1993

L. Diane Turner v. Craig H. McQueen, M.D., and Utah Orthopaedic Associates and Sports Medicine Clinic: Brief of Appellant

Utah Court of Appeals

David W. Slagle; Snow, Christensen and Martineau.
J. Ray Barrios, Jr., P.C.

IN THE UTAH COURT OF APPEALS

L. DIANE TURNER, Plaintiff/Appellant,	)	
CRAIG H. McQUEEN, M.D., and UTAH ORTHOPAEDIC ASSOCIATES & SPORTS MEDICINE CLINIC, Defendants.	)	Case No. 930187-CA (Argument Priority 15)

BRIEF OF APPELLANT

(Appeal from the Third Judicial District Court, Salt Lake County, State of Utah, Judge Leslie Lewis)

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	)	
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BRIEF OF THE APPELLANT

JURISDICTION STATEMENT

Jurisdiction is conferred upon The Utah Court of Appeals pursuant to Utah Code Annotated, § 78-2-2 (3)(j) (1992).

ISSUE FOR REVIEW AND STANDARD OF REVIEW

The issue for review is whether or not the trial court judge abused her discretion in ruling that Dr. Robert Horne, M.D. had never agreed to act as Plaintiff's expert, and since Dr. Horne, M.D., for the first time on September 11, 1992 indicated to Plaintiff that he would not act as such expert, the trial court

judge abused her discretion in not granting Plaintiff's motion for a continuance of her trial, and an extension of time in which to designate a replacement expert. The standard of review is whether or not the court's decision was clearly erroneous.

DETERMINATIVE LAW

No determinative law has been found as the facts of this case are not on point with cases that have been discovered. The Case, under the facts herein, is one of first impression. Instructive cases are cited.

ARGUMENT SUMMARY

The surprise event of Dr. Horne, M.D., Plaintiff's treating physician/surgeon, claiming he would not testify, and doing so for the first time after the designation of expert cutoff date had passed, was an event beyond Plaintiff's control, and Plaintiff should have been allowed to continue the trial and replace such designated expert.

ARGUMENT

THE TRIAL COURT JUDGE ABUSED HER DISCRETION IN NOT ALLOWING PLAINTIFF TO CONTINUE THE TRIAL AND DESIGNATE A NEW EXPERT TO REPLACE THE DESIGNATED EXPERT WHO, AT THE LAST INSTANCE, DECIDED NOT TO TESTIFY.

The trial Court has substantial discretion in deciding whether to grant continuances. Christenson v. Jewkes, 761 P.2d 1375, at 1377 (Utah 1988). In the case before the bar, it is clear that Plaintiff properly and timely designated her expert witness on July 31, 1992 pursuant to Court order. It is also

clear that Plaintiff and Plaintiff's counsel learned for the first time, after designation of expert and discovery cutoff dates had passed, that Plaintiff's designated expert, Dr. Robert Horne, M.D., was going to refuse to testify for Plaintiff. Such refusal of Plaintiff's designated expert to testify was learned on September 11, 1992, nearly six weeks after the expert designation of experts deadline had passed. Further, it is clear that Defendant, or Defendant's counsel, contacted Plaintiff's designated expert without Plaintiff's or Plaintiff's counsel knowledge or consent and obtained an affidavit from Plaintiff's designated expert stating that he would not testify for Plaintiff. (See Affidavit of Dr. Robert Horne, M.D., as attached to Defendant's Statement of Points and Authorities in Support of Motion for Summary Judgement; and see also Affidavit of L. Diane Turner, as attached to Plaintiff's Response to Defendants Motion for Summary Judgment).

Plaintiff's only alternative as a result of this surprise event was to move for a continuance of the scheduled trial date, and to move for an extension of time in which to designate an expert to replace Dr. Horne. Plaintiff requested that she be allowed ninety (90) days in which to designate a replacement expert. The trial was scheduled for November 30, 1992. The continuance should have been for a reasonable period of time (Plaintiff suggested 90 days) to allow for the designation of Plaintiff's expert, and thereafter for the deposing of the designated expert by Defendant.

Further, the trial court presumably based her decision on the deposition testimony of Plaintiff that Defendants asserted was testimony showing Plaintiff's designated expert never intended to testify in her behalf. Plaintiff's deposition was taken by Defendants on January 23, 1992. Defendants took two (2) lines from Plaintiff's testimony, (Plaintiff's Deposition, page 81, lines 9 and 10), and propose from that testimony Dr. Horne, M.D. never, ever, criticized Dr. McQueen. All one need do is look at the full context of the preceding series of questions in Plaintiff's deposition to see that such a proposition was not accurate. The two (2) lines of testimony relied upon by Defendants were taken out of context, the full context of the testimony being found on page 76, line 9, through page 81, line 14. These pages are Plaintiff's testimony concerning when she fired Dr. McQueen and hired Dr. Horne, and an explanation of how Dr. Horne immediately put her in the hospital and operated on her knee. Her testimony was that Dr. Horne, at the time of that first visit with Dr. Horne, never criticized Dr. McQueen. (See, Plaintiff's Deposition, page 76, lines 9-25, through page 81, lines 1-14).

Defendants also took three (3) other deposition testimony lines, i.e., page 96, lines 23-25, for the proposition that no medical experts have been critical of Dr. McQueen. Plaintiff's testimony, by deposition, was taken on January 23, 1992, experts were not designated until July 31, 1992. At the time of Plaintiff's deposition Plaintiff did not consider Dr.

Horne to be anything other than her treating physician. Additionally, Plaintiff, personally, had not talked to any other medical experts specifically on the issue of whether or not Dr. McQueen had committed malpractice as of January 23, 1992.

On several occasions during Dr. Horne's care of Plaintiff he made comments to her, and there are comments in some of his reports that illustrate his concern that proper care by Dr. McQueen was not given. (See, Exhibit "B", to Plaintiff's Response To Defendants Motion For Summary Judgment, Discharge Summary, 7-14-89, from Dr. Horne, [highlighted sections]; Exhibit "C", to Plaintiff's Response To Defendants Motion For Summary Judgment, November 20, 1991 letter from Dr. Horne to Social Security Administration commenting on secondary infection after first [McQueen] surgery; and, Exhibit "D", to Plaintiff's Response To Defendants Motion For Summary Judgment, February 24, 1990 letter from Dr. Horne to Hartford Insurance). Those Exhibits, "B", "C", and "D", were over a period of time from Dr. Horne's first visit/surgery through late in 1991, a period of nearly two and one-half years. Through all of that time, Plaintiff states that Dr. Horne either directly told her, or clearly inferred, that the "secondary infection" in Plaintiff's knee that precipitated her problems, was the result of Dr. McQueen allowing the open wound on her knee to stay open. Plaintiff had reasonably relied upon the fact that her surgeon and treating physician, Dr. Horne, would testify as to those events and causes, as he had stated to her from the

beginning. The first time Dr. Horne said he would not testify is in his September 11, 1992 letter to Plaintiff's attorney, such time being approximately one and one-half months after the deadline for expert designation, and two and one-half months before the scheduled trial.

The cases set forth in the Addendum, i.e., Hill v. Dickerson, 839 P.2d 309 (Utah Ap. 1992); Christenson v. Jewkes, 761 P.2d 1375 (Utah 1988); Charlie Brown Construction Co., Inc. v. Leisure Sports Incorporated, 740 P.2d 1368 (Utah App. 1987); Maxfield v. Fishler, 538 P.2d 1323; and Hardy v. Hardy, 776 P.2d 917 (Utah App. 1989), are all instructive, but none are on point with the facts of the instant case. They can all be distinguished in that none of those cases involved a factual circumstance where, as here, (1) no continuances had been previously requested by Plaintiff; (2) Plaintiff had not disobeyed any court scheduling or other order; (3) a timely designated expert who was also Plaintiff's treating physician and surgeon had, without Plaintiff's knowledge, supplied an affidavit to opposing counsel saying he would not testify, and on the same date inform Plaintiff's counsel by letter for the first time that he would not testify; (4) Defendants knew who Plaintiff's designated expert was and didn't attempt to depose him until September, when at that same time, Defendant obtained an affidavit from Plaintiff's expert, without informing Plaintiff that contact was going to be made with Plaintiff's designated expert.

Hill v. Dickerson is instructive in that the Plaintiff in

Dickerson had previously asked for and obtained continuances of the trial based upon not having a designated expert, had failed to timely respond to discovery, had violated the court's Scheduling Order, and orally moved the court for another continuance. In the instant case, Plaintiff had asked for no continuances, timely and pursuant to court order designated her expert and was moving toward trial when, after the expert designation cutoff date Plaintiff's expert supplies an affidavit to Defendants stating he would not testify for Plaintiff. It was at that point in time that Plaintiff requested for the first time a continuance and the opportunity to designate a replacement expert.

None of the circumstances that existed in the Dickerson case existed in the instant case, and yet a careful reading of the Dickerson case suggests that it was those conditions that supported the finding that the trial court did not abuse its discretion in dismissing the case with prejudice. In this case, Defendant would not have been prejudiced as Defendant had not even taken Plaintiff's expert's deposition when the expert announced he would not testify. A continuance of the trial date and designation of another expert would have visited no hardship or prejudice upon Defendants in this case.

CONCLUSION

Since none of the conditions existed in this case that existed in the Dickerson case, or that existed in any of the other cited cases, the court erred in dismissing this case with

prejudice without granting the Plaintiff the opportunity to replace her designated expert. The case should be remanded to the trial court with the instruction to allow Plaintiff 90 days in which to designate her expert and allow Defendants to take his/her deposition, before trial.

Dated this 10th day of May, 1993.

J. Ray Barrios, Jr., P.C.
Attorney for Plaintiff/Appellee

CERTIFICATE OF MAILING

I hereby certify that I mailed two (2) true and correct copies of foregoing BRIEF OF APPELLANT, to Mr. David W. Slagle, Esq., of SNOW, CHRISTENSEN & MARTINEAU, P. O. Box 45000, Salt Lake City, Utah 84145, postage prepaid, this 11th day of May, 1993.

ADDENDUM

examined, even if they occur outside Utah. *See Tummurru*, 802 P.2d at 718–19. Here, CBI's customers intended to purchase fully assembled tanks permanently installed on real estate. Whether that real estate was located in this or another state is not relevant as to CBI's status as a real property contractor.

CBI also argues that imposing Utah sales tax on CBI's purchases of steel materials in Utah subjects CBI to taxation by two states on the same transaction, that is, taxation by Utah and taxation by the state where the tanks are installed. CBI contends that this amounts to double taxation in violation of the commerce clause of the United States Constitution.

In support of its position, CBI relies on *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977), and *Goldberg v. Sweet*, 488 U.S. 252, 109 S.Ct. 582, 102 L.Ed.2d 607 (1989). In our view, those cases do not control the issue here. Those cases dealt with the constitutionality of different types of taxes that call into play different legal principles.

Complete Auto Transit involved a Mississippi statute that imposed a tax "for the privilege of ... doing business" in the state. The company that the state taxed was engaged in interstate commerce. The United States Supreme Court upheld Mississippi's tax and overruled an earlier case, *Spector Motor Service, Inc. v. O'Connor*, 340 U.S. 602, 71 S.Ct. 508, 95 L.Ed. 573 (1951), which held that a state tax on the privilege of doing business was per se unconstitutional when applied to interstate commerce. Cases following *Complete Auto* have established a four-part test for determining when a tax will be sustained against a commerce clause challenge:

> [A] state tax will withstand scrutiny under the Commerce Clause if "[(1)] the tax is applied to an activity with a substantial nexus with the taxing State, [(2)] is fairly apportioned, [(3)] does not discriminate against interstate commerce, and [(4)] is fairly related to the services provided by the State."

Goldberg v. Sweet, 488 U.S. at 257, 109 S.Ct. at 586 (quoting *Complete Auto Transit*, 430 U.S. at 279, 97 S.Ct. at 1079).

[8] This test does not apply to the instant case because Utah did not tax an out-of-state transaction or even a transaction in interstate commerce. *See McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 64 S.Ct. 1023, 88 L.Ed. 1304 (1944). The transactions Utah taxed were CBI's purchases of steel materials from Utah vendors. The transactions occurred solely within this state, and the goods that were subject to the transactions were all used within the state by the taxpayer. Utah did not tax the use of a particular product manufactured outside the state but used within the state, *see, e.g., D.H. Holmes Co. v. McNamara*, 486 U.S. 24, 108 S.Ct. 1619, 100 L.Ed.2d 21 (1988), nor did it tax a sale in another state. The installation of the finished tanks in other states does not affect the local nature of the sales transactions, nor does it make CBI's purchase of materials in Utah subject to apportionment, even though CBI paid a use tax to the state where the tanks were assembled and installed.

CBI argues that because California may impose a use tax when the tanks are installed in California, imposition of the Utah sales tax may result in double taxation. This argument is based on a 1941 California Supreme Court ruling that steel materials purchased by CBI from out-of-state sources for use in the fabrication of tanks in California or for inventory for use in California as business required were subject to the California use tax. *Chicago Bridge & Iron Co. v. Johnson*, 19 Cal.2d 162, 119 P.2d 945 (1941) (per curiam).

