

1986

# Gayla Hatch Anderson v. Michael Hall Hatch : Reply Brief

Utah Court of Appeals

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**BRIEF**

DOCKET NO. 860225

IN THE SUPREME COURT OF THE STATE OF UTAH

GAYLA HATCH ANDERSON, )

Plaintiff/Respondent, )

vs. )

MICHAEL HALL HATCH )

Defendant/Appellant. )

Case No. 860225

*Category 136*

REPLY BRIEF OF APPELLANT

APPEAL FROM A JUDGMENT OF THE THIRD JUDICIAL  
DISTRICT COURT IN AND FOR SALT LAKE COUNTY  
HONORABLE DAVID B. DEE, JUDGE

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COURT OF APPEALS

GAYLA HATCH ANDERSON, )  
                   Plaintiff/Respondent, )  
                   vs. )                   Case No. 860225  
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IN THE SUPREME COURT OF THE STATE OF UTAH

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GAYLA HATCH ANDERSON,	)	
Plaintiff/Respondent,	)	
vs.	)	REPLY BRIEF OF APPELLANT
MICHAEL HALL HATCH	)	Case No. 860225
Defendant/Appellant.	)	

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REPLY TO RESPONDENT'S STATEMENT OF FACTS

At the outset of this Reply Brief defendant/appellant deems it necessary to reply to certain assertions made in the plaintiff/respondent's Statement of Facts. At page 2 thereof the plaintiff asserts, "Mrs. Hatch's attorney drafted a Stipulation which reflected the parties agreement. (R.58). It is included as Exhibit 'A' in the Addendum to this Brief." The Exhibit A shown in the Addendum has no signatures on it, was never filed in the action nor incorporated in the Findings, Conclusions or Decree, and is nothing more than an initial draft which was prepared by plaintiff's counsel and which was rejected by the defendant. Plaintiff's statement that that stipulation reflects the parties' "agreement" is totally unjustified.

Further, it should be noted that plaintiff's reference to page 58 of the record only refers to plaintiff's Affidavit.

and that Affidavit doesn't even claim that the said unsigned Stipulation is the agreement of the parties. It only asserts that the unsigned Stipulation sets forth plaintiff's "intent."

It is true that plaintiff (in her Verified Motion to Compel, R.57-65) asserts that the unsigned Stipulation sets forth what she desired, and she even states in paragraph 5 thereof (R.58):

"The plaintiff, on the instructions of plaintiff's counsel, Nolan J. Olsen, signed a stipulation which was eventually filed and entered with this court, and the plaintiff was never notified that said stipulation contained language which varied from her above-described intent and understanding as to the disposition of the parties' marital residence."

Any claim that the unsigned Stipulation sets forth the agreement of the parties is controverted by the fact that it wasn't even used and by the affidavit of the defendant (R.70-71) and of defendant's counsel, Leland K. Wimmer (R.72-73). If the plaintiff is stating that her attorney, Nolan J. Olsen, did not carry out her instructions, then that is a matter between her and her attorney, but does not affect the validity of the actual Stipulation signed and filed in this action by Mr. Olsen and plaintiff, and in any event such a claim would seem to be rebutted by the fact that she signed the Stipulation along with her attorney and thereby approved the settlement as set forth in the signed Stipulation. Plaintiff does not claim that there was any fraud or trickery on the part of defendant or his attorney, and of course there was none.

We believe that the assertion of plaintiff that the signed Stipulation didn't set forth her "intent" lacks persuasion for several other reasons. First of all, the plaintiff as noted signed the document, and we can assume that she read it and had it explained to her by her counsel. Mr. Nolan Olsen is a reputable attorney of many years experience, and no doubt represented his clients' interests fully and properly. Nowhere does plaintiff assert that she did not read the document or that she did not understand it, although she states in paragraph 4 that she "never waived from her instructions to her previous counsel." The uncontroverted fact is that she signed a document at variance with those supposed instructions and thereby clearly "waivered" from any such earlier instructions to her counsel. Furthermore, we feel it is significant that there is no affidavit of Nolan J. Olsen on file in this matter, which one would suppose plaintiff would have obtained if there had been any error in the Stipulation as signed. One can only suppose that Nolan J. Olsen fully intended to enter into the actual Stipulation which was filed in this action, and that he did so with the assent of his client, who approved the Stipulation by placing her signature thereon. There would seem to be no question that Mr. Olsen intended to enter into the very Stipulation which was entered into and under clear authority plaintiff is bound by the actions taken by her counsel (and herself) who, it should be noted, actually drafted the



