

2007

William Kurt Dobson v. Cindy Delaughter Cooper : Brief of Appellant

Utah Court of Appeals

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Recommended Citation

Brief of Appellant, *Dobson v. Cooper*, No. 20070525 (Utah Court of Appeals, 2007).
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IN THE UTAH COURT OF APPEALS

450 South State Street, Salt Lake City, Utah 84111

WILLIAM KURT DOBSON
Plaintiff and Appellee

vs.

CINDY DELAUGHTER COOPER
Defendant and Appellant

Court of Appeals No. 20070525

BRIEF OF APPELLANT

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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Appellee

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UTAH APPELLATE COURTS
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Utah Code Ann. §78-2-2(j) (1953), as amended 1

JURISDICTION

Jurisdiction of this Court is pursuant to the provisions of Utah Code Ann. §78-2-2(j) (1953), as amended.

ISSUES PRESENTED

ISSUE: **Did the Lower Court Err by Failing to Realize That There Were Disputed Issues of Material Facts That Should Have Precluded the Lower Court from Granting a Motion for Summary Judgment.**

Standard of Review: “Summary judgment is appropriate only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The Court must view all facts and inferences in the light most favorable to the nonmoving party, but it may not assume facts for which no evidence is offered. We review a trial court’s order granting summary judgment for correctness.” *Mountain West Surgical Center v. Hospital Corp. of Utah*, 2007 UT 92, ¶10. Under a correctness review the lower court is afforded no deference. *Afridi v. State Farm Mut. Auto Ins. Co.*, 2005 UT 53, ¶5, 122 P.3d 596. Review of fraudulent intent fell under the correctness standard of the summary judgment review. *Lakeside Lumber Products, Inc. v. Evans*, 2005 UT App 87, ¶8, P.3d 154.

This issue was preserved in the lower court. R. 500-503.

There were further issues that could also be raised¹ but the granting of summary

¹ **Another issue was whether the evidence was sufficient to prove by clear and convincing evidence that all of the elements of fraud were met.**

Standard of Review: Whether there was sufficient evidence to support a finding is reviewed under the clearly erroneous standard. *Pasker, Gould, Ames & Weaver v. Morse*, 887 P.2d 872, 875 (Utah Ct. App. 1994). “To demonstrate that the trial court’s findings of fact are clearly erroneous the appellant must first marshal all the evidence in

judgment when there are disputed issues of facts is so fundamentally inappropriate that that issue should be sufficient alone to warrant reversal of the lower courts granting of the summary judgment.

CONSTITUTIONAL PROVISIONS AND STATUTES
DETERMINATIVE OF THE APPEAL

None.

STATEMENT OF THE CASE
(Introduction)

This is an appeal from a decision of the Third District Court, Honorable Robert P. Faust presiding, granting Kurt Summary Judgment in this matter. The lower court ruled on motion that Cindy had defrauded Kurt. In particular, the lower court concluded on motion that Kurt relied on a false statement made by Cindy and had entered into a settlement where he was to pay child support in excess of the statutory guidelines. However, since there was evidence that the child support was to compensate for Kurt's potentially lopsided property allocation the Decree of Divorce was set aside to determine the amount of child support that should be paid and the property distribution. 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 hereto as Addendum "A."

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

support of those findings. *Id.* The issue was preserved for appeal in the lower court. R. 503-521.

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 provided for child support that was greater than what was provided by the standard guidelines for child support and was unmodifiable except for health concerns of Kurt. The fact that the amount was greater than the guidelines was specifically set forth in the Settlement Agreement and Decree. Kurt brought the action to set aside the child support provision and to leave the remaining portions of the Decree of Divorce in force. Kurt and Cindy had agreed to the child support amount that would assure Cindy of an amount of money to provide to Cindy a property settlement since Kurt obtained a lopsided allocation of the marital estate.

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*.

STATEMENT OF FACTS

The following facts are taken in a light most favorable to Cindy and are supported by the record. These facts demonstrate that the trier of facts on trial could determine that Kurt had not been defrauded by Cindy.