[9] The short answer to CBI's argument lies in the Multistate Tax Compact. Both Utah and California are members of the Multistate Tax Commission, and both have adopted the Multistate Tax Compact. Utah Code Ann. § 59–22–1 (1974 & Supp. 1985) (currently codified at Utah Code Ann. § 59–1–801 (1987)); Cal.Rev. & Tax.Code §§ 38001, 38006 (West 1979 & Supp.1992). Article V of the Compact provides:

> Elements of Sales and Use Tax Laws Tax Credit
>
> 1. Each purchaser liable for a use tax on tangible personal property shall be entitled to full credit for the combined amount or amounts of legally imposed sales or use taxes paid by him with respect to the same property to another State and any subdivision thereof. The credit shall be applied first against the amount of any use tax due the State, and any unused portion of the credit shall then be applied against the amount of any use tax due a subdivision.

Under this article, California, in imposing a use tax, must give credit against that tax for any Utah sales tax levied, since "precedence in liability shall prevail over precedence in payment." *Resolution of Multistate Tax Commission* (1980). Accordingly, the imposition of the Utah sales tax in this case should not result in double taxation. If it does, the remedy lies in the state that seeks to impose a tax having that effect.

PENALTY

CBI asserts that the Commission erred in imposing a 15% penalty pursuant to Utah Code Ann. § 59–1–401(3)(b) (1987). That provision states, "If any underpayment of tax is due to intentional disregard of law or rule, the penalty is 15% of the underpayment." The Commission ruled that CBI was guilty of "intentional disregard of law or rule as made known to it by way of the letter from the Commission dated February 29, 1984."

Although CBI did not comply with the Commission's demand in the February 29 letter, we do not believe that constituted an "intentional disregard of law or rule" as that term is used by the statute. When the letter was sent, CBI's status as a real property contractor was arguable. Indeed, the Commission states in its brief, "The letter evidences a long standing disagreement between the Auditing Division and Petitioner regarding Utah sales tax."

[10] The Utah tax laws establish procedures for resolving good faith disputes between the Commission and taxpayers. *See* Utah Code Ann. §§ 59–30–1 to –5 (Supp. 1985) (currently §§ 59–1–501 to –505 (1987 & Supp.1991)). The Commission cannot base a finding of "intentional disregard of law or rule" merely on a letter written to a taxpayer asserting the Commission's position on an arguable question of law. The Commission's letter did not constitute a rule or law, and CBI's disregard of the letter did not, therefore, constitute an intentional disregard of the law. In our view, the dispute as to CBI's liability for sales taxes was a good faith dispute, even though CBI's position was wrong. Whether a taxpayer is a real property contractor for sales tax purposes usually is fact sensitive. The issue in this case turned on facts that reasonably support either party's position. In addition, the taxes were imposed for transactions that occurred beginning October 1, 1983, five months before the date of the letter. In short, the Commission erred in imposing the penalty.

The tax assessment is affirmed. The imposition of the penalty is reversed.

HALL, C.J., HOWE, Associate C.J., and DURHAM and ZIMMERMAN, JJ., concur.

Gina M. HILL, Plaintiff and Appellant,

v.

Dr. Carl DICKERSON, Defendant and Appellee.

No. 920271–CA.

Court of Appeals of Utah.

Oct. 9, 1992.

Patient filed dental malpractice suit against dentist. The First District Court, Box Elder County, W. Brent West, J., dismissed patient's case with prejudice, and she appealed. The Court of Appeals, Russon, J., held that: (1) denial of patient's motion for continuance was not an abuse of discretion; (2) trial court's refusal to allow patient to designate new witnesses did not constitute an abuse of discretion; and (3)

patient's dilatory conduct justified dismissal of her case with prejudice.

Affirmed.

Orme, J., concurred in part and concurred in result in part, and filed opinion.

1. Appeal and Error ⇐966(1)
Pretrial Procedure ⇐713

Trial court has substantial discretion in deciding whether to grant continuances and will not be reversed on appeal unless it has abused that discretion by acting unreasonably.

2. Pretrial Procedure ⇐726

Trial court's refusal to grant patient a continuance in dental malpractice action was not abuse of discretion, where court had already granted one continuance and second request was solely due to patient's own failure to retain and designate new expert witness in timely manner.

3. Appeal and Error ⇐970(2)

Appellate court will not reverse trial court's determination on admissibility of evidence absent abuse of discretion impacting party's substantial rights; it is not abuse of discretion for trial court to refuse to admit evidence which is not timely provided to opposing party, contrary to court's instruction.

4. Pretrial Procedure ⇐3

Patient's untimely designation of new expert and fact witnesses in dental malpractice action violated trial court's orders and therefore, trial court did not abuse its discretion in granting dentist's motion in limine to preclude patient from calling these new witnesses.

5. Pretrial Procedure ⇐46

Dismissal of dental malpractice case with prejudice was justified by patient's dilatory conduct and failure to name witnesses until a few days prior to trial.

Douglas M. Durbano (argued) and Walter T. Merrill, Ogden, for plaintiff and appellant.

David G. Williams (argued) and Terence L. Rooney, Snow, Christensen & Martineau, Salt Lake City, for defendant and appellee.

Before GARFF, ORME and RUSSON, JJ.

OPINION

RUSSON, Judge:

Gina M. Hill appeals from the district court's order dismissing her case with prejudice. We affirm.

FACTS

In March 1990, Gina M. Hill filed a complaint against Dr. Carl Dickerson, alleging dental malpractice arising from treatment she received from February through April 1986.

The matter was originally set for trial on April 10, 1991. Two days before trial, Hill moved for a continuance of the trial on the ground that her expert witness, her new treating dentist, had declined to testify. Hill, acknowledging the need for expert testimony in order to establish her prima facie case, represented at that time that she had two other possible expert witnesses and would soon decide who would be called to testify.

On April 9, 1991, the district court granted Hill's motion and ordered the parties to exchange new expert witness lists, identifying their expert witnesses, by April 19, 1991. There was no provision in the district court's order for additional time to identify new fact witnesses. The district court further ordered that all discovery be completed twenty days before the new trial date of August 26, 1991.

On April 19, 1991, Dickerson served his expert list in accordance with the district court's order. On April 23, Hill's attorney contacted Dickerson's attorney and requested that Hill be allowed to defer retaining and designating her expert witness while settlement was being explored. Dickerson's attorney agreed.

Settlement efforts continued until June 28, 1991, at which time a mediation conference was scheduled. However, Hill refused to participate in that conference. After June 28, no further efforts at settlement were pursued.

On August 19, 1991, Hill sent a new witness list to Dickerson, naming a new expert witness and six additional fact witnesses, never previously identified. In response, Dickerson filed a motion in limine to preclude Hill from calling these new witnesses. At a hearing on August 26, Hill's attorney again admitted that expert testimony would be required in order for Hill to establish her prima facie case, stating that "for us to be precluded from having an expert ... defeats our entire case."

The district court granted Dickerson's motion on the basis that Hill's list was untimely and in violation of the court's April order. Moreover, the court found that Dickerson would be "seriously prejudiced" if the witnesses were allowed to testify. Hill orally moved for another continuance, which was denied. The district court then dismissed Hill's case with prejudice.

Hill appeals, claiming that the district court erred in: (1) denying her oral motion for a continuance, (2) granting Dickerson's motion in limine, and (3) dismissing her case with prejudice.

I. MOTION FOR CONTINUANCE

[1] The trial court has substantial discretion in deciding whether to grant continuances, *Christenson v. Jewkes*, 761 P.2d 1375, 1377 (Utah 1988), and will not be reversed on appeal unless it has abused that discretion by acting unreasonably. *Hardy v. Hardy*, 776 P.2d 917, 925–26 (Utah App.1989).

[2] In the case at bar, Hill has failed to demonstrate that the district court's action in denying her oral motion for a continuance in August 1991 was an unreasonable action by the district court meriting reversal as an abuse of discretion. To the contrary, the fact that the district court had already granted Hill one continuance in April weighs heavily in favor of the court's decision. Moreover, Hill's second request for a continuance was solely due to her own failure to retain and designate a new expert witness in a timely manner. Under such circumstances, we find no abuse in the district court's denial of Hill's oral motion in August. *See id.* at 926.

II. MOTION IN LIMINE

[3] We will not reverse a trial court's determination on the admissibility of evidence absent an abuse of discretion impacting a party's substantial rights. *Hardy v. Hardy*, 776 P.2d 917, 924 (Utah App.1989). It is not an abuse of discretion for a trial court to refuse to admit "evidence which is not timely provided to the opposing party contrary to the court's instruction." *Id.* at 925.

[4] In the present case, Hill's action in naming a new expert witness and six additional fact witnesses on August 19, 1991, was clearly contrary to the district court's instruction. First, Hill's action violated the court's April 9, 1991, order directing the parties to identify their expert witnesses by April 19, 1991. Secondly, Hill attempted to name several additional fact witnesses, despite the fact that the court's April order contained no provision for additional time to identify new fact witnesses. Thirdly, Hill's action also was inconsistent with the district court's order that all discovery be completed on August 6, 1991, twenty days before the new trial date. Lastly, the court found that to allow the newly named witnesses to testify would "seriously prejudice" Dickerson, a fact which has not been challenged by Hill on appeal. Thus, since Hill's untimely designation of her new expert witness violated the district court's instruction, the court's action in granting Dickerson's motion in limine clearly did not constitute an abuse of discretion. *See id.*[1]

1. Nor does it matter that the parties agreed between themselves to allow Hill further time to designate her new expert witness. First, a court has the right to control its own calendar. *See Charlie Brown Constr. v. Leisure Sports, Inc.*, 740 P.2d 1368 (Utah App.) (A trial court is not bound by a mere agreement between the parties which has not been incorporated in an order

III. DISMISSAL WITH PREJUDICE

[5] Although dismissal with prejudice is a harsh penalty, there are numerous cases in which the Utah appellate courts have held that a 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. *Id.* Accordingly, we find that Hill had ample opportunity to litigate her case here, but abused such opportunity, and thus we affirm the district court's dismissal of her case with prejudice.

CONCLUSION

The purpose of the Utah Rules of Civil Procedure is to effect total fairness for all parties in a suit. To allow one party to have continuance after continuance to the prejudice of the other party would be patently unfair. This is especially true when such continuances are being granted for the plaintiff who triggers the time constraints of litigation by bringing the suit in the first place. It is equally unfair to allow a party to name new witnesses several days before trial. Allowing a party to do so at the last minute not only prejudices the other party by foreclosing adequate opportunity to depose said witnesses and find opposing witnesses to respond to the new testimony, but also encourages parties to do so as a trial strategy. Accordingly, we affirm the district court's order dismissing Hill's case with prejudice.

GARFF, J., concurs.

ORME, Judge (concurring in part and concurring in the result in part):

I concur in parts I and III of the court's opinion. Because I have some trepidation about the majority's refusal to even consider, as a fact in mitigation, counsel's informal stipulation to extend plaintiff's time for supplementing her witness list, I concur only in the result of part II.

While the trial court may surely be concerned for its calendar and may impose reasonable deadlines to insure the calendar and its business are not disrupted, counsel ought to have some flexibility to resolve minor matters between themselves. Indeed, limited judicial resources are preserved by not requiring counsel to bother the court for approval every time they perceive some need to massage the preliminary details of a scheduling order.

In this case, with trial still four months off, no risk of disruption was posed to the court's basic schedule by permitting plaintiff to defer supplementing her witness list while settlement discussions progressed, at least for some reasonable time. To require counsel to reduce their understanding to writing and submit it to the court for an order of approval would not only require judge time to be expended on a pro forma matter, but also would require some part of counsel's time to be diverted from the salutary business of settlement discussions. But had such a stipulation been prepared and submitted, I have no doubt the court would have signed off on it, at least for a specific period, reasonable in duration, that would not jeopardize the discovery cut-off date.

I would prefer that the informal extension in this case not be dismissed out of hand. Rather, I would prefer to premise our decision at least partly on this basis: When settlement efforts terminated definitively on June 28, the extension terminated as well by its terms. It became incumbent on plaintiff's counsel *immediately* to designate his new expert. This he failed to do. Instead, nearly two months went by before he finally got around to submitting the new expert's name—a scant week prior to trial and *after* the discovery cut-off. Yes, this violated the terms of the scheduling order. Just as important in my view, it also violated the terms of counsel's stipulation.

where that agreement "attempts to wrest from the court control of its own calendar." *Id.* at 1371 (citations omitted).), *cert. denied*, 765 P.2d 1277 (Utah 1987). Moreover, the agreement in the case at bar was not made until April 26, 1991, several days *after* the deadline set by the district court for the designation of experts had already passed. Lastly, to rule otherwise would encourage parties to adopt a trial strategy of persuading their opponents to allow postponement of designation of expert witness while settlement is being pursued, only to designate an expert a few days before trial, at which time the opponent would have no time to depose the said expert or to find witnesses to oppose the new testimony.

tion in the tort action. The divorce decree is affirmed in all other respects.

