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Utah Court of Appeals

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# IN THE UTAH COURT OF APPEALS

**450 South State Street, Salt Lake City, Utah 84114**

**WILLIAM KURT DOBSON**
**Plaintiff and Appellee**

**vs.**

**CINDY DELAUGHTER COOPER**
**Defendant and Appellant**

**Court of Appeals No. 20070525**

## APPELLANT'S REPLY BRIEF

---

**Appeal from a Summary Judgment rendered in the Third District Court**
**Salt Lake County**
**State of Utah**
**Civil No. 050922651**
**Honorable Robert P. Faust, District Court Judge**

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FILED
UTAH APPELLATE COURTS

MAY 20 2008

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## STATEMENT OF THE CASE

### (Introduction)

This appeal is from the granting of a Motion for Summary Judgment in favor of William Kurt Dobson ("Kurt") on his claim that Cindy Delaughter Cooper ("Cindy") had defrauded him into entering a settlement of a hotly contested divorce action whereby Kurt was to paid child support at a rate that was greater than the Utah Child Support Guidelines (formerly Utah Code Ann. §78-45-1 *et seq.*, currently codified as Utah Code Ann. § 78B-12-101 *et seq.*). In the granting of the Motion the lower court set aside the Decree of Divorce (except the dissolution of the marriage) and reopened the divorce action to reset child support, allocate debt and allocate assets.[1] The lower court concluded, on motion, that Cindy had defrauded Kurt. However, no damages were awarded inasmuch as the lower court in the Divorce Action could determine those damages, if any, and offset them against the property award, if necessary and available. A copy of the lower court's Memorandum Decision is attached as Addendum "A" to the Brief of Appellant.

After a fifteen-year marriage Cindy and Kurt, while both were represented by legal counsel, divorced in May 2004. In an independent action filed in 2005 Kurt claimed that Cindy had made a statement in December 2003 about her health that defrauded Kurt to enter a Settlement Agreement in late April 2004 and the entry of the Decree in May 2004. The Settlement Agreement and the Decree of Divorce specifically stated that the child support

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[1] Since there was evidence that the child support was to compensate for Kurt's lopsided property allocation the Decree of Divorce was set aside to determine the amount of child support that should be paid <u>and</u> the property distribution.

provided for was greater than what the standard guidelines for child support provided[2] and was further specifically set forth as unmodifiable except for health concerns of Kurt. Kurt and Cindy had agreed to the child support amount that would assure Cindy an amount of money to provide to Cindy a property settlement since Kurt obtained a lopsided allocation of the marital estate. Kurt brought the current action to set aside the child support provision only and to leave the remaining portions of the Decree of Divorce (specifically the lopsided property distribution) in force.

Kurt's claim was made under a fraud theory. However, there are genuine issues of material facts that should have precluded the lower court from granting a Motion for Summary Judgment and entering a judgment in favor of Kurt. The facts, taken in a light most favorable to Cindy, show that Kurt should not have been granted Summary Judgment *as a matter of law*.

## ARGUMENT

### POINT 1: THE LOWER COURT ERRED *AS A MATTER OF LAW* WHEN IT GRANTED SUMMARY JUDGMENT WHEN GENUINE ISSUES OF MATERIAL FACT REMAINED TO BE DECIDED.

Kurt moved for summary judgment. Cindy, by affidavit and deposition, provided the lower Court with verified specific, detailed and admissible statements of fact that demonstrated numerous genuine issues of material fact. The lower Court, without a trial or other evidentiary hearing, rendered summary judgment notwithstanding the numerous

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[2] The Utah child support guidelines (Utah Code Ann. §78-45-1 *et seq.*) Topped out at a combined family income of $10,100.00\month. Kurt's and Cindy's combined income was greater than that amount.

genuine issues of material fact. Consequently, by the application of basic rules of summary judgment procedure the lower court's entry of summary judgment was in error. Simply stated, summary judgment is precluded "when a material fact is genuinely controverted." *Heglar Ranch, Inc. v. Stillman*, 619 P.2d 1390, 1391 (Utah 1980).

Kurt urged the lower court (and now this Court) not to believe the verified facts that Cindy set forth in good faith. That urging was made at the wrong time. On a motion for summary judgment it is not the judge's role to choose which factual recitation to believe. To the contrary, the lower court has the explicit duty to "liberally construe the facts and view the evidence in a *light most favorable* to the party opposing the motion." *Oberhansly v. Sprouse*, 751 P.2d 1155, 1156 (Utah Ct. App. 1988) (emphasis added); *see also Hamblin v. City of Clearfield*, 795 P.2d 1133, 1135 (Utah 1990). In other words, the lower court has to believe, for the purposes of the motion for summary judgment, the facts presented by the party opposing the motion for summary judgment. In this case, Cindy was the party opposing the motion and the facts (*and all inferences from those facts*) that Cindy presented to the court below are to be embraced by that lower court as true in ruling upon a motion for summary judgment. Therefore, if there are conflicts in any material fact the motion for summary judgment is to be denied. In this case the lower court failed to deny a motion for summary judgment when a conflict in the testimony regarding material facts existed. The ultimate determination of fact when the facts are in dispute is the trier of fact (in this case a jury as requested by Kurt) *and* only after a trial — and never on a motion.

The *Heglar Ranch* court explained what it means to have a genuine issue of material

fact. *See* 619 P.2d at 1391. In *Heglar Ranch*, the appellant claimed that summary judgment was inappropriate because there were factual disputes regarding a defense of duress. *Id.* at 1390–91. The Utah Supreme Court held that there was no genuinely controverted material fact because even if the facts were taken as the appellant alleged the facts could not have given rise to duress. *Id.* at 1391–92. Thus to find that there is no genuine issue of material fact the court must find that even if the facts were as the appellant alleged there was no way to establish the theory of liability or defense. *See Id.* at 1391. In further explaining this standard the Utah Supreme Court explained that "[t]he issues of fact must be material to the applicable rule of law" *Norton v. Blackham*, 669 P.2d 857, 859 (Utah 1983).

If the facts are as Cindy alleges them to be, it is clear that there are genuine disputes regarding material facts that would have real application to the elements of fraud. The elements of a fraud claim are set forth in the 1952 opinion of *Pace v. Parrish*, 247 P.2d 273 (Utah 1952), and are:

(1) That a representation was made;

(2) concerning a presently existing material fact;

(3) which was false;

(4) which the representor either (a) knew to be false, or (b) made recklessly, knowing that he had insufficient knowledge upon which to base such representation;

(5) for the purpose of inducing the other party to act upon it;

(6) that the other party, acting reasonably and in ignorance of its falsity;

(7) did in fact rely upon it;

**(8)** and was thereby induced to act;

**(9)** to his injury and damage.

*Id.* at 274-275. When the record is viewed *in the light most favorable to Cindy*, Kurt cannot establish *all* of the nine requisite elements of fraud. For a detailed elaboration on why Kurt fails to establish all of the elements of fraud when the facts are viewed in the light most favorable to Cindy, see Point 3 in Br. of Appellant, at pages 26–50.

Kurt claims that many of the statements of fact made by Cindy are immaterial. *See* Br. of Appellee 16–17. Kurt criticizes Cindy, arguing that she is still litigating a divorce and not fraud. Kurt over simplifies these facts and this situation. The facts claimed to be immaterial clearly apply to the elements of fraud or establish the context in which this claimed fraud action has emerged from the initial divorce proceedings. The following are the paragraphs from the Statement of Facts in the Brief of Appellant which Kurt claims to be immaterial and an explanation why they are material to the elements of fraud:

- **Paragraphs 3-4:** These paragraphs contain facts concerning the nature of the action and the care that a party is required to take in relying on the other party. That related to Elements 6 and 7.

  [The facts contained in these paragraphs are the following: (1) Kurt was represented by legal counsel; (2) the divorce was hostile and hotly contested; (3) litigation was required on almost every aspect of the divorce; and (4) their was mutual distrust between the parties.]

- **Paragraphs 5–7:** The facts in this paragraph are material as to whether the child support was in lieu of an equitable property distribution which relates to Element 9.

  [The facts contained in these paragraphs are the following: (1) Cindy asked for $4,500.00 in child support each month so that she could remain a stay-at-home mom and compensate for an unequal property division; (2) Kurt wanted to

keep the very valuable assets, i.e. expensive cars and business interests; (3) statements made by Kurt which demonstrate that Kurt hid the value of the assets from Cindy through out divorce proceedings; (4) the child support amount was designated as child support so that it would not terminate upon remarriage since it was in lieu of an equitable property distribution; and (5) the respective values of property received by Kurt and Cindy in the property distribution reflecting the inequitable distribution .]

- **Paragraph 8:** The facts in this paragraph are material to Elements 7–8 because the facts provide an alternative motive for Kurt to settle quickly the divorce proceedings outside of any potential representation that Cindy made.

  [The facts contained in this paragraph are as follows: (1) Kurt expected a large windfall to come shortly after the divorce was settled; (2) a quotation from Kurt's affidavit explaining that he expected to make a lot more in salary and bonuses starting a month or two after the divorce was entered; and (3) Kurt never told Cindy about this potential change in income.]

- **Paragraph 9:** The facts regarding Cindy's health at the time she made the representation to Kurt are material to Element 4 as to whether or not Cindy knew the statements to be false, or made the statements recklessly.

  [The facts contained in this paragraph are as follows: (1) A description of Cindy's medical maladies around and after the suspicious mole was removed from her back; and (2) the timing of each of these medical maladies in relation to her surgery and the alleged false representations.]

- **Paragraph 10:** This paragraph contains facts which explain the circumstances under which Cindy believed to have melanoma and is material to material to Element 4.

  [The facts contained in this paragraph are as follows: (1) Cindy's visit to Dr. John Clayton, a cosmetic surgeon; (2) Timing of this visit with Kurt's leaving Cindy; (3) Kurt began treating Cindy and the children poorly after he started dating a woman looking for a husband so she could stay in the United States; (4) the emotional affect that Kurt's leaving, starting dating, and poor treatment had on Cindy; and (5) this emotional turmoil led to liposuction.]

- **Paragraphs 16–22:** These facts regarding Cindy's physical and emotional health, and the opinions of doctors at or around the time that Cindy's excisions of melanoma are material to Element 4, whether or not Cindy knew the statements to be false, or made the statements recklessly.

[The facts contained in these paragraphs are as follows: (1) Cindy's visit to an emergency room for severe pain in her back shortly after treatment of the mole; (2) Cindy's kidney blockages; (3) surgery for kidney blockages; (4) surgery shortly thereafter for a "wide excision of melanoma;" (5) Cindy encouraged to return for further Kidney procedures; (6) statement of an emergency room doctor to Cindy that Cindy's health problems were likely related to the melanoma; (7) statement of doctor that he was still worried that there was still some melanoma present in her body; (8) Cindy was very scared for her health; (9) Cindy's background in nursing; (9) Cindy's limited exposure to melanoma; (10) Cindy's grandmother died from melanoma years previously; (11) Cindy's understanding that if melanoma spread to other parts of her body it was even more serious and dangerous; (12) Cindy concerned that all the health problems at same time as finding out about melanoma made her think that they were all connected; (13) the hasty signing of the affidavit which claimed Cindy had stage 3 melanoma and surgery on her thyroid; (14) Cindy's poor handling of the stress caused by the melanoma, the other health problems, and the divorce; (15) Cindy's stress made her want the divorce over with; (16) Cindy's health began improving; (17) Cindy's melanoma required follow up visits to ensure the melanoma was not returning or spreading; (18) Cindy was emotionally fragile from September 2003 to December 2003; (19) Cindy lost a lot of weight unrelated to the liposuction surgery; (20) Cindy's hair began falling out; (21) Cindy's complexion was yellow with dark circles under her eyes; (22) Cindy's menstrual cycles were irregular and resulted in uncontrollable bleeding for longer periods of time then previously; (23) Cindy went to the emergency room for pain on several occasions; (24) Cindy was confined to bed for most of the time between September 2003 and December 2003; (25) divorce proceedings caused significant stress to Cindy from August 2003 to May 2004; (26) this stress complicated the kidney problems; and (27) Cindy visited the hospital and clinics at least 38 times between August 2003 and May 2004.]

- **Paragraph 24:** Kurt's lack of concern for Cindy's health at this time is material to Elements 6 and 7 as to whether Kurt acted reasonably and in ignorance of the statement's falsity in relying upon the statement.

  [The facts contained in this paragraph are as follows: (1) Kurt made little contact with the children in the fall of 2003; and (2) Kurt showed no concern for Cindy's health.]

- **Paragraphs 25–26:** Cindy's improving health between her representation that she had cancer *five moths earlier* and the divorce settlement are material to Elements 2 (whether the statement was of a present fact), 6 and

7 as to whether Kurt acted reasonably and in ignorance of the statement's falsity in relying upon the statement.

[The facts contained in these paragraphs are as follows: (1) Cindy's health began to improve in January 2004; (2) The health problems that remained after January 2004 were episodes of kidney pain, migraine headaches, high blood pressure and increased lipase levels; (3) conversations between Cindy and Kurt that reflected that Cindy's health was improving or that health was never brought up; (4) Cindy never represented that she was going to die; and (5) Cindy told Kurt that she was going to provide for herself and the kids for the next twenty years.]

- **Paragraph 27:** Kurt's complete lack of curiosity regarding Cindy's health after her representation is material to the reasonableness of his ignorance to her condition (Element 6).

  [The facts contained in this paragraph are as follows: (1) There was not much communication between Kurt and Cindy during divorce because the tenseness of the divorce; (2) Kurt and Cindy's limited conversations revolved around Kurt's girlfriend, Zivile; (3) Kurt never asked about Cindy's health; (4) Kurt never asked who Cindy's doctor was or for doctor reports; (5) Kurt never asked about Cindy's progress in her treatments; (6) Kurt never offered to help with the kids in the Fall of 2003 when Cindy was the sickest; and (7) in November 2003 Kurt told Cindy that he hoped that she was sick and that she would die.]

- **Paragraphs 28–29:** Cindy's lack of believing that she was going to die is material to Elements 1 and 8 as to whether she made the representation that Kurt claims he ultimately relied on that she about to die.

  [The facts contained in this paragraph are as follows: (1) Cindy never thought she was going to die; (2) Cindy never told anyone that she was going to die; (3) Cindy's legal counsel never represented to Kurt's legal counsel that Cindy was dying; and (4) Cindy's legal counsel represented that Cindy would be moving on with her life in Texas where she would be buying a home.]

- **Paragraph 30:** The fact that Kurt and Cindy never discussed Cindy dying is material to the reasonableness of Kurt's ignorance to her condition (Element 6) and to Elements 1 and 8 as to whether she made the representation that Kurt claims he ultimately relied on that she was about to die.

  [The facts contained in this paragraph are as follows: (1) Kurt and Cindy never

had any conversations regarding Cindy's death as Kurt alleges; (2) Kurt and Cindy made no plans about an impending death as Kurt alleges; (3) Cindy never told Kurt in December 2003 that Cindy had six months to live or that her life was being shortened for any reason as Kurt alleges; (4) Cindy never told Kurt that her cancer had spread to her liver and kidneys as Kurt alleges; and (5) it took five months from late December 2003 to get the Decree of Divorce agreed to and entered.]

- **Paragraphs 31–37:** The lack of discussion of Cindy's condition or potential death is material to whether Kurt actually relied upon the representation and whether the representation actually induced him to act (Elements 7 and 8).

  [The facts contained in these paragraphs are as follows: (1) Kurt's legal counsel never left any impression that Cindy's health or medical condition had any bearing on the settlement; (2) Kurt's legal counsel never expressed concern for Cindy's health or any other indication that Kurt considered Cindy's condition a factor in the settlement of the case; (3) Kurt never requested any further information regarding Cindy's medical condition; (4) Kurt never asked for or subpoenaed Cindy's medical records, nor asked for any waiver from Cindy regarding records; (5) Kurt did not ask for an independent medical examination; (6) Kurt made it abundantly clear that he a medical condition that could result in a stroke, but no mention of Cindy's condition showed up in the Decree of Divorce; (7) Kurt was anxious to have the divorce entered so that he could remarry; (8) the settlement agreement in negotiation, the Settlement Agreement signed by the parties and the Decree of Divorce were all drafted by Kurt's legal counsel; (9) divorce entered on May 25, 2004; (10) Kurt had remarried within a week of the divorce being entered before the end of May 2004; (11) Cindy remarried in July 2004; and (12) pertinent sections of the Decree of Divorce are included.]

As is clearly evident, there are many more material facts than Kurt would have this Court consider. Kurt's Brief has tried to make a complicated situation overly simplistic and to do so Kurt has tried to discredit Cindy and the facts she asserts and has ignored many facts which are material to this case.