1. Kurt and Cindy were married on April 29, 1989. R. 560, ¶2.
2. Kurt filed for divorce (a second filing during the marriage) on July 3, 2003 in

the matter entitled:

William Kurt Dobson v. Cindy Delaughter Cooper
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Third District Court
State of Utah

R. 561, ¶¶4 - 5.

3. Kurt was represented by competent and experienced legal counsel. R. 429, ¶3.

4. The divorce proceedings were particularly contested, mean-spirited, excessively volatile and marked by distrust. The divorce action was hotly contested on all issues throughout the litigation. R. 560–61, ¶3. Cindy was very suspicious of Kurt and Kurt of her. The parties' distrust of one another went not only to financial issues but also their personal lives and their relationships with their children. R. 433, ¶¶15 -16. The contested issues included property allocation, child support, alimony\spousal support, debt allocation and other issues incident to divorcing spouses and parents. Almost everything required litigation. R. 429, ¶5.

5. Cindy demanded \$4,500.00\month in child support, premised upon Cindy not going to work outside the home and being a stay-at-home mother (as Cindy and Kurt had previously discussed when they were together) *and* to compensate for an unequal division of assets. Kurt wanted to keep very valuable assets, including expensive cars (including a race car) and businesses (Kurt told Cindy that he did not want her to know what was going on in those businesses). The amount to be paid was designated as child support instead of alimony so that Cindy would be entitled to receive the amount even if Cindy remarried and would be a counterbalance for the property distribution. R. 563–64, ¶7; R. 565, ¶ 9; R. 565,

¶10; R. 584–85, ¶48.. *See also* R. 561–63, ¶6. A copy of the Decree of Divorce is attached hereto as Addendum “B.”

6. Kurt made it very difficult for Cindy to find out any information about the assets and had kept all the finances secret from Cindy. Kurt told Cindy on multiple occasions:

“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.”

Cindy wanted to end the divorce process and just have enough to care for the children. R. 564–65, ¶8.

7. The property distribution and value of the property at the time of the divorce was as follows:

To Kurt: \$757,250.00 (plus unknown values for business assets, retirement accounts and bank accounts)

To Cindy: \$148,000.00

Some assets were allocated equally between Kurt and Cindy that were not valued at the time that are in addition to the amounts above. A more detailed description of the division of assets is set forth in Addendum “E” attached hereto. R. 565–68, ¶11.

8. Kurt was anxious to have the Decree entered because he had a an anticipated large windfall coming that Cindy did not know about. In an affidavit Kurt made in the

Divorce Action (first time Cindy learned of it) 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.

R. 544, ¶6. Kurt never told Cindy about this “multi-million dollar” development. That may have explained why Kurt was so anxious to have the decree entered. R. 568, ¶12.

9. 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 afterwards)
- ▶ **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 December 2003\January 2004 then menstrual stopped.
- ▶ **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; with intermittent episodes afterwards)

R. 322; 325; 331; 569, ¶13.

10. Cindy initially went to Dr. John Clayton, a cosmetic surgeon to have some cosmetic surgery (liposuction). Kurt had just left Cindy for a twenty-six year old woman that he had met on the Millionaires.com. This new woman was living in New York and was looking for a husband so she could stay in the United States. Kurt began to treat Cindy and the children like they were a nuisance. Needless to say, this sent Cindy into an emotional tailspin. Hence, Cindy turned to liposuction. However, it was quite fortuitous that Cindy had the liposuction. R. 569–70, ¶14.

