IN THE UTAH COURT OF APPEALS

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Lonnie Paulos and Advanced Orthopedics & Sports Medicine, LLC, Plaintiffs and Appellants, v. All My Sons Moving and Storage, S&B Storage, John Siddoway, and John Does 1-10, Defendants and Appellees.	MEMORANDUM DECISION (Not For Official Publication) Case No. 20080196-CA F I L E D (December 18, 2008) 2008 UT App 462

Third District, Salt Lake Department, 060903698
The Honorable Stephen L. Henriod

Attorneys: Richard S. Nemelka and Stephen R. Nemelka, Salt Lake City, for Appellants
Stephen D. Spencer and Nathan Whittaker, Murray, for Appellee All My Sons Moving and Storage
Randy S. Ludlow, Salt Lake City, for Appellees S&B Storage and John Siddoway

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Before Judges Thorne, Davis, and Orme.

DAVIS, Judge:

Plaintiffs Lonnie Paulos and Advanced Orthopedics & Sports Medicine, LLC (Paulos) argue that the trial court abused its discretion in dismissing this case with prejudice after Paulos's attorney, Richard S. Nemelka, failed to appear on the first day of the scheduled bench trial. Defendants All My Sons Moving and Storage, S&B Storage, and John Siddoway argue that dismissal was a proper exercise of the trial court's discretion.[1] We reverse and remand.

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1. Defendants initially argue that we do not have jurisdiction to hear this case due to an untimely appeal. The final orders in this case were issued January 8, 2008. See generally Promax Dev. Corp. v. Raile, 2000 UT 4, ¶ 15, 998 P.2d 254 ("[A] trial court must determine the amount of attorney fees awardable to a party before the judgment becomes final for the purposes of an appeal under Utah Rule of Appellate Procedure 3."). Three days later, Paulos filed a motion for a new trial, which tolls the time for appeal. See Hume v. Small Claims Court, 590 P.2d 309, 311 (Utah 1979). The district court denied that motion on February 21, 2008, and Paulos filed a notice of appeal on February 29, 2008. Thus, the appeal is timely and we have jurisdiction to hear it.

"It is well established that under Rule 41(b) of the Utah Rules of Civil Procedure, a trial court has the discretion to dismiss an action with prejudice for failure to prosecute without justifiable excuse." Rohan v. Boseman, 2002 UT App 109, ¶ 28, 46 P.3d 753 (footnote omitted); see also Utah R. Civ. P. 41(b) ("For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him."). Paulos did not meet his burden of giving a justifiable excuse for Mr. Nemelka's failure to appear. Mr. Nemelka was present when the trial date was rescheduled to start November 5, 2007, and he cannot rely on subsequent pleadings generated by him that simply perpetrated his mistake. Mr. Nemelka was also aware that there was a discrepancy between when he thought the trial would start and when opposing counsel thought the trial would start. This was sufficient to put Mr. Nemelka on notice and require some action on his part to directly confirm the correct date with the trial court. Thus, the trial court had discretion to dismiss the case under rule 41(b).

"However, the trial court's discretion 'must be balanced against' the priority of 'afford[ing] disputants an opportunity to be heard and to do justice between them.'" Rohan, 2002 UT App 109, ¶ 28 (alteration in original) (quoting Maxfield v. Rushton, 779 P.2d 237, 239 (Utah Ct. App. 1989)). To determine whether the trial court abused such discretion, we consider five factors:

> "(1) The conduct of both parties; (2) the opportunity each party has had to move the case forward; (3) what each of the parties has done to move the case forward; (4) what difficulty or prejudice may have been caused to the other side; and (5) most important, whether injustice may result from the dismissal."

Id. (quoting Maxfield, 779 P.2d at 239).

Defendants argue that the first three factors support dismissal because while Defendants were diligently moving the case forward to trial, including one of Defendants' attorneys forgoing a trip to avoid further postponing trial, Mr. Nemelka created several delays. These alleged delays include once changing the date of depositions due to a scheduling conflict; later scheduling a hearing to stop those depositions from occurring; failing to appear at the hearing on the contested depositions due to a scheduling conflict; delaying a response to a summary judgment motion based on the depositions; initially requesting a later trial date because of a conflict with his personal activities; and failing to appear on the first day of trial. The majority of these actions are familiar delays in litigation, and we are not convinced that these actions were

particularly egregious and show that Paulos "'had ample opportunity to litigate [his] case . . . but abused such opportunity.'" See id. ¶ 32 (quoting Hill v. Dickerson, 839 P.2d 309, 312 (Utah Ct. App. 1992)). Moreover, the trial court, which did not explain in its initial order why it chose the harsh sanction of dismissal with prejudice, only mentioned as dilatory actions that Mr. Nemelka did not appear on the first day of trial and that the trial had previously been rescheduled at his request. Indeed, although the later order denying Paulos's motion to set aside the dismissal was originally drafted by Defendants to characterize Mr. Nemelka's actions as "multiple delays and recklessness in conducting this litigation," the trial court edited the phrase to simply read "delays in conducting this litigation."

