranted in that
3 case. Also that case is different because in that case we
4 don't have a situation where the plaintiff failed to comply
5 with the court order.

6 That's what we have here, not only for failure to
7 prosecute but failure to comply with a court order.
8 Dismissal in this case with prejudice is more justified than
9 in any of the cases cited. And we would therefore ask that
10 the Court grant defendant Smith's Motion to Dismiss.

11 THE COURT: Thank you, counsel.

12 Well, I read the memorandum and considered the
13 arguments of counsel and I am familiar with the case law and
14 the rules to which counsel have referred.

15 It is clear that under the Utah Code of Judicial
16 Administration Rule 4-103(2), that after a party files a
17 complaint and there hasn't been action on the file --
18 actually if a Certificate of Readiness has not been filed or
19 served within 180 days of the filing date -- that based upon
20 that the clerk is supposed to mail a written notification
21 based on the Court's order to show cause why the case should
22 not be dismissed for failure to prosecute. And that is a
23 very regular management tool that trial courts use to avoid
24 cases becoming inactive for substantial periods of time and
25 to make sure that the cases are moving along.

1 That's what happened in this case. There is no
2 question that Judge Moffat did send out the order to show
3 cause consistent with Rule 4-103(2). There was a show cause
4 hearing at which time -- all of this is undisputed --
5 Mr. Thurber appeared on behalf of his client and persuaded
6 the judge not to dismiss the case. Judge Moffat then
7 required that one of two things happen, namely: That a
8 certificate of readiness be filed before the March date, I
9 don't have the specific date before me, or that the parties
10 settle the case prior to that time. So it was quite clear
11 what was expected of the parties.

12 After that nothing did happen on the file. And
13 subsequently Judge Moffat did dismiss the case without making
14 a reference of whether it was a dismissal with or without
15 prejudice. It's really not an uncommon item of occurrence,
16 at least in the state trial court.

17 It appears to me that the second order of Judge
18 Moffat, the order requiring the parties to settle or file a
19 certification of readiness was not an order that -- it arose
20 out of the 4-103 process, but it was not an order that falls
21 under that rule. And frankly, I think the better-reasoned
22 view is consistent with the defendant's view that it then
23 fell under Rule 41, involuntary dismissal. Because that
24 order then did not indicate whether it was with or without
25 prejudice consistent with the language of that Rule, it had

1 to be construed with prejudice. The party was given his day
2 in court in the sense that he was given a substantial period
3 of time to prosecute the case.

4 The fact that Mr. Panos chose Mr. Thurber as his
5 attorney and Mr. Thurber dropped the ball and Mr. Thurber
6 otherwise did not zealously represent his client in this case
7 is not critical in the analysis. It's unfortunate. And I
8 think we are aware of the problems that Mr. Thurber has been
9 causing, and some of it has been written about in the
10 newspapers recently. And it's extremely regrettable, and it
11 may give rise to some kind of independent action -- I am not
12 voicing any opinion about that.

13 But as far as the adjudication of the nature of
14 this dismissal, it appears that the defendant's view is
15 meritorious. Accordingly, the Motion to Dismiss is granted.
16 And Mr. Rice is to prepare an order consistent with the
17 Court's ruling.

18 Any questions?

19 MR. RICE: Not from the defendant. Thank you, your
20 Honor.

21 MR. JENSEN: No, your Honor.

22 THE COURT: Thank you, counsel.

23 (This concludes these proceedings).

24 * * *

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C E R T I F I C A T E

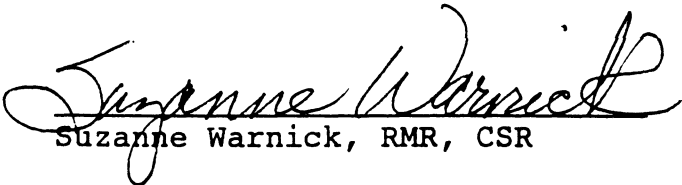
STATE OF UTAH)
 :
COUNTY OF SALT LAKE)

I, SUZANNE WARNICK, RMR, CSR, do certify that I am
a nationally certified Registered Merit Reporter, a state
Certified Shorthand Reporter, and a Notary Public in for the
State of Utah.

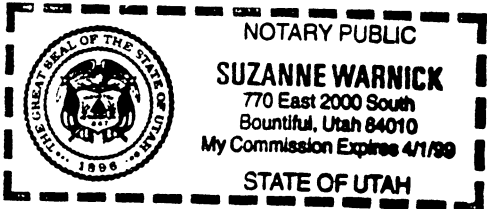
That at the time and place of the proceedings in
the foregoing matter, I appeared as the court reporter in the
Third Judicial District Court for the Honorable Judge Anne M.
Stirba, and thereat reported in stenotype all of the
proceedings had therein.

That thereafter, my said shorthand notes of the
Defendant's Motion to Dismiss were transcribed by computer
into the foregoing pages; and that this constitutes a full,
true and correct transcript of the same.

WITNESS MY HAND AND SEAL in Salt Lake City, Utah on
this, the 30th day of April 1995.


Suzanne Warnick, RMR, CSR

My commission expires:
1 April 1999



Tab G

FILED IN CLERK'S OFFICE
Salt Lake County Utah

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By [Signature] Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

JOHN PANOS,	:	
Plaintiff,	:	ORDER GRANTING DEFENDANT'S
	:	MOTION TO DISMISS
vs.	:	
SMITH'S FOOD & DRUG CENTERS,	:	Civil No. 940904176 PI
INC.,	:	
Defendant.	:	Judge Anne M. Stirba
	:	

This matter came before the Court for a hearing on the Motion to Dismiss Plaintiff's Complaint of Smith's Food & Drug Centers, Inc., Defendant in the above-entitled action, with Gordon K. Jensen appearing as attorney for Plaintiff, and Mitchel T. Rice appearing as attorney for Defendant Smith's Food and Drug Centers, Inc.; and

After reading the Motion to Dismiss and Memorandum in Support thereof, the Memorandum in Opposition to Defendant's Motion to Dismiss, the exhibits attached to said Memoranda, and Affidavits, and after consideration of the argument of counsel for Plaintiff and Defendant,

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, and

IT IS HEREBY ORDERED THAT:

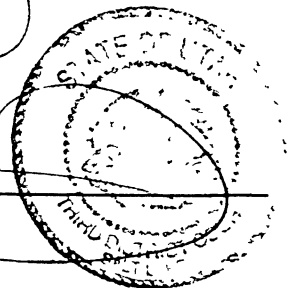
1. Defendant's Motion to Dismiss is hereby granted;
2. Plaintiff's Complaint against Defendant Smith's Food & Drug Centers, Inc. is hereby dismissed with prejudice;
3. Defendant Smith's Food & Drug Centers, Inc. is awarded its costs of the action as are allowed by law.

Dated this 31st day of February, 1995.

BY THE COURT



ANNE M. STIRBA
District Court Judge



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 **ADDENDUM TO 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 "Gordon K. Jensen", is written over a horizontal line.