Findings, Conclusions and Decree which incorporated the Stipulation. It is inconceivable that Mr. Olsen could incorporate the Stipulation in the Findings, Conclusions and Decree and not know what it said and be confident that it incorporated his client's agreement.

It should further be noted that at page 3 of the Statement of Facts of the plaintiff, in the final paragraph thereof, plaintiff refers to "Mrs. Hatch's retyped stipulation." We are unaware of any such document. Such a document does not appear in the record, nor is any such document attached to the Addendum in any Brief filed herein. It is an instrument unknown to the defendant and is apparently a non-existent document.

Further, we desire to note that there are indeed a number of differences between the unsigned Stipulation and the Stipulation which was actually signed by the parties and filed in this action. It is interesting to note that the additional changes are substantial, were obviously negotiated by the parties, and no objection to any of the same is now raised by plaintiff, and plaintiff thereby acknowledges that considerable negotiations took place subsequent to the drafting of the unsigned Stipulation and prior to the execution of the Stipulation which was actually signed by the parties and accepted by the court. They are reflected in the following changes:

Unsigned Stipulation  
(R.66,67)

\$150 per child support money

Defendant maintain medical  
insurance and life insurance

Defendant pay \$350 additional  
attorney's fees

No reference to marriage  
counseling

Stipulation signed  
and filed (R.15-17)

\$100 per child support money

Defendant maintain health  
and life insurance only so  
long as available to him  
at his employment

Each party assume own  
attorney's fees and costs

Plaintiff agrees to continue  
existing marriage counseling

It should further be noted that the plaintiff claims in her Verified Motion (R.57-65) that the provisions of the unsigned Stipulation were to have been incorporated in the signed Stipulation and would accordingly give her the first option to acquire the property (1) when she remarried, or (2) when the youngest child reached majority, or (3) when she desired to sell the home. Nevertheless, in paragraph 12 of her Affidavit (R.60) plaintiff asserts that she "advised the defendant of such listings." If the plaintiff had the first option to buy out the defendant when she desired to sell the property, then to be consistent, she should have notified the defendant that she was selling the property and tendered him his money. Plaintiff didn't do this and doesn't assert that she did. Instead of that, she alleges that she "advised the defendant of such listings" as though that somehow resulted in a waiver on his part. If the plaintiff had the first option, which was triggered when she elected to sell the property, and she did not tender the money to

the defendant, then one can safely assume that at the very least she waived her first option. Even under plaintiff's version this would give the defendant the next option to acquire the property. Notwithstanding that, the plaintiff went to great lengths in paragraphs 11 through 17 to show how defendant waived his first option. That would seem to be inconsistent with plaintiff's version that she had the first option. Of course defendant disputes that he was ever given notice of the aforesaid listings or of plaintiff's remarriage and, as stated in his Affidavit, he at no time waived, nor intended to waive, his first option, which the Decree of Divorce clearly gave him. Commissioner Peuler found in her first recommendation (R.51) that there was no evidence that defendant "failed to exercise his option" and that recommendation was not timely objected to by plaintiff as required by Rule 8 of Third District Local Rules, copy of which is included in the Addendum to appellant's initial Brief herein. Even if plaintiff had timely objected to the Commissioner's recommendation, the issue of "waiver" of defendant's first option was never thereafter tried, and no finding of fact made thereon one way or the other by Judge Dee, nor indeed could there have been as no testimony was ever permitted in this action.

At page 7 of plaintiff's Statement of Facts, it is asserted that Mr. Hatch at no time offered to purchase Mrs. Hatch's equity. That is inaccurate. Defendant was not aware of the existence of the contingencies which permitted him to exercise

his option until the Order to Show Cause was commenced by the plaintiff. In his Answer to that Order to Show Cause (R.52-53) defendant clearly stated his willingness to acquire plaintiff's equity in accordance with the provisions of the Decree of Divorce.