Beyond Kurt's attempt to devalue the facts, Kurt's Brief continues using quotations from cases to establish cursory and conclusory arguments. Kurt argues that "[a]llegations

of a pleading or factual conclusion of an affidavit are insufficient to raise a genuine issue of fact" emphasizing the language "factual conclusion of an affidavit." *Winter v. Northwest Pipeline Corp.*, 820 P.2d 916, 919 (Utah 1991) (citing *Treloggan v. Treloggan*, 699 P.2d 747, 748 (Utah 1985) and *Reagan Outdoor Advertising, Inc. v. Lundgren,* 692 P.2d 776, 779 (Utah 1984)); *see* Br. of Appellee 15–16. Kurt does not elaborate on what the Utah Supreme Court meant by "factual conclusion of an affidavit." *See* Br. of Appellee 15–16.

However, Kurt uses this language ("factual conclusion of an affidavit") to encourage this Court to overlook and undervalue the "factual statements" of Cindy in her March 1, 2007 affidavit from which, as Kurt states, "one gets the impression Dr. Noyes was very concerned about this 'melanoma,'" and to value the statements in Cindy's Dec. 2, 2006 deposition, which when viewed in the light most favorable to Cindy are entirely consistent with Cindy's statement, contrary to what Kurt wants this Court to believe. *Id.* at 16; *see also* R. 323 (deposition of Cindy Cooper).

Kurt leads this Court to believe that this language ("factual conclusion of an affidavit") means that any "factual statement" in an affidavit is unreliable and unable to create a genuine issue of fact. Br. of Appellee at 15–16. Such an interpretation is far from what the Utah Supreme Court intended the language "factual conclusion of an affidavit" to mean and is clearly not the law. *Winter*, by way of explaining this language, cites the Utah Rule of Civil Procedure 56(e) which provides:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the pleadings, but the response, *by affidavits* or as otherwise provided in this rule, must set forth *specific facts* showing that there is a genuine issue for trial.

> Summary judgment, if appropriate, shall be entered against a party failing to file such a response.

820 P.2d at 919 (emphasis added). This rule of procedure explains that in order to withstand a motion for summary judgment, the opposing party must file *an affidavit* or other document which sets for "specific facts" which will create a "genuine issue for trial." Utah R. Civil P. 56(e). Cindy's March 1, 2007 Affidavit was filed in direct compliance with this rule to establish her characterization of the facts. Surely the Supreme Court could not have meant that the facts asserted in an affidavit cannot be used to create a factual dispute since that is the time-honored way to provide the facts to the Court from which disputes arise.

The *Winter* court criticized the statements in the opposing party's affidavit by saying that the statements were not of specific facts but conclusory factual statements. *See Winter*, 820 P.2d at 919. The language "factual conclusion of an affidavit" was not used by the court to communicate that facts in an affidavits are insufficient to establish genuine issue of material fact as Kurt argues, but the court used that language to condemn only conclusory and unspecific factual conclusions in affidavits. *Id.* *Treloggan* further supports this conclusion by explaining that an affidavit needs to contain specific evidentiary facts to create a genuine issue for trial to survive a motion for summary judgment. 699 P.2d at 748; *see also Reagan Outdoor Advertising*, 692 P.2d at 779 (explaining that specific facts, not just conclusions, are needed to create a genuine issue of material fact). The *Treloggan* court held that the affidavits in that case were deficient in that they did not contain "evidentiary facts, but merely reflect the affiant's unsubstantiated opinions and conclusions." 699 P.2d at 748.

Cindy's affidavit, contrary to Kurt's claims, is full of specific facts that are material

to the elements of the fraud claim. Moreover, the facts as alleged in Cindy's affidavit are by no means conclusory. The Court may wish to review the detailed "factual statements" contained in the Affidavit of Cindy Cooper, dated March 1, 2007, and the Affidavit of Frederick N. Greene, dated March 2, 2007, copies of which are attached hereto respectfully as Addendum "A" and Addendum "B." Also, for a detailed description of the application of the facts viewed in the light most favorable to Cindy, *see* Point 3 of Brief of Appellant, pages 26–50. The fact that any single statement by Cindy may not be a specific fact is not fatal to her case. Kurt has the burden to prove each one of the required elements of fraud, and Cindy has to only dispute just one for a motion for summary judgment to fail. Cindy's statements are not "opinion" or "conclusory" statements, but specific facts that directly relate to her defense to liability for fraud and are facts that she can and will testify to at trial. *See* Addendum "A." Likewise, Frederick N. Greene's affidavit set forth detailed statements of fact. *See* Addendum "B."

Kurt also claims that Cindy's facts fall into the arena of speculation citing *Gildea v. Guardian Title Co. of Utah*. 970 P.2d 1265, 1270 (Utah 1998) (explaining that "speculation falls short of creating a genuine issue of material fact"). Once again, Kurt fails to explain the context in which the court made the statement cited. *Gildea* concerned the divulging of confidential information regarding the relationship between the opposing party and a third party. *Id.* at 1270. The party opposing summary judgment provided the conclusion, without any further evidence, that the moving party must have divulged the opposing party's confidential information because the opposing party knew of the relationship. *Id.* The

holding in *Gildea* stands for the principle that speculation *alone* without specific evidentiary facts to back up that theory is insufficient to create a genuine issue of material fact. *See id.*

Kurt claims that Cindy is being speculative regarding her claims in that her later representations to Kurt that she was healthy and recovered "should have signaled" to Kurt that she no longer had the cancer. The factual inference that what Cindy said "should have signaled" something to Kurt was clearly supported by the facts and is clearly an inference that can be made by the facts. Inferences that can be made from the facts are not speculation. We cannot forget that all inferences from the facts must also be determined in favor of the party opposing the motion for summary judgment. *Orvis v. Johnson*, 2007 UT 2, ¶ 6, 177 P. 3d 600 (explaining that in reviewing the grant or denial of a motion of summary judgment "[a]n appellate court . . . views 'the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party'") (*quoting Higgins v. Salt Lake County*, 855 P.2d 231, 233 (Utah 1993)). Cindy discloses in detail every conversation when these representations are made as specific and material evidence of the unreasonableness of Kurt's claimed reliance on Cindy's past statement made months before the entering of the Stipulation. *See* Br. of Appellant 12–15, at ¶¶ 23–26.

Kurt also claims that Cindy's factual observation that Kurt showed no concern for her medical condition is speculation. Cindy also backs this observation by providing specific evidence of all of Kurt and Cindy's interactions which demonstrate Kurt's lack of interest in Cindy's medical condition. *See id.* Surely, Cindy can testify as to what she observed and what she saw was that Kurt failed to show concern for her. It is hard to see how Cindy's eye

witness observation is speculative.

Kurt similarly claims that it is somehow speculative to explain now the inaccuracies in Cindy's Dec. 31, 2003 affidavit occurred. This is not a matter of speculation made in bad faith to manipulate the court as Kurt alleges, but a matter of explaining an inaccuracy made by oversight. *See* Br. of Appellee 18 (discussing the remedies of filing a affidavit in bad faith). Taking into account the severity of the stress and anxiety that Cindy was feeling at that time, with her fragile health and fighting a heated and hostile divorce, such an oversight, how-be-it regrettable, is at the least put in context of the time and place where it occurred.

Furthermore, Kurt claims that Cindy's is engaging in "double-speak to obtain her desired end result." Br. of Appellee 19. Kurt argues that Cindy now criticizes Kurt for showing no interest in her medical condition, which condition she tried to keep quiet from Kurt. *Id.* The reality is Kurt knew about Cindy's situation regardless of Cindy's desire to keep it from him — and Kurt showed no interest in Cindy. Cindy represented the complexity of the situation in which she found herself — neck deep in a divorce, a representation to her from a physician that she had a melanoma and a multitude of other health maladies. Those health conditions slowly improved through the course of the original divorce proceedings. Kurt, however, collapses the events of a significant period of time in a way to make it look like Cindy is simply a liar, which is far from the truth.

* * * * * * * *

Under Section I of Kurt's Brief, Kurt's argument is laden with underdeveloped and misconstrued legal arguments and filled with the oversimplification of a complicated factual situation. There are clearly disputed issues of material facts in this case. Ultimately, these disputed facts will need to be sorted out by a jury who can appropriately distinguish between the opposing parties' very different view of the facts, but at this point the facts must be viewed in the light most favorable to Cindy.

**POINT 2: KURT'S ARGUMENT REGARDING CLEAR AND CONVINCING EVIDENCE ONLY REINFORCES THE FACT THAT THERE WERE MATERIAL FACTS IN DISPUTE; FOR THIS COURT TO ANALYZE WHETHER THE EVIDENCE IS CLEAR AND CONVINCING PRESUPPOSES A FINDING OF FACT WHICH IS INAPPROPRIATE IN A SUMMARY JUDGMENT PROCEEDING.**

Section II of Kurt's Brief entirely misses the point of this appeal. In section II, Kurt unfurls his argument that the evidence in the record is sufficient to establish by clear and convincing evidence that Kurt establishes all of the elements of fraud. However, the purpose of a summary judgment is to allow the disposition of a case when there have not been evidentiary hearings or trial and, therefore, no finding of facts is needed. *See Smith v. Four Corners Mental Health Ctr.,* 2003 UT 23, ¶16 n.6, 70 P.3d 904 (citations omitted) (noting that in summary judgment the court "does not resolve any factual disputes"). A determination of whether the evidence is sufficient to meet clear and convincing burden is only needed "to support a jury's verdict or a district court's ruling containing specific

findings of fact." *Id.* (citing Utah R. App. P. 24(a)(9) and *Harding v. Bell*, 2002 UT 108, ¶19, 57 P.3d 1093). The *Smith* court further explained that under this reasoning the marshaling requirement for a sufficiency of the evidence challenge is unnecessary when a summary judgment is in question. *Id.* Therefore, section II is unimportant with the exception of proving that there are genuine disputes as to material facts which need to be sorted out by a jury *at trial*. In this matter we do not get to a determination of whether the facts are sufficient to support the judgment until the facts have been actually determined by the trier of fact.

The entirety of section II of Kurt's Brief is dedicated to pointing out the facts *in the light most favorable to Kurt*. This is completely inapplicable to an appeal of a summary judgment. In fact, it is simply a backwards analysis. Under summary judgment the evidentiary standard views the facts in the light most favorable to the opposing party (in this case Cindy), not whether there is clear and convincing evidence supporting the moving party (in this case Kurt). *Oberhansly*, 751 P.2d at 1156. An argument that the evidence was clear and convincing is of no consequence to us and is only applied after a jury verdict or bench trial when the evidence can be weighted and determined by the trier of fact. *See Smith*, 2003 UT at ¶16 n.6.

The important and material disputed facts which are unveiled in section II of Kurt's Brief have been addressed in Point 1 above and in Point 3 of the Brief of Appellant.

**POINT 3: CINDY'S MARCH 1, 2007 AFFIDAVIT IS ENTIRELY CONSISTENT WITH CINDY'S DEPOSITION AND WAS MADE IN GOOD FAITH TO EXPLAIN THE FACTS AND SITUATION WHICH LED TO THIS LITIGATION.**

Cindy's March 1, 2007 affidavit is not a sham affidavit as Kurt portrays it to be, but was made in good faith to address and explain the situation which led to this litigation and the Motion for Summary Judgment. Kurt urges this Court to view Cindy's March 1, 2007 affidavit as suspect given Cindy's deposition. Notwithstanding Kurt's unsupported protestations, Cindy's deposition was entirely consistent with her March 1, 2007 affidavit. One must remember that in a deposition the deponent only responds to the questions asked and has no duty to provide information that is not requested by the questioner nor is the deponent to respond to questions not asked. As such, depositions by their very nature are limited by what the questioner wants to elicit. The deponent's duty is to answer truthfully the questions asked and none other. At the deposition the questioner failed to ask for lots of information that is relevant to this matter. The March 1, 2007 affidavit further explains Cindy's Dec. 31, 2003 affidavit. *See* Br. of Appellee 29–30.

Kurt cites *Harnicher v. University of Utah Medical Center* to argue that Cindy cannot raise an issue of fact with her most recent affidavit because (Kurt claims) it "contradicts her deposition" and (Kurt claims) Cindy's March 1, 2007 affidavit does not provide an adequate explanation for the discrepancy. 962 P.2d 67, 71 (Utah 1998) (citing *Webster v. Sill*, 675 P.2d 1170, 1172–73 (Utah 1983) (explaining that "when a party takes a clear position in a

deposition, that is not modified on cross-examination, he may not thereafter raise an issue of fact by his own affidavit which contradicts his deposition, unless he can provide an explanation of the discrepancy"). *Harnicher* dealt with a situation where the opposing parties claimed that they had not received any physical harm (an essential element in their claim for relief) in a deposition and then reversed their position and claimed that they did have an injury in a subsequent affidavit. *Id.* The excuse given was that they were not the type of people who were likely to go to a doctor. *Id.* The *Harnicher* court did not accept the excuse that they were not the type of people to go to a doctor as an explanation for the discrepancy. *Id.* The court reasoned that a dislike for going to the doctor does not explain a denial that they had any physical harm in the deposition. *Id.*

Profoundly interestingly is that Kurt entirely fails to point this Court in the direction of any discrepancy between the deposition and the March 1, 2007 affidavit. All that Kurt alleges is that there was a contradiction. *See* Br. of Appellee 29–31. If Kurt wants to rely upon some preclusion of the affidavit then he must surely be required to set forth the discrepancy. He never has.[3] There are no blatant discrepancies like in *Harnicher* between the deposition and the March 1, 2007 affidavit. There are no statements that are entirely inconsistent with each other. Furthermore, the facts as Cindy presented them in the

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Kurt never raised this issue below and does so now only on appeal. Kurt never made a motion to strike the Affidavit of Cindy Cooper or any part thereof and no ruling of the lower court was ever made as to the admissibility of the Affidavit of Cindy Cooper..

deposition and the March 1, 2007 affidavit are entirely consistent and help to explain each other. In short, Cindy's deposition does not contradict Cindy's March 1, 2007 Affidavit and both were reviewed by the court below.

The only discrepancy that exists is between the December 31, 2003 affidavit, the deposition and the March 1, 2007 affidavit is the representation in the December 31, 2003 affidavit of Stage 3 melanoma and a confusion between Cindy's medical problems on her kidney or thyroid. The rule cited above provides no remedy for such a situation, and even if the law is extended to this situation, the deposition and March 1, 2007 affidavit work together to explain the conditions under which Cindy misspoke in the December 31, 2003 affidavit.

The explanation given regarding Cindy's condition at the time is entirely reasonable and very different from the explanation provided in *Harnicher*. A doctor told Cindy that she had a melanoma.[4] Melanoma is cancer. Cindy had surgery on a kidney shortly thereafter.

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[4] Dr. Clayton told Cindy that he had found a suspicious mole, excised it and sent it for evaluation. *See* R. 570, ¶ 15. Dr. Clayton informed Cindy that she would be dead within a year if he had not found the mole and then referred Cindy to an oncologist. *See id.*

Dr. Noyes, the oncologist, provided a note on his stationary\prescription pad that said:

**EXCUSED ABSENCE**

R. Dirk Noyes, M.D.
324 Tenth Avenue, #249
Salt Lake City, UT 84103

Cindy had additional and numerous serious and frightening health problems.[5] Coupled with

---

(801) 408-3555

Patient: Cindy Dobson

* * *

/s/ Dirk Noyes
Signature

Special Instructions:

[Hand Written] Maybe be extended due to recovery times. Pt. [patient] is to have surgery on the 27th of October. She will be unable to attend court. *Pt. [patient] is having a wide excision of melanoma.*

Cindy read the note and understood it to mean that she had melanoma since that is what Dr. Noyes said that it was. R. 323; 570–71, ¶16; 617. A photocopy of Dr. Noyes' note is attached as Addendum "C" in Br. of Appellant.

[5] In the midst of the divorce proceedings Cindy began experiencing some health concerns. Cindy's initial medical concerns evidenced themselves in June 2003 but most evidence of illness was after having cosmetic surgery where a suspicious mole was found. As things progressed Cindy experienced the following:

- **Pain through Cindy's back area** (June 2003 through the present); currently Cindy has a spot near Cindy's kidney that constantly remains in pain

- **Nausea and Vomiting** (began in September 2003 and continued, getting worse, through December and then declined through March 2004)

- **Urinating blood** (starting August 2003 and intermittently in November 2003, February 2004 and occasionally to this day)

- **Hair falling out** (starting in August 2003 through December 2003)

a heated and hostile divorce proceeding, Cindy was an emotional wreck. That provides a much more compelling explanation of any possible discrepancy than the one in *Harnicher* where the explanation was based on the parties' dislike of going to the doctor.