II. The Tort Actions

Elaine appeals from Judge Ballif's decision dismissing her intentional tort claims on the basis of the claim preclusion branch of the doctrine of res judicata.[5] And she argues that if she is allowed to proceed with that action, Glen should be bound under the issue preclusion branch of res judicata by the divorce court's specific finding that he intentionally shot Elaine.

[8] Neither of these arguments requires extensive analysis. The rules of res judicata and the records in both of these cases fully support Elaine's position. Judge Ballif ruled that Elaine's intentional tort claims had been litigated and determined in the earlier divorce action and were therefore barred under the rules of claim preclusion. In *Penrod v. Nu Creation Creme, Inc.*, 669 P.2d 873, 875 (Utah 1983), we explained that claim preclusion applies only to claims that actually were or could and should have been litigated in the prior action. Tort claims *qua* tort claims should not be tried as part of a divorce action, *Walther v. Walther*, 709 P.2d at 388, and the record shows that Elaine's tort claims, as such, were not tried. Therefore, claim preclusion does not bar Elaine from proceeding on her intentional tort claims and recovering damages. Once proper findings have been made by Judge Tibbs with respect to the specific elements of loss or injury considered in making the alimony and property awards, it will be a simple matter for Judge Ballif to structure the tort case so as to avoid duplicate compensation. The claim preclusion ruling was error, and we reverse the grant of summary judgment and remand for further proceedings on the claims of battery and intentional infliction of emotional distress.

[9] Elaine argues that on remand of the tort case, Glen should be precluded from relitigating the specific finding made in the divorce action that he intentionally shot her.[6] In *Searle Bros. v. Searle*, 588 P.2d 689, 691 (Utah 1978), we reviewed the rules of issue preclusion and listed the elements generally accepted to be required if the determination of an issue in a preceding case is to bind the parties in a later case: (i) the issues must be identical, (ii) the judgment must be final, (iii) the party estopped must be a party or in privity with a party to the preceding adjudication, and (iv) the issue must have been competently, fully, and fairly litigated. In this case, the parties only dispute whether the second and fourth elements have been satisfied.

There is no merit in Glen's lack-of-finality claim, at least at this point. Although he appealed from the divorce decree, Glen did not challenge the specific finding of liability for the shooting. At any rate, our affirmance of the decree disposes of the finality issue.

[10] Glen's second argument, that the issue was not fully and fairly litigated because it was not essential to the divorce decree, is entirely contrary to the record, and we reject it as meritless. Section 30-3-1(3)(g) of the Code provides that cruel treatment causing bodily injury is grounds for divorce. Utah Code Ann. § 30-3-1(3)(g) (Supp.1988) (formerly codified at Utah Code Ann. § 30-3-1(7) (1984)). Elaine's counterclaim for divorce was based on Glen's cruelty to her. The issue of liability for the shooting was raised in the pleadings, was fully and fairly litigated, and was expressly made the basis for granting Elaine's counterclaim for divorce. Throughout the divorce proceeding, Glen was repeatedly put on notice that issue preclusion would be asserted against him in the tort case. As Glen's own memorandum urging the trial court to dismiss on grounds of claim preclusion accurately explained, "The key issue to the present tort action—whether or not an *intentional* tort was committed [—] was *in fact* litigated in the divorce action.... It cannot be disputed that a dominant issue in the divorce action between these parties was whether an intentional shooting took place." The policies behind the doctrine of res judicata would be ill-served by allowing Glen to force Elaine to retry this issue.

We have considered the remaining arguments and find them to be without merit. The divorce decree is remanded for further findings but affirmed in all respects. The summary judgment dismissing Elaine's intentional tort claims is reversed, and those claims are remanded for further proceedings in which Glen will be bound by the previous finding of liability for intentionally shooting Elaine.[7] After general and special damages have been set, the trial court is instructed to offset that portion of special damages provided for in the divorce decree, as shown by the revised findings to be made by Judge Tibbs. Costs on both appeals are awarded to Elaine.

HALL, C.J., HOWE, Associate C.J., and STEWART and DURHAM, JJ., concur.

5. The doctrine of res judicata has two branches, claim preclusion and issue preclusion. As the United States Supreme Court has noted, there has been a great deal of confusion with respect to the "varying and, at times, seemingly conflicting terminology" used in discussing the doctrine and its two branches. *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 77 n. 1, 104 S.Ct. 892, 894 n. 1, 79 L.Ed.2d 56 (1984). Much confusion has resulted from the use of the term "res judicata" to refer to either claim preclusion alone or to the overall doctrine, incorporating both claim and issue preclusion. To avoid engendering further confusion, we will use "res judicata" to refer to the overall doctrine of the preclusive effects to be given prior judgments. We will use the term "claim preclusion" to refer to the branch which has often been referred to as "res judicata" or "merger and bar." And we use the term "issue preclusion" to refer to the branch often termed "collateral estoppel." See the discussions in *Penrod v. Nu Creation Creme, Inc.*, 669 P.2d 873, 874-75 (Utah 1983), *Mel Trimble Real Estate v. Monte Vista Ranch, Inc.*, 86 Utah Adv.Rep. 29, 30 (Utah App. 1988), and *Lane v. Honeywell, Inc.*, 663 F.Supp. 370, 371 n. 1, 372 & n. 2 (D.Utah 1987). *See generally* F. James & G. Hazard, *Civil Procedure* § 11.3 (3d ed. 1985); C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure: Jurisdiction* § 4402 (1981).

6. Finding No. eight in the divorce proceeding reads: "On the late night of the 18th of August 1980, plaintiff intentionally and willfully and without just cause, shot the defendant Elaine Hans[o]n Noble, in the head with a .22 caliber rifle, thereby causing severe bodily injury to the defendant."

7. Elaine has also appealed from Judge Ballif's ruling that her negligence claim was barred by the doctrine of interspousal immunity. She argues that the partial summary judgment was in error because the common law doctrine was held to have been abrogated as to negligence actions in *Stoker v. Stoker*, 616 P.2d 590 (Utah 1980). In *Stoker*, this Court held that the doctrine had been abrogated with respect to intentional torts. *Id.* at 590, 592. We have never had occasion to decide whether this abrogation extended to negligence claims, and we do not do so in this case. It is unnecessary for us to reach that question because our disposition of Elaine's intentional tort action makes it a certainty that she will have a remedy for her injuries.

Richard A. CHRISTENSON, Trustee for Cape Trust, Plaintiff and Appellant,

v.

J. Paul JEWKES and Lorna Jewkes, Defendants and Appellees.

No. 19984.

Supreme Court of Utah.

Aug. 25, 1988.

Creditor brought deficiency judgment action against debtors after nonjudicial trust deed sale of undeveloped real property. The Fourth District Court, Utah County, J. Robert Bullock, J., by jury verdict, entered judgment in favor of debtors.

Creditor appealed The Supreme Court, Stewart, J , held that the District Court did not err by allowing debtors' expert witness to testify concerning fair market value of subject property

Affirmed

Zimmerman, J , concurred in result and filed opinion

1 **Pretrial Procedure** ⇐713

Trial courts have substantial discretion in deciding whether to grant continuances Rules Civ Proc , Rule 40(b)

2 **Pretrial Procedure** ⇐45

Debtors' expert witness could testify concerning fair market value of subject property, in deficiency judgment action brought after nonjudicial trust deed sale of undeveloped real property, even though debtors did not inform creditor that witness would testify until five days before trial and even though creditor did not receive witness' report until one day before trial, witness was made available to creditor ei ther for informal interview or for deposi tion, and creditor was not prejudicially un prepared to conduct adequate cross-exami nation in that only issue in action was value of subject property U C A 1953, 57-1-32

Scott W Cameron, Salt Lake City, for plaintiff and appellant.

H Hal Visick, Provo, for defendants and appellees

STEWART, Justice

The plaintiff, Cape Trust, appeals a judgment entered on a jury verdict in favor of the defendants, J Paul and Lorna Jewkes, *in an action for a deficiency judgment* pursuant to Utah Code Ann § 57-1-32 (1986), following a nonjudicial trust deed sale of undeveloped real property

The defendants owed $264,000 on a loan made by the plaintiff The plaintiff com menced this action seeking a deficiency judgment for $109,000, which was owed after a nonjudicial sale of 38 78 acres of undeveloped property which secured the loan The plaintiff purchased the property at the trustee's sale for $100,000 The complaint alleged that, according to Cape Trust's appraisal, the market value of the property was $155,000 or $4,000 per acre [1] Subsequent to filing the complaint, the plaintiff made various discovery requests in September and November, 1983, and in February, 1984 The defendants answered the September and November requests, they did not answer the February, 1984 request

At a January 13, 1984 pretrial conference, the court set the case for trial on March 13, 1984, and ruled that discovery could continue up to ten days before trial The pretrial order stated that neither unfin ished discovery nor failure to discover would be grounds for continuance of the trial date

On March 8, 1984, five days before trial, the defendants informed the plaintiff that they intended to call as an expert witness Mr Gerald Higgs, an appraiser who would testify concerning the fair market value of the property, which he had determined to be approximately $685,000, or $17,700 per acre The defendants' counsel offered to make this witness available to the plain tiff's counsel despite the expiration of the discovery period

The day before trial, the defendants gave the plaintiff a copy of the appraiser's report, and the plaintiff thereafter asked the defendants for a continuance Although both the plaintiff's and the defendants' counsel agreed to a continuance, the trial *judge refused to grant one* Just before trial the plaintiff renewed the motion for a continuance and, in the alternative, moved to preclude the testimony of Gerald Higgs,

1. Section 57-1-32 requires that a complaint seeking a deficiency judgment must state the amount of the indebtedness, the amount for which the property was sold and the fair mar ket value of the property on the date of the sale

pursuant to the sanction provisions of Rule 37(b), Utah Rules of Civil Procedure The court denied the plaintiff's motion to continue and later, during the trial, denied the motion to strike

At trial, the plaintiff presented the testimony of its expert appraiser, who appraised the value of the land at approximately $4,000 per acre, or $155,000 total The defendants' expert, Mr Higgs, after adjusting for the time interval between the date of foreclosure and the date of the appraisal, estimated the fair market value of the land to be approximately $622,775, or $16,070 per acre Paul Jewkes, one of the defendants, also an expert appraiser, testified that the value of the property was approximately $16,500 per acre, or $639,375 total

The jury was asked to return a special verdict fixing the fair market value of the property on the date of the foreclosure sale The jury found the value to be $9,600 per acre, or $372,288 total Because the value of the property was found to be in excess of the amount of the debt owed, the court entered judgment in favor of the defendants

After the trial, the plaintiff brought a timely motion for a new trial based on Rule 59(a)(3) of the Utah Rules of Civil Procedure, claiming that it was surprised by the defendants' expert witness, Higgs, who had not been identified in the defendants' answers to the pretrial discovery requests The motion for a new trial was denied, and this appeal followed

On appeal, Cape Trust contends that the trial court abused its discretion by denying the continuances which were requested the day before and the day of trial Cape Trust also contends that the trial court *erred in failing to grant a motion for a new* trial due to the surprise caused by late notification that Gerald Higgs would testi-

2. Cape Trust does not contend that the defend ants' counsel acted in bad faith The third set of interrogatories submitted by Cape Trust requested, among other things, the identity of every witness the defendants intended to call

fy Because both of these contentio volve the same issue, i e , the propri the trial court's allowing Higgs to te we shall discuss them together

[1] Trial courts have substantial d tion in deciding whether to grant c uances Utah R Civ P Rule 40(b) *also State v Humpherys*, 707 P 2d (Utah 1985), *Griffiths v Hammon* P 2d 1375 (Utah 1977), *Sharp v Gran is*, 63 Utah 249, 225 P 337 (1924) Si ly, both the granting of, and the ref to grant, a new trial is a matter left t discretion of the trial judge, and that sion will be reversed only if the judg abused that discretion by acting unre ably *Batty v Mitchell*, 575 P 2d 1043 (Utah 1978), *Smith v Shreeve* P 2d 1261 (Utah 1976), *Page v Utah F Fire Ins Co*, 15 Utah 2d 257, 391 P 2 (1964) *Thorley v Kolob Fish & C Club*, 13 Utah 2d 294, 373 P 2d 574 (1

[2] Cape Trust contends that it prejudiced by Higgs' testimony The was concerned with only one issue at the fair market value of the land Trust asserts that since it did not kno the defendants' expert until five day fore trial and did not receive his r until one day before trial, it did not adequate time to evaluate comparable which were used as the basis for th pert's testimony concerning the valu the land Cape Trust further claims because it had inadequate time to pre it was unable to conduct an adequate c examination of the defendants' expert ness [2]

The argument is unconvincing though Cape Trust did not know Higgs would testify until after the time *discovery closed, the expert was n* available to the plaintiff either for an i mal interview or for a deposition

The record indicates that the defendants' c sel provided such information to the plain counsel as soon as it was determined that H would be a witness for the defendants.

plaintiff did not take advantage of either option.