Further, it should be noted that even if the unexecuted Stipulation were binding on the parties, the provision therein which would have allowed plaintiff to exercise her "first option to acquire the property" was triggered when she desired to "sell" the home. Plaintiff seeks to acquire the home, not sell it.

At page 8 of the Statement of Facts, with reference to private discussions between Commissioner Peuler and Mr. Pignanelli, the plaintiff asserts that:

"A letter advising Mr. Hatch's counsel of these discussions was sent to him in August of 1985. (See Exhibit 'D' included in the Addendum to this Brief)."

That statement is entirely erroneous. Not only were the conversations between defendant's counsel and Commissioner Peuler irregular without counsel for defendant being present, but the said Exhibit "D" is not dated until September 13, 1985, and was received by counsel for the defendant some time thereafter. Counsel for the defendant was not aware that Mr. Pignanelli had entered the case until receipt of that letter sometime after September 13, 1985.

At page 9 of the plaintiff's Statement of Facts plaintiff asserts that the Order of October 9, 1985, was not submitted to Mr. Pignanelli. That is true, but the Order was

served upon Mrs. Hatch in August 1985. (R.80) Also, Notice requiring plaintiff to Appear in Person or Obtain New Counsel was served upon plaintiff in August before counsel for the defendant knew that Mr. Pignanelli had appeared in the action for plaintiff. (R.56) As Mr. Wimmer did not know that plaintiff had retained Mr. Pignanelli, it was proper for him to serve plaintiff herself. Respondent's Brief asserts that the Order of October 9, 1985, was not sent to Mr. Pignanelli by defendant's counsel, but said Brief does not claim that Mrs. Hatch did not give Mr. Pignanelli her copy of the proposed Order, and Mr. Pignanelli in fact received a copy of the Commissioner's recommendation (R.51).

At the bottom of page 9 plaintiff asserts that:

"at the November 6, 1985, hearing, counsel for both parties presented argument to the court and submitted documents and Affidavits in support of their respective positions."

That did not happen if plaintiff intends by that to imply that new information was given to the Court. It is true that counsel for defendant furnished some documents from his file to the Court as the Court did not even have the original file present, but there were no documents submitted at that time which were not already in the file. Furthermore, there was no argument on the merits of the case, but only with regard to the preliminary matter of whether or not the Court should give independent consideration to the case or merely adopt the recommendations of Commissioner Peuler as a matter of course. Counsel were never permitted to argue the merits of the case.

It should be noted that there is no minute entry in the file showing a hearing (or anything else for that matter) before Judge Dee on November 6, 1985, nor is there a memorandum decision, nor any other indication that a hearing was held on November 6, 1985, except the reference thereto in the Order of March 19, 1986, (R.93-95), which Order in its entirety is the subject of this appeal, and with respect to which defendant asserts that there was no hearing held on that date as the Court did not have the file, did not have a clerk and did not have a reporter. There should have been a minute entry indicating that the matter (which was set for hearing that day) was continued without date, but no such minute entry has ever been prepared, and that apparently for the reason that there was no clerk present to make such a notation.

Finally, at page 10 of plaintiff's Statement of Facts, plaintiff states that after the Court later indicated that he was going to affirm Commissioner Peuler's ruling, her counsel prepared and submitted proposed Findings of Fact, Conclusions of Law and an Order. It is correctly stated that defendant's counsel objected to the proposed Findings and Conclusions, but plaintiff fails to state that defendant also objected to the Order. (R.90-91) In those objections (R.90-91) defendant pointed out to the Court that the Court had already ruled on this matter and noted that no evidentiary hearing had been permitted and that therefore no Findings of Fact or Conclusions of Law or Order could be made. Plaintiff also correctly states at page 10 of her Brief that:

"Judge Dee ruled that a Finding of Fact and Conclusion of Law were not necessary in connection with the respective motions and that he would sign Mr. Pignanelli's proposed Order which reflected his affirmation of Commissioner Peuler's recommendation."