As to the fourth factor, Defendants claim that they would have been prejudiced by postponing trial because they would have needed to subpoena all of their witnesses again and prepare for trial a second time. Assuming that three days were required for the trial, this assertion is true. However, that prejudice could have been mitigated by holding the bench trial during the two scheduled days that Mr. Nemelka was prepared to attend, taking witnesses out of order if necessary, and continuing only one day of the trial to a later date if that proved necessary. And any monetary cost of such a solution could have been reclaimed through an appropriate award of attorney fees and costs. Defendants also argue that they would have suffered prejudice because there is a proceeding in Delaware involving one of Defendants and that proceeding "depends on the outcome in this case." But Defendants do no more than allege this as prejudice and do not explain how the existence of this separate proceeding would equate to suffering prejudice via a postponement in this case. It is therefore impossible for us to weigh this claim of prejudice.

The final and most important factor is the injustice that may result from dismissal. The injustice to Paulos here is particularly heavy, leaving him without his day in court and with no avenue of relief against Defendants. Thus, when combining the factors, considering the relatively routine nature of most of the complained of delays, the extent to which the prejudice to Defendants may have been cured by an appropriate award of attorney fees and costs, and the severe injustice to Paulos resulting from a dismissal, we conclude that the trial court abused its discretion in dismissing Paulos's case with prejudice. Thus, we reverse the dismissal and remand for further proceedings.

Paulos also contests the trial court's award of attorney fees. When a party fails to appear, the trial court may award attorney fees under its authority to control proceedings before it. See Utah Code Ann. § 78A-2-201 (Supp. 2008); Barnard v.

Wassermann, 855 P.2d 243, 249 (Utah 1993) ("[C]ourts of general jurisdiction . . . possess certain inherent power to impose monetary sanctions on attorneys who by their conduct thwart the court's scheduling and movement of cases through the court.").[2] Such an award, however, should only be the amount necessary "to compensate for the delay, inconvenience, and expense resulting from [the offending lawyer]'s behavior." Barnard, 855 P.2d at 248; see also Griffith v. Griffith, 1999 UT 78, ¶ 14, 985 P.2d 255. We see no authority for the trial court awarding attorney fees not limited to those incurred as a result of Mr. Nemelka's nonappearance.[3] For example, had the case gone to trial and Defendants prevailed, based upon the pleadings Defendants would not have been entitled to any attorney fees. Similarly, had we affirmed the trial court's dismissal with prejudice, there would be no attorney fees awardable as a result of the nonappearance; indeed, in that scenario, Defendants would have spent less money defending the suit than if Mr. Nemelka had appeared as scheduled. But because we reverse the dismissal of the case, Defendants will have to further defend the case and attorney fees may be awarded to compensate for those fees and costs resulting directly from Mr. Nemelka's nonappearance. These fees and costs should be calculated in light of the fact that trial was scheduled for the following two days, Mr. Nemelka was prepared to appear on those two days, and the monetary cost resulting from Mr. Nemelka's nonappearance could have been mitigated by holding trial those two days, resulting in lower attorney fees and costs than would have been incurred by cancelling the trial in its entirety. We therefore reverse the award of all attorney fees and costs, and we remand this matter to the trial court for an award of attorney

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2. We recognize that the trial court initially categorized its award of attorney fees as fees awarded because the matter was without merit. See generally Utah Code Ann. § 78B-5-825(1) (Supp. 2008) (providing for an award of attorney fees when action is without merit and not brought in good faith). However, the trial court later clarified that no one had alleged that Mr. Nemelka's nonappearance was in bad faith, that the court "ha[d] made no ruling that [Paulos]'s case is without merit," and that the fees were awarded pursuant to the trial court's authority to control the proceedings before it.

3. Defendants' attorneys initially requested only attorney fees "for having to get ready and be here today" and "for trial preparations . . . done in the last 48 hours."

fees and costs limited to those directly resulting from Mr. Nemelka's nonappearance on the first day of trial.[4]

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James Z. Davis, Judge

WE CONCUR:

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William A. Thorne Jr.,
Associate Presiding Judge

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Gregory K. Orme, Judge

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4. Defendants' cursory request for attorney fees based on Paulos's alleged inadequate briefing is denied.