Further, since the only issue in the case was the value of the land and the plaintiff had to prepare and present evidence on that issue anyway, the plaintiff surely was not prejudicially unprepared to conduct an adequate cross-examination. In fact, the record reveals that Cape Trust conducted a very thorough examination of Mr. Higgs. He was questioned closely concerning both his written report and the properties listed as comparable sales in the report. Furthermore, Cape Trust recalled its own expert appraiser as a rebuttal witness. That appraiser testified concerning the properties listed in the Higgs appraisal. Cape Trust's appraiser was familiar with at least five of the comparable sales listed in the Higgs appraisal. In short, the prejudice claimed by Cape Trust is simply not validated by an examination of the record.

Finally, one additional factor tends to support the conclusion that Cape Trust was not prejudiced by the introduction of Higgs' testimony. The jury found the value of the land to be $9,600 per acre. Undisputed testimony was given that the property in question had sold for $9,000 per acre in 1977, some six years before the valuation at issue in this case. The jury therefore had a figure for the value of the land which was independent of the appraisers' reports and could well have been a basis for the verdict. In short, Cape Trust has demonstrated no error and no prejudice.

AFFIRMED.

HALL, C.J., HOWE, Associate C.J., and DURHAM, J., concur.

ZIMMERMAN, Justice (concurring in the result):

I agree that the decision below should be affirmed. However, I join the result reached by the majority only because any error committed by the trial court in unreasonably refusing either to grant a continuance or to exclude the evidence made known to Christenson immediately before trial in violation of the court's orders has not been shown to have sufficiently undermined the outcome so as to lead me to believe that the error was harmful under the harmless error test of Utah Rule of Civil Procedure 61 and Utah Rule of Evidence 103(a). *See Ashton v. Ashton*, 733 P.2d 147, 154 (Utah 1987); *Redevelopment Agency of Roy v. Jones*, 743 P.2d 1233, 1235 (Utah Ct. App.1987); *see also State v. Knight*, 734 P.2d 913, 919–20 (Utah 1987).

Sandra MISKIN, Plaintiff and Appellant,

v.

Marianne CARTER, Defendant and Appellee.

No. 20587.

Supreme Court of Utah.

Aug. 25, 1988.

Following automobile accident, injured party brought suit seeking damages and punitive damages. The District Court, Third District, Salt Lake County, James S. Sawaya, J., granted defendant partial summary judgment on punitive damages issue. On appeal, the Supreme Court, Zimmerman, J., held that: (1) mere presence of legal minimum for establishing drunk driving combined with nothing more than negligent conduct was insufficient to warrant imposition of punitive damages, and (2) under some circumstances punitive damages could be warranted by drunk driving.

Affirmed.

1. Automobiles ⇐245(1)

Mere presence of legal minimum for establishing driving while intoxicated, combined with nothing more than negligent conduct, was insufficient to put issue of punitive damages in a personal injury suit arising from motor vehicle accident to the jury; driver had consumed three or four drinks more than four hours prior to driving and had entered intersection after light had changed.

2. Automobiles ⇐249

Under some circumstances, manner in which a vehicle is operated, when considered in light of driver's degree of intoxication and driver's past behavior patterns, may warrant punitive damages.

G. Steven Sullivan, Robert J. DeBry, Salt Lake City, for plaintiff and appellant.

Roger Christensen, Roger Fairbanks, Salt Lake City, for defendant and appellee.

ZIMMERMAN, Justice:

Plaintiff Sandra Miskin appeals from a grant of partial summary judgment dismissing her claim for punitive damages. That claim was based on an accident arising from defendant Marianne Carter's operation of a motor vehicle while legally intoxicated. We affirm.

The record regarding Carter's conduct was fully developed below through discovery. We consider those facts in the light most favorable to Miskin. *See, e.g., Webster v. Sill*, 675 P.2d 1170, 1172 (Utah 1983). Carter had consumed three or four alcoholic drinks on the day in question. After drinking, Carter had a friend drive her car back to their place of employment, and then Carter waited four hours before driving the car herself. When she did drive, she entered an intersection immediately after the light had turned red and collided with Miskin's car. Miskin sued, claiming that Carter had injured her by driving her car negligently and recklessly while intoxicated. Miskin sought gene and punitive damages.

Carter admitted her negligence and cepted liability for Miskin's general da ages but moved for partial summary ju ment on the issue of punitive damag The trial court granted the motion, ruli that, as a matter of law, bare evidence legal intoxication combined with sim negligence in the operation of a motor hicle, without more, is insufficient to su port a claim for punitive damages.

The Utah cases that have attempted define the legal standard for awarding p nitive damages in tort cases appear to somewhat in conflict, as noted recently the Utah Court of Appeals in *Biswell Duncan*, 742 P.2d 80, 83–84 (Utah Ct.Ap 1987). In false imprisonment cases, v have applied a "malice in fact" or "actu malice" standard. *See McFarland Skaggs Companies*, 678 P.2d 298, 3((Utah 1984). In other cases, we have a plied the "implied malice" or "malice law" standard, often characterized as rec less disregard for the rights of anothe *See, e.g., Branch v. Western Petroleun Inc.*, 657 P.2d 267, 277–78 (Utah 1982 Still other cases state that either the "actu al malice" or the "implied malice" standar applies in determining the propriety of punitive damages award. *See, e.g., Atkin Wright & Miles v. Mountain States Tel. Tel. Co.*, 709 P.2d 330, 337 (Utah 1985 We note that these conflicts in the state standards may be more apparent than rea at least when the legal and factual context in which the standards have been enunciat ed are taken into account. Be that as i may, we have no occasion to address these precedents because, whatever may be th case with respect to the standards appro priate for other causes of action, today we have clarified the standard for imposing punitive damages in drunken driving cases. In *Johnson v. Rogers*, — P.2d —, No. 20622, slip op. (Utah August 25, 1988), we settled on the "knowing and reckless disregard for the rights of others" standard. The question is whether that standard is satisfied here.

ing and insubstantial that a reasonable person could not possibly have reached a verdict beyond a reasonable doubt." *State v. Tanner*, 675 P.2d 539, 550 (Utah 1983). Clearly the State's evidence supports the trial court's finding. Therefore, we affirm defendant's conviction.

GREENWOOD and GARFF, JJ., concur.

CHARLIE BROWN CONSTRUCTION CO., INC., a Nevada Corporation, Charlie Brown and Carma Brown, Plaintiffs and Appellants,

v.

LEISURE SPORTS INCORPORATED, a Nevada Corporation, West Village Unit No. One, Mt. Holly Recreation Community, Conrad H. Koning, and Amy J. Koning, Defendants and Respondents.

No. 860119-CA.

Court of Appeals of Utah.

Aug. 17, 1987.

Plaintiffs appealed an order of the District Court, Beaver County, J. Harlan Burns, J., denying their motion to set aside dismissal of their complaint. The Court of Appeals, Bench, J., held that: (1) rule governing dismissal for failure to prosecute merely permits, and does not require, motion by defendant for dismissal; (2) parties' prior stipulation to postpone any pretrial conference which was communicated to and filed with court did not prevent trial court from dismissing suit for failure to prosecute; regardless of whether trial court never knew of, ignored, or simply forgot about stipulation, plaintiffs themselves failed to comply with intent of stipulation by failing to move for order compelling discovery after additional 30-day period to respond to interrogatories had expired and no response had been received; and (3) trial court did not abuse its discretion by dismissing suit with prejudice on the merits for failure to prosecute; trial court provided plaintiffs an opportunity to be heard and to do justice, and plaintiffs nevertheless abused their opportunity through dilatory conduct.

Affirmed.

1. Pretrial Procedure ⇐674

Rule governing dismissal for failure to prosecute merely permits, and does not require, motion by defendant for dismissal. Rules Civ.Proc., Rule 41(b).

2. Stipulations ⇐3

Trial court is not necessarily bound by mere stipulation between parties which has not been incorporated in an order, where stipulation attempts to wrest from the court control of its own calendar.

3. Stipulations ⇐3

Parties' prior stipulation to postpone any pretrial conference which was communicated to and filed with court did not prevent trial court from dismissing suit for failure to prosecute; regardless of whether trial court never knew of, ignored, or simply forgot about stipulation, plaintiffs themselves failed to comply with intent of stipulation by failing to move for order compelling discovery after additional 30-day period to respond to interrogatories had expired and no response had been received. Rules Civ.Proc., Rule 37.

4. Pretrial Procedure ⇐596

Generally, law office delays or failures are unacceptable excuses for failure to prosecute.

5. Pretrial Procedure ⇐587, 690

Trial court did not abuse its discretion by dismissing suit with prejudice on the merits for failure to prosecute; trial court provided plaintiffs an opportunity to be heard and to do justice, and plaintiffs nevertheless abused their opportunity through dilatory conduct. Rules Civ.Proc., Rule 41(b).

Jackson Howard, Leslie W. Slaugh, Provo, for appellants.

Russell J. Gallian, Gallian, Drake & Westfall, St. George, for respondents.

Before JACKSON, BENCH and ORME, JJ.

OPINION

BENCH, Judge:

Plaintiffs appeal an order of the district court denying their motion to set aside the dismissal of their complaint. We affirm.

Plaintiffs are the purchasers and owners of certain lots at Mount Holly Ski Resort. Defendants are the developers of the area. On June 15, 1981, plaintiffs filed a complaint against defendants to compel completion of certain road improvements. At defendants' request, plaintiffs posted a non-resident cost bond pursuant to Utah R.Civ.P. 12(j). Defendants then filed their answer on July 6, 1981.

Ten and one-half months later, on May 27, 1982, plaintiffs filed a motion to amend their complaint and a notice to take defendants Conrad and Amy Koning's depositions. At defendants' request, the depositions were postponed to July 9, 1982. On June 14, a hearing was held on plaintiffs' motion to amend their complaint. Plaintiffs failed to appear and the motion was denied subject to renewal at a later date. On June 21, 1982, John B. Maycock filed an appearance as defendants' co-counsel. Subsequently, defendants' original counsel, Scott J. Thorley, withdrew.

On July 9 and 16, 1982, defendants filed motions for protective orders requesting their depositions not be taken. Defendants based their motions on protective orders issued in concurrent federal litigation. The court never ruled on the motions, nor did plaintiffs pursue their requested depositions. Plaintiffs filed interrogatories with the court on April 4, 1983, nine months after defendants' motions for protective orders. Plaintiffs' counsel mistakenly mailed a set of the interrogatories to Thorley, defendants' former counsel, who never forwarded the interrogatories to Maycock.

On December 5, 1983 after eight more months of inactivity, the court sua sponte filed an order to show cause why the case should not be dismissed for failure to prosecute. The court ordered both parties to appear on March 19, 1984. Failure to appear "[would] be considered as acquiescence to entry of an order of dismissal and the judgment [would] be entered by the Court without further notice to the parties." The court also filed a notice for a pre-trial hearing, also set for March 19, 1984. Plaintiffs realized the error with the interrogatories and entered into a stipulation with defendants allowing defendants thirty more days to respond. The stipulation also gratuitously stated, "this matter should be stricken from the Court's Pre-Trial Calendar until the parties have completed their discovery or until either party requests a Pre-Trial Conference."

The morning of March 19, plaintiffs' counsel telephoned the trial court judge and informed him of the stipulation. The trial court excused the parties' absence and in a second order to show cause continued the pre-trial to April 16, 1984. A transmittal letter, which referred to the telephone conversation and the stipulation, was filed on March 22. On April 16, 1984, the court again continued the matter for sixty days. A signed stipulation was filed on April 19, 1984. On April 30, 1984, the trial court sua sponte mailed notices to the parties setting trial for June 18, 1984. Plaintiffs contacted the trial court executive and explained the stipulation. The trial court executive, rather than vacating the date, sent revised notices changing the trial setting to a pre-trial hearing.

On June 15, 1984, plaintiffs' counsel personally spoke to the trial court judge in St. George. Counsel explained the stipulation and informed the judge a settlement was likely. The court allegedly excused the parties from appearing at the June 18 hearing. However, when the matter was called on June 18 and neither party was present, the judge ordered the case dismissed. In a minute entry, the court stated:

> This matter was called on hearing for a Pre-Trial Conference. No one appeared on behalf of either party. This matter had been set several times for pre-trial and no one had ever appeared. The Court ordered the matter dismissed with prejudice and on the merits. The minute entry will serve as the Order of Dismissal. A copy is to be mailed to the respective parties.

The court clerk mailed copies of the unsigned minute entry to both parties on June 28.

Due to error, allegedly on the part of plaintiffs' counsel's secretary, the minute entry did not come to plaintiffs' counsel's attention until seven months later in January, 1985.[1] When plaintiffs' counsel became aware of the minute entry, he attempted to consult with the trial court and defendants. Unable to do so, he filed a motion on February 25 to set aside the dismissal. At a hearing on March 18, 1985, the court reviewed the entire file and considered arguments of counsel.[2] The court, noting plaintiffs' failure diligently to prosecute their lawsuit, affirmed the dismissal and entered orders accordingly.

