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**IN THE CIRCUIT COURT OF NEWTON COUNTY
STATE OF MISSOURI, AT NEOSHO**

Comment [MJH1]: Second edit by Michelle Hulett on 2/1/2010

ADAM DAVID HOOVER,)
)
 Plaintiff,)
)
 vs.) Case No. CV302-521CC
)
 BEN'S CLUB-EAST, INC.)
 and ACCENT SPORTS HOLDINGS, INC.,)
)
 Defendants.)

**PLAINTIFF'S SUGGESTIONS IN OPPOSITION TO DEFENDANT BEN'S
CLUB-EAST, INC.'S MOTION FOR CONTINUANCE.**

Comes now plaintiff, ADAM DAVID HOOVER ("Adam"), by and through his counsel of record and for his suggestions in opposition to defendant BEN'S Club-East, Inc.'s ("BEN'S") Motion for Continuance, states as follows:

Background

On May 7, 2005, Adam was riding his bike [\(See picture on page Error! Bookmark not defined.\)](#) across the campus of Missouri Southern University to deliver a paper to one of his professors. While riding over a speed bump, the front wheel of Adam's bike fell off, causing an immediate and catastrophic accident. Adam's face took the brunt of the crash. He suffered a permanent and serious closed head injury (a diffuse axonal injury). The injury has reduced Adam's level of function from that of a 4.0 grade point average (computer-science) student to the level of an average high school student. Adam's projected loss of earnings are between \$2.4 and \$2.8 million. This product liability/negligent assembly case was filed on July 7, 2006 (over three years ago). The Court set this matter for trial almost 12 months ago.¹ [At that time, all parties](#) agreed to the trial setting of January 10, 2010.

Comment [WK2]: Change data in this footer from 2008 to 2012. Completed by Michelle Hulett.

Defendants' history of delay and inactivity before attorney Blanchard's withdrawal.

¹See Exhibit 1, attached - Court's docket confirming case was set for trial on December 2, ~~2008~~[2012](#).

Through-out this case both defendants, BEN'S and ACCENT, have shown a pattern of delay and inactivity, including, but not limited to the following illustrative examples:

1. It took BEN'S 10 months to answer plaintiff's first set of written discovery.²
2. Attempts to take corporate representative depositions were met with objections, motions to quash and repeated requests for rescheduling.³
3. ACCENT's counsel has claimed not to have received materials via the regular U.S. mail including discovery requests and deposition notices, on one such occasion, even despite plaintiffs having a facsimile confirmation sheet showing that the documents were faxed, as well as mailed. In light of the persistent mail difficulties, on a few occasions plaintiff resorted to sending important documentation (a prejudgment interest demand and a warning letter that absent resolution of ACCENT's unacceptable discovery conduct plaintiff would file a motion for default) via certified mail. Neither item was deliverable to the office of ACCENT's California lawyer; neither item was picked-up and both were returned.⁴
4. ACCENT's attorney only corresponds via email, including service of discovery responses, many of which have never been signed. This practice is unauthorized by any Missouri Rule of Civil Procedure.
5. Almost without exception every deposition scheduled in the case has been met with scheduling resistance from ACCENT's California lawyer, beyond that normally expected for a busy law practice.

Attorney Blanchard's withdrawal.

In an apparent about-turn from the prevailing attitude of disinterest in defending the case, on Saturday, October 8, 2009 counsel for BEN'S called plaintiff's attorneys. Attorney Blanchard explained both he and ACCENT's California counsel had discussed the issue, and that both thought this case should be mediated. Plaintiff agreed, and as requested, wrote to defense counsel to confirm the same. Some two weeks later, after hearing nothing further, attorney Blanchard

²See Exhibit 2, attached - discovery was filed in July 2006 and answered in May 2007.

³See Exhibit 3, attached

⁴See Exhibit 4, attached - certified mail packages returned as never collected.

filed his motion to withdraw. Since attorney Blanchard filed his motion to withdraw over a month ago, ACCENT's California counsel has unilaterally refused to do anything on the case.⁵

In response to attorney Blanchard's motion to withdraw, BEN'S has retained the law firm of Brown and James to represent it in this case. The first (and only) thing Brown and James has done is to file a motion for continuance. Neither defendant can justify why Adam should lose the trial setting that all parties agreed to, almost one year ago.

In light of the defendants' conduct in this case, the claim of insufficient time to prepare for trial because of attorney Blanchard's withdrawal does not justify a continuance.

In the matter of granting continuances, tremendous discretion is vested in the trial court and reversible error based upon the denial of the continuance is exceptional. *Shelton v. Missouri Baptist Foundation*, 573 S.W.2d 121, 124 (Mo.App.1978), *Foster v. Foster*, 149 S.W.3d 575 (Mo.App. 2004), Mo.R.Civ.P. 65.03. The trial court is vested with broad discretion in controlling its docket, the progress of litigation, and the grant or refusal of a continuance; the decision of the trial court will not be set aside absent a showing of arbitrary or capricious exercise of its discretion. *Sotirescu v. Sotirescu*, 52 S.W.3d 1 (Mo.App.2001). The denial of a request for a continuance is seldom reversible error. *In re P.D.*, 144 S.W.3d 907 (Mo.App.2004).

