IN THE UTAH COURT OF APPEALS

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James E. Sandmire and Heidi Sandmire, Cross-claim Plaintiffs and Appellees, v. John C. Putvin, Cross-claim Defendant and Appellant.	)	MEMORANDUM DECISION (Not For Official Publication) Case No. 20030098-CA F I L E D (March 16, 2006) 2006 UT App 100

Third District, Sandy Department, 010411194
The Honorable Denise P. Lindberg

Attorneys: John C. Putvin, Brigham Canyon, Appellant Pro Se
Michael W. Crippen, Salt Lake City, for Appellees

Before Judges Davis, Orme, and Thorne.

PER CURIAM:

John C. Putvin appeals certain orders entered by the trial court. Specifically, Putvin appeals an order denying a motion for continuance of a trial date and an order denying a motion for new trial pursuant to rule 59 of the Utah Rules of Civil Procedure. We affirm.

Rule 40(b) of the Utah Rules of Civil Procedure states, in relevant part: "Upon motion of a party, the court may in its discretion . . . postpone a trial or proceeding upon good cause shown." Utah R. Civ. P. 40(b). "'[T]rial courts have substantial discretion in deciding whether to grant continuances.'" Brown v. Glover, 2000 UT 89,¶43, 16 P.3d 540 (quoting Christenson v. Jewkes, 761 P.2d 1375, 1377 (Utah 1988)). "Their decision will not be overturned unless that discretion has been clearly abused." Id. (citing State v. Cabututan, 861 P.2d 408, 413 (Utah 1993)). An abuse of discretion may be found if a party has "'made timely objections, [has] given necessary notice, and has made a reasonable effort to have the trial date changed for good cause.'" Id. (quoting Griffiths v. Hammon, 560 P.2d 1375, 1376 (Utah 1977)).

Here, the trial date was scheduled months in advance and the parties were notified of the same. Although Putvin knew that he may have a conflict with another court date taking place at the same time, he made no motion for a continuance until just before trial, which motion was faxed to the trial court. Instead, Putvin sought and received orders from the trial court compelling the appearance of certain witnesses for trial and issued trial subpoenas just weeks or even days before the trial date. The trial court noted these and other facts, including that Putvin was present and participated in a pretrial conference when the trial date was set. Based on these facts, the trial court did not abuse its discretion when it denied Putvin's motion for a continuance. Cf. Miller Pontiac, Inc. v. Osborne, 622 P.2d 800, 802 (Utah 1981) (affirming denial of trial continuance requested on morning of trial where basis was counsel's purported inability to inform client of trial date).

We next address Putvin's argument that the trial court erred by denying his motion for a new trial.[1] Putvin moved for a new trial pursuant to rule 59 of the Utah Rules of Civil Procedure. See Utah R. Civ. P. 59(a). The trial court denied the motion because it concluded that Putvin had every chance to attend trial but voluntarily absented himself from the proceedings and that the underlying judgment was supported by the evidence. We review the trial court's decision to deny Putvin's motion for a new trial under an abuse of discretion standard. See Crookston v. Fire Ins. Exch., 817 P.2d 789, 804 (Utah 1991).

Rule 59 provides that a new trial may be granted for any of the following causes:

> (1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion by which either party was prevented from having a fair trial.
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> . . . .

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1. On December 2, 2002, Putvin simultaneously filed two motions with the trial court--a "motion for reconsideration" and a motion under Utah Rule of Civil Procedure 59 to "vacate judgment and for a new trial." Each motion requested in essence the same relief, though in different format. The trial court issued a single minute entry decision on December 31, which considered and denied each motion as though filed under rule 59. We refer herein to the minute entry decision as the order denying Putvin's motion for new trial.

> (3) Accident or surprise, which ordinary prudence could not have guarded against.
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> . . . .
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> (6) Insufficiency of the evidence to justify the verdict or other decision, or that it is against law.

Utah R. Civ. P. 59(a)(1), (3), (6).

Putvin has failed to show that the trial court abused its discretion in denying his motion for new trial under rule 59(a)(1) and 59(a)(3). Instead, Putvin simply reiterates his argument that a continuance should have been granted. As set forth in Anderson v. Bradley, 590 P.2d 339 (Utah 1979), "surprise as a ground for a new trial is only that which ordinary prudence could not have guarded against." Id. at 341. The trial court found that Putvin failed to show such prudence when he did not request a timely continuance despite prior knowledge of conflicting proceedings. See id. at 341-42 ("the 'surprise' claimed here may not be so categorized since it could have been easily guarded against by utilization of available discovery procedures."). Moreover, Putvin shows no "[i]rregularity in the proceedings." Utah R. Civ. P. 59(a)(1). Thus, the trial court did not abuse its discretion in denying Putvin's motion for new trial under rule 59(a)(1) and 59(a)(3).

Further, Putvin fails to show that the evidence was insufficient to justify the trial court's decision. See Utah R. Civ. P. 59(a)(6). "Where the trial court has denied a motion for a new trial [under rule 59(a)(6)], its decision will be sustained on appeal if there was an evidentiary basis for the [trial court's] decision." Child v. Gonda, 972 P.2d 425, 433 (Utah 1998) (quotations and citation omitted).

There is substantial evidence in the record to support the trial court's decision. Four witnesses testified at trial and twenty exhibits were received by the trial court. The witnesses were subject to cross-examination not only by counsel but by the trial judge as well. The evidence established at trial through the testimony and documents received is not so "completely lacking or so slight and unconvincing as to make the [decision] plainly unreasonable and unjust." Id. (quotations and citations omitted). Thus, we conclude the trial court did not err in denying Putvin's motion for a new trial under rule 59(a)(6).

Finally, to the extent Putvin's appeal advances different theories than raised below, we need not address them. See State v. Richins, 2004 UT App 36,¶8, 86 P.3d 759 ("As a general rule,

appellate courts will not consider an issue, including a constitutional argument, raised for the first time on appeal unless the trial court committed plain error or the case involves exceptional circumstances." (quotations and citation omitted)).

Accordingly, we affirm.

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James Z. Davis, Judge

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Gregory K. Orme, Judge

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William A. Thorne Jr., Judge