[1] On appeal, plaintiffs contend the trial court erred in denying plaintiffs' motion to set aside the dismissal. Plaintiffs argue under Utah R.Civ.P. 41(b) the court has no authority to dismiss for failure to prosecute absent a motion by defendants. The rule states, "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." The language in Rule 41(b) merely permits, not requires, a motion by defendant. The Utah Supreme Court, in *Brasher Motor and Finance Co. v. Brown*, 23 Utah 2d 247, 461 P.2d 464, 464–65 (1969), states, "In dismissing an action for want of prosecution, the court may proceed under [Rule 41(b)], or it may, of its own motion, take action to that end." *See also Wilson v. Lambert*, 613 P.2d 765, 768 (Utah 1980). Under the comparable federal rule, the United States Supreme Court similarly held:

> Neither the permissive language of the Rule—which merely authorizes a motion by the defendant—nor its policy requires us to conclude that it was the purpose of the Rule to abrogate the power of courts, acting on their own initiative, to clear their calendars of cases that have remained dormant because of the inaction or dilatoriness of the parties seeking relief. The authority of a court to dismiss sua sponte for lack of prosecution has generally been considered an "inherent power," governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.

Link v. Wabash R. Co., 370 U.S. 626, 630–31, 82 S.Ct. 1386, 1388–89, 8 L.Ed.2d 734 (1962).

As stated in *Lake Meredith Reservoir Co. v. Amity Mutual Irrigation Co.*, 698 P.2d 1340, 1344 (Colo.1985), "The burden is upon the plaintiff to prosecute a case in due course without unusual or unreasonable delay." Plaintiffs are required "to prosecute their claims with due diligence, or accept the penalty of dismissal." *Maxfield v. Fishler*, 538 P.2d 1323, 1325 (Utah 1975). Dismissal for failure to prosecute is a decision within the broad discretion of the trial court. This Court will not interfere with that decision unless it clearly appears that the court has abused its discretion and that there is a likelihood an injustice has been wrought. *Department of Soc. Serv. v. Romero*, 609 P.2d 1323, 1324 (Utah 1980).

At the March 18 hearing on plaintiffs' motion to set aside the dismissal, the court reviewed the entire file. The court reviewed plaintiffs' ten and one-half months delay after defendants filed their answer and plaintiffs' failure to attend the hearing on their motion to amend their complaint. The court reviewed plaintiffs' failure to pursue a ruling on defendants' motion for protective orders against the requested depositions. The court reviewed another ten month delay before plaintiffs pursued another discovery device, namely the interrogatories. The court also reviewed eight months more of delay before plaintiffs discovered defendants did not have the interrogatories. Finally, and as noted by the court in its order denying plaintiffs' motion to set aside the dismissal, the court reviewed yet another eight months delay by plaintiffs from the time notification of the minute entry was received until they filed a motion to set aside the dismissal.

[2] Plaintiffs argue the court erred in dismissing their action in light of the court's alleged excusal of both parties' appearance at the June 18 hearing. Plaintiffs contend the trial court was bound by the parties' prior stipulation to postpone any pre-trial conference which was communicated to and filed with the court. However, a trial court is not necessarily bound by a mere stipulation between parties which has not been incorporated in an order where the stipulation attempts to wrest from the court control of its own calendar. *See Lake Meredith*, 698 P.2d at 1346.

[3] Regardless of whether the trial court never knew of, ignored, or simply forgot about the stipulation, plaintiffs themselves failed to comply with the intent of the stipulation. The primary purpose of the stipulation was to provide defendants an additional thirty days to respond to the interrogatories. When the thirty day period expired and no response had been received, plaintiffs did not move under Utah R.Civ.P. 37 for an order compelling discovery nor attempt in any way to move the case forward.

[4] Plaintiffs do not claim the stipulation as an excuse for any of their numerous delays. Rather, plaintiffs' counsel asserts secretarial error as an excuse for the delay after receipt of the minute entry. Generally, law office delays or failures are unacceptable excuses for failure to prosecute *Valente v. First Western Savin Loan Ass'n*, 528 P.2d 699, 700 (Ne

[5] Plaintiffs last argue the tria erred in dismissing their action *with dice and on the merits.* Rule 41(b) "Unless the court in its order for di otherwise specifies, a dismissal und subdivision and any dismissal not pr for in this rule, other than a dismis lack of jurisdiction or for improper or for lack of an indispensable party ates as an adjudication upon the m Plaintiffs cite three Utah Supreme cases which reversed a trial court's d sal with prejudice as an abuse of disc *Johnson v. Firebrand, Inc.*, 571 P.2d (Utah 1977) (motion to dismiss filed same time as defendant's answer); *Oil Co. v. Harris*, 565 P.2d 1135 1977) (delay due to settlement ne tions); *Crystal Lime & Cement C Robbins*, 8 Utah 2d 389, 335 P.2d 624 ((failure to consider counterclaims). T three cases are readily distinguish The facts of this case are much clos those of *Maxfield v. Fishler*, 538 P.2d (Utah 1975). In *Maxfield*, the Utah preme Court affirmed a trial court's dis sal with prejudice against the plaintif "inexcusable neglect in failing to pre and prosecute her claim with reason diligence." *Id.* at 1324–25. In the ins case, the trial court provided plaintiffs opportunity to be heard and to do justi *Westinghouse Elec. Supply Co. v. Pau Larsen Contractor, Inc.*, 544 P.2d 876, (Utah 1975). Plaintiffs neverthe abused their opportunity through dilat conduct.

We therefore find no abuse of discret and affirm the trial court's order deny plaintiffs' motion to set aside the dismis Costs to defendants.

ORME and JACKSON, JJ., concur.

1. During this seven month period, Maycock filed a notice of withdrawal and defendants Konings, in reliance on the minute entry, sold their shares in co-defendant Leisure Sports, Inc.

2. Defendants opposed plaintiffs' motion, arguing their counsel never had been authorized to enter into any stipulation to delay the action. The claim is of questionable relevance and is not a factor in our decision.

raised about the personal property being there until after controversy over the forfeiture developed We are not persuaded that we should disagree with the view taken by the trial court that the plaintiff did not, and could not, make a showing that this storage was of sufficient substance and materiality to justify its non-performance

[5,6] Plaintiff's second contention is that on or about December 8, 1973, the Holts had orally agreed to a modification of the contract to allow for reduced payments until the personal property was removed It says that the payment of $500 on December 10th and the $1,000 paid on December 16th were made in accordance with that oral agreement In support of that claim plaintiff points to the fact that on the latter check there are the words, "as per agreement of 12-8-73" This, plaintiff argues, is a sufficient memorandum in writing to modify the original contract and satisfy the statute of frauds It is elementary that when a contract is required to be in writing, the same requirement applies with equal force to any alteration or modification thereof[4] More importantly here, any such modifying agreement must be sufficiently certain and unequivocal in its terms that the parties will understand what it is and what is to be done under it[5] Neither the check, nor the quoted notation thereon, make any such recitals and they therefore do not meet that requirement.

[7] Plaintiff also claims, in the alternative, that the oral agreement is removed from the statute of frauds due to the equitable principle of part performance, which is part of our law by statute,[6] and decision[7] The observations just made pertaining to oral modification also apply here The payments referred to could well be regarded as payments on the written contract and they do not unequivocally relate to any oral contract

[8-10] Plaintiff's final argument is that it tendered the payments due under the contract on four separate occasions Its evidence relates to two occasions after the forfeiture had occurred. These are thus not material to the issues involved here With respect to the other two, these observations are pertinent A tender requires that there be a bona fide, unconditional, offer of payment of the amount of money due, coupled with an actual production of the money or its equivalent[8] What occurred was that plaintiff's president discussed with the defendants the prospect that payment would be made under certain conditions But there was no actual tender of the amounts due under the contract within the foregoing definition, nor even a tender of such amounts due, less a reasonable and specific set-off for storage of the defendants property on the premises

[11] The immutable proposition faced by the plaintiff in this case is this that unless there is some showing of legal excuse or justification for failure to perform the obligations of a contract, it must be enforced according to its terms[9] The facts of controlling significance are that when it took over the contract on July 18, 1973, it knew that it was assuming the duty to pay 13 days later, on August 1, $7,000 principal, plus $1,600 interest, a total of $8,600, which obligation it did not meet It did make the payments listed above, aggregating $7,500 paid by December 16, 1973,

4 See Sec 25-5-1, 3, Utah Code Ann 1953, and Coombs v Ouzounian, 24 Utah 2d 39, 465 P 2d 356 (1970) Combined Metals v Bastian, 71 Utah 535, 267 P 1020 (1928)

5 See Baugh v Logan City, 27 Utah 2d 201, 495 P 2d 814 (1972) Birdzell v Utah Oil Refining Co, 121 Utah 412, 242 P 2d 578 (1952)

6 Sec 25-5-8, Utah Code Ann 1953

7 Holmgren Brothers, Inc v Ballard, Utah 534 P 2d 611 (1975), and authorities cited therein

8 74 Am Jur 2d p 545, as to tender by check unless the offeree objects to payment by check see Sec 70A-2-511, U C A 1953

9 Paggi v Skliris, 54 Utah 88, 179 P 739 (1919)

thus $1,100 short of the amount past due, and when the next annual installment of something over $8,000, came due on February 1, 1974, it failed to make that payment This brought the defendants' notice of forfeiture, to which the plaintiff made no responsive performance, but instead attempted to justify non performance on the grounds discussed herein.

Upon consideration of the total circumstances as shown by the depositions and documentary evidence, we are not persuaded that the trial court was in error in concluding that plaintiff has raised no issue of material fact which if resolved in its favor would entitle it to prevail Therefore the summary judgment will not be disturbed

Affirmed Costs to defendants (respondents)

HENRIOD, C J, and ELLETT, TUCKETT and MAUGHAN, JJ, concur

Susan E. MAXFIELD, as guardian ad litem for Laurie Ann Maxfield, Plaintiff and Appellant,

v.

Kenneth O. FISHLER, Defendant and Respondent.

No. 13955.

Supreme Court of Utah
Aug 1, 1975

Action was brought seeking to recover damages for medical malpractice The Third District Court, Salt Lake County, Bryant H Croft, J, dismissed the complaint for failure to prosecute, and plaintiff appealed. The Supreme Court, Harding, District Judge, pro tem held that dismissal for failure to prosecute did not constitute an abuse of discretion since plaintiff was not ready to proceed on trial date, which was more than two years after complaint was filed, such failure was the result of inexcusable neglect, and no justification for a continuance was shown.

Affirmed.

Ellett, J, dissented and filed opinion in which Maughan, J, joined

Crockett, J, disqualified himself.

1. Dismissal and Nonsuit ⇐60(1)

Litigants must prosecute their claims with due diligence, or accept the penalty of dismissal. Rules of Civil Procedure, rule 41(b)

2. Dismissal and Nonsuit ⇐60(6)

Where medical malpractice action was filed on October 18, 1972, trial date was set for October 24, 1974, where on trial date plaintiff's counsel moved for continuance after stating that person he had hoped would testify was absent, and where record showed that plaintiff or her counsel had been dilatory in responding to efforts of defendant to obtain discovery and had resisted defendant's attempts to resolve the issue by getting the case to trial, dismissal for failure to prosecute was not an abuse of discretion since plaintiff was not ready to proceed on trial date, such failure was the result of inexcusable neglect, and no justification for continuance was shown. Rules of Civil Procedure, rules 40(b), 41(b).

Boyd M. Fullmer of Fullmer & Harding, Salt Lake City, for plaintiff and appellant.

John H. Snow, Worsley, Snow & Christensen, Salt Lake City, for defendant and respondent.

HARDING, District Judge Pro Tem.:

Plaintiff appeals from the trial court's order dismissing her complaint with prejudice for failure to prosecute pursuant to Rule 41(b), Utah Rules of Civil Procedure.

The basic question is whether or not the trial court abused its discretion in dismissing the action.

The complaint, for medical malpractice, was filed October 18, 1972, and process was served on October 23, 1972. The defendant answered on November 13, 1972. The plaintiff was a nonresident of Utah, and defendant filed a notice requiring security for costs. The plaintiff failed to file a bond within one month as required by Rule 12(j), Utah Rules of Civil Procedure, and on December 26, 1972, the defendant moved for a dismissal. The plaintiff was ordered to file the bond by January 3, 1973. No bond whatever was filed until January 10, 1975, at the time the notice of appeal was filed.

On January 25, 1973, the defendant took the plaintiff's deposition. Neither party took any further action in the case until March 14, 1974, when defendant submitted interrogatories and asked that the case be set for trial. Plaintiff objected to the interrogatories and to the setting of the case for trial on the grounds of insufficiency of time to answer the interrogatories and that discovery had not been completed. The objections were not noticed for hearing, but a trial date was set for October 29, 1974, with a jury. Additional interrogatories were submitted by defendant on May 20, 1974, which went unanswered, and on October 18, 1974, the defendant moved for an order to require answers or for dismissal of the claim. The answers were filed October 24, 1974, five days before the trial date.