Kurt's conclusory argument that there are discrepancies between the deposition and March 1, 2007 affidavit fail as being completely unsupported. Kurt fails to meet his burden to discredit the March 1, 2007 affidavit. The March 1, 2007 affidavit is vital and important in providing a complete and consistent picture with that provided in the deposition.

Kurt in this section revisits the issue that the factual statements of an affidavit need to be more than opinions and conclusions. *Webster*, 675 P.2d at 1172. This issue is addressed fully above in Point 1 of this Reply Brief.

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- **Abnormal Menstrual Cycles**; excessive bleeding for weeks or no menstrual period at all (excessive bleeding starting August 2003 through December2003\January 2004 then menstrual stopped. Cindy has yet to experience a menstrual period.

- **Excessive weight loss**; Cindy lost 50 pounds including the maximum of 10 pounds lost from the liposuction (beginning August 2003 through January 2004)

- **Anxiety and Depression**; Cindy could not sleep, was lethargic and weak; could not keep food down; had dark circles under Cindy's eyes (starting in August 2003 through December 2003; presently have intermittent episodes)

R. 322; 325; 332; 569, ¶ 13.

**POINT 4: KURT FAILS ENTIRELY TO DISPUTE THE LEGAL ISSUE OF WHETHER STATES OF MIND CAN BE DECIDED ON SUMMARY JUDGMENT.**

As explained thoroughly in Point 2 of Brief of Appellant, it is inappropriate for a judge to determine state of mind in a summary judgment proceeding. *See* Br. of Appellant 25–26. Kurt does not dispute this, but confirms that the lower court judge made a finding regarding the state of mind of the parties to resolve the motion for summary judgment. *See* Br. of Appellee 22, 25. That was an error. The only reference Kurt makes to Cindy's argument regarding Cindy's state of mind is that no inquiry into state of mind is needed because the facts were not in dispute regarding her statement being made under oath. *See id.* at 24–25. While there is little dispute that she signed the 2003 affidavit that she understood that she had cancer, such does little and in actuality entirely ignores the other elements that require mental state determinations. All the elements that require a state of mind determination are completely ignored by Kurt.

## CONCLUSION

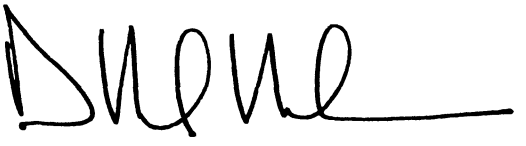
Kurt's Motion for Summary Judgment should have been denied by the lower court. Taken in a light most favorable to Cindy, there are plenty of disputed material facts to preclude the granting of summary judgment. Summary judgment is not appropriate when there are contested issues of material facts. The lower court in this matter made a mistake and because of that mistake we ask this Court in its role of correcting the mistakes of the

lower courts to reverse the lower court's grant of Summary Judgment and remand the matter back to the lower court for trial.

**ORAL ARGUMENT REQUESTED.**

**DATED** this 14th day of May 2008.

**HOLMAN & WALKER LC**



D. Miles Holman
**Attorneys for Defendant and Appellant**
**Cindy Cooper**

**CERTIFICATE OF SERVICE**

I hereby certify that this 14th day of May 2008 I mailed, postage prepaid, two copies of the foregoing Appellant's Reply Brief to the following:

Meb W. Anderson
Bret W. Rawson
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Salt Lake City, Utah 84111

**HOLMAN & WALKER LC**

D. Miles Holman
**Attorneys for Defendant and Appellant**
**Cindy Cooper**

# ADDENDUM "A"

# AFFIDAVIT OF CINDY COOPER
# (Dated March 1, 2007)

Handwritten page numbers reflect the record pages

D. Miles Holman (USB #1524)
**HOLMAN & WALKER LC**
9533 South 700 East, Suite 100
Sandy, Utah 84070
Telephone: (801) 990-4990; Facsimile: (801) 990-4999

**ATTORNEYS FOR DEFENDANT\RESPONDENT**

**IN THE THIRD JUDICIAL COURT FOR SALT LAKE COUNTY**

**STATE OF UTAH**
**Salt Lake Department, 450 South State Street, Salt Lake City, Utah 84111**

| | |
|---|---|
| **WILLIAM KURT DOBSON**<br>**Plaintiff**<br><br>**vs.**<br><br>**CINDY DELAUGHTER COOPER**<br>**Defendant** | **AFFIDAVIT OF CINDY COOPER**<br><br>**Civil No. 050922651**<br><br>**Judge Robert Foust** |

Defendant\respondent Cindy D. Cooper ("Cindy"), having been duly sworn, deposes and states of her own knowledge as follows:

1. I am the defendant in this matter.

**Preliminary statement:** Kurt Dobson and I communicated oftem by email. Unfortunately, when I left Utah to move to Dallas, Texas I lost all the computer copies of my emails to Kurt and his to me. I firmely believe that the loss of the emails was not accidental but was the work of Kurt. Kurt is a computer genius and has the ability to tap into other peoples' computers and do thisngs in their computers. I have personally observed him evesdropping with electronic listening devices on others. Kurt is presently in the Federal crimninal justice system charged with tapping into others computers. I would have greater documentary proof of the matters set forth in this affidavit if mjy emails and those of Kurt were accessible to me.

2. Plaintiff William Kurt Dobson ("Kurt") and I were previously married. We were married on April 29, 1989.

3. I had never been married before I met and married Kurt. Consequently, I had never

been through a divorce before. Nonetheless, I believe that the divorce proceedings with Kurt were particularly contested and mean-spirited. It was horrible. I will explain why I believed that as you read further in this Affidavit. The divorce was hotly contested on all issues throughout the litigation.

4. Kurt claimed to have filed for divorce in the late 1990s. That case was never concluded. I was never served. Kurt told me that he filed for divorce. Kurt told me that he did not pursue the divorce then because it would cost him too much money because he would be paying a lot of alimony and that he would have to share the assets.

5. Kurt again filed for divorce on July 3, 2003 in the matter entitled:

*William Kurt Dobson v. Cindy Delaughter Cooper*
Civil No. 050922651
Third District Court
State of Utah

6. On May 26, 2004, the Court entered a Decree of Divorce, dissolving our marriage. Paragraphs 16, 17 19, 20 - 34 of the Decree of Divorce provide:

> 16. Commencing May 1, 2004, petitioner shall pay child support to respondent in the base amount of $4,500 per month until Margaret turns 18 or graduates from high school during the normal and expected year, whichever occurs later. Thereafter, petitioner shall pay child support to respondent in the base amount of $1,500 per month until William turns 18 or graduates from high school during the normal and expected year, whichever occurs later.
>
> 17. The foregoing base child support amount exceeds the child support amount calculated pursuant to the guidelines set forth at Utah Code Ann. §78-45-7.2 through 78-45-7.21.
>
> * * * * * * * *
>
> 19. Petitioner shall pay an additional sum of $1,000 to respondent on or before December 5 of each year through the year in which Margaret graduates from high school, $666.00 through the year in which Kristen graduates from high school, and $333.00 through the year in which William graduates from high school. The

intent of this is to provide funds for Christmas gifts to the children.

20. Petitioner shall be solely responsible for the children's orthodontia and dental expenses.

21. Petitioner shall establish a college fund for the children and contribute $200 per month to it, commencing May 1, 2004. The children shall be the sole and exclusive beneficiaries of said fund, and petitioner shall not access it for purposes other than the children's higher education expenses except upon respondent's express written approval. Said funds shall be applied to the children's higher education expenses in equal amounts or as agreed by the parties in writing. Petitioner shall provide yearly statements to respondent.

22. Respondent shall be solely responsible for all expenses related to the children, including medical insurance and uninsured medical expenses, except those expenses specifically allocated to petitioner as set forth above.

23. Any increase or decrease in the parties' respective incomes shall not be grounds for modification of the foregoing child support obligations, either upward or downward, except that a decrease in petitioner's income due to verified disability and impairment shall be grounds for a downward modification.

25. The marital residence, which is currently under contract for sale, shall be awarded to petitioner. Petitioner shall be entitled to reside in home as designated in the contract of sale and shall be entitled to proceeds from sale.

26. The Snowbird timeshare shall be sold. The timeshare is currently under contract of sale and the parties shall cooperate to ensure that the sale is completed. Pursuant to the terms of the sale, the buyers shall bring the timeshare out of foreclosure and assume the loan obligation thereon. No proceeds are due or expected from the sale.

27. Respondent shall be awarded stock in Silicon Optics, Inc. and S5 Wireless equal to one-half of petitioner's ownership interest in these companies as of April 28, 2004.Petitioner's interest in Spectrum5 Racing shall be awarded to him, free and clear of any interest therein of respondent's. As of April 28, 2004, petitioner owns 615,000 shares of stock in S5 Wireless and 50% of the stock in Silicon Optics, Inc. Petitioner shall provide stock certificates or equivalent documents to respondent on or before July 27, 2004.

28. Petitioner is hereby awarded all cash, retirement, and investment accounts titled in his name, including the Merrill Lynch 401(k) and the Wells Fargo checking accounts. Respondent is hereby awarded all cash, retirement, and

investment accounts titled in her name.

29. The Lexus is hereby awarded to respondent. Respondent shall be solely responsible for the balance remaining on the Bank One loan secured by Lexus and shall ensure that the loan is paid in full on or before April 28, 2004.

30. The houseboat, airplane, jet skis, GTR, machine equipment, safe, guns, digital camera, and video camera are hereby awarded to petitioner.

31. Respondent is hereby awarded all the jewelry she has acquired, her personal effects, and the following home furnishings:

a. The entire dining area furniture;

b. The tan armoire;

c. The kids' curio cabinet;

d. The two large mirrors;

e. The secretary desk; and

f. The paintings and framed photographs

32. Petitioner is hereby awarded his personal effects and the remaining home furnishings not specifically awarded to respondent in paragraph 31 above.

33. Petitioner shall make copies of the family videotapes and photographs and provide them to respondent.

34. Petitioner shall pay respondent the sum of $50,000 forthwith upon execution of the settlement agreement. Of this amount, $25,000 shall come from the Wells Fargo account in his name.

A copy of the Decree of Divorce is attached hereto as Exhibit "A."

7. In various emails and conversation I told Kurt that I needed $4,500.00\month to raise the children. I told Kurt that the amount was premised upon me not going to work outside the home and being a stay-at-home mother, as we had previously discussed when we were together. Kurt and

I agreed, with Kurt actually saying that would be "no problem" to the $4,500.00\month payment. (*See* email from Kurt to Cindy dated 2/23/2004 a copy of which is attached hereto as Exhibit "B.") I told Kurt, however, that the payment had to be all child support because I wanted to have the amount to be paid whether I married or not inasmuch as it would be compensation for the unequal division of assets. In numerous telephone calls with Kurt during the entire divorce proceedings Kurt told me that he wanted to keep his Porsche (purchased for over $100,000.00; paid for by cash without my knowledge), GTR automobile (purchased for over $250,000.00; paid for by cash without my knowledge), and the businesses (the value of which I never knew). Kurt actually told me that he did not want me to know what was going on with Spectrum 5 Racing (Kurt said others in the company did not want me to know about the assets of the company), S5 Wireless (Kurt said others in the company did not want me to know about the assets of the company) and Silicon Optics (Kurt said others in the company did not want me to know about the assets of the company).

8. Kurt made it very difficult for me to find out any information about the assets. Kurt had kept all the finances secret from me. Kurt told me all the time that I would never find the money. He said to me on multiple occasions whenever we were trying to negotiate a settlement:

> "You will never find where I put the money"
>
> "You would never have access to any of the businesses."
>
> "I have money in other peoples' names. You'll never find it."
>
> "I've hidden it in places where you will never find it."
>
> "I'll have you in a trailer park if you don't do what I say."

Kurt had made it clear to me that I would never find the money or assets. I wanted to end the

divorce process and just have enough to care for the children.

**9.** I was so frustrated with the information I was getting that I demanded that I be paid the $4,500.00\month in such a way that it would not be reduced even if I were to remarry. The child support would be set at $4,500.00\month (initial setting to be reduced as the children reached the age of majority). The child support was to be at the levels set irrespective of any changes in income by either Kurt or me and was not to be modified either upward or downward for any reason except if Kurt had a "verified disability and impairment."

**10.** Although, Kurt initially proposed that a portion of what was latter denominated as child support be denominated as alimony. I required that the amount to be paid be designated as child support inasmuch as I firmly understood at all times that being designated as child support I would receive it even if I remarried and would be a counterbalance for the property distribution where Kurt received the majority of the marital assets. Kurt so wanted the assets and did not want to share them with me that I agreed to the child support payment because I knew that as child support the amounts would come to me whether I remarried or not. Kurt also did not want me exploring the company business and their records.

**11.** The property distribution and value of the property as I understood it to be at the time of the divorce was as follows (those values I had were told to me by Kurt):

**To Kurt:**

| | **ITEM OF PROPERTY** | **Equity** |
|---|---|---|
| (a) | Marital Home, Pepperwood, Sandy, Utah | $65,250.00 |
| (b) | Spectrum 5 Racing | Unknown |

| | | |
|---|---|---|
| (c) | ½ Stock in S5 Wireless | Unknown |
| (d) | ½ Silicon Optics, Inc. Stock | Unknown |
| (e) | All retirement benefits | Unknown |
| (f) | Merrill Lynch 401(k) | Unknown |
| (g) | Wells Fargo Checking accounts | (he did not allow access to the accounts) |
| (h) | Houseboat | $40,000.00 |
| (i) | Airplane | $40,000.00 |
| (j) | Jet skiis | $10,000.00 |
| (k) | GTR Race car | $250,000.00 |
| (l) | Machine Equipment (for GTR Race Car) | $100,000.00 |
| (m) | Safe | $8,000.00 |
| (n) | Guns | $5,000.00 |
| (o) | Digital Camera[1] | $2,000.00 |
| (p) | Video Camera | $2,000.00 |
| (q) | Remaining Home Furnishings | $66,000.00 |
| (r) | All Cash | $64,000.00 (Along with another $100,000 - $200,000) |

Additional Items Kurt Received Not in Decree of Divorce

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1 Both the Digital Camera and the Video Camera were top-of-the line models that Kurt purchased. Kurt always purchased such items during our marriage.

| | | |
|---|---|---|
| (s) | Porsche | $80,000.00 |
| (t) | Trailer | $25,000.00 |
| | **KNOWN TOTAL:** | $757,250.00 |

**To Me:**

| | **ITEM OF PROPERTY** | **Equity** |
|---|---|---|
| (a) | Lexus Automobile | $10,000.00 |
| (b) | ½ Silicon Optics, Inc. Stock (I never received this stock) | Never received from Kurt |
| (c) | ½ S5 Wireless stock | $0[2] |
| (d) | Jewelry | $29,000.00 |
| (e) | Dining Room Area Furniture | $2,000.00 |
| (f) | Tan Armoire | $2,000.00 |
| (g) | Kids' Curio Cabinet | $2,000.00 |
| (h) | Two Large Mirrors | $1,000.00 |
| (i) | Secretary Desk | $2,000.00 |
| (j) | Paintings and Framed Photographs | $5,000.00 |

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[2] At the time of divorce, I was told the stock's future price would be worth about $500,000.00. However, when Kurt left the company in December 2004, Dave and Kurt both told me that Kurt published a damaging paper about the company that he sent to capital investors, who subsequently withdrew their investments. Kurt did not deliver the stock to me until after he left company and the stock is currently worthless. Dave has told me that the company is attempting to gain new investors. He said that in time, the stock may regain its value, but I have no assurance that it will. If Kurt had given the stock to me immediately following the divorce, I would have been able to sell it for at least some value.

| | | |
|---|---|---|
| (k) | Cash Payment (in consideration for stock in Spectrum 5 Racing) | $50,000.00 |

Additional Items Cindy Received Not in Decree of Divorce

| | | |
|---|---|---|
| (l) | BMW (I had to sell the BMW to live off of during the divorce proceedings) | $17,000.00 |
| (m) | Repayment of Loan to Odyssey Dance Company (this money was used to pay medical bills, and attorneys fees and for living expenses for the year) | $28,000.00 |
| | **TOTAL:** | $148,000.00 |

12. I later learned that Kurt was anxious to have the Decree entered because he had a an anticipated large windfall coming that I did not know about. In an affidavit Kurt made in the Divorce Action Kurt stated:

> When the divorce was resolved I had an income history of approximately $200,000.00 a year base and I was the founder of a company that I thought was one or two months away from a significant multi-million dollar venture capital investment. My salary was scheduled to increase along with a schedule of bonuses. However, shortly after the divorce was settled the company (S5 Wireless) lost the venture capital investor and my salary became unstable and by October I left the company to obtain a position where I could be paid in a more stable manner.