The fact that an attorney withdraws from a case does not give a party a right to a continuance. See *Moore Enterprises, Inc. v. Franklin Newspapers, Inc.*, 716 S.W.2d 907 (Mo.App.1986) (holding that an attorney's withdrawal the morning of trial did not necessitate a continuance, particularly in light of the defendant's failure to file the Rule 65.03 affidavit); and *Scott v. LeClercq*, 136 S.W.3d 183 (Mo.App.2004) (confirming that even where new counsel is brought into the case the same day as trial is scheduled to begin, a continuance is not required). In the case of *Chapman v. St.Louis County Bank*, 649 S.W.2d 920, 924 (Mo.App.1983) the fact that counsel withdrew four weeks before trial was held to have given the appellant adequate time to prepare for trial, with or without new counsel.

The conduct of the party requesting relief from the court can also effect whether or not a

⁵ See Exhibit 9, attached

continuance is warranted. *Bolander v. City of Green City*, 35 S.W.3d 432 (Mo.App.2000). Particularly when a party has shown a history of delay and a recalcitrant attitude, a motion for continuance should be denied. *Scott v. LeClercq*, 136 S.W.3d 183, 193 (Mo.App.2004). See also *Arnett v. Keith*, 582 S.W.2d 363, 365 (Mo.App.1979) (holding, despite the withdrawal of defendant's counsel nine days before trial, the trial court did not abuse its judicial discretion in requiring the defendant to proceed with trial as scheduled, where the record indicated a pattern of inattention and lack of interest on the part of the defendant); and *Harms v. Simkin*, 322 S.W.2d 930, 933 (Mo.App.1959) (holding a defendant who employs a series of lawyers without making satisfactory financial arrangements for payment of their fees, and as a result of which is never prepared for trial, cannot depend upon courts to postpone the case on the ground that his counsel has withdrawn and, by such inattention, a defendant may not be permitted to impede the orderly administration of justice and then complain that the court has acted arbitrarily in holding him to consequences of his own neglect).

In this case, defendants' conduct over the course of three years cannot justify Adam losing his trial setting. Whether it was BEN'S refusal to pay attorney Blanchard, or its refusal to produce materials he knew to be discoverable, or for refusal to go to mediation, one thing is certain; it is the defendants' conduct in failing to defend this case for three years and BEN'S conduct that forced attorney Blanchard to withdraw that has created the defendants' present predicament. The defendants come to the Court seeking relief from a situation their own conduct has created and they should not be permitted relief. In addition, contrary to Mo.R.Civ. P. 65.03, BEN'S has failed to file an affidavit supporting the motion for a continuance. A failure to do so is, in and of itself, sufficient basis to uphold a trial court's denial of a motion for continuance. *Scott v. LeClercq*, 136 S.W.3d 183 (Mo.App.2004).⁶

The claim of scheduling conflict does not justify a continuance.

⁶See also *AutoACCENTe Leasing Corp. v. Westerhold*, 945 S.W.2d 600 (Mo.App.1997) (confirming there can be no abuse of discretion in denying a request for a continuance where the moving party failed to comply with the affidavit requirements of the rule).

The mere fact that a party's counsel has been engaged elsewhere does not compel a continuance. *Commerce Bank of Mexico, N.A. v. Davidson*, 667 S.W.2d 474 (Mo.App.1984). In this case, the scheduling conflict is, at best, tenuous. The conflicting trial defendant's Motion for Continuance references a case as being set in Greene County. That case is a one day bench trial, listed number five, as back up to four jury trials (the "bench trial").⁷ The opposing lawyer for the bench trial has informed Adam's counsel, by letter, that it is extremely unlikely the bench trial will proceed as scheduled, even assuming the four jury trials ahead of it, resolve.⁸ In any event, even if the bench trial was to materialize into more than a potential conflict, Adam's case was set seven months before it and should take priority.⁹ If BEN'S still felt compelled to stay with the firm of Brown and James, despite attorney James' bench trial, rather than hiring any one of the other multiple defense firms in Southwest Missouri, BEN'S could use one of the hundred other lawyers listed on Brown and James' website.¹⁰ The schedule conflict is not sufficient to warrant a continuance of this important case.

Conclusion

The Motion for Continuance amounts to nothing more than defendants' request for this Court to bail them out of an awkward situation that they, themselves, have created. Under these circumstances Adam should be permitted to keep his trial setting.

THE ODOM LAW FIRM, P.C.

⁷See Exhibit 10, attached - the Court's trial calendar showing four jury trials are set ahead of attorney James' one day bench trial.

⁸See Exhibit 11, attached - a letter from opposing counsel in attorney James' bench trial, confirming the likelihood of the case being moved based upon attorney James representations of intending on asking for a jury trial.

⁹See Exhibit 12, attached - showing the bench trial was set for trial seven months after Adam's case was scheduled.

¹⁰See Exhibit 13, attached - the listing from Brown and James website showing one hundred other lawyers listed with the firm, in addition to attorney James.



Figure 1 Assembled Bicycle

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