On the trial date, plaintiff, her husband, and her counsel, and the defendant and his counsel were present. Plaintiff's counsel requested a conference with the court in chambers before selecting the jurors to try the case. At the conference plaintiff's counsel acknowledged that he had no medical expert to testify. He stated that the person he had hoped to have testify was absent from the jurisdiction when he had attempted to subpoena him four days earlier and would not return by the trial date. No medical experts had been deposed or even contacted for the purpose of testifying by plaintiff's counsel. Plaintiff's counsel moved for a continuance. The court asked plaintiff's counsel to make an offer of proof of the testimony he expected of the medical expert. Plaintiff's counsel stated that one of the doctors who had cared for the child for whom damages were being sought had said that the defendant had done nothing wrong in caring for the child, but claimed that the same doctor had made contrary statements to the plaintiff. That was the extent of the offer of proof as far as plaintiff's claim was concerned.

The court determined that a sufficient showing of diligence or of justification for a continuance had not been made and denied the motion.

Plaintiff's counsel now states that he could have proceeded with the trial using only the parents of the child and the defendant doctor as an adverse witness on the question of the proper standard of care of a medical doctor. The record does not show that a request to so proceed was ever made.

[1, 2] No showing was made that plaintiff's counsel had made or attempted to make any discovery of evidence to support the action. The record showed that plaintiff or her counsel had been dilatory in responding to defendant's efforts at discovery, and had resisted his attempts to resolve the issues by getting the case to trial.

It is evident that plaintiff was not ready to proceed at the time the trial date arrived; that such failure was the result of inexcusable neglect in failing to prepare and prosecute her claim with reasonable diligence; and that no justification for continuance was shown as required by Rule 40(b), Utah Rules of Civil Procedure. If Rule 41(b), Utah Rules of Civil Procedure, is to be effective in expediting and resolving litigation, it must require litigants to prosecute their claims with due diligence, or accept the penalty of dismissal.

The ruling of the trial court is affirmed. Costs to respondent.

HENRIOD, C. J., and TUCKETT, J., concur.

ELLETT, Justice (dissenting):

This case was dismissed for failure to prosecute on the very day it was to be tried. The plaintiff moved for a continuance in order for her to obtain an expert witness, and the defendant thereupon moved for the dismissal of the action.

In the light of the history of this case, I think the court might have been justified in refusing to continue the matter, but I do not see how the court could dismiss it for failure to prosecute at trial unless the plaintiff refused to produce evidence.

While it may have appeared to the trial judge that the plaintiff was certain to lose the case in the absence of an expert witness, I think he could not for that reason dismiss the case. He should have ordered the plaintiff to proceed to trial. A dismissal might have been proper at the conclusion of her evidence, but not before it was offered.

I would reverse the judgment of dismissal and award costs to the appellant.

MAUGHAN, J., concurs in the views expressed in the dissenting opinion of Mr. Justice Ellett.

CROCKETT, J., having disqualified himself, does not participate herein.

Dennis PRINCE, Plaintiff and Respondent,
v.
Darlene PETERSON, Defendant and Appellant.
No. 13765.

Supreme Court of Utah.
July 22, 1975.

Defendant appealed a judgment of the Fourth District Court, Utah County, J. Robert Bullock, J., awarding plaintiff compensatory and punitive damages in libel and slander suit. The Supreme Court, Crockett, J., held that written and oral statements that defendant was a "clever crook" and was "stealing from his own children," made in regard to plaintiff's operation of business and his efforts to sell it, were slanderous; that award of $5,537 as compensatory damages to plaintiff who spent approximately 25 days attempting to overcome harm caused by slanderous remarks would not be disturbed; and that award of $3,000 punitive damages was excessive and would be reduced to $1,000.

Affirmed as modified.

Henriod, C. J., filed a dissenting opinion in which Maughan, J., concurred.

1. Libel and Slander ⇐6(1)

The making of some general statement about another being a crook or even using profanity against him in a general way may not be actionable slander; however, if words of such character are used in a context or under circumstances as they would reasonably be understood to come within traditional requirements of libel or slander: that is, to hold a person up to hatred, contempt or ridicule, or to injure him in his business or vocation, they are deemed actionable per se; and law presumes that damages will be suffered therefrom.

2. Libel and Slander ⇐6(2, 4)

Written and oral statements that plaintiff was a drunk and a "clever crook" and

SUPREME COURT OF UTAH

PETITIONS FOR CERTIORARI DENIED

Title	Docket Number	Date	Lower Court Citation or Number
Smith v. Rocky Mt. Helicopter	890129	5/30/89	870511-CA
First Fed. v. Air Terminal	890166	6/7/89	771 P.2d 1096
Sampson v. Richins	890146	6/7/89	770 P.2d 998

Colin Edward HARDY, Plaintiff and Respondent,

v.

Nellie Peterson HARDY, Defendant and Appellant.

No. 870348-CA.

Court of Appeals of Utah.

June 20, 1989.

Former husband filed motion for modification of divorce decree, requesting custody of child. The Third District Court, Salt Lake County, John A. Rokich, J., modified divorce decree by transferring custody of child from former wife to former husband, and former wife appealed. The Court of Appeals, Garff, J., held that: (1) trial court properly received evidence pertaining not only to former wife's changed circumstances but also as to child's best interests in nonbifurcated hearing; (2) remand of case was necessary for entry of appropriate findings which clearly articulated judge's considerations behind his finding that change of custody was in child's best interests; (3) trial judge did not abuse his discretion in refusing to continue trial to allow former wife's new attorneys to prepare for trial; and (4) substantial evidence in record as to former wife's precarious financial circumstances, as compared with former husband's relatively prosperous situation, justified trial court's refusal to award costs to former husband.

Affirmed in part and remanded.

1. Divorce ⇐303(2)

If initial custody decree is unlitigated, such as where custody is obtained by default divorce or parties stipulate as to custody, then trial court, on motion to modify custody decree, may focus custody determination on child's best interests, as opposed to custodial parent's changed circumstances.

2. Divorce ⇐303(2, 5)

Trial court properly received evidence pertaining not only to custodial parent's changed circumstances, but also as t child's best interests, in nonbifurcate hearing on noncustodial parent's motion t modify divorce decree by changing custod al parent for child, even though initial fc cus in modification proceedings is normall on custodial parent's changed circumstanc es, and child's best interests are considere only after changed circumstances ar found; initial custody determination wa stipulated to by parties, and thus custod was not based on impartial judicial exam nation of child's best interests, and evi dence establishing parents' substance ad dictions was also probative for both deter mining child's best interests and parties respective parenting abilities.

3. Appeal and Error ⇐1008.1(5)
Trial ⇐395(5)

Trial court's findings of fact must: in clude enough facts to disclose proces through which ultimate conclusion i reached; indicate that process is logica and properly supported; and not be clearl erroneous.

4. Parent and Child ⇐2(18)

Trial court should state those factors i considered in making its determination o motion to change custodial parent, such a needs of child, ability of each parent t meet those needs, parenting ability of cus todial parent, and functioning of estab lished custodial relationship.

5. Trial ⇐393(3)

Oral findings of fact and conclusion of law made by court when it rules from bench are sufficient. Rules Civ.Proc., Rul 52(a).

6. Parent and Child ⇐2(18)

Weight that trial court accords to sta bility and continuity of existing custodia relationship when determining whether t change custodial parent will depend upo duration of existing custody arrangement child's age, nature of developing relation ship between child and both parents, an how well child is thriving physically, men tally and emotionally.

7. Divorce ⇐312.7

Remand of trial court's determination to modify divorce decree by transferring custody of child from former wife to former husband was necessary for entry of appropriate findings which clearly articulated judge's considerations behind his finding that change in custody was in child's best interests; judge orally found that change of custody was in child's best interests, but failed to make any specific factual findings supporting that conclusion.

8. Divorce ⇐312.2, 312.5

Court of Appeals would not consider former wife's allegation that trial court erred in failing to provide written instructions to expert witnesses in custody hearing pursuant to Rules of Evidence, where record indicated that alleged lack of written instructions was not objected to nor even mentioned at time of trial, and there was no indication in record as to what instructions, if any, were given to expert witnesses. Rules of Evid., Rule 706(a).

9. Appeal and Error ⇐970(2)

Court of Appeals will not reverse trial court's determination on admissibility of proffered evidence absent abuse of discretion affecting party's substantial rights. Rules of Evid., Rule 103.

10. Pretrial Procedure ⇐45

Trial court does not abuse its discretion in refusing to admit evidence which is not timely provided to opposing party, contrary to court's instructions.

11. Divorce ⇐85

Letter from former wife's therapist was inadmissible in child custody modification hearing, where former wife had not timely provided it to former husband.

12. Evidence ⇐535

Home study performed by former wife's counselor at out-patient drug treatment center was inadmissible in child custody modification hearing, as counselor had not qualified as expert.

13. Appeal and Error ⇐931(6)

Where trial is to court rather than to jury, court's rulings on evidence need not be subjected to as critical an inquiry because, in arriving at his conclusions, judge will include in his consideration his knowledge and judgment as to materiality, competency and effect of evidence; in such cases, there is presumption that trial judge has disregarded all inadmissible evidence in reaching his decision.

14. Divorce ⇐303(8)

Trial judge did not abuse his discretion in child custody modification hearing by reading depositions and reports that judge did not admit into evidence; trial judge specifically disavowed placing much reliance on them in his decision making process.

15. Divorce ⇐312.6(9)

Whether trial judge erred in refusing to admit certain depositions into evidence in child custody modification proceeding was immaterial, where disputed evidence, regarding former wife's cocaine addiction and relationship with drug dealer, was merely cumulative to other evidence, including former wife's own testimony.

16. Appeal and Error ⇐966(1)
Pretrial Procedure ⇐713

Granting of continuance rests in sound discretion of trial court, and denial of continuance will not be reversed on appeal unless court has abused that discretion by acting unreasonably.

17. Divorce ⇐145

Trial court did not abuse its discretion by denying continuance to former wife in child custody modification proceeding, even though former wife had new attorney, where judge had already continued trial at former wife's request on one other occasion so that new counsel could prepare case, prosecution of case had been substantially delayed by former wife's dilatory conduct, and trial judge had previously made it clear that time was of essence in that child's best interests required timely resolution of dispute.

18. Divorce ⇐188

In modification of divorce decrees pursuant to continuing jurisdiction of trial court, question of ability or inability of party to pay costs in defending matter is factual matter which lies in discretion of trial court. U.C.A.1953, 30-3-5.

19. Divorce ⇐312½

Substantial evidence set forth in record as to former wife's precarious financial circumstances, as compared to former husband's relatively prosperous situation, justified trial court's refusal to award costs to former husband after divorce decree was modified by transferring custody of child from former wife to former husband.

John B. Anderson, William A. Somppi, Allan M. Metos, Salt Lake City, for defendant and appellant.

John F. Clark, Salt Lake City, for plaintiff and respondent.

Before DAVIDSON, GARFF and ORME, JJ.

GARFF, Judge:

Defendant/appellant, Nellie Peterson Hardy, appeals the trial court's order which modified the divorce decree transferring custody of the parties' minor child, S., from her to plaintiff/respondent, Colin Edward Hardy. We affirm in part and remand for findings consistent with this opinion.

The parties were married in 1982 and had one child, S. During this marriage, both p rties engaged in drug and alcohol abuse. They were divorced on April 8, 1985, stipulating that appellant was a fit and proper person to have custody of S. The trial court was unaware at that time that appellant was addicted to cocaine and that respondent was an alcoholic.

In November 1985, respondent successfully completed a hospital alcoholism treatment program, and was alcohol-free at the time of this action. However, he used marijuana twice in April 1986.

In the summer of 1985, appellant substantially increased her cocaine usage and became romantically involved with Rudy Lema, a drug dealer. In February 1986, appellant quit her job because of cocaine usage. During this time, appellant neglected S. In the beginning of 1985, S. had been a bright, outgoing, happy three-year-old who made friends easily. By the end of 1985 and during the first three months of 1986, however, she had become withdrawn, standoffish, depressed, and exhibited other disturbed behavior as a result of appellant's neglect.

On April 18, 1986, at 1:00 p.m., a highway patrolman stopped appellant for speeding and driving erratically on the freeway in Utah County. He found S. in the vehicle, unrestrained by a seatbelt. Because appellant was in a confused, excited, incoherent state and appeared to be under the influence of drugs, the patrolman transported the two to the Timpview Mental Health Unit in Provo and involuntarily committed appellant. Appellant and S. were then transported to the University Hospital in Salt Lake City. Appellant's attending physician believed that she was suffering from chronic cocaine abuse syndrome in which delusional disorders and severe impairment might be present for weeks or months, and that appellant was in no condition to care for S.

University Hospital personnel informed respondent that appellant had been admitted to the hospital and that if he was not able to pick up S., the hospital would have to place her in a shelter home. Respondent agreed to take S. and to return her to appellant's custody upon her discharge. Instead of returning S. to appellant's custody, however, he took S. home with him that night and subsequently moved her to his parents' home in Saratoga, California.