That is exactly what Judge Dee did, but he did not, and could not, rule on disputed issues of fact as raised by the respective Affidavits of the parties without taking evidence. Indeed, Judge Dee appears to have attempted to circumvent the need for an evidentiary hearing by declaring in the Order of March 19, 1986, what the "intent of the Decree of Divorce" was (R.94). Since the language of the Decree is clear, Judge Dee erred in rewriting that language and, even if the language were deemed to be ambiguous, then Judge Dee erred in assuming that he is not required to conduct an evidentiary hearing to determine "intent."

Plaintiff also correctly states in the concluding paragraph of her Statement of Facts at page 10 of her Brief that:

"no transcript of any of the above hearings was made, nor has appellant presented a statement of evidence or proceedings . . . "

The reason for that is that there was no testimony taken, no one was sworn, and no hearing took place on November 6, 1985. Therefore, there is no transcript, and no statement of the evidence or proceedings is possible because there is none.

#### ARGUMENT

Defendant will now respond to the argument of the plaintiff, and will treat the subject matter of each of the

plaintiff's points in the same order as contained in plaintiff/respondent's brief.

POINT I. APPELLANT IS NOT REQUIRED TO PROVIDE A TRANSCRIPT IN ORDER TO OBTAIN REVERSAL OF THE LOWER COURT'S DECISION.

Plaintiff asserts in her Point I that because appellant did not provide a transcript, the trial court's decision must be affirmed. This assertion is clearly erroneous. Plaintiff asserts that on November 6, 1985, the Court requested the parties to state their respective positions, and that each submitted copies of motions filed and affidavits and supporting documents, and that no objection to this procedure was made by the appellants, nor did appellant request that the proceedings be reported. The Court did not request the parties to state their respective positions on the merits of the case, nor for that matter on anything. It is true that each of the parties stated their position with respect to whether a hearing should be had or whether the Court could simply as a matter of course adopt the Commissioner's recommendation. There was, however, no argument on the merits of the case. It is true that counsel's copies of certain documents already in the file were handed to the judge because he did not even have the file, but those were not submitted in connection with a hearing, nor did the defendant understand that a hearing was being held.

It should be noted that counsel for the respondent does not dispute the fact that there was no clerk present, that there



was no court reporter present, and that the file was not present, and he does not deny that there is no minute entry and no transcript. We respectfully suggest that none of the normal indicia of a hearing are present in this action.

Under those circumstances the Court could not and did not conduct a hearing, and certainly no responsible judge would have attempted to do so. Indeed Rule 7(b)(3), Utah Rules of Civil Procedure, applies to such a situation and requires a continuance in such a case. The rule states:

" . . . When on the day fixed for the hearing of a motion or an order to show cause, the judge before whom such motion or order is to be heard is unable to hear the parties, the matter shall stand continued until the further order of the court, or it may be transferred by the court or judge to some other judge of the court for such hearing."

Thus, when Judge Dee was not able to hear the motion, it was continued automatically, even without being so ordered by the Court and without minute entry.

One is compelled to ask, "How does one protect oneself from a result such as this where counsel go into chambers to talk with the judge about preliminary matters, and the judge says he will not proceed further that day, but will get the file and review it?" Counsel for the respondent seemed to be saying that counsel for appellant had a duty to get a reporter into judge's chambers in order to record what the judge said. But the fallacy of this argument is that there is no obligation to request a court reporter for a non-hearing. It should be noted that even if

defendant had requested a court reporter and been denied by the judge, there is no way to prove such in the absence of a court reporter. If Judge Dee considered what happened on that day as a hearing, it would only be in the sense that he felt that he could adopt the recommendation of Commissioner Peuler as a matter of law, and as that matter was in a preliminary manner addressed by counsel, there might be some justification for saying that the matter of adopting the Commissioner's recommendation without a hearing on the merits was considered by the Court. If that position is taken, it is so clearly erroneous as to require very little argument on our part. It is clear that the judge must conduct some kind of a meaningful, independent hearing and is not permitted to adopt the recommendations of Commissioner Peuler in every single case as a matter of course and without a hearing on the merits. Otherwise, the whole procedure is ridiculous. Even Judge Dee did not pretend that there was an evidentiary hearing because when it was later called to his attention that there had been no evidentiary hearing, he declined to sign Findings of Fact or Conclusions of Law. So he apparently felt that he could adopt the Commissioner's recommendation as a matter of law.