11. Dr. Clayton performed the liposuction surgery in August 2003 and during the surgery a suspicious mole was discovered on Cindy's back. After the surgery (one week later) Dr. Clayton called Cindy into his office and expressed grave concern for Cindy. Dr. Clayton told Cindy that he took the liberty of taking a specimen of the mole and sent it to pathology. Dr. Clayton told Cindy that the mole was suspicious and that Cindy should have it checked by an oncologist (cancer specialist) immediately. Dr. Clayton told Cindy that if he had not detected the mole that Cindy would be dead within a year. Cindy believed at that time that she had cancer. That information really upset Cindy and Cindy was crying in Dr. Clayton's office. Cindy was already an emotional wreck from the divorce. Dr. Clayton's

office made the appointment with the oncologist for within a week of Cindy's meeting with Dr. Clayton. The fact that the appointment had been made so quickly and to an oncologist instead of a dermatologist further upset Cindy and caused Cindy to believe that the condition was really serious. Cindy knew an oncologist to be a cancer specialist. R. 322; 570, ¶15.

12. On the referral of Dr. Clayton, Cindy met in October 2003 with Rick D. Noyes, M.D., an oncologist, to continue the examination regarding the suspicious mole that was on Cindy's left mid back where the kidney is located (the same spot where Cindy had kidney pain). At that time Dr. Noyes examined Cindy fully for moles and told Cindy that she had what appeared to be a melanoma. Dr. Noyes told Cindy that the suspicious mole appeared to be serious but that Cindy was not to worry. Nonetheless, Cindy was crying and was upset. Cindy understood a melanoma to be a skin cancer that could be potentially dangerous. Cindy believed Dr. Noyes had a pathology report from Dr. Clayton at that meeting. According to Dr. Noyes' recommendation they scheduled another surgery for October 27, 2003 to perform what Dr. Noyes told Cindy was a wide excision to remove the melanoma. That surgery was done and a portion of the skin where the mole was previously located was also removed. The incision left a scar that is approximately 8 inches long that Cindy has to this day. During this time there were Court hearings scheduled. Dr. Noyes wrote a note for Cindy to excuse Cindy from a court hearing. A copy of that note is attached as "Addendum "C." Dr. Noyes gave Cindy that note. The note, on Dr. Noyes stationary\prescription pad said, among other things:

Special Instructions:

[Hand Written] Maybe be (sic) 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.*

(Emphasis added.) Cindy read the note and understood it to mean that she had melanoma since that is what Dr. Noyes said that it was. That note was used to excuse Cindy from the Court hearing. R. 323; 570–71, ¶16, 430, ¶8..

13. In early November 2003 Cindy went back to have the incision on Cindy's back for the melanoma excision treated because the incision had opened up unexpectedly and became infected. Those treatments were done in the emergency room and at home with IV antibiotics. R. 571–72, ¶17.

14. Dr. Noyes told Cindy that she had melanoma. Cindy was devastated and worried and concerned about herself and the children. Cindy was particularly concerned because there was a family history of melanoma that had lead to a death. Also, Cindy had a family history of kidney problems. That family history added to Cindy's anxiety and fears. Cindy's emotional state at that time was a deep depression and Cindy had anxiety attacks. R. 323; 572, ¶18.

15. Cindy went back to Dr. Noyes after the excision. Dr. Noyes told Cindy that he thought that he had gotten all the melanoma but that Cindy was to have checkups every three to six months to make sure the condition did not return. It frightened Cindy that this was so serious that she had to go back so frequently for checkups. At no time did Dr. Noyes say that Cindy had not had a melanoma. Cindy understood that she had melanoma and that she had additional precautions she had to take (the check ups) in the future to detect reoccurrence. R. 572, ¶19

16. During the period when the mole was being treated Cindy was also experiencing severe pain in Cindy's mid-back region where the melanoma was to be removed. That pain frightened her because it was in the same area as the melanoma. Cindy went to a hospital emergency service. A physician there referred Cindy to a urologist (Dr. George W. Middleton) for examination. R. 572, ¶20.