(Affidavit of Kurt Dobson in the Divorce Action at p. 3, ¶6, a copy of which is attached as Exhibit "C.") If I had known about this windfall that was expected I may have resisted the divorce being entered when it did. Kurt never told me about this "multi-million dollar" development. That may have explained why Kurt was so anxious to have the decree entered since he didn't seem to want to share any of the new found money.

13. In the midst of the divorce proceedings I began experiencing some health concerns. My initial medical concerns evidenced themselves in June 2003 but most evidence of illness was after having cosmetic surgery where a suspicious mole was found. As things progressed I experienced the following:

- **Pain through my back area** (June 2003 through the present); currently I have a spot near my kidney that constantly remains in pain
- **Nausea and Vomiting** (began in September 2003 and continued, getting worse, through December and then declined through March 2004)
- **Urinating blood** (starting August 2003 and intermittently in November 2003, February 2004 and occasionally to this day)
- **Hair falling out** (starting in August 2003 through December 2003)
- **Abnormal Menstrual Cycles**; excessive bleeding for weeks or no menstrual period at all (excessive bleeding starting August 2003 through December2003\January 2004 then menstrual stopped. I have yet to experience a menstrual period.
- **Excessive weight loss**; I lost 50 pounds including the maximum of 10 pounds lost from the liposuction (beginning August 2003 through January 2004)
- **Anxiety and Depression**; I could not sleep, was lethargic and weak; could not keep food down; had dark circles under my eyes (starting in August 2003 through December 2003; presently have intermittent episodes)

14. I initially went to Dr. Clayton, to have some cosmetic surgery (liposuction). Kurt had

just left me for a twenty-six year old woman that he had met on the Millionaires.com (Kurt told me that was where he met her). Kurt told me that she was living in New York and was looking for a husband so she could stay in the United States. Kurt began to treat me and the children like we were a nuisance. Needless to say, this sent me into an emotional tailspin. Hence my turning to liposuction. It was quite fortuitous that I had the liposuction.

15. It was at a visit with Dr. John Clayton, during the surgery in August 2003 for cosmetic surgery that a suspicious mole was discovered. After the surgery (one week later) Dr. Clayton called me in and expressed grave concern for me. He told me that he took the liberty of taking a specimen and sent it to pathology. Dr. Clayton told me that the mole was suspicious and that I should have it checked by an oncologist (cancer specialist immediately). Dr. Clayton told me that if he had not detected the mole that I would be dead within a year. I believed at that time that I had cancer. That information really upset me and I was crying in his office. I was already an emotional wreck from the divorce. Dr. Clayton's office made the appointment with the oncologist for within a week of my meeting with Dr. Clayton. The fact that the appointment had been made so quickly and to an oncologist instead of a dermatologist further upset me and caused me to believe that the condition was really serious. I potentially an oncologist to be a cancer specialist.

16. On the referral of Dr. Clayton I met with an oncologist to examine the suspicious mole that was on my left mid back where the kidney is (the same spot where I had the pain for the kidneys). In October 2003, I met with Rick D. Noyes, M.D., an oncologist, who at that time examined me fully for moles and told me that I had what appeared to be a melanoma. Dr. Noyes, in a conversation I had with him told me that it appeared to be serious but I was not to worry. I was

crying and was upset. I understood a melanoma to be a skin cancer that could be potentially dangerous. I believe he had a pathology report from Dr. Clayton. According to Dr. Noyes' recommendation we scheduled another surgery for October 27, 2003 to perform what he told me was a wide excision to remove the melanoma. That surgery was done and a portion of the skin where the mole was located was removed. The incision left a scar that is approximately 8 inches long that I have to this day. During this time we were having court hearings scheduled. Dr. Noyes wrote a note for me to excuse me from a court hearing. A copy of that note is attached as "Exhibit "D." Dr. Noyes gave me that note. The note, on Dr. Noyes stationary\prescription pad said:

**EXCUSED ABSENCE**

R. Dirk Noyes, M.D.
324 Tenth Avenue, #249
Salt Lake City, UT 84103
(801) 408-3555

Patient: Cindy Dobson

* * *

/s/ Dirk Noyes
Signature

Special Instructions:

[Hand Written] Maybe be extended due to recovery times. Pt. [patient] is to have surgery on the 27th of October. She will be unable to attend court. *Pt. [patient] is having a wide excision of melanoma.*

I read the note and understood it to mean that I had melanoma since that is what Dr. Noyes said that it was.

17. In early November 2003 I went back to have the incision on my back for the

melanoma treated because the incision had opened up unexpectedly. The incision had popped open so wide that they were not able to close it and I was told that it would have to heal from the inside out. That is when it got infected. Continuing into December 2003, those treatments were done in the emergency room and with at home with IV antibiotics.

18. Dr. Noyes told me that I had melanoma. I was devastated and worried and concerned about myself and my children. I was crying in his office. I was particularly concerned because my grandmother had a melanoma and died from it. It went to her brain and killed her. My aunt who I was very close to had kidney problems and ended up losing a kidney and a year latter died of pancreatic cancer. These incidences added to my anxiety and fears. My emotional state was a deep depression. I had anxiety attacks.

19. I went back to Dr. Noyes after the excision. He told me that he thought that he had gotten all the melanoma but that I was to have checkups every three to six months to make sure it does not return. It frightened me that this was so serious that I had to go back so frequently for checkups. At no time did Dr. Noyes say that I had not had a melanoma. I understood that I had melanoma and that I had additional precautions I had to take (the check ups) in the future.

20. During the period when the mole was being treated I was also experiencing severe pain in my mid back region where the melanoma was to be removed. That pain frightened me because it was in the same area. I have had three children. The pain I was experiencing at this time was worse than child birth. I went into an emergency room at a hospital. A physician at the emergency room referred me to a urologist (Dr. Middleton) for examination.

21. Just prior to the excision to remove what was told to me to be a melanoma, I met with

George W. Middleton, M.D., an urologist, who ran several tests on me. Dr. Middleton told me that the tests that he ran on me revealed kidney problems including a kidney blockages in both kidneys. He put me on pain medication and informed me that I needed surgery. A few days later, on October 24, 2003, I returned to Cottonwood Hospital where Dr. Middleton's performed a procedure to open the blockage. Just three days later I had the surgery performed by Dr. Noyes to remove the melanoma. I was advised by Dr. Middleton that I needed additional kidney blockage procedures. I had additional kidney procedures by Dr. Middleton on November 13, 2003 and March 22, 2004. Dr. Middleton also wrote me a note excusing me from a court a copy of which is attached as "Exhibit "E."

21. In a visit to the emergency room an emergency room doctor explained to me that I had high levels of calcium in my blood and that those high levels may have caused the kidney stones that caused the blockages and that they were likely related in some way to the melanoma. Since the blockages kept forming after the melanoma removal, the doctor told me that he was worried that there was still melanoma present in my body.

22. The fact that the appointment with the oncologist was made so quickly for me, that Dr. Noyes called my condition a melanoma, that I had other and painful kidney conditions and the explanation that the stones and the melanoma may be related caused me great alarm. Quite frankly, I was really scared about my heath. While I had been trained as a registered nurse I had not practiced any nursing for a period of fifteen (15) years. When I did practice as a registered nurse it was for a short time in the years 1991 to 1993 as a medical unit nurse. I had no exposure to melanoma except for my grandmother who died of it years ago and I knew that it could be potentially very dangerous.

From what was explained to me by Dr. Noyes I also knew that if the melanoma had spread to other parts of the body that it could be even more dangerous and even deadly. However, I am not a doctor and I do not make diagnoses of illness, and especially serious illness. However, because I was having multiple health related concerns at the same time I was extremely fearful that they were all related to melanoma and could evidence that the melanoma was a more serious type. Again, that caused me a great deal of stress and anxiety.

23. Between the painful kidney blockages and the melanoma excision, I was in very bad shape and was not able to focus much on the divorce at hand. I do not handle stress very well and the stress of the divorce was frankly overwhelming. I made many concessions to Kurt's demands regarding our marital property. I did not want the controversy. I wanted the divorce to conclude, and I wanted my health back. The treatments to the melanoma seemed successful, but as with any form of cancer, required follow up visits to assure my condition was improving and that the melanoma was not returning or spreading.

24. In addition to all of the foregoing health issues Kurt had infected me during the marriage with a lifelong incurable venereal disease (herpes) that Kurt knew he had but gave to me without telling me.

25. My communications with Tamera Dobson during the height of my sickness in the latter half of 2003 were minimal. I had no conversations with Tamera after December 2003. Further, due to a severe head injury Tamera sustained the year prior to my sickness she has not been the same and has had memory problems.

26. The actual extent of contact between Tamera and myself while I was sick in the latter

half of 2003 included maybe a few phone calls and I believe she visited my home twice during that period. If anyone other than me could accurately account for the events of my sickness, it would be Debbie Davis and Jodi Tucker, not Tamera. Either Debbie or Jodi took me to my appointments and surgeries over a six month period. That included in 2004. Those appointments were at both LDS Hospital, Cottonwood Hospital and Alta View Hospital. Dr. Noyes, the oncologist, worked at LDS Hospital. Dr. Middleton was at Cottonwood Hospital. At no time did I ever have appointments or claim to have appointments at the Huntsman Cancer Institute. I did not tell Tamera that I was going to have surgery at the Huntsman Cancer Institute.

27. Tamera is confused in her affidavit. Tamera says in her affidavit that she was aware that I was having kidney or gallbladder stone problems. Furthermore, she claims I told her I had a biopsy on a spot that came back positive for "stage 3 ½" melanoma. I never had a gall bladder problem. I was having kidney problems, however. To the best of my knowledge there is no such thing as "stage 3 ½" melanoma and furthermore I never said to her that I had a stage 3 ½ melanoma or any stage melanoma for that matter. I told her I was having problems with my kidney and I told her about the biopsy. I also told her that Dr. Noyes said that I had a melanoma, but never mentioned anything to Tamera about the severity of my condition.

28. Tamera was further confused about my condition, evidenced by her claim that I said I would be going to Dallas where I would have surgery for an infection that had developed. I did not tel her that. I had an infection at the incision site of the melanoma. My infection had completely healed by January 2004. I did not move to Dallas until May 2004. I considered moving to Dallas as early as January 2004 and expressed that desire on occasion. I made my final decision to move

to Dallas in March 2004 (to the best of my recollection). It was incidental to my decision to move to Dallas, but good, that there were good doctors in Dallas to handle any potential problems and follow up examinations.

29. In Tamera's statements in her affidavit, she makes representations that my condition at the time of the surgeries that I was "not overly concerned about [my] health, but rather [my] concern was with the impending divorce." At this time I was trying to not disclose to Tamera (who would get back to Kurt) the full extent of my illness for fear that Kurt would attempt to use my health against me in a custody dispute. Nonetheless, if anything, my perceived indifference to my medical condition should have signaled to Kurt that my condition was not too serious.

30. The divorce proceedings caused me a great deal of stress between August 2003 and May 2004. The increased stress seemed to complicate my ongoing kidney problems. During this time I visited with doctors and specialists at various hospitals and clinics at least 38 times.

31. Beginning in January 2004 my health began to improve but I was still having some health problems. They were:

- Episodes with kidney pain
- High blood pressure
- Episodes of Headaches (Migraine)
- Increased lipase levels

32. I did not see Kurt frequently from January 1, 2004 through April 26, 2004 when the Decree of Divorce was signed. Kurt did not take the children often during this time and we had little interaction except for emails and an occasional visit to each other. However, we did meet and talk

on the following occasions:

- Late December 2003: Mediation sessions; No mention of my health ever came up.
- January 1, 2004: I told Kurt that I was going to move to Dallas, Texas to live to be closer to my mother and father.
- January 8, 2004: I was going to be raising the three children for the next twenty years.
- January 2004: I told Kurt that was going to buy a home in Dallas.
- January\February 2004: I told Kurt that I going to return to work.
- April\May 2004: I told Kurt that I was thinking about getting married again.
- May 2004: I told Kurt that I was probably going to marry David.

At no time did I tell Kurt that I was about to die or was going to die from any of the maladies that I had. To the contrary, I told Kurt that I was going to do what was necessary to care for myself and our children and make a life for us. If Kurt believed that I was about to die he leapt to that conclusion without any help from me.

33. In December 2003 Kurt and I met for mediation with Bill Downes, an attorney who I was told specializes in mediation . No lawyers were present. At that meeting there was no discussion of any kind of my health.

34. On December 23, 2003 Kurt and I had mediation scheduled with Bill Downes. That was my birthday. I arrived with my lawyer for the mediation. We waited for Kurt to arrive. After about an hour we called Kurt who said that he was in California for vacation with Zivile. Later that day I called Kurt and asked why he would schedule a mediation for that day and not show up. Kurt

responded saying again that he was in California on vacation with Zivile. Kurt, with sarcasm, also said: "Did you have fun in mediation on your birthday? How much did it cost you?"

35. The January 04, 2004 email (Exhibit "F" attached hereto) makes mention about David (the person who I would later marry), but I was just becoming reacquainted with him and at that time I had no intention of marrying him. We had only been dating a few weeks and the likelihood of marriage amidst the divorce and all that was happening seemed very slim at that time. I was still trying to recover from my marriage with Kurt and I did not think the children were ready for another man to come into their lives. I was also very embarrassed that Kurt had given herpes to me. By July 2004 I had fallen in love with David and so had the children. Kurt and I were divorced on May 25, 2004. David and I married July 29, 2004, 90 days after Kurt and I divorced. Kurt told me that he married Zivile in May 2004 — so he was married within a week of the divorce.

36. The point of the January 04, 2004 (Exhibit "F" attached) and January 08, 2004 (Exhibit "G" attached) emails were to inform Kurt that I had been searching hard to find affordable housing in Dallas. I had still not made up my mind to move to Dallas. Our children had lived in an affluent neighborhood for the past ten years and had been provided with most anything they wanted. They were now thrust into a situation of possibly not having a home because Kurt decided to let the home be foreclosed upon as a way to get me out of the expensive Pepperwood neighborhood. Kurt had told me he wanted me in a trailer park in Mississippi. We are now living in a home that cost half ($300,000.00) what the Pepperwood home cost. My goal during that time was to negotiate with Kurt to secure child support payments and some cash in order to get into a home and have some secured income that I would be assured in order to properly care for the children.

**37.** In an email from me to Kurt on January 08, 2004 (Exhibit "G" attached) I wrote to Kurt as follows (excerpts):

> These children have suffered enough and I will be raising them on my own without you and it's hard and I will be doing this for the next 20 years. You on the other hand have plenty of free time and all your money goes only to you.
>
> * * *
>
> If I need to call my lawyer and get things going to see what we have where all the money in the last 9 months has gone and what the companies are doing that's what we will do.

The rest of that email depicts an accurate reflection of how things were at that time between Kurt and me. Squarely in the middle of the divorce, I was negotiating to get what I could from Kurt, since I knew he had hidden all the financial records and I knew I would never have access to them. I was still having some health problems but in no way did I think that it was life-threatening. In this email I expressed my worries about securing a long-term future for the children and not about my health or "duping" Kurt into giving me money on account of my health.

**38.** In an email from me to Kurt on January 21, 2004 (Exhibit "H" attached), I wrote to Kurt as follows:

> January 21, 2004
>
> Since I won't be working that won't work. I will have to go to school for two years, in order to start back in nursing. I haven't worked in fifteen years Kurt and I am a mother and a dad remember, you left me holding the bag. Cortland will not be in school for two more yrs. And I will not put the kids in daycare. Would you like them to have a Mom work at McDonalds while she does her Cancer treatments and then have the kids be key latch kids? Hmmm, guess you'd better come up with a better plan than that one. I will raise my kids. You choose to leave them, I will not. That will not change, you will have

> to do your part to make that happen. Your choice to start your new care free life with your 26 yr old girlfriend. If you can't take care of your original family I suggest you hold off on creating more problems for yourself. Babies cost a lot and need their Mom, your going to have two mommies at home taking care of your babies? If you can't afford that then you will have to forgo starting another family at 53 yrs old. In 20 years, who will you suggest take over your responsibilities again?

I was angry because Kurt had left me with the children to figure it all out while he is on vacations with his new 26 year old girlfriend who he met on MillionaireMatch.com. Kurt was off playing with his girlfriend while I was worried about the future of our children. I indicated that I was going to raise the children and I gave no indication that I was going to die. A discussion fo these events follow.

39. The January 21, 2004 email (Exhibit "H" attached) mentions "cancer treatments." I had been very sick through the last half of 2003. I had a melanoma as I had been told by my physician, but I never said I was dying or that I was terminally ill. All any of the emails or Kurt's statements show was that I did in fact have health problems (including a melanoma which required cancer treatments (a biopsy and a further wide excision surgery)). I was also given instructions that I was to have full body scans for possible reoccurring melanoma every three to six months for the rest of my life. I was going to have to have follow up examinations forever.