Counsel did object to the Court's statement that it was his practice to affirm the Commissioner. The Court declined to proceed further and said that he would review the file, presumably to determine if an evidentiary hearing was necessary, and reschedule the case for hearing. In that event Judge Dee then no

doubt concluded (erroneously we feel) that he could affirm the Commissioner's recommendation without an evidentiary hearing as a matter of law.

We respectfully submit that the Court could perhaps have ruled as a matter of law that the Affidavit of the plaintiff did not state a cause of action. But we respectfully submit that the Court could not make the opposite determination without an evidentiary hearing as factual issues had to be resolved and evidence taken by reason of the opposing Affidavits filed by the parties. It is true that defendant has not submitted a transcript, but there was no hearing held to be recorded. There were no witnesses called; no one was sworn.

The cases cited by the plaintiff are totally inapplicable to this situation. It is grossly unfair for the plaintiff to contend that defendant was charged with a duty of providing the transcript of a non-existent hearing.

In Point I of her Brief plaintiff cites five Utah cases. These cases simply stand for the proposition that where there has been an evidentiary hearing in the lower court (which was the fact in each of those cases), that the Supreme Court is unable to, and therefore will not, canvass the facts unless a transcript of the evidence is furnished. One of the cases there cited by the plaintiff is Sawyers v. Sawyers, 558 P2d 607 (Utah, 1976) (See page 14 of plaintiff's brief.) Among other things from the Sawyers decision plaintiff cites the following:

"And, as under elementary principles of appellate review we ' . . . presume the findings of the court to have been supported by admissible competent, substantial evidence . . . ', we affirm."

That is no doubt the correct principle in cases where there has been evidence presented. In the instant case, however, there was, by plaintiff's own admission, no evidence presented; there was, by plaintiff's own admission, no testimony; no witnesses were called, and no one was sworn.

We respectfully submit that the reasoning of those cases is wholly inapplicable to this case where there has been no evidence presented and no findings made. This Court is not required to "presume" that there is "substantial evidence" when all parties admit that there was no evidence presented.

POINT II. THE TRIAL COURT IS NOT ENTITLED TO EXERCISE DISCRETION TO INTERPRET PARAGRAPH 5 OF THE DECREE OF DIVORCE AND CERTAINLY HAS NO DISCRETION TO REWRITE THAT PARAGRAPH.

In plaintiff's Point II plaintiff seems to be saying that the language of paragraph 5 is ambiguous, and therefore the Court has discretion to interpret it, and even if it is not ambiguous, it is unfair and therefore the court can modify the Decree anyway in its discretion. We respectfully submit that the trial court cannot indulge "discretion" in matters of interpretation. In interpreting the document the trial court is required to interpret it in accordance with its clear intent if that intent can be determined from the four corners of the document, and it certainly can be determined in this instance. The interpretation

of the document is an objective undertaking and is not a matter of "discretion" which is subjective in its nature.

Further, it should be noted that it is not the intention of the parties that is determinative in the matter of construction of a judgment or decree. The construction of a judgment calls for determining the intent of the Court that entered it. In 46 Am Jur 2d, Judgments, Section 73, it states:

"As a general rule, judgments are to be construed like other written instruments. The determinative factor is the intention of the court, as gathered not from an isolated part thereof, but from all parts of the judgment itself."

In the instant case the judge that entered the Decree had before him a written Stipulation, which he approved, and when he signed the Decree of Divorce he clearly intended to incorporate that very Stipulation in the Decree in the form in which it was filed in the action. There is no way the Court could have known any secret "intent" of the plaintiff, assuming that there was such. The Court intended the Decree to mean just what it says. To allow the Court to rewrite the Decree, as it has done, constitutes an unlawful and improper collateral attack on the Decree under the guise of "interpretation." See 46 Am Jur 2d, Judgments, Section 72.