On April 24, 1986, appellant discharged herself from the hospital against medical advice, and returned to her parents' home in Scottsdale, Arizona. She subsequently admitted herself to Terros, an outpatient drug treatment center in Phoenix, Arizona, where she completed a twenty-one day detoxification program.

On May 8, 1986, respondent filed a motion for modification of the 1985 custody order, requesting custody of S. On May 19, 1986, the trial court heard respondent's motion, and, in a preliminary injunction, ordered both parties to undergo home stud-

ies and psychological evaluations. It also awarded temporary custody of S. to appellant so long as she resided with her parents in Scottsdale, Arizona, and forbade either party to abuse drugs in S.'s presence.

On September 5, 1986, appellant's counsel withdrew. Appellant subsequently obtained representation from the Arizona-based Legal Aid Society.

In September 1986, the court appointed a social worker, Frances R. Purdie, to conduct home studies and a licensed psychologist, Dr. Barbara Liebroder, to conduct psychological evaluations of the parties.

The case was set for trial on March 2 and 3, 1987, but, upon appellant's motion, was continued until May 7 and 8, 1987 so that appellant's new counsel from the Legal Aid Society, David Hartwig, could prepare for trial.

On February 27, 1987, respondent was granted extended visitation with S. for forty-five days from March 4, 1987 to April 14, 1987. Liebroder evaluated S. a second time immediately following her return from this visitation.

On March 28, 1987, appellant married Robert Bruce Blake in Arizona. Respondent, Purdie, and Liebroder were unaware of her remarriage until the day before trial. Consequently, no home or psychological studies were done involving Blake.

Appellant's attorney, Hartwig, left the Legal Aid Society shortly before trial. Appellant's case was then assigned to other Legal Aid Society attorneys. Despite his pending departure, Hartwig made no formal motion to continue the May trial date, but, one week before trial, contacted the judge by telephone to ask for a continuance, which the judge denied.

The matter came to trial on May 7, 8 and 12, 1987 before the same judge who had made the initial custody award. Hartwig, despite his departure from Legal Aid, was present for part of the trial and conducted much of the examination and cross-examination on the second day of the trial.

Purdie, on the basis of her home evaluations performed on the parties and their parents, testified that S. was emotionally deprived, and that, even though appellant and her parents obviously cared for S., their concern and caring were not expressed in such a way that would help S. to realize her full potential. She testified, instead, that S. was being emotionally damaged in her present environment and that she would have more of her emotional needs met in respondent's custody.

Liebroder, who had performed psychological evaluations on each of the parties, two on S., and a screening evaluation on respondent's new wife, testified that appellant's drug use, because it was being treated and was currently under control, was not appellant's most serious problem, although she had a poor prognosis for continued abstinence. Liebroder concluded that appellant's most serious problems were that she was extremely self-centered and had difficulty empathizing with, understanding, and caring in a significant way for other people, and that these were symptoms of a chronic, change-resistant character disorder. She noted no really significant interaction between appellant and S., who had an unusually negative self-image.

Liebroder indicated that S. appeared to be suffering from a lack of attention and nurturing. She stated that S.'s needs for a structured environment, adequate stimulation, and interaction with other children were not being met, and that she had suffered serious emotional damage while in appellant's custody. She concluded that S. was in serious jeopardy of sustaining permanent emotional damage along with loss of use of her intellectual potential and personality, and had already adopted, at age four, a very non-achieving lifestyle.

Liebroder testified that respondent, on the other hand, had a great deal of energy and determination to succeed and was a disciplined person. She found that his relationship difficulties were related to his alcoholism, which was currently under control, and that he had the ability, stability, and structured lifestyle to be a good parent for S. Regarding S.'s April visitation with respondent, Liebroder indicated that S. had changed behaviorally for the better, that her intelligence scores had jumped twenty points, and that these changes were not attributable to chance, but were reflective of the time S. had spent in respondent's custody.

Dr. Lindeman, a psychologist hired by appellant, testified that appellant's personality was within normal limits and that, contrary to Liebroder's study, appellant did not have any serious psychological or emotional problems. He indicated that he was pleasantly surprised with S.'s relationship with appellant, and that appellant not only did not have the personality disorder diagnosed by Liebroder, but that Liebroder's study did not justify such a diagnosis.[1] He also noted, however, that appellant was in the middle to high risk range for further drug abuse.

Liebroder rebutted Lindeman's testimony, stating that he used a very cursory battery of tests to arrive at his conclusions as opposed to her large variety of in-depth tests, and because Lindeman's observation of S. took place two weeks after she returned from visitation with respondent, the behavior he observed was attributable to the visitation.

In summary, Liebroder believed that respondent was more likely than appellant to remain alcohol and drug free over time. Because she found that S.'s social and psychological needs were not being met, and that, at age four, she was already moving into a non-achieving, manipulative life pattern as a result of the current custodial situation with appellant, Liebroder recommended that respondent take custody of S.

During the trial, respondent's counsel requested publication of Rudy Lema's deposition rather than bringing him in as a witness, because, at that time, he was a federal prisoner in transit to a federal penitentiary. However, the judge refused to publish the deposition, which he had read prior to trial, because respondent's counsel had made no attempt to serve process on Lema.

The court excluded some proffered evi-

dence was proffered by respond show, in greater detail, the nature a tent of appellant's cocaine addiction pellant's only disallowed evidence letter written by her therapist and a study performed by her counselor. judge disallowed the letter because lant had not timely provided it to r dent, and the home study because he that the counselor was not qualified expert.

At the conclusion of the trial, cu was transferred to respondent. On 19, 1987, appellant moved for a new and a stay of the custody order pe appeal. On June 29, Hartwig filed an davit indicating, among other things, he had requested a continuance to new counsel adequate preparation time that appellant had not been allowed s cient time to present her case during The trial court denied this motion, ord that the parties split the cost of the psy logical evaluations and home studies, nied respondent's motion for legal cost $803.70, and approved the transfer of p ical custody of S. from appellant to res dent, which was to take place on July 1987.

The following issues raised by appel are of primary concern: (1) whether trial court erred in admitting evidence garding both the substantial change in pellant's circumstances and S.'s best int ests, including changes in respondent's cumstances, thus failing to bifurcate hearing; and (2) whether the court erred awarding custody to respondent, abs specific factual findings.

Appellant raised numerous additional sues, including the following: (1) wheth the trial court must provide written instr tions to expert witnesses; and (2) wheth the court abused its discretion by: (a) stricting appellant's proffered testimon (b) reading depositions and reports whi were not admitted into evidence; (c) fusing to grant a continuance to allow ne

1. Other evidence was admitted supporting Lindeman's conclusion: Although he did not testify at trial, Atila Dereli, a licensed psychologist associated with appellant's outpatient drug treatment program, prepared a written repo and stated that appellant was a caring perso and was willing to take care of other people an help them.

ly appointed attorneys to prepare for trial; (d) awarding custody to respondent, who admitted that he had intentionally violated prior court orders by hiding S. from appellant; and (e) refusing to allow new home studies.

Respondent asserts that the trial court erred in refusing to award him court costs.

At the outset, we note that under the well-established standard of review for child custody proceedings, we do not set aside the trial court's factual findings unless clearly erroneous, but give due regard to the opportunity of the trial judge to ascertain the witnesses' credibility. *Marchant v. Marchant*, 743 P.2d 199, 202 (Utah Ct.App.1987). A finding is clearly erroneous if it is against the great weight of the evidence or if we are otherwise definitely and firmly convinced that a mistake has been made. *Johnson v. Johnson*, 771 P.2d 696, 697 (Utah Ct.App.1989); *Power Systems and Controls, Inc. v. Keith's Elec. Constr. Co.*, 765 P.2d 5, 9 (Utah Ct.App.1988).

BIFURCATION OF PROCEEDINGS

[1, 2] In an unbifurcated hearing, the judge considered evidence concerning both parents' changed circumstances, S.'s relationship with both parents, and additional evidence relevant to S.'s best interests. He found that there was a material change in appellant's circumstances because of the serious nature of her addiction, and that neither party had previously apprised him that appellant was a cocaine addict and respondent an alcoholic at the time of the divorce. He then orally found that a change of custody was in S.'s best interest. Appellant asserts that in following this procedure, the trial court erroneously failed to bifurcate the hearing pursuant to *Hogge v. Hogge*, 649 P.2d 51, 53–54 (Utah 1982) and *Becker v. Becker*, 694 P.2d 608, 610 (Utah 1984), thus improperly mingling evidence of appellant's changed circumstances and S.'s best interests, including respondent's changed circumstances, in the same hearing.

The Utah Supreme Court set forth in *Hogge* and later clarified in *Becker* a two-step procedure for modifying a custody order: (1) the party seeking custody must show that there has been a material change in the custodial parent's circumstances upon which the original custody award was based, and (2) once a change in circumstances has been shown, the transfer of custody must be in the child's best interests. *Hogge*, 649 P.2d at 53–54; *Becker*, 694 P.2d at 610. Usually,

> the noncustodial parent's change of circumstances is relevant only to a determination of whether, under the second prong of the *Hogge–Becker* test, the best interests of the child warrant a shift in custody, an issue reached only after a change of custodial circumstances has been found and the issue of custody has been reopened.

Kramer v. Kramer, 738 P.2d 624, 627 (Utah 1987).

In a recent decision, this court reasoned that if an initial custody award is based upon a thorough examination by the trial court of the various factors relevant to the child's welfare, a rigid application of the *Hogge–Becker* change in circumstances test is appropriate. *Maughan v. Maughan*, 770 P.2d 156, 160 (Utah Ct.App. 1989). In such a case, the court has already considered the child's best interests and fashioned the custody award accordingly. *Id.* Any subsequent petition for modification of custody must overcome the high threshold set forth in *Hogge* "to 'protect the child from "ping-pong" custody awards' and the accompanying instability so damaging to a child's proper development." *Id.* (quoting *Kramer*, 738 P.2d at 626.) If, however, the initial custody decree is unlitigated, e.g., where custody is obtained by default divorce or where the parties stipulate as to custody, then the trial court may focus the custody determination on the child's best interests. *Maughan*, 770 P.2d at 160. Subsequent to *Maughan*, the Utah Supreme Court followed this same line of reasoning in *Elmer v. Elmer*, 776 P.2d 599 (Utah 1989), holding that "in change of custody cases involving a nonlitigated custody decree, a trial court, in applying the changed circumstances test, should receive evidence on changed circumstances and that evidence may include evidence that pertains to the best interests of the child." *Id.* at 605. In such cases, the res judicata purpose served by the *Hogge–Becker* test must be subservient to the child's best interests. *Id.* at 603.

> The stability with which the law is primarily concerned is not the stability of the legal custody arrangement as such, but rather the stability that makes possible the psychological and emotional security that underlies a child's well-developed sense of self-worth and self-confidence.... [This stability is a means of] promoting the ultimate objective, the overall best interests of the child.

Id. at 604 (citations omitted). In such cases, "[t]oo rigid an application of the [*Hogge–Becker* test] would lock a child into the custody of one parent or the other where there has been no determination on the merits of parenting ability of either parent and custody has been awarded only because of the default of one parent in failing to oppose the complaint of the other." *Id.* (quoting *Kramer*, 738 P.2d at 629 (Howe, J., concurring)). *Elmer* concludes, "In sum, we hold that in change of custody cases involving a nonlitigated custody decree, a trial court, in applying the changed-circumstances test, should receive evidence on changed circumstances and that evidence may include evidence that pertains to the best interests of the child." *Id.* at 605.

The initial custody determination in this matter was unlitigated, as was also the case in *Maughan* and *Elmer*, because it was stipulated to by the parties. Consequently, custody was not based upon an impartial judicial examination of S. interests. In fact, evidence in the indicates that the initial custody av appellant was inimical to S.'s best int and its continuation could seriousl ardize S.'s psychological, intellectu emotional development. Thus, a ri plication of the *Hogge–Becker* chan cumstances test, as urged by appel inappropriate here.[2] Therefore, w that the trial court did not commit e receiving evidence pertaining not c appellant's changed circumstances b to S.'s best interests in a non-bifu hearing.

FACTUAL FINDINGS

Appellant next argues that we overturn the trial court's order bec made no specific finding that resp was a fit and proper person to take c of S.