40. When Kurt left the home on June 23, 2003 he took with him a garage door opener. With that garage door opener he had continued to come into the home from time to time without my permission. In February 2004 Kurt had entered the home when I was not home. Meggie, our 9 year old daughter at that time, reported to me that Kurt went upstairs into my bedroom and opened mail I had received from David Cooper for Valentine's Day. Later that month I went to the movies with

some friends. When I returned home Kurt was in my house and I confronted Kurt about coming into the house and opening my mail. Kurt's response to my confrontation was that "it was still [his] house and he was paying for it and [he] could come and go as he pleased." I confronted him about reading my mail. Kurt said: "It looks like you replaced me pretty fast. You must not be too sick if you are jetting off to Dallas very other weekend." That was information that he could gotten from no other place than my mail. I said: "I'm feeling a lot better. I'm doing fine. I think that we have resolved most of the problems." He said: "Where are you getting the money." I also told him (with regard to the money) that "it was none of [his] business and that [he was] to stay out of my house and out of my bedroom." I said to Kurt: "Are you taping me like you used to." Kurt said: "Don't flatter yourself. I don't care enough to tape you any more."The confrontation lasted about ten minutes.

41. Just prior to March 2004, I made a visit to the emergency room at Cottonwood Hospital. I went to the emergency room because I was throwing up, urinating blood and had severe backaches. A doctor there told me that he had found a mass or a tumor on my kidney and that it was enlarged. With my past melanoma, I was again extremely worried that it was possibly related to the melanoma.

42. On March 1, 2004 a hearing was held before Commissioner Susan Bradford. That hearing was to establish temporary orders for this case. After an early payment, Kurt had been only sporadically paying anything towards: (a) child support, (b) alimony, (c) the home mortgage (i learned in April or May 2004 that the home was in foreclosure; Kurt had told me that it was being paid for by him), (d) the car (which was subject to repossession; the repossession person was calling

to repossess the car); (e) the utilities ( I received calls from the utility companies threatening me of turn off), and (f) the medical bills (they piled up and Kurt would not pay any; I had to pay approximately $8,000.00 that year in medical bills). At that hearing my legal counsel at the time, Frederick Greene, stated before the court *in the presence of Kurt and his lawyer* and myself:

> My client is ill, [uh] she has been diagnosed with stage three Melanoma she has received treatments for that ***and these treatments are successful***, but last week she was diagnosed with another mass on her kidney. [uh] They don't know what it is they have to do an MRI. Part of the urgency of this matter is that she can't even afford to do the MRI because of lack of funds. The problem of all that is, aside from her health, and with all due respect to my client and, I think she would acknowledge this begrudgingly, she is not much help to me [uh] in this case at this time. Her thoughts are elsewhere. She does not respond well to stress when she had just been diagnosed with potentially another cancer tumor.

(Emphasis added.) At that hearing I appeared much better than I had in a long time. I exchanged greetings with Kurt at the hearing. At that time I was feeling much better than I did in the Fall of 2003.

43. In late March 2004 (or early April 2003) I went to a Kelly Clarkston concert. Kurt was going to watch Cortland while I took the girls to the concert. We were excited to go to the concert and have some fun. Kurt picked up the children for him to watch Cortland. I was in a dating mode (high heels, etc.). Kurt said to me: "Gosh, I can't remember the last time you went to a concert." "It looks like you are having a lot of fun." I said: "I'm having a great time. Life goes on." I told him: "I'm feeling great. I haven't felt this good in months." Kurt said: "I'm glad you are feeling better."

44. In April 2004, before the Stipulation for Settlement was signed on April 27 and 28,

2004, I went to Kurt's office at S-5 Wireless to speak to Kurt. I needed to drop some paperwork off and talk about the settlement. Kurt said that I was "looking really good." Kurt said: "So I guess you are okay." I then said: "Yeah, I'm feeling a lot better and I'm moving on with my life and moving to Texas." I told Kurt that I needed to have the divorce concluded because I was considering marrying David. [I did not decide to marry David until a later time.] I told Kurt that I needed $4,500 a month. Kurt asked me what kind of money David made. I told Kurt that David an accountant but that he was not rich. Kurt then told me that I should marry someone "who was rich." I had litigation fatigue.

45. In response to Exhibit "I", the letter from my attorney mentions a small "window" which is in reference to a home I wanted to purchase, which fell through because I did not have enough cash and Kurt was getting ready for a trip to Lake Powell with Zivile. I wanted to finish the divorce before they went on another trip. This also states that I am in a hurry because of health problems. This is true. I was exhausted by heath problems which included extreme emotional anxiety related to the divorce. An Emergency Room doctor told me that Kurt was toxic to me and that I should conclude the divorce as quickly as possible because it would be hard for me to fully recover under so much stress. He said that the stress compromised my immune system.

46. Although I considered my sickness serious in the fall of 2003, I never thought I was going to die. I was really worried and concerned but never thought I was going to die. I never told anybody that I was going to die.

47. Other than as I have referred to in this affidavit, Kurt and I did not speak to each other much during the divorce proceedings since the situation between us was tense and antagonistic and

communication between us was very distasteful and unpleasant. We would descend into argument when we talked. When we did talk in person or over the telephone or communicate by email it seemed to me that Kurt's attention was focused on getting his now wife Zivile to Utah from New York and be able to stay here with a visa. Kurt talked to me about getting Zivile's son to the United States who Kurt said Zivile had not seen in years. Other than the times that I have mentioned above, Kurt did not inquire about my health. Kurt never seemed to be concerned about my health. Kurt never asked who my doctor was. Kurt never asked for reports from the doctor, Kurt never asked for an update on my progress. Kurt never suggested that he was concerned with my health in any way or that my health made any difference to him. Kurt never discussed the severity of my condition nor the likelihood of recovery. Kurt never offered to help with the children, even when I asked (begged) him to do so in the Fall of 2003 when I was at my sickest. Kurt never sent a flower or brought a meal. One time Kurt did tell me: "I hope you are sick. I hope you die then I won't have to pay you child support and Zivile will raise the kids." That conversation was in November 2003.

48. I had not worked for the 15 years prior to the divorce. Kurt and I previously had agreed that it was best for the children if I were home to look after them and fill their needs. At the time of the divorce, the children were only 3, 7 and 8 years old and I assumed that what we considered to be the best interests of the children had not changed, and that I would continue to stay at home with the children and live off child support. Even if I had wanted to return to work, I was in no condition to do so in the Fall of 2003 because of the extent of my sickness at that time and the youngest child was only 3 years old.. It was my intentions to stay at home with the children until my financial situation required me to return to work when Kurt stopped paying child support after the

divorce.

**49.** During the early stages of the divorce proceedings in 2003, Kurt went two to three months without ever seeing the children even though we both lived in Salt Lake City, Utah. The first time Kurt visited with the children was the night he picked Zivile up at the airport. Kurt called me on his cell phone and told me he was on his way to pick up Zivile, whom he had never met in person.

**50.** I was very sick (as I explained above) during this time and received no help from Kurt in caring for the children. Kurt showed no compassion to me at any time. In fact, during that time, Kurt failed to make payments on the car I was driving and the collections agencies threatened to repossess it. My legal counsel requested that Kurt pay the car payment to prevent repossession. Without the car it would be very difficult for me to attend medical visits. Kurt refused to make the car payments. I was finally able to cover the past due payments for the car by selling our children's video collection and some other items at a garage sale.

**51.** Kurt has told me the following:

- July 2003: He wants me in a trailer park and broke.
- November 2003: He would make sure I never had a good life.
- February 2004: I would beg him to take the children after working 12 hour shifts and attempting to raise three kids on my own.
- After Divorce: That he would have his father sue me for the emotional distress of my children for restraining them from seeing their father. [I have made the children available to Kurt according to the provisions of the Decree of Divorce and have accommodated his few requests to see the children.]
- After Divorce: That he would have his business sue me for disclosing privileged information. [Kurt represented to me that he was

out of work because the business was going under. When I called the office to see if he was still working, I found that indeed he was.]

- After Divorce: None of the money I would receive in child support will benefit me since it will all go to pay legal fees.

52. If Kurt came to the conclusion that I was about to die he did so on his own and without any help from me. Kurt and I never had any discussions about my death. We made no plans about an impending death. I never told Kurt in December 2003 (or at any other time) that I had six months to live or that my life was being shortened for any reason. Kurt's claim that I told him that I was going to die in six (6) months is simply not true. I never told him that. Interestingly it took five (5) months from late December 2003 to get the Decree of Divorce agreed to and entered.

53. In the end, all the settlement proposals were drawn up by either Kurt or his attorney.

54. Kurt and I were hardly civil to each other during this time January 2004 through April 2004) and Kurt was preoccupied with his new life and his new girlfriend. Kurt would come over to my house on occasion and parade Zivile before me. One time I came home to see Kurt and Zivile making out on my couch with the children present. Kurt wanted to move as quickly as I did. Kurt remarried within a week of our divorce.

55. Of the three emails speaking of my heath problems and my melanoma, there is no mention of terminal cancer or the possibility of death. There are hundreds of emails between Kurt and me and not once is there an email stating I was dying. Kurt and I communicated often by email. I do not have copies of the enmails that I had sent to Kurt because every email that I had sent or received prior to leaving Utah had been deleted from my computer. I did not delete the emails.

56. Kurt claims that I was the cause of him agreeing to a generous Settlement Agreement.

Kurt never expressed to me any worry about my health problems. Kurt states by March 2004 I had told him my cancer had spread to my liver and kidneys. This is not true. I never told Kurt that. At the beginning I was terrified with the word "cancer," I was emotionally spent, my hair was falling out, and I was in the hospital frequently, but by January 2004 I was feeling much better even though I was still having some health problems. I didn't believe I was going to die and I never told Kurt I was going to die. Even in my December 31, 2003 affidavit I never said I was going to die. Kurt has stated that we were having discussions about what to do with the children in case of my death. However, we never had any such discussions. There is nothing that even remotely supports that we were having any such discussions. I had been sick and one part of the sickness was that I had a melanoma. I thought I had a melanoma, the doctors told me I had a melanoma and I believe to this day that I had a melanoma that was excised from my lower back and that I will have to return to a trained physician for frequent body scans to assure that another melanoma does not develop.

57. I started as a Registered Nurse in September 2005 after Kurt had ceased paying child-support in the summer and I was forced to retain a lawyer. I had no choice. I wanted to stay home with my children, but because Kurt continues to sue me and after three years of litigation I would be in debt and in jeopardy of losing our home if I did not work. With the possibility of endless lawsuits my fear is that I will work to pay for attorneys and the children will not have child support.

58. **With regard to Paragraphs 1-4:** Cindy admits the factual statements contained in Paragraphs 1, 2, 3 and 4 of the Statement of Undisputed Material Facts of the Memorandum in Support of Plaintiff's Motion for Summary Judgment. Cindy does not recall receiving the written report from Dr. Clayton. Furthermore, even if she had received it she did not understand it, it being

written in medical jargon that she did not understand at that time. Cindy had never worked in the oncology field and her work experience was fifteen years prior to this time.

59. **With regard to Paragraph 5:** Cindy denies and disputes the factual statements contained in Paragraph 5 of the Statement of Undisputed Material Facts of the Memorandum in Support of Plaintiff's Motion for Summary Judgment. *See* the Statement of Facts as set forth below for the actual facts.

60. **With regard to Paragraph 6:** Cindy denies and disputes the factual statements contained in Paragraph 6 of the Statement of Undisputed Material Facts of the Memorandum in Support of Plaintiff's Motion for Summary Judgment. The claimed factual statement is not supported in any way by the citation to the record inasmuch as the letter supposedly supporting the statement (Deposition Exhibit 3, attached to the Memorandum in Support of Plaintiff's Motion for Summary Judgment as Exhibit D), does not contain the statements alleged in Paragraph 6 of the Statement of Undisputed Material Facts. Deposition Exhibit 3 is a letter dated April 23, 2004. It is not an October 22, 2003 letter as referred to in Paragraphs 6 & 7 of the Memorandum in Support of Plaintiff's Motion for Summary Judgment.)

61. **With regard to Paragraph 7:** Cindy denies and disputes the factual statements contained in Paragraph 7 of the Statement of Undisputed Material Facts of the Memorandum in Support of Plaintiff's Motion for Summary Judgment. the allegations of Paragraph 7 of the Petition.

62. **With regard to Paragraph 8:** Cindy admits the factual statements contained in Paragraph 8 of the Statement of Undisputed Material Facts of the Memorandum in Support of

Plaintiff's Motion for Summary Judgment but disputes that plaintiff has adequately set forth the full statement of the letter of Dr. R. Dirk Noyes to Dr. Grant E. Hawkins, dated November 4, 2003, wherein Dr. Noyes advises that additional surgery is to be performed and was performed at a later date than the October 22, 2003, initial examination. Further, Dr. Noyes did not give Cindy a copy of the November 4, 2003 letter nor did he tell Cindy the information contained in that November 4, 2003 letter. Dr. Hawkins, to whom the letter was sent, never gave Cindy a copy of the letter nor did he explained to Cindy the contents of the letter. Cindy became preoccupied with her kidney medical problems.

63. **With regard to Paragraph 9:** Cindy admits the factual statements contained in Paragraph 9 of the Statement of Undisputed Material Facts of the Memorandum in Support of Plaintiff's Motion for Summary Judgment.

64. **With regard to Paragraph 10:** Cindy denies and disputes the factual statements contained in Paragraph 10 of the Statement of Undisputed Material Facts of the Memorandum in Support of Plaintiff's Motion for Summary Judgment inasmuch as the date is incorrect and the incision was described by the doctor as a "wide excision of melanoma" not as a "conservative incision. The Lab Report further notes that it was a "Wide excision." See Exhibit "G" to the Memorandum in Support of Plaintiff's Motion for Summary Judgment. In Dr. Noyes' letter he stated that he felt Cindy "needed only a conservative excision *because of the severe atypia on the initial biopsy.*" A "conservative" approach is to take more issue not less tissue. However, Cindy disputes that Dr. Noyes ever conveyed the information in the Lab Report to Cindy.

65. **With regard to Paragraph 11:** Cindy admits the statements contained in

Paragraph 11 of the Statement of Undisputed Material Facts of the Memorandum in Support of Plaintiff's Motion for Summary Judgment. However, Cindy disputes that Dr. Noyes ever conveyed the information to Cindy.

66. **With regard to Paragraph 12:** Cindy admits the statements contained in Paragraph 12 of the Statement of Undisputed Material Facts of the Memorandum in Support of Plaintiff's Motion for Summary Judgment. admits the allegations in Paragraph 12 of the Petition. However, Cindy disputes that Dr. Noyes ever conveyed the information to Cindy. However, Cindy read the affidavit before signing it on New Year's Eve in a hurried way and did not catch that the drafting of the affidavit which was done by her attorney referred to a procedure with her thyroid when it was a actually her kidneys that had undergone medical procedures and surgery. Cindy thought that if the melanoma was in her kidneys (because she had kidney problems at the same time) it would be a stage 3 (she was worried that it might be a stage 3) but she had never been told she was a stage 3, and in the hurry of getting the affidavit signed missed it.

67. **With regard to Paragraph 13:** Cindy admits the statements contained in Paragraph 13 of the Statement of Undisputed Material Facts of the Memorandum in Support of Plaintiff's Motion for Summary Judgment. However, Cindy disputes that the email infers that she is stating that she is gravely ill and not likely to recover at that time but the email actually infers that she is on the road to recovery.

68. **With regard to Paragraph 14:** Cindy admits the statements contained in Paragraph 14 of the Statement of Undisputed Material Facts of the Memorandum in Support of Plaintiff's Motion for Summary Judgment. However, Cindy disputes that the email infers that she

is gravely ill and not likely to recover.

69. **With regard to Paragraph 15:** Cindy denies and disputes the factual statements contained in Paragraph 15 of the Statement of Undisputed Material Facts of the Memorandum in Support of Plaintiff's Motion for Summary Judgment inasmuch as Cindy never mad such a statement to Tamera Dobson.

70. **With regard to Paragraph 16:** Cindy denies and disputes the factual statements contained in Paragraph 16 of the Statement of Undisputed Material Facts of the Memorandum in Support of Plaintiff's Motion for Summary Judgment. While Cindy had told Kurt that she had a melanoma she never told Kurt that the melanoma was a "stage 4 melanoma" or that it had spread to her thyroid and that she might not live. To the contrary, Cindy was actually telling Kurt that she was better.

71. **With regard to Paragraph 17:** Cindy admits the statements contained in Paragraph 17 of the Statement of Undisputed Material Facts of the Memorandum in Support of Plaintiff's Motion for Summary Judgment. Cindy, however, denies any inference that she did not have melanoma or that she did not believe that she did not have melanoma. Cindy further denies that she ever told Kurt that she went under chemotherapy or radiation therapy.