Fairness of the Decree is not an issue here, but even if it were, it certainly cannot be said that the Stipulation as agreed to by the parties and adopted by the Court in the Findings, Conclusions and Decree and allowed to stand for ten years is

unfair. The parties negotiated the settlement of this action. Disposition of the house was only one aspect of the settlement and was negotiated and approved by the parties. Plaintiff was permitted to live in the home by paying a very modest mortgage payment, and that arrangement could not be said to be unfair.

The trial court did not make a finding or ruling that the Decree was unfair. The trial court's decision was based upon what it determined the "intent" of the Decree to be. Paragraph 1 of the Court's Order states: "That the intent of the Decree of Divorce entered in this court on November 21, 1975, as evidenced by the stipulation, is that the defendant is to receive the one-half share of his equity based upon the amount of equity existing at the time of the Decree." We respectfully submit that it is entirely impossible for the Court to determine that such was the intention of the Court from the four corners of the document. The document most clearly states the opposite.

Furthermore, the Affidavits of the respective parties were contradictory, and no evidence was taken by the Court from which it could have determined what the "intent" of the parties was aside from the clear language of the document even if such intent were relevant. Certainly the decision of the lower court cannot be supported on the basis of unfairness to the plaintiff. The Court can only modify a decree of divorce upon a material and permanent change of circumstances, and there has been no allegation or proof of any such change.

As stated in Land v. Land, 605 P2d 1248, at page 1251:

"Equity is not available to reinstate rights and privileges voluntarily contracted away because one has come to regret the bargain made. Accordingly, the law limits the continuing jurisdiction of the court where property settlement agreement has been incorporated into the decree, and the outright abrogation of the provisions of such agreement is only to be resorted to with great reluctance and for compelling reasons."

If this Court considers this matter one which might fall within the definition of "compelling reasons," then at the very least those compelling reasons should be explored in an evidentiary hearing. So far as known to appellant, this Court has not stated what would constitute "compelling reasons." However it would seem to require at the very least a canvassing of all of the facts and circumstances as they existed at the time of the Decree as well as any permanent, material change of circumstances during the ten years since the entry of the Decree.

We do not think that DeBry v. DeBry, 27 Ut 2d 337, 496 P2d 92 (1972), assists plaintiff. In that case the defendant (wife) signed a Stipulation without the assistance of counsel, and a Decree of Divorce was entered based upon the Stipulation. Some five weeks later (and while the Decree was still interlocutory, but presumably after the time for appeal had expired) the wife moved to vacate the Decree, set aside her default, and be permitted her to file her Answer and Counterclaim. After a hearing was held on the Motion to Vacate, the trial judge denied her requested relief. On appeal the Supreme Court seemed to feel that the Stipulation might have been improvidently entered into by

her (without counsel) and that the lower court should conduct a full hearing on the matter, and accordingly the Supreme Court vacated the Decree of Divorce and sent the case back for a full plenary hearing on all financial aspects of the case. That case therefore involved in effect a Rule 60(b) Motion to Vacate the Decree which the Supreme Court felt should have been granted, and accordingly reversed and remanded the matter for full hearing.

In this case plaintiff has never made a motion to vacate the Decree, and accordingly the Decree must stand and be interpreted according to the four corners thereof, which can be done without resort to extraneous matters. Furthermore, the action of the plaintiff in DeBry was taken within five weeks after the entry of the Decree, whereas in the instant case the plaintiff has permitted over ten years to elapse and certainly is guilty of laches. In this action plaintiff had counsel, whereas the wife had no attorney in DeBry. At the very least the DeBry case stands for the proposition that substantial modifying of a decree should not be undertaken without a full evidentiary hearing. That has never been afforded to defendant in the instant action.

POINT III(A). THE FAILURE TO SUBMIT A COPY OF THE PROPOSED ORDER OF OCTOBER 9, 1985, TO MR. PIGNANELLI DOES NOT PRECLUDE THE DEFENSE OF RES JUDICATA.

Point III(A) of the respondent's Brief appears to state that defendant was required to serve a copy of the proposed Order which was signed by Judge Dee on October 9, 1985, on Mr.