17. Just prior to the excision to remove what was told to Cindy to be a melanoma, Cindy met with Dr. Middleton, an urologist, who ran several tests on Cindy. Dr. Middleton told Cindy that the tests revealed kidney problems including blockages in both kidneys. Dr. Middleton put Cindy on pain medication and informed her that she needed surgery. A few days later, on October 24, 2003, Cindy returned to Cottonwood Hospital where Dr. Middleton's performed a procedure to open the blockage. Just three days later Cindy had the "wide excision of melanoma" surgery performed by Dr. Noyes. Dr. Middleton informed Cindy that she needed additional kidney blockage surgery. Cindy had additional kidney procedures by Dr. Middleton on November 13, 2003 and March 22, 2004. Dr. Middleton also wrote Cindy a note for an excuse for Cindy not being in court, a copy of which is attached as "Addendum "D." R. 572-73, ¶21(1st).

18. During this same time in another visit to the emergency room a doctor explained to Cindy that she was having symptoms that were likely related in some way to the melanoma. The doctor told Cindy that he was worried that there was still melanoma present

in her body. R. 573, ¶21(2nd).

19. Cindy was really scared about her health. While Cindy had been trained as a registered nurse Cindy had not practiced any nursing for a period of fifteen (15) years prior to this occurrence. Cindy was a registered nurse for a short time only in the years 1991 to 1993 on a medical unit. Cindy had no exposure to melanoma except for her grandmother who died of it years previously and Cindy knew that it could be potentially very dangerous. From what was explained to Cindy by Dr. Noyes, Cindy 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, Cindy is not a doctor and she does not make diagnoses of illness, and especially serious illness. However, because Cindy was having multiple health related concerns at the same time Cindy was extremely fearful that they were all related to melanoma and could evidence that the melanoma was a more serious type. Again, that caused Cindy a great deal of stress and anxiety. R. 573–74, ¶ 22. On December 31, 2003 Cindy hastily signed an affidavit that indicated that she had stage 3 melanoma and an operation on her thyroid, failing to catch the reference to stage 3 and thyroid. R. 590, ¶ 66.

20. Between the painful kidney blockages and the melanoma excision, Cindy was in very bad shape emotionally and was not able to focus much on the divorce at hand. Cindy did not handle stress very well and the stress of the divorce was overwhelming her. Cindy did not want the controversy and wanted the divorce to conclude. Cindy wanted her health

back. The treatments for the melanoma seemed successful but, as with any form of cancer, required follow up visits to assure Cindy's condition was improving and that the melanoma was not returning or spreading. R. 574, ¶23.

21. For the period of September 2003 to mid- to late December 2003, Cindy was emotionally fragile. Cindy had become extremely ill. Cindy lost a lot of weight (more so than the cosmetic surgery), her hair began to fall out, she was yellow in appearance with dark black circles under her eyes, her menstrual cycles were irregular and Cindy had significant uncontrolled bleeding for longer than usual periods of time and she was in pain a substantial amount of time. Cindy went to the Emergency Room several times for pain. Cindy was essentially incapacitated during this time. She was confined to her bed most of the time. Cindy even had IV medications at her home. R. 694, ¶¶6 and 7.

22. The divorce proceedings caused Cindy a great deal of stress between August 2003 and May 2004. The increased stress seemed to complicate Cindy's ongoing kidney problems. During this time Cindy visited with doctors and specialists at various hospitals and clinics at least 38 times. R. 576, ¶30.

23. Kurt's sister, Tamara, however, after seeing Cindy, reported to Kurt that Cindy was "not overly concerned about her health, but rather her concern was with the impending divorce." Cindy's indifference to her medical condition should have signaled to Kurt that Cindy's condition was not too serious. R. 576, ¶29.

24. Kurt made little contact with the children in the fall of 2003 and showed no concern for Cindy's health. R. 694–95, ¶¶8-9.