72. **With regard to Paragraph 18:** Cindy denies and disputes the factual statements contained in Paragraph 18 of the Statement of Undisputed Material Facts of the Memorandum in Support of Plaintiff's Motion for Summary Judgment. In particular, there was never any indication that Kurt's thinking was impacted in any way by any representation made by Cindy.

73. **With regard to Paragraph 19:** Cindy denies and disputes the factual statements

contained in Paragraph 19 of the Statement of Undisputed Material Facts of the Memorandum in Support of Plaintiff's Motion for Summary Judgment.

74. **With regard to Paragraph 20:** Cindy denies and disputes the factual statements contained in Paragraph 20 of the Statement of Undisputed Material Facts of the Memorandum in Support of Plaintiff's Motion for Summary Judgment. Kurt never acted in such a way that would indicate that he had relied on any statement of Cindy's in deciding to enter the settlement agreement that he did.

75. **With regard to Paragraph 21:** Cindy admits the statements contained in Paragraph 21 of the Statement of Undisputed Material Facts of the Memorandum in Support of Plaintiff's Motion for Summary Judgment. Cindy was acutely aware that what she was agreeing to when the stipulation was entered for a child support payment to be in excess of the statutory guidelines that she was receiving a payment that would not be terminated if she were to remarry. Cindy entered into the agreement in the form it was made so that she could get a property distribution inasmuch as the property distribution was otherwise substantially skewed in favor of Kurt.

76. **With regard to Paragraph 22:** Cindy admits the statements contained in Paragraph 22 of the Statement of Undisputed Material Facts of the Memorandum in Support of Plaintiff's Motion for Summary Judgment.

77. **With regard to Paragraph 23:** Cindy admits the statements contained in Paragraph 23 of the Statement of Undisputed Material Facts of the Memorandum in Support of Plaintiff's Motion for Summary Judgment. However, Cindy was aware that the statutory child

support guidelines were in fact "guidelines" and that the amount could be greater than the guidelines. The Decree of Divorce, at paragraph 17, actually provided specifically as follows:

> 17. The foregoing base child support amount exceeds the child support amount calculated pursuant to the guidelines set forth at Utah Code Ann. §78-45-7.2 through 78-45-7.21.

That provision was no surprise to anyone. It was Kurt who insisted that the child support was not to change whether his income went up or down.

78. **With regard to Paragraph 24:** Cindy admits the statements contained in Paragraph 24 of the Statement of Undisputed Material Facts of the Memorandum in Support of Plaintiff's Motion for Summary Judgment but further assets that she was in Texas by Memorial day.

79. **With regard to Paragraph 25:** Cindy admits the statements contained in Paragraph 25 of the Statement of Undisputed Material Facts of the Memorandum in Support of Plaintiff's Motion for Summary Judgment. An interesting addition was that Kurt remarried within a week of the entry of the Decree of Divorce.

80. **With regard to Paragraph 26:** Cindy admits that Kurt provided an August 3, 2005 Affidavit that says what is contained in Paragraph 26 of the Statement of Undisputed Material Facts of the Memorandum in Support of Plaintiff's Motion for Summary Judgment but Cindy denies and disputes the factual statements contained in Paragraph 26 of the Statement of Undisputed Material Facts of the Memorandum in Support of Plaintiff's Motion for Summary Judgment the allegations in Paragraph 26 of the Petition. In particular, Cindy had a melanoma and has continuing obligations to have herself checked for melanoma. In that Affidavit Kurt reported that he was disabled but provided no proof of disability.

81. **With regard to Paragraph 27:** Cindy denies and disputes the factual statements contained in Paragraph 27 of the Statement of Undisputed Material Facts of the Memorandum in Support of Plaintiff's Motion for Summary Judgment. In particular, Cindy had extensive medical issues that she considered significant and serious and major.

82. **With regard to Paragraph 28:** Cindy admits the statements contained in Paragraph 28 of the Statement of Undisputed Material Facts of the Memorandum in Support of Plaintiff's Motion for Summary Judgment. However, the factual assertions made in paragraph 28 need to be taken in the context of Cindy having significant and major kidney medical problems. The reference to the thyroid was merely a misstatement.

83. **With regard to Paragraph 29:** Cindy admits the statements contained in Paragraph 29 of the Statement of Undisputed Material Facts of the Memorandum in Support of Plaintiff's Motion for Summary Judgment.

84. Based upon all the foregoing I hope that the court can recognize that I had no intention to defraud any person. When I made the statement I did in the December 31, 2003 affidavit I had no intention to misstate any fact but I read the affidavit to quickly and inadvertently stated that the melanoma was a stage 3 and that it was my thyroid I had had surgery on. What I was trying to say was that I had been really ill and I had a melanoma and I was deeply concerned about its severity. I did not intend to induce Kurt to rely on that statement for him to negotiate. I don't believe that I made the statement knowingly believing it to false or recklessly.

**DATED** this 1st day of March 2007.

Cindy D. Cooper

Cindy D. Cooper

**SUBSCRIBED AND SWORN TO** before me a notary public by Cindy D. Cooper this 1st day of March 2007.

Christopher Young

**Notary Public**

CHRISTOPHER YOUNG
Notary Public, State of Texas
My Commission Expires 07-13-09

***SUBMITTED BY:***

**HOLMAN & WALKER LC**

D. Miles Holman
**Attorneys for Defendant Cindy D. Cooper**

**CERTIFICATE OF SERVICE**

I hereby certify that this 3rd day of March 2007 I mailed, postage prepaid, the foregoing **AFFIDAVIT OF CINDY COOPER** to the following:

Peter Stirba
Meb W Anderson
**STIRBA & ASSOCIATES**
215 South State Suite 750
PO Box 810
Salt Lake City, Utah 84110-0810

D. Miles Holman
**Attorney for Defendant/Respondent**
**Cindy D. Cooper**

# EXHIBIT "A"

**To**

**AFFIDAVIT OF CINDY COOPER**

***William Kurt Dobson v. Cindy DeLaughter Cooper)***

**Civil No. 050922651**

**Judge Robert Foust**

**PAIGE BIGELOW (6493)**
**KRUSE LANDA MAYCOCK & RICKS, LLC**
Attorneys for Petitioner
Eighth Floor, Bank One Tower
50 West Broadway
P.O. Box 45561
Salt Lake City, Utah 84145-0561
Telephone: (801) 531-7090

COPY SENT TO CLIENT
7/1/04 ME
DATE INITIALS

**IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY**

**STATE OF UTAH**

| | | |
|---|---|---|
| WILLIAM KURT DOBSON, | ) | |
| Petitioner, | ) | **DECREE OF DIVORCE** |
| vs. | ) | Civil No. 034904073<br>Judge Stephen L. Henriod |
| CINDY DELAUGHTER DOBSON, | ) | Commissioner Susan Bradford |
| Respondent. | ) | |

The above-entitled matter came before the court pursuant to petitioner's motion for entry of default decree of divorce. The court reviewed the motion, the affidavit of petitioner in support of the motion, the parties' written Agreement, and the previously entered findings of fact and conclusions of law. Based thereon, and for good cause appearing, now therefore,

**IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:**

Dissolution of Marriage

1. Petitioner William Kurt Dobson is hereby awarded a decree of divorce from respondent Cindy Delaughter Dobson on the grounds of irreconcilable differences. Said decree shall be final upon signing and entry.

Legal Custody

2. The parties are the parents of three minor children born during their marriage, namely, Margaret Lela Dobson, age 10, born March 3, 1994, Kristen Elizabeth Dobson, age 9, born April 20, 1995, and William Cortland Dobson, age 4, born November 4, 1999.

3. The parties are hereby awarded joint legal custody of their minor children. The parties shall work together to support one another's relationships with their minor children.

4. The parties shall refrain from criticizing, demeaning, or derogating the other party to or in the presence of the children. The parties shall prohibit any such conduct or speech from occurring in the children's presence.

5. The parties shall advise and consult with one another before making major decisions concerning the children's religious training, education, medical care, mental health care, and extra-curricular activities.

6. The parties shall exchange information with one another concerning the health, education, general welfare, and significant functions in which the children are participating in a timely fashion.

7. The parties shall each be entitled to make day-to-day and emergency medical decisions for the children when the children are in their care.

8. The parties shall each immediately notify the other in the event of a medical emergency involving the children.

9. The parties shall each be entitled to direct access to all school, medical, and other records pertaining to the children.

10. The parties shall each provide the other with their current address and telephone number within 24 hours of any change.

Primary Residence

11. Respondent's residence, which is or will be within the Dallas, Texas area, shall be designated as the children's primary residence.

12. The parties shall work together to ensure that the children have frequent and continuing contact with petitioner.

13. At a minimum, petitioner shall be entitled to the following parent-time with the children in Salt Lake City, or wherever he may be located.

a. Summer school vacations beginning one week following the last day of the school year and ending one week prior to the first day of the next school year.

b. The Christmas break and Spring break in even-numbered years, beginning the day following the day school lets out and ending the day before school begins again.

c. The Thanksgiving break in odd-numbered years, beginning the day following the day school lets out and ending the day before school begins again.

14. Petitioner shall be entitled to parent-time with the children in Dallas, Texas, or wherever they may be located, upon 10 days' notice to respondent. Petitioner shall ensure that the children do not miss school during these visits and that their homework is completed.

15. Petitioner shall be solely responsible for the costs of transportation for all parent-time with the children, except for the parent-time set forth in 13.b. and 13.c. above, for which respondent shall be solely responsible.

Child Support

16. Commencing May 1, 2004, petitioner shall pay child support to respondent in the base amount of $4,500 per month until Margaret turns 18 or graduates from high school during the normal and expected year, whichever occurs later. Thereafter, petitioner shall pay child support to respondent in the base amount of $3,000 per month until Kristen turns 18 or graduates from high school during the normal and expected year, whichever occurs later. Thereafter, petitioner shall pay child support to respondent in the base amount of $1,500 per month until

William turns 18 or graduates from high school during the normal and expected year, whichever occurs later.

17. The foregoing base child support amount exceeds the child support amount calculated pursuant to the guidelines set forth at Utah Code Ann. § 78-45-7.2 through 78-45-7.21.

18. The parties shall cooperate with one another to establish an account wherein the foregoing base child support sums shall be automatically deposited one-half on the 5th and one-half on the 20th day of each month.

19. Petitioner shall pay an additional sum of $1,000 to respondent on or before December 5 of each year through the year in which Margaret graduates from high school, $666.00 through the year in which Kirsten graduates from high school, and $333.00 through the year in which William graduates from high school. The intent of this is to provide funds for Christmas gifts to the children.

20. Petitioner shall be solely responsible for the children's orthodontia and dental expenses.

21. Petitioner shall establish a college fund for the children and contribute $200 per month to it, commencing May 1, 2004. The children shall be the sole and exclusive beneficiaries of said fund, and petitioner shall not access it for purposes other than the children's higher education expenses except upon respondent's express written approval. Said funds shall be

applied to the children's higher education expenses in equal amounts or as agreed by the parties in writing. Petitioner shall provide yearly statements to respondent.

22. Respondent shall be solely responsible for all expenses related to the children, including medical insurance and uninsured medical expenses, except those expenses specifically allocated to petitioner as set forth above.

23. Any increase or decrease in the parties' respective incomes shall not be grounds for modification of the foregoing child support obligations, either upward or downward, except that a decrease in petitioner's income due to verified disability and impairment shall be grounds for a downward modification.

Tax Exemptions

24. Petitioner shall be entitled to claim the dependency exemptions for the minor children.

Property Division

25. The marital residence, which is currently under contract for sale, shall be awarded to petitioner. Petitioner shall be entitled to reside in the home as designated in the contract of sale and shall be entitled to the proceeds from the sale.

26. The Snowbird timeshare shall be sold. The timeshare is currently under a contract of sale and the parties shall cooperate to ensure that the sale is completed. Pursuant to the terms

of the sale, the buyers shall bring the timeshare out of foreclosure and assume the loan obligation thereon. No proceeds are due or expected from the sale.

27. Respondent shall be awarded stock in Silicon Optics, Inc. and S5 Wireless equal to one-half of petitioner's ownership interest in these companies as of April 28, 2004. Petitioner's interest in Spectrum5 Racing shall be awarded to him, free and clear of any interest therein of respondent's. As of April 28, 2004, petitioner owns 615,000 shares of stock in S5 Wireless and 50% of the stock of Silicon Optics, Inc. Petitioner shall provide stock certificates or equivalent documents to respondent on or before July 27, 2004.

28. Petitioner is hereby awarded all cash, retirement, and investment accounts titled in his name, including the Merrill Lynch 401(k) and the Wells Fargo checking accounts. Respondent is hereby awarded all cash, retirement and investment accounts titled in her name.

29. The Lexus is hereby awarded to respondent. Respondent shall be solely responsible for the balance remaining on the Bank One loan secured by the Lexus and shall ensure that the loan is paid in full on or before April 28, 2004.

30. The houseboat, airplane, jet skis, GTR, machine equipment, safe, guns, digital camera and video camera are hereby awarded to petitioner.

31. Respondent is hereby awarded all the jewelry she has acquired, her personal effects, and the following home furnishings:

a. The entire dining area furniture;

b. The tan armoire;

c. The kids' curio cabinet;

d. The two large mirrors;

e. The secretary desk; and

f. The paintings and framed photographs.

32. Petitioner is hereby awarded his personal effects and the remaining home furnishings not specifically awarded to respondent in paragraph 31 above.

33. Petitioner shall make copies of the family videotapes and photographs and provide them to respondent.

Cash Award

34. Petitioner shall pay to respondent the sum of $50,000 forthwith upon execution of the settlement agreement. Of this amount, $25,000 shall come from the Wells Fargo account in his name.

Debt Allocation

35. Petitioner shall be responsible to pay or assume the following debts: Citifinancial, Chase, HFC, Chevron, and Nordstrom.

36. Respondent shall be solely and separately responsible for the Capitol One, Mervyns, and Limited Too debts and any unpaid medical bills incurred for her or the children.

37. The parties are unaware of any debts existing in either parties' name, except as set forth herein. In the event a debt is hereafter discovered, the party incurring the debt shall be solely and separately responsible for paying it and shall hold harmless and indemnify the other party thereon. Neither party shall incur debt in the other parties' name, nor be responsible for any debt incurred by the other party, from April 28, 2004 onward. The parties shall ensure that all joint accounts are closed forthwith upon the signing of the settlement agreement.

Alimony

38. Neither party is awarded alimony from the other.

Income Taxes

39. The parties shall file joint tax returns for the years 2001, 2002, and 2003. Petitioner shall be solely responsible for all tax liability owing in these years. The parties shall file separately in 2004 and thereafter.

Attorney Fees

40. The parties shall each be solely and separately responsible for their own attorney fees incurred in connection with this matter, except that petitioner shall pay $7,500 to respondent for attorney fees she has incurred forthwith upon the sale of the marital home.

Full Disclosure

41. In the event it is determined that assets or liabilities of the parties have not been distributed or allocated herein, for whatever reason, including the failure of either party to

disclose those assets or liabilities, then the distribution and allocation of those undisclosed or unallocated assets and liabilities may be addressed by either party pursuant to a petition to modify the decree of divorce, and the nonmoving party shall not claim or assert that distribution or allocation of the undisclosed asset or liability must be pursued by an independent action. If such a petition is brought, the moving party's standard of proof shall be preponderance of the evidence and shall not be limited to the establishment or proof of fraud by the other party.

**DATED** this _____ day of _____ 2004.

**BY THE COURT:**

_____
**STEPHEN L. HENRIOD**
District Court Judge

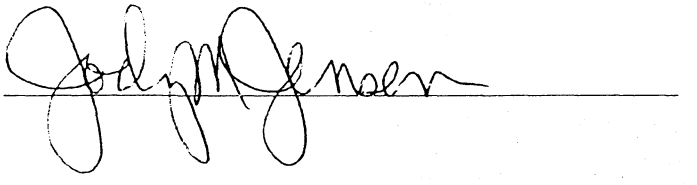
APPROVED:

_____
**D. MILES HOLMAN**
Attorney for Respondent

## CERTIFICATE OF SERVICE

I hereby certify that on this 11 day of May, 2004, I caused a true and correct copy of the foregoing **DECREE OF DIVORCE** to be mailed by United States mail, postage prepaid, to the following:

D. Miles Holman
HOLMAN & WALKER, LC
9537 South 700 East
Sandy, UT 84070



# EXHIBIT "B"

**To**

**AFFIDAVIT OF CINDY COOPER**

***William Kurt Dobson v. Cindy DeLaughter Cooper)***

**Civil No. 050922651**

**Judge Robert Foust**

Subj: settlement
Date: 2/23/2004 12:27:34 PM Mountain Standard Time
From: wkd@s5w.com
To: Mzdelaughter@aol.com
*Sent from the Internet (Details)*

Cindy,

I spent an hour this morning talking to Paige Bigelow about a possible settlement. Here's what we think:

a) $4500/month: No problem, but she said the court won't go for it all in child support for obvious reasons. Standard terms are $1808 child support and the rest in alimony.

b) Half the stock: No problem, just need to issue stock certificates.

c) Cash: If we do something soon, I might be able to scrape together $25k. If we go another month, then the cash gets used to pay lawyers, expenses, etc.

d) Equity in Home: No problem, but the house needs to sell and the agent needs to be paid the commission. If we cut a deal, then you keep whatever is left over.