Pignanelli. It is true that Rule 2.9(b), Third District Local Rules, requires that copies of a proposed order be served upon opposing counsel before being presented to the court for signature. However, we respectfully submit that that rule only applies to attorneys who have made an appearance in the action and therefore are known to opposing counsel. In the instant case the hearing before Commissioner Peuler was conducted with Nolan J. Olsen appearing for the plaintiff. Mr. Olsen withdrew from the action on July 19, 1985, (R.50) and Commissioner Peuler's recommendation was made on August 23, 1985, (R.51). Thereafter Mr. Wimmer, counsel for defendant, served a Notice to Appoint Counsel or Represent Self (R.56) upon plaintiff, and also sent a copy of the proposed Order to the plaintiff herself (R.80). Both of those documents were served in August prior to defendant's counsel, Leland K. Wimmer, receiving the letter and notice from Mr. Pignanelli announcing his appearance in the action sometime subsequent to September 13, 1985. Accordingly, the proposed Order was properly served on plaintiff herself and was not required to be served upon Mr. Pignanelli.

Although plaintiff claims that the Order of October 9, 1985, is not final because a copy thereof was not served upon Mr. Pignanelli, it should be noted that Mr. Pignanelli has not disputed that he received a copy of Commissioner Peuler's recommendation dated "8-23-85" (R.76) and which indicates that it was sent to counsel on "8-26-85" and contains Mr. Pignanelli's

name. Defendant's attorney, Leland K. Wimmer, is blind and didn't read Mr. Pignanelli's name thereon, nor did his secretary read it to him, and Mr. Pignanelli's name thereon was not noticed until co-counsel discovered it there in connection with work on this appeal.

Rule 8 of the Third District Court Rules states that a party has only five days in which to object to a recommendation, and states in subparagraph (d) of said Rule 8:

"If no objection or request for further hearing is made within five (5) days, the party shall be deemed to have consented to entry of an order in conformance with the Commissioner's recommendation."

Therefore, even if the Court should feel that a copy of the Order should have been served upon Mr. Pignanelli, inasmuch as Mr. Pignanelli did not timely object to the recommendation, the plaintiff is "deemed to have consented to entry of an order" and therefore defendant is entitled to the Order of October 9, 1985, as a matter of law. Even if the proposed Order signed October 9, 1985, should have been served on Mr. Pignanelli, the Utah cases cited by plaintiff only stand at most for the proposition that such an Order is not final for purposes of appeal. If defendant is entitled to the entry of the Order under Rule 8, then such a judgment must logically be a bar to the Order of March 19, 1986. If the judgment of October 9, 1985, is not deemed final, that merely means that plaintiff can still appeal it, but it still stands as a bar to the later Order unless the plaintiff does appeal and this Court reverses.

Calfo v. D. C. Stewart Co., 717 P2d 697 (Utah, 1986), involved a situation where a summary judgment was entered, but Rule 2.9(b) was not complied with. Thereafter the trial court entered another order stating that:

"the summary judgment entered by the court on January 14, 1982 ... was properly signed and entered by the court on said date and is in full force and effect..."

The Supreme Court thus in effect held that the second order constituted a filing of the first order, thereby recognizing the first order as a valid order except that the appeal time ran from the entry of the second order.

It would therefore seem that the order of October 9, 1985, (even if Rule 2.9(b) had not been complied with) was valid for all purposes except to start the appeal time running, and certainly bars the Order of March 19, 1986.

It therefore appears to be inescapable that the judgment of October 9, 1985, has been duly entered, or at the very least defendant is entitled to have it entered under said Rule 8(d). We respectfully submit that such valid, existing judgment (or entitlement to judgment) cannot simply be ignored. Our Rules of Civil Procedure provide that a judgment can be amended or vacated in accordance with Rule 52(b), Rule 59 or Rule 60. None of those rules have been called upon by plaintiff to vacate or amend the Order of October 9, 1985, and it does not appear that any of the provisions of said rules are applicable to this case. The

judgment of October 9, 1985, has thus not been amended or vacated in accordance with Rule 52(b), Rule 59 or Rule 60, nor has the judgment of March 19, 1986, been entered pursuant to application of said rules, and the said March 19 judgment is therefore void. In Nunley v. Stan Katz Real Estate Inc., 15 Utah 2d 126, 388 P2d 798 (1964), this Court held that a second judgment, not having been entered in compliance with Rule 52(b) or Rule 59(b), was void. We believe the same rule to be applicable in the instant case.