[3–5] This court requires that fi of fact (1) include enough facts to d the process through which the ul conclusion is reached, (2) indicate th process is logical and properly supp and (3) be not clearly erroneous. *chant*, 743 P.2d at 202–03. "A mer ing that the parties are or are not 'f proper persons to be awarded the custody, and control' of the child c pass muster when the custody aw challenged and an abuse of the trial c discretion is urged on appeal." *Ma v. Martinez*, 728 P.2d 994, 995 (Utah (per curiam). The trial court should those factors it considered in maki determination, such as the needs c child, the ability of each parent to

2. Taking a broader range of evidence than normally allowed under the changed-circumstances test is appropriate in this case for an additional reason and resolves a nagging dilemma for the trial court. Because the evidence establishing appellant's and respondent's respective addictions was also probative for determining S.'s best interests and the parties' respective parenting abilities, there was no effective way to bifurcate the hearing and strictly limit the evidence to that relating only to appellant's changed circumstances. Evidence regarding appellant's changed circumstances dealt primarily with her cocaine addiction and how its use im negatively upon her care of and relati with S. and it is relevant to both chang cumstances and S.'s best interests. The witnesses presented evidence relevant t appellant's changed circumstances and S interests which was so intertwined that b tion of the two issues would have done vi to an orderly, reasonable presentation, have created confusion and misunderstа and would have resulted in further expen inconvenience to the witnesses and the p

those needs, the parenting ability of the custodial parent, and the functioning of the established custodial relationship. *Myers v. Myers*, 768 P.2d 979, 983 (Utah Ct.App. 1989). "Failure of the trial court to make findings on all material issues is reversible error unless the facts in the record are 'clear, uncontroverted, and capable of supporting only a finding in favor of the judgment.'" *Acton v. J.B. Deliran*, 737 P.2d 996, 999 (Utah 1987) (quoting *Kinkella v. Baugh*, 660 P.2d 233, 236 (Utah 1983)).[3]

[6] Although we find that the trial court did not err in failing to bifurcate the hearing, the supreme court has indicated that the trial court's "findings of fact should reflect that the court considered stability as a factor in the custody decision and the weight the court accorded it." *Elmer*, 776 P.2d at 605; *see also Paryzek v. Paryzek*, 776 P.2d 78, 81–84 (Utah Ct.App. 1989). The weight the trial court accords to the stability and continuity of the existing custodial relationship will depend upon the duration of the existing custody arrangement, the child's age, the nature of the developing relationship between the child and both parents, and how well the child is thriving physically, mentally and emotionally. *Elmer*, 776 P.2d at 604.

[7] The trial judge orally found that a change of custody was in S.'s best interests but failed to make any specific factual findings supporting this conclusion. Therefore, even though the ultimate disposition seems abundantly reasonable under the circumstances, we are compelled to remand the case for entry of appropriate findings which clearly articulate the judge's considerations behind his finding that the change of custody is in S.'s best interests.

To reduce confusion and to lessen the possibility of an additional appeal, we address appellant's remaining issues.

3. Oral findings of fact and conclusions of law made by the court when it rules from the bench are sufficient. Utah R.Civ.P. 52(a).

WRITTEN INSTRUCTIONS TO EXPERT WITNESSES

[8] Appellant claims that the trial court erred in failing to provide written instructions to expert witnesses pursuant to Utah Rules of Evidence 706(a), which requires the expert witness to "be informed of his duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate." Our review of the record indicates that this alleged lack of written instructions was not objected to nor even mentioned at the time of trial. Further, there is no indication in the record as to what instructions, if any, were given to the expert witnesses. It is well established that we will not consider any issue raised for the first time on appeal. *Marchant v. Park City*, 771 P.2d 677, 682 (Utah Ct.App.1989) *appeal filed* 106 Utah Adv.Rep. 63 (1989). "A matter is sufficiently raised if it is submitted to the trial court, and the court is afforded an opportunity to rule on the issue." *State v. One 1979 Pontiac Trans Am*, 771 P.2d 682, 684 (Utah Ct.App.1989). The trial court was not given such an opportunity here, so we decline to address appellant's point.

RESTRICTION OF PROFFERED TESTIMONY

[9–12] Appellant asserts that the trial court abused its discretion in restricting some of her proffered testimony. Our review of the record reveals that the trial court disallowed the following proffered testimony: a letter from appellant's therapist on the basis that appellant had not timely provided it to respondent, and a home study performed by appellant's counselor at Terros on the basis that the counselor was not qualified as an expert. We will not reverse a trial court's determination on the admissibility of proffered evidence absent an abuse of discretion affecting a party's substantial rights. Utah R.Evid. 103; *see also State v. Jamison*, 767 P.2d 134, 137 (Utah Ct.App.1989); *State v.*

Aase, 762 P.2d 1113, 1116 (Utah Ct.App. 1988). The trial court does not abuse its discretion in refusing to admit evidence which is not timely provided to the opposing party contrary to the court's instructions. Further, "[t]he matter of qualification of an expert witness lies in the discretion of the court." *State v. Locke*, 688 P.2d 464, 464 (Utah 1984) (per curiam) (footnote omitted); *see also State v. Eldredge*, 773 P.2d 29, 33–34 (1989); *State v. Wight*, 765 P.2d 12, 14 (Utah Ct.App.1988). Under the facts set forth in the record, we do not find any abuse of discretion on the part of the trial court.

DEPOSITIONS NOT ADMITTED INTO EVIDENCE

[13, 14] Appellant claims that the trial court abused its discretion by reading depositions and reports that it did not admit into evidence, Rudy Lema's deposition in particular,[4] suggesting that the trial court may have improperly based its decision upon them.

At the outset, we note that the trial judge, upon being questioned by appellant's counsel regarding this evidence, specifically disavowed relying on it much in his decision making process. He stated, "I read the deposition in its entirety, and I don't believe that's going to be a major factor in my decision. So, I will not allow it in, but even if it were allowed in I'm not giving it that much weight."

It is obvious that for the court to rule on the admissibility of the evidence in question, the court must be familiar with it, and, so, must read it. The law is well established that where the trial is to the court rather than to a jury, the court's rulings on evidence need not be subjected to as critical an inquiry because, in arriving at his conclusions, the judge will include in his consideration his knowledge an ment as to the materiality, competei effect of the evidence. *In re Es Baxter*, 16 Utah 2d 284, 399 P.2d 4 (1965); *see also Del Porto v. Nic* Utah 2d 286, 495 P.2d 811, 814 (197 *per Tire Market, Inc. v. Rollins*, 1 2d 122, 417 P.2d 132, 136 (1966). I cases, there is a presumption that tl judge has disregarded all inadmissil dence in reaching his decision. *Co v. Connolly*, 209 Mont. 298, 680 P.2 573 (1984). Appellant has not ove this presumption, so we find that th court did not abuse its discretion h

[15] Further, inquiry is not l merely to whether or not an erro have been committed, but whether th any "reasonable likelihood that the affected the outcome of the proceed *State v. Verde*, 770 P.2d 116, 120 1989). Our review of the record an proffered evidence indicates that th puted evidence was merely cumulati cause the critical facts surrounding lant's cocaine addiction and relatio with Lema, which were brought out i disputed evidence, were also brought other evidence, including appellant's testimony. Therefore, whether or no judge erred in refusing to admit the de tions is immaterial.

CONTINUANCE OF TRIAL

Appellant alleges that the trial ju abused his discretion in refusing to co ue the trial to allow her new attorney prepare for trial.

[16] The granting of a continu rests in the sound discretion of the court. *Miller Pontiac, Inc. v. Osbo* 622 P.2d 800, 803 (Utah 1981). The jud action in denying a continuance will no reversed on appeal unless the court

4. In his deposition, Lema testified that after the May 19, 1986 hearing, he visited appellant in Phoenix on four occasions. Each time, he brought large amounts of cocaine, which he and appellant used together. On one trip in late June, he and appellant spent three days and two nights in a hotel drinking alcohol and using cocaine. He also arranged through appellant to sell two ounces of cocaine to her brother. Lema further testified that in September 1 appellant requested that he mail cocaine to boyfriend in Phoenix, and that appellant ad ted that she had been using cocaine that n and that her boyfriend was a cocaine dealer. Lema's opinion, appellant was addicted to caine in spite of the treatment program, was "strung out and wanted to get more more all the time."

abused that discretion by acting unreasonably. *Christenson v. Jewkes*, 761 P.2d 1375, 1377 (Utah 1988); *see also Patton v. Evans*, 92 Utah 524, 69 P.2d 969, 971 (Utah 1937).

[17] In the present case, the judge had already continued the trial at appellant's request on one other occasion so that her new counsel could prepare the case. Further, prosecution of the case had been substantially delayed by appellant's dilatory conduct in failing to agree on expert witnesses and in failing to retain new counsel in a timely manner. The trial judge had made it clear to the parties on several occasions that he considered time to be of the essence, and that S.'s best interests required the resolution of the custody dispute in as short a time as possible. Under these circumstances, we do not find that the trial judge acted unreasonably in refusing to grant appellant another continuance to prepare for trial. We find this and appellant's remaining issues to be without merit.

AWARD OF COSTS

[18, 19] Respondent asserts that, as the prevailing party, he should have been awarded costs totaling $803.70 for filing fees, witness fees, service fees, and reporter fees pursuant to Utah R.Civ.P. 54(d), which provides, in part, that "[e]xcept when express provision therefor is made either in a statute of this state or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs." This statute leaves the question of costs "somewhat in the discretion of the courts." *Hull v. Goodman*, 4 Utah 2d 163, 290 P.2d 245, 247 (1955). Further, in modification of divorce decrees pursuant to the continuing jurisdiction of the trial court set forth in Utah Code Ann. § 30-3-5 (1984), the question of the ability or inability of a party to pay costs in defending the matter is a factual matter which lies in the discretion of the trial court. *Anderson v. Anderson*, 13 Utah 2d 36, 368 P.2d 264, 266 (1962). There was substantial evidence set forth in the record as to appellant's precarious financial circumstances as compared to respondent's relatively prosperous situation to justify the trial court's refusal to award costs to respondent.

We affirm the trial court on these remaining issues and find that its failure to bifurcate the hearing was not reversible error. We remand, however, for adequate findings regarding the stability and continuity of appellant's custodial relationship with S. and S.'s best interests.

DAVIDSON and ORME, JJ., concur.

Stanley C. MANN, Plaintiff and Appellant,

v.

H. Wayne WADSWORTH, Watkiss, & Campbell, and Does 1-10, Defendants and Respondents.

No. 870211-CA.

Court of Appeals of Utah.

June 20, 1989.

Former defendant in conspiracy action brought action against attorney and attorney's law firm, alleging malicious prosecution. The District Court, Third District, Salt Lake County, John A. Rokich, J., entered summary judgment of dismissal in favor of firm and, on jury verdict, entered judgment in favor of attorney. Plaintiff appealed. The Court of Appeals, J. Robert Bullock, Senior Judge, held that: (1) sufficient factual basis for a disqualifying trial judge was lacking; (2) trial court erroneously applied doctrine of respondeat superior in dismissing firm; but (3) dismissal was harmless error.

Affirmed.

1. Judges ⇐51(3)

Sufficient factual basis for disqualifying judge was lacking absent specification of nature and time of judge's averred prior relationship with defendant law firm; motion seeking disqualification alleged only that judge was once "of counsel" to firm.

2. Malicious Prosecution ⇐42

Vicarious liability of law firm for acts of its attorney, under doctrine of respondeat superior, did not depend on finding of express authorization for attorney's acts and, accordingly, trial court should not have dismissed firm in malicious prosecution action on grounds that attorney had not been authorized to commit act of malicious prosecution and that, therefore, acts complained of were outside scope of attorney's employment.

3. Appeal and Error ⇐1062.2

Trial court's erroneous failure to allow jury to determine whether attorney alleged to have engaged in malicious prosecution was acting within scope of his employment, so as to impose liability on attorney's employer under doctrine of respondeat superior, was harmless in light of jury's finding that attorney was not liable; employer's liability under respondeat superior was vicarious and did not exist apart from attorney's liability.

4. Appeal and Error ⇐499(4)

Appellate court would not consider correctness of instruction for first time on appeal absent specific objection on record or compelling reason to do so.

5. Appeal and Error ⇐199, 499(1)

Appellate court was not in position to consider alleged deficiencies in discovery where such deficiencies were not called to attention of trial court or made part of record.

Stanley C. Mann, Salt Lake City, pro se.

Ray R. Christensen, Gainer M
lig, Salt Lake City, for defendan
spondents.

Before BULLOCK,[1] GREENW
and NEWEY,[2] JJ.

J. ROBERT BULLOCK, Judg

Plaintiff Stanley C. Mann appe
judgment on a verdict dismissing
for malicious prosecution again
dant H. Wayne Wadsworth, an
summary judgment of dismissal
defendant Watkiss & Campbell.
firm.

The events leading to Mann's
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adopted minor child, David
David's adoptive parents were
and he was placed in the custo
adoptive mother, Mann's niece,
leaving a will designating Mann
wife guardians of David. There
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David's guardians. However,
adoptive father, Mark Wheeler, r
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award of the child's custody to hir
an initial temporary award of cus
mediately following the death of t
adoptive mother, permanent cust
awarded to the child's adoptive
Mark Wheeler, and his wife Sylv

Shortly after the initial hearing
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California. Though critically inju
survived, but was unable to ider
assailant. His present wife, Sylvi
was an eyewitness to the shooting,
also unable to consciously identify
sailant. However, in a hypnotic i
conducted by police, she identified
being at the scene of the shoot
leaving in the getaway car with t
man.

1. J. Robert Bullock, Senior Judge, sitting by special appointment pursuant to Utah Code Ann. § 78-3-24(1)(j) (1987).

2. Robert L. Newey, Senior Judge, sittin
cial appointment pursuant to Utah C
§ 78-3-24(1)(j) (1987).