Logistics: The only way I have to do this is to only support one home. Therefore, you'd need to take the $25k and get to Texas and setup an apartment until the

house sells. I'd move into the Pepperwood home, clean it up and get it sold send you the cash, then move back into an apartment or small house.

Let me know your thoughts... we might be wasting our time. If not, Paige said she could setup a meeting with everyone there to work out a written agreement.

We enjoyed having Cortland Saturday. He's a good kid and I think he had alot of fun.

Kurt

## Rick

**From:** <Mzdelaughter@aol.com>
**To:** <Rick@rickgreenLaw.com>
**Sent:** Tuesday, February 24, 2004 5:52 AM
**Attach:** settlement.eml
**Subject:** Fwd: settlement

In a message dated 2/23/2004 12:27:34 PM Mountain Standard Time, wkd@s5w.com writes:

Cindy,

I spent an hour this morning talking to Paige Bigelow about a possible settlement. Here's what we think:

a) $4500/month: No problem, but she said the court won't go for it all in child support for obvious reasons. Standard terms are $1808 child support and the rest in alimony.

b) Half the stock: No problem, just need to issue stock certificates.

c) Cash: If we do something soon, I might be able to scrape together $25k. If we go another month, then the cash gets used to pay lawyers, expenses, etc.

d) Equity in Home: No problem, but the house needs to sell and the agent needs to be paid the commission. If we cut a deal, then you keep whatever is left over.

Logistics: The only way I have to do this is to only support one home. Therefore, you'd need to take the $25k and get to Texas and setup an apartment until the house sells. I'd move into the Pepperwood home, clean it up and get it sold send you the cash, then move back into an apartment or small house.

Let me know your thoughts... we might be wasting our time. If not, Paige said she could setup a meeting with everyone there to work out a written agreement.

We enjoyed having Cortland Saturday. He's a good kid and I think he had alot of fun.

Kurt

# EXHIBIT "C"

**To**

**AFFIDAVIT OF CINDY COOPER**

***William Kurt Dobson v. Cindy DeLaughter Cooper)***

**Civil No. 050922651**

**Judge Robert Foust**

COPY SENT TO CLIENT - Fax
8-4-05 ME
DATE INITIALS

SUZANNE MARELIUS - 2081
Attorney for Petitioner
**LITTLEFIELD & PETERSON**
426 South 500 East
Salt Lake City, Utah 84102
Telephone: (801) 531-0435
Facsimile: (801) 575-7834

**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT**
**IN AND FOR SALT LAKE COUNTY, STATE OF UTAH**

| | |
|---|---|
| **WILLIAM KURT DOBSON,**<br><br>Petitioner,<br><br>-vs-<br><br>**CINDY D. COOPER,**<br><br>Respondent. | **AFFIDAVIT OF KURT DOBSON**<br><br>Case No. 034904073<br>Judge Stephen L. Henriod<br>Commissioner Bradford |

STATE OF UTAH )
:ss
COUNTY OF SALT LAKE )

## MOTION TO ADJUST CHILD SUPPORT

1. I am the Petitioner in the above-matter and make this Affidavit of my own personal knowledge and belief.

2. I was divorced from Respondent by Decree entered on or about May 26, 2004. We have three children together namely Margaret (DOB 3-3-94) , Kristen (DOB

is less than my whole child support obligation. Copy of W-2 attached hereto Exhibit "B".

5. I finally obtained employment early this year with a start-up company Star Bridge Systems Inc. as Director of Engineering, hired 1-10-05. My salary is $140,000.00 annual and a pay stub is attached. Exhibit "C". I request that the Court adjust my support obligation to the correct amount for that level of salary. It is accurate that I still own the company Silicon Optics with my brother but that is being closed down and has been inactive for two years since my brother's wife had a near-fatal accident. I have received no money or stock from this company since before the divorce.

I was previously a Director of Spectrum 5 Wireless and my last significant earnings there was $52,500.00 in wages in 2003. I was paid nothing from this company last year and was suspended from payroll January 2004 - a copy of letter attached. Exhibit "D".

6. When the divorce was resolved I had an income history of approximately $200,000.00 a year base and I was the founder of a company that I thought was one or two months away from a significant multi-million dollar venture capital investment. My salary was scheduled to increase along with a schedule of bonuses. However, shortly after the divorce was settled the company (S5 Wireless) lost the venture capital investor and my salary became unstable and by October I left the company to obtain a position where I would be paid in a more stable manner.

DATED this 3rd day of August, 2005.

KURT DOBSON
Petitioner

SUBSCRIBED AND SWORN to before me this 3rd day of August, 2005.

Notary Public
DEBBIE D. ANDERSON
426 South 500 East
Salt Lake City, Utah 84102
My Commission Expires
October 15, 2007
State of Utah

NOTARY PUBLIC
Residing at: Salt Lake County

My Commission expires:

10/15/2007

# EXHIBIT "D"

**To**

**AFFIDAVIT OF CINDY COOPER**

***William Kurt Dobson v. Cindy DeLaughter Cooper)***

**Civil No. 050922651**

**Judge Robert Foust**

# EXCUSED ABSENCE

R. Dirk Noyes, M.D.
324 Tenth Avenue, #249
Salt Lake City, UT 84103
(801) 408-3555

Patient Cindy Dobson

Has been under my care for the period

From: Oct. 22nd 03

To: Oct. 30th, 03

I confirm that the patients absence was physician advised.

Signature

Special Instructions:
maybe be extended due to recovery times. Pt is to have surgery on the 27th of October, she will be unable to attend Court. Pt is having a wide excision of melanoma.

# EXHIBIT "E"

**To**

**AFFIDAVIT OF CINDY COOPER**

***William Kurt Dobson v. Cindy DeLaughter Cooper)***

**Civil No. 050922651**

**Judge Robert Foust**

MIDDLETON UROLOGICAL ASSOCIATES
A PROFESSIONAL CORPORATION
110 MEDICAL TOWERS
1060 EAST FIRST SOUTH
SALT LAKE CITY, UTAH 84102
PHONE 531-9453

10-23-03

To whom it may concern,

Cindy Dobson is a patient of mine, on the 24th of October we are doing surgery to remove her kidney stones. This patient has stones obstructing both kidneys and will need another surgery at another time in the next two to four weeks. If you have any other questions please call my office.

Thank you,

George W. Middleton, MD

DEA #AM3566066

GEORGE W. MIDDLETON, M.D., F.A.C.S.
UROLOGY

INDEPENDENCE SQ./LIBERTY HALL
181 EAST 5600 SOUTH, SUITE 130
MURRAY, UTAH 84107
(801) 266-8664

Name Cindy Dobson

Address _____ Date 10/4/2003

Rx Cindy has stone in ureter causing her to be painful & require care for the next 24-48 hrs - precluding her attending a hearing

Label

☐ Refill _____ times PRN NR

G Middleton M.D. _____ M.D.

SUBSTITUTION PERMITTED DISPENSE AS WRITTEN

# EXHIBIT "F"

**To**

**AFFIDAVIT OF CINDY COOPER**

***William Kurt Dobson v. Cindy DeLaughter Cooper)***

**Civil No. 050922651**

**Judge Robert Foust**

## W. Kurt Dobson

**From:** <Mzdelaughter@aol.com>
**To:** <wkd@s5w.com>
**Sent:** Sunday, January 04, 2004 6:31 PM
**Subject:** Re:Mediation?

Kurt,

I guess vacation time is over for both of us and I would love to get moving on the divorce. My attorney said we have to answer to your hearing on the 8th of Jan. I suggest we try to mediate and tie things up before and see if we can do it on our own eliminating all the expense and headache, but it's your call. Let me know because my attorney is ready to hit it hard starting tomorrow

As you know I am interested in moving closer to my family and friends. Dallas looks like the kind of place I can afford and have the support of friends and family. There are excellent doctors in Dallas that are highly recommended that deal with melanoma. My family was in Dallas with me and we were looking for affordable housing for me and the children. I found a place near the church and close to one of the best schools in the Dallas Metro area. Because the house is taking so long to sell, maybe you and Zivile could move in here and me and the kids could get settled in Dallas by spring. We need to figure out child support, alimony, and some cash so I can get into a home. I found a home around 340,000. I may be able to get it for less, but the kids could have their own rooms and live in an acceptable neighborhood and be surrounded by nice families. If I had a down payment of 40,000, I could get into the home and not pay a high interest or insurance issued by the bank. I talked to a mortgage broker yesterday and she offered me a rate under 6%. It is contingent of course on me getting rid of the loans left in my name and having a judgment showing child support and stock ect.

I need some dialog soon or I'll assume you want to go the attorney route. I hope you all enjoyed your vacation, it was fun seeing my family again and experiencing the South. I forgot how much I missed it.

Thanks for the gift card, I would love to treat you and Zivile to dinner sometime so I can get to know her better. The children have spoken highly of her and she sounds lovely

Let me know what I can do to expedite the process. Thanks. Cindy

p.s. The children said you were asking a lot of questions about David. FYI, I am in no way interested in Marriage or a serious relationship. I think I'll need a long time to recover from this one. I am seeing David and a few other men in the area that I've known for years. My focus is to get the children settled and get healthy, a relationship would hardly fit at this point. The children are not ready, and I respect that.
There of course would be room for you and Zevile to visit and you would be welcome at any time.

# EXHIBIT "G"

**To**

**AFFIDAVIT OF CINDY COOPER**

***William Kurt Dobson v. Cindy DeLaughter Cooper)***

**Civil No. 050922651**

**Judge Robert Foust**

## W. Kurt Dobson

**From:** <Mzdelaughter@aol.com>
**To:** <wkd@s5w.com>
**Sent:** Thursday, January 08, 2004 8:26 PM
**Subject:** Re: Today

Kurt,

Your right I will not be able to afford a 340,000.00 Home. I am looking at a new one that is 250,000.00 I have to have a place that is acceptable for the children to live. This is about as far down as we are willing to go. A note should run around 1,500 a month. With my crappy credit I'll be getting a terrible interest rate unless we can come up with a major down payment. You are going to have to help more on this. You keep talking about two homes, you are the one who decided to split this family up so your going to have to be the one to take what comes with that decision. These children have suffered enough and I will be raising them on my own without you and it's hard and I will be doing this for the next 20yrs. You on the other hand have plenty of free time and all your money goes only to you. We are four you are one You need to put that into consideration. You have let go of all your responsibilities as a husband and father, you will not let go of the obligations you have to provide for me and these kids If it was just me and I had run out on you and the kids, an apartment would be fine. Why is it you need a home? Start thinking about your children. This is not a 50/50 proposition at all and I will not negotiate to give these kids the basics so you can be free and have a nice home too. If we disagree then I need to call my attorney back and say you are not on the same page as I thought. Do you want me to raise the kids in a slum or an apartment? Reality is that I have all the emotional responsibility and physical custody and all you have to do is write a check. How about keeping your end of the bargain. I'll be lucky not to have to go to work and come home late at night and be a DAD and a MOM And your worried about getting yourself a home. Get a grip. Stop thinking of yourself for once. This is about your three children, who had no choice in what you have done It's not pretty or nice and I am responsible for picking up the pieces You may move on and not look back and leave it all up to me to make sure these kids are raised in the right environment and schools, church, activities, and what's needed is a secure home and safe place to live. Not in an apartment complex and not with their Mom working 24 hrs a day. Think for once You and your girlfriend are capable and healthy, unlike your helpless children and me with health problems. You need to let me know now where you are headed with this, if you have a problem with what we have discussed already, then we are in major trouble and need to go back to the attorneys. I was trying to be fair If you are trying to make this an even divide, your right it won't work. There are four of us. They are 3,8, and 9. I am the only one they have, Do you get it.

As far as a budget Home Mortgage 1,500 plus taxes at2.5% and insurance. Probably looking at 2,100.00 Utilities, I really have no idea, but I assume for a home in Texas maybe around 500.00. Car insurance 500.00 Medical 500.00. Food 600.00, Kids 350.00, Clothing and entertainment 600.00 month. As you can see I need about 5,150.00 a month. I'm sorry, but that is what it takes to raise three kids. If I got an apartment, three bedroom, it would be 1,200-1,500 A month This is not a luxurious lifestyle Your children deserve better. This is the minimum. You need to come up with some cash so we can get in a home You need to realize that If I need most the cash in order to get them in a home, so be it Why do you need a home again? Why are you getting married and taking on someone else and her child again? Help me here. Take care of your original family first if you don't mind then if you can make more money to support another wife and child more power to you. Why get married you get what you want from her already, your not religious I don't get why you continue to make more problems Do whatever the hell you want, but you have to take care of MEGGIE, KIRSTEN,, and CORTLAND , ages 3, 8, and 9. They can't go to work. They can't stay home by themselves. I'm sorry I am so mad, but you have got to stop obsessing about yourself and remember what this is about. Let me know by tonight what you are thinking. If I need to call my lawyer and get things going to see what we have where all the money in the last 9 months has gone and what the companies are doing, that's what we will do If you what to communicate to me a different and more fair story great Lets do that. Your call again How long do you want this to go on? Cindy

# EXHIBIT "H"

**To**

**AFFIDAVIT OF CINDY COOPER**

***William Kurt Dobson v. Cindy DeLaughter Cooper)***

**Civil No. 050922651**

**Judge Robert Foust**

## Re: Kids

From: <Mzdelaughter@aol.com>
To: <wkd@s5w.com>
Date: Jan 21 2004 - 4:34pm

Since I won't be working that won't work. I will have to go to school for two yrs, In order to start back in Nursing. I've haven't worked in 15 yrs Kurt and I am a mother and dad remember, you left me holding the bag. Cortland will not be in school for two more yrs. and I will not put the kids in daycare. Would you like them to have Mom work at McDonalds while she does her Cancer treatments and then have the kids be key latch kids? Hmmm , guess you'd better come up with a better plan than that one. I will raise my kids. You choose to leave them, I will not. That will not change, you will have to do your part to make that happen. Your choice to start your new care free life with your 26 yr. old girlfriend. If you can't take care of your original family I suggest you hold off on creating more problems for yourself. Babies cost a lot and need their Mom, your going to have two mommies at home taking care of your babies? If you can't afford that then you will have to forgo starting another family at 53 yrs old. In 20 yrs, who will you suggest take over your responsibilities again?

# EXHIBIT "I"

**To**

**AFFIDAVIT OF CINDY COOPER**

***William Kurt Dobson v. Cindy DeLaughter Cooper)***

**Civil No. 050922651**

**Judge Robert Foust**

Law Office of
**FREDERICK N. GREEN**

Litigation
Mediation
Collaborative Law

7390 South Creek Road
Suite 104
Sandy, Utah 84093

Telephone: (801) 401-0185
Fax: (801) 401-0188
rick@rickgreenlaw.com

April 23, 2004
****Sent Via Fax and Regular Mail****

Paige Bigelow
KRUSE LANDA MAYCOCK & RICKS, LLC
Eighth Floor, Bank One Tower
50 West Broadway (300 South)
PO Box 45561
Salt Lake City, Utah 84145-0561

RE: *Dobson v. Dobson*

Dear Paige:

Cindy is anxious to resolve the Stipulation, or not, today. Her desire to do this is dictated more by her health concerns than anything else. While you and your client are undoubtably aware that I am uncomfortable with the pace and timing of these negotiations I must respect my client's wishes in this regard and I hope that Mr. Dobson will do the same. Whatever the case, it is clear that there is a very small "window" for this matter to be resolved today and if it is not then I believe we will be back to our original positions. While that is, frankly, agreeable to me, Cindy wishes otherwise.

With that in mind, you should know that Mr. Dobson has seem fit to communicate directly with me by way of e-mail. He has sent me a re-drafted Settlement Agreement making changes that I had confidentially suggested to my client but have not proposed to you. My client tells me the changes that Mr. Dobson has suggested are agreeable to her with the following exceptions:

Paragraph 19. Cindy asks that this paragraph reflect that Mr. Dobson will absorb all cost associated with his parent time and transportation.