POINT III(B). DEFENDANT WAS NOT REQUIRED TO PLEAD RES JUDICATA AS A DEFENSE TO PLAINTIFF'S VERIFIED MOTION TO COMPEL.

Plaintiff asserts that defendant was required to raise in writing the defense of res judicata to the Verified Motion to Compel Defendant to Execute Quit-claim Deed and Requesting Clarification of Decree. We respectfully submit that that is not the law. Rule 8(c), URCP, requires res judicata to be raised as an affirmative defense in an answer to a complaint or counterclaim or reply to counterclaim, but does not require it to be raised in writing in response to a motion. A motion is not a pleading within the meaning of Rule 7(a), URCP. The Rules of Civil Procedure nowhere require the Rule 8(c) affirmative defenses to be raised in writing responding to motions, nor do they require a written answer or reply to a motion at all. The matter would have been raised at the hearing before Judge Dee on November 6, 1985,

if there had been a hearing. However no hearing was held on that date. The response of the defendant to the said Verified Motion was by Affidavit of the defendant (R. 70, 71) and of his attorney (R.72, 73), both of which were served on September 27, 1985, and accordingly before the entry of the aforesaid Order of October 9, and therefore the fact of the entry thereof could not be included in said Affidavits. The fact of the entry of the said Order of October 9, 1985, as a bar to further proceedings was raised before Judge Dee prior to entry of his judgment of March 19, 1986, in paragraph 2 of the Objections served and filed by the defendant on March 3, 1986. (R.90-91). Said Objections were heard by the Court on March 19, 1986. (See paragraph 10 of defendant's Brief.) The issue therefore was clearly raised in the lower court.

POINT IV. THE PLAINTIFF HAS REQUESTED IN EFFECT A  
MODIFICATION OF THE DECREE OF DIVORCE.

In her Point IV plaintiff denies that she is asking for modification of the Decree of Divorce. If the plaintiff is not requesting modification of the Decree of Divorce, then as hereinabove noted, the Court can only interpret the Decree of Divorce from the four corners thereof when the intention is clear from the document itself, which indisputably it is in the instant case; therefore, if counsel is not asking for modification of the Decree, there is no way that the courts at this time can consider the question of "intent" or "fairness" of the Decree of Divorce

or any other matter beyond the four corners of the document. We therefore submit that if the plaintiff is not asking for modification of the Decree, the courts are limited to interpreting the meaning of the Decree of Divorce from the four corners thereof, which clearly precludes the relief sought by the plaintiff in her Motion to Compel.

If, on the other hand, the plaintiff is seeking modification of the Decree, then we believe that she must likewise fail for the reasons set forth in Land v. Land, supra.

POINT V. PLAINTIFF IS ENTITLED TO NO ATTORNEY'S FEES OR COSTS IN CONNECTION WITH THIS APPEAL.

We believe that the decision of the lower court was erroneous, that defendant has been entitled to resist the same below and in this Court, and that accordingly no award of attorney's fees or costs to the plaintiff is justified.

#### CONCLUSION

For the foregoing reasons we believe that the Order of March 19, 1986, should be reversed and that the language of the Decree of Divorce be thus adjudged to be clear and unequivocal, and accordingly that defendant has the first option to acquire the property as set out in the Decree of Divorce, and that defendant has not waived that option.

If this Court shall not grant the foregoing relief, then the Order of March 19, 1986, should be vacated and the defendant

granted, at the very least, a full evidentiary hearing in the District Court.

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Attorneys for Defendant/Appellant

CERTIFICATE OF MAILING

I certify that two copies of the foregoing Reply Brief were mailed to Frank R. Pignanelli, attorney for plaintiff/respondent, at his address, 48 Post Office Place, 3rd Floor, Salt Lake City, Utah 84101, postage prepaid, this \_\_\_\_\_ day of January, 1987.

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Attorney for Defendant