Paragraph 27. My client does not agree that child support can be reviewable in the event of an IRS garnishment.

Paragraph 35f.g. These references should be deleted and replaced with this language: "Paintings, photos and personal affects."

Paragraph 38. The number here should be $57,500.00 in view of the fact that there is no reference to reimbursement for attorney's fees.

I will be unavailable the better part of the day. If it is important feel free to interrupt me.

Sincerely,

FNG Green/AB

Frederick N. Green

FNG/ab
cc: Cindy Dobson

Dictated by FNG
But Not Read

# ADDENDUM "B"

# AFFIDAVIT OF FREDERICK N. GREENE
# (Dated March 3, 2007)

Handwritten page numbers reflect the record pages

D. Miles Holman (USB # 1524)
**HOLMAN & WALKER LC**
9533 South 700 East, Ste. 100
Sandy, Utah 84070
Telephone: (801) 990-4990; Facsimile (801) 990-4999

Pf

**ATTORNEYS FOR RESPONDENT/DEFENDANT**

**IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY**

**STATE OF UTAH**
**Salt Lake Department, 450 South State Street, Salt Lake City, UT 84111**

| | |
|---|---|
| **WILLIAM KURT DOBSON**<br>**Petitioner/Plaintiff**<br><br>**vs.**<br><br>**CINDY DELAUGHTER COOPER**<br>**Respondent/Defendant** | **AFFIDAVIT OF FREDERICK N GREEN**<br><br>**Civil No. 050922651**<br><br>**Judge Robert Faust** |

**STATE OF UTAH )**
**:ss**
**COUNTY OF SALT LAKE )**

Frederick N. Green, having been duly sworn deposes and says as follows

1. I am an attorney licenced to practice law before the Courts of the State of Utah.

2. I was retained to represent Cindy Dobson ("Cindy") as her legal counsel. The case in which I was retained to represent her was:

**WILLIAM KURT DOBSON v. CINDY DELAUGHTER DOBSON**

**Civil No. 034904073**

**Judge Stephen L. Henriod**
**Commissioner Susan Bradford**

(the "Divorce Action"). I made my appearance in the matter on August 21, 2003.

3. William Kurt Dobson ("Kurt") was represented by Paige Bigalow of the law firm of Kruse Landa Maycock & Ricks for the Divorce Action. Paige was and is an accomplished and highly skilled lawyer from a law firm that has highly skilled and accomplished domestic law attorneys.

4. I withdrew as Cindy's legal counsel on April 26, 2004. This followed my termination by Cindy on April 23, 2004 which was a Friday.

5. The Divorce Action was a hotly contested matter. The contested issues included property allocation, child support, alimony\spousal support, debt allocation and other issues incident to divorcing spouses and parents. In addition, there were other hotly disputed matters, including:

- Kurt having a live in girlfriend from Lithuania while Cindy and Kurt were still married to each other.
- Kurt's use of pornography while in the presence of the children
- Kurt exposing the children to his sexual relations with his live in girl friend
- Kurt wasting marital assets to pursue his girlfriend

Kurt denied all of the foregoing, except having a live in girlfriend.. I found that in this case there was little that the parties could agree upon. Almost everything required litigation.

6. The Divorce Action had been filed by Kurt on July 25, 2003.

7. During the time that I represented Cindy I :

(a) prepared documents and pleadings for the Divorce Action which were submitted to the Court for its consideration .

(b) made Court appearances on behalf of Cindy where Cindy was present some times

and Kurt was present and Kurt's legal counsel was present. During those Court appearances I made representations to the Court on behalf of Cindy.

(c) sent correspondence to and received correspondence from legal counsel for William Kurt Dobson ("Kurt").

(d) had other conversations with legal counsel for Kurt, some of those conversations having been made in person at court proceedings or over the telephone.

(e) had conversations with Kurt with his attorney present.

8. Whatever issue might have existed regarding Cindy's health, according to my recollection, first arose in the Fall of 2003 and in the context of a hearing that had apparently been scheduled on or about October 29, 2003. I was informed at that time that Cindy was experiencing two significant health problems which required the continuance of that hearing. I understood that Cindy had been struggling with kidney stones. This required morphine to ease the pain. Surgery was scheduled for October 23, 2003. I understood that in the course of treating one medical situation that a suspicious mole was discovered on Cindy's back and diagnosed as a cancerous melanoma. Surgery for that condition was scheduled for October 27, 2003. I provided hand written notes from the treating physicians including Dr. R. Dirk Noyes, M.D., the oncologist, and Dr. George Middleton, the urologist. Dr. Middleton also provided a typed version of his notes and all of these were provided to Mr. Dobson's attorney. Dr. Noyes stated in part, in his "excused absence" note of October 2003: "PT is having a wide excision of melanoma." It appears that another surgery regarding the melanoma was scheduled for November 4, 2003 which may have complicated a hearing set for November 24, 2003.

9. It would be fair to say that in my communications with Mr. Dobson's attorney I raised

the issue of Ms. Dobson's health. This was done in the context, initially, of procedural issues, namely the continuance of a scheduled hearing. On another occasion I referred to Ms. Dobson's health concerns to explain her desire to bring the divorce litigation to an expedient conclusion. In fact, this reference was in the context of settlement letters and proposals which were reaching an advanced stage by April 23, 2004.

10. While Cindy was acutely aware of her health, the stress of the litigation, how this impacted her and the children and so forth, I can find no evidence and have no recollection of any circumstance whereby one could come to the conclusion that Kurt Dobson relied upon those circumstances or even referred to those circumstances in the prolonged settlement discussions of this case.

11. To back up, within a month of the commencement of the case both parties were discussing the possibility of Court hearings. This was necessary to resolve some immediate concerns and to establish some temporary "ground rules" for the case. While those efforts were pursued in Court and out of Court, the parties were also actively pursing settlement possibilities and discussions. These discussions sometimes occurred between counsel but more frequently it occurred between the parties themselves either telephonically or in an exchange of emails.

12. The parties were both anxious to avoid any unnecessary attorney's fees. In his emails to Cindy Mr. Dobson made reference to the attorney's fees. Unfortunately, more formal settlement procedures met with some frustration. For instance, on one occasion when mediation was scheduled with Mr. Downes, Mr. Dobson did not appear. Initially, at least in the first few months of the case,

some agreements were reached and some matters were postponed hoping that the parties could resolve them one way or another without the involvement of the Court. It became apparent by December 2003 that this would not happen and I pursued a more formal methodology through the Courts to resolve certain temporary issues. This resulted in a hearing on March 1, 2004 before Commissioner Susan Bradford. In that hearing the parties represented to the Court certain stipulations and the Court made certain rulings based upon findings and the parties' stipulation. Mr. Dobson's attorney prepared an order based upon that hearing. The interlineated version of that order was signed by Commissioner Bradford on about April 16, 2004 apparently including interlineations made by the Commissioner based upon an objection that I believe I filed on behalf of Cindy.

13. The one pronounced feature of the this case was the incredible acrimony and what I would like to call "game playing" which went on during my involvement. The parties made numerous attempts to resolve their issues by a variety of means. Throughout my representation I tried to approach the resolution of the divorce issues from an objective point of view.

14. This required the production of documents so that I could, together with expert witnesses, analyze the financial aspects of the case. These documents were hard to come by even though I recall promises being made on numerous occasions. These promises were not met. Ultimately, the absence of this information played a significant part in my reluctance to approve a settlement which was based largely on, in my opinion, Mr. Dobson's self serving representations as to the values and cash flow factors which I could not establish from the documents that I had in my file.

15. It goes without saying that Ms. Dobson was very suspicious of Mr. Dobson. Her suspicions were exceeded only by Mr. Dobson's own lack of trust and suspicion of Cindy.

16. Having now practiced law for 31 years, and the majority of that time has been spent in divorce litigation, there were few cases that were as volatile and marked by such distrust as this one. The basis for the parties' distrust of one another went not only to financial issues but also their personal lives and their relationships with their children.

17. Sensing this, I was always careful to attempt to prove every aspect of any fact that my client or I would rely upon by the best and most persuasive evidence possible. Hence, when it came to continuing the October 2003 hearing I was sure to include the notes and names of doctors pertinent to Cindy's health concerns.

18. In spite of that, I am not aware of any occasion when Mr. Dobson requested further information regarding Cindy's health concerns. He did not ask for the medical records. He did not subpoena that information. He did not ask that Cindy sign any waivers in connection with her records. He did not ask for an independent medical examination.

19. The obvious reason that Mr. Dobson did not pursue that line of inquiry was that Cindy's health concerns did not appear to be relevant to him when it came to settlement and probably not when it came to litigation. We will never know whether Mr. Dobson may have inquired further as to these matters if the case had not settled. However, up until the time when the parties did settle the case (or at least my withdrawal from the process) Mr. Dobson did not appear to be concerned about the Cindy's health concerns. My inference from this has always been that Mr. Dobson never

really believed Cindy on such matters in the first place.

20. The only relevance or impact of Cindy's health concerns on the litigation process or the settlement process was as to Cindy's attitude in the case. I think these factors were very relevant to Cindy and may have dictated her approach to settlement (including the timing of the settlement and its terms). However, the impact of Cindy's health concerns, if any at all, would have been to Mr. Dobson's benefit without any doubt. In other words, Cindy would have expedited the settlement on terms less favorable to her than otherwise in order to bring the matter to a speedy conclusion and without the benefit of all of the evidence, discovery and expert opinion which is usually so important in a case of this sort. My experience has been in similar cases that the other party in such a dynamic intuitively if not intentionally grasps that reality and exploits it. Whether it was intentional or not, I believe that the outcome of this case represented that dynamic. In other words, Mr. Dobson was able to dictate the timing and largely the terms of the settlement agreement because Cindy may have been unduly anxious to resolve the matter.

21. Whatever the case, the parties pursued their settlement discussions between them. Sometimes I was privy to their email communications. To a great extent they arrived at an agreement and then presented it to me and Ms. Bigelow so that the formalities could be taken care of. Ultimately, because of my schedule, I could not prepare the agreement that Cindy wished me to prepare and Ms. Bigelow agreed to do so.

22. Furthermore, it became clear to me that the agreement was quite likely not in Cindy's best interests or at least I could not offer the kind of input that I normally would mostly because of

the lack of data, documents and expert input on critical value and income issues.

23. My impression was that the parties were unreasonably and perhaps irrationally focused more on expediency than equity.

24. At the time, in April 2004, the only relevance that Cindy's health concerns might have had in this case was reflected in her desire for expediency. There was no discussion, communication or reference to Cindy's health concerns on the part of Mr. Dobson or his attorney. As far as he is concerned, I can find no evidence that it played any role whatsoever in the terms that he was demanding.

25. I can find no evidence and recall none which would suggest that Mr. Dobson was in any way motivated by an anticipation of Cindy's imminent passing or incapacity as a factor in the ultimate settlement terms that he and Cindy agreed on.

26. If I had sensed then that Mr. Dobson was attempting to exploit Cindy's health concerns, such as they were and whatever they were, and that my client was being manipulated thereby, I would have ceased my involvement in the case earlier. If Mr. Dobson was motivated by some speculative event regarding my client's health, I simply do not recall that fact.

27. Whatever the case, I felt that I could not in good conscious endorse or approve the settlement agreement that the parties had worked out between them. Again, this was due to the lack of data, documents and expert opinion that I find necessary in a case like this as well as my overall belief that the agreement was inequitable from Cindy's point of view and unduly favorable to Mr. Dobson.

28. March 1, 2004: On this day I appeared in court before Commissioner Susan Bradford on the Motion for Temporary Relief. That hearing was to set and made the following representation to the Court:

> "My client is ill, [ah] she has been diagnosed with stage three Melanoma *she has received treatments for that and these treatments are successful*, but last week she was diagnosed with another mass on her kidney. [ah] They don't know what it is they have to do an MRI part of the urgency of this matter is that she can't even afford to do the MRI because of lack of funds. The problem of all that is aside from her health, and with all due respect to my client and I think she would acknowledge this begrudgingly she is not much help to me [ah] in this case at this time. Her thoughts are elsewhere she does not respond well to stress when she had just been diagnosed with potentially another cancer tumor."

(Emphasis Added )

29. During the period between October 2003 and March 2004 counsel for Kurt and I were in settlement communications in the hopes that the Divorce Action could be settled and a final decree of divorce entered by the Court. During that period of time at no time was it brought to my attention from legal counsel from Kurt or from Kurt that Cindy's medical condition played any part in the settlement of the case from Kurt's point of view.

30. I do not recall a time when Kurt's legal counsel ever expressed concern, on Kurt's behalf or otherwise, about Cindy's health or medical condition or express any sympathy for her condition that would in any way evidence that they considered her condition a factor in the settlement of this matter. I do not recall a time when Kurt's legal counsel ever asked me about Cindy's health or medical condition or asked me to confirm any aspect of her health or medical condition.

31. Kurt's health and medical condition, however, came up in the settlement discussions. Kurt made it abundantly clear that he had a medical condition that could result in a stroke. That concern was placed in the settlement documents that I saw prior to my withdrawal where it provides in the child support provisions that:

> 16. Commencing May 1, 2004, petitioner shall pay child support to respondent in the base amount of $4,500 per month until Margaret turns 18 or graduates from high school during the normal and expected year, whichever occurs later. Thereafter, petitioner shall pay child support to respondent in the base amount of $1,500 per month until William turns 18 or graduates from high school during the normal and expected year, whichever occurs later.
>
> *17. The foregoing base child support amount exceeds the child support amount calculated pursuant to the guidelines set forth at Utah Code Ann. §78-45-7.2 through 78-45-7.21.*
>
> * * * * * * * *
>
> 19. Petitioner shall pay an additional sum of $1,000 to respondent on or before December 5 of each year through the year in which Margaret graduates from high school, $666.00 through the year in which Kristen graduates from high school, and $333.00 through the year in which William graduates from high school. The intent of this is to provide funds for Christmas gifts to the children.
>
> 20. Petitioner shall be solely responsible for the children's orthodontia and dental expenses.
>
> 21. Petitioner shall establish a college fund for the children and contribute $200 per month to it, commencing May 1, 2004. The children shall be the sole and exclusive beneficiaries of said fund, and petitioner shall not access it for purposes other than the children's higher education expenses except upon respondent's express written approval. Said funds shall be applied to the children's higher education expenses in equal amounts or as agreed by the parties in writing. Petitioner shall provide yearly statements to respondent.
>
> 22. Respondent shall be solely responsible for all expenses related to the children, including medical insurance and uninsured medical expenses, except those

expenses specifically allocated to petitioner as set forth above.

> *23. Any increase or decrease in the parties' respective incomes shall not be grounds for modification of the foregoing child support obligations, either upward or downward, except that a decrease in petitioner's income due to verified disability and impairment shall be grounds for a downward modification.*

(Italics emphasis added by me.) While we discussed Kurt's health and medical condition and provided for it in the Decree of Divorce and further provided that the child support was to be greater than the child support guidelines we never discussed Cindy's health and medical conditions in this context.

32. At no time did I ever tell Kurt or Kurt's legal counsel that Cindy was dying. To the contrary I represented to Kurt's counsel that:

- Cindy wanted to move to Texas
- Cindy wanted to buy a house in Dallas, Texas.
- Cindy was ready to move on with her life

33. In all the conversations and communications I had with counsel for Kurt I never had the impression that Cindy's health or medical condition had any bearing on the discussions from Kurt's point of view.

DATED THIS 2 day of March, 2007.

FREDERICK N. GREEN
Affiant

SUBSCRIBED AND SWORN before me this 2 day of March, 2007.

Notary Public
Residing in Salt Lake County
State of Utah

My Commission Expires:

Notary Public
LISA BALDWIN
7390 South Creek Road, Suite 104
Sandy, Utah 84093
My Commission Expires
July 10, 2008
State of Utah

**SUBMITTED BY:**

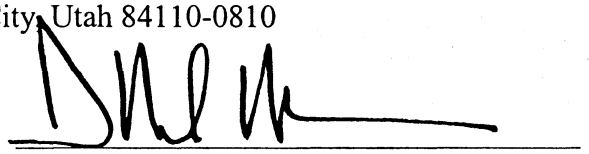
**HOLMAN & WALKER LC**

D. Miles Holman
**Attorneys for Defendant\Respondent**
**Cindy D. Cooper**

## CERTIFICATE OF SERVICE

I hereby certify that on this the 3rd day of March 2007 the foregoing **AFFIDAVIT OF FREDERICK N GREEN** by mailing a copy thereof, postage prepaid, addressed to:

Peter Stirba
Meb W Anderson
**STIRBA & ASSOCIATES**
215 South State Suite 750
PO Box 810
Salt Lake City, Utah 84110-0810



D. Miles Holman
**Attorney for Defendant**