25. Beginning in January 2004 Cindy's health began to improve but Cindy was still having some health problems. They were:

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

R. 576, ¶31.

26. Cindy did not see Kurt frequently from January 1, 2004 through April 26, 2004 when the Settlement Agreement for entry of the Decree of Divorce was signed. Kurt did not take the children often during this time and Cindy and Kurt had little interaction except for emails and an occasional visit with each other. However, Cindy and Kurt did meet and talk on at least the following occasions where the following conversations were held:

- ▶ **December 2003: Mediation sessions late December:** No mention of Cindy's health ever came up. R. 577, ¶33, R. 577–78, ¶34.²
- ▶ **January 1, 2004: Cindy told Kurt:** That Cindy was going to move to

² On December 23, 2003 Kurt and Cindy had mediation scheduled. That was Cindy's birthday. Cindy arrived with her lawyer. Cindy and her lawyer waited for Kurt to arrive. After about an hour Kurt was called who said that he was in California for vacation with Zivile, his girlfriend. Later that day Cindy 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?" R. 577–78, ¶34.

Dallas, Texas to live to be closer to Cindy's mother and father.

- ▶ **January 8, 2004:** **Cindy told Kurt:** "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." R. 579–80, ¶¶37 and 38.
- ▶ **January 2004:** **Cindy told Kurt:** That Cindy going to buy a home in Dallas. R. 578, ¶36.
- ▶ **January 21, 2004:** **Cindy told Kurt:** That Cindy was going to raise the children. R. 579–80, ¶38.
- ▶ **February 2004:** **Kurt told Cindy:** "It looks like you replaced me pretty fast. You must not be too sick if you are jetting off to Dallas every other weekend."
- Cindy told Kurt:** "I'm doing a lot better. I'm doing fine. I think that we have resolved most of the problems [referring to her health]." R. 580–81, ¶40.
- ▶ **January\ February 2004:** **Cindy told Kurt:** That Cindy was going to return to work.
- ▶ **February 2004:** **Kurt told Cindy:** Cindy would beg Kurt to take the children after working 12 hour shifts and attempting to raise three kids on her own. R. 585–86, ¶51.
- ▶ **March 2004:** **Cindy's lawyer made this statement in open court with Kurt and Kurt's lawyer present:** After referring to the melanoma went on to state that "these treatments [the melanoma treatments] are successful. R. 581–82, ¶42, R. 436, ¶28.
- ▶ **March 2004:** **Kurt told Cindy:** "Gosh, I can't remember the last

time you went to a concert.” “It looks like you are having a lot of fun.”

Cindy told Kurt: “I’m having a great time. Life goes on.” “I’m feeling great. I haven’t felt this good in months.”

Kurt told Cindy: “I’m glad you are feeling better.”
R. 582, ¶43.

► **April 2004:** **Kurt told Cindy:** You are “looking really good.” “So I guess you are okay.”

Cindy told Kurt: “Yeah, I’m feeling better and I’m moving on with my life and moving to Texas.” Cindy said that she was considering marrying David.

Kurt told Cindy: You should marry someone “who was rich.”
R. 582–83, ¶44

► **May 2004:** **Cindy told Kurt:** That Cindy was probably going to marry David.

At no time did Cindy tell Kurt that Cindy was about to die or was going to die from any of the maladies that Cindy had. To the contrary, Cindy told Kurt that she was going to do what was necessary to care for herself and their children and make a life for them “for the next twenty years.” If Kurt believed that Cindy was about to die he leapt to that conclusion without any help from Cindy. R. 576–77, ¶¶32, 33.

27. Other than as referred to above, Kurt and Cindy did not speak to each other much during the divorce proceedings since the situation between them was tense and

antagonistic and communication between them was very distasteful and unpleasant. They would descend into argument when they talked. When they did talk in person or over the telephone or communicate by email it seemed to Cindy that Kurt's attention was focused on getting Zivile (later his wife) to Utah from New York and be able to stay here with a visa. Kurt talked to Cindy about getting Zivile's son to the United States who Kurt said Zivile had not seen in years. Other than the times referred to above, Kurt did not inquire about Cindy's health. Kurt never seemed to be concerned about Cindy's health. Kurt never asked who Cindy's doctor was. Kurt never asked for reports from the doctor. Kurt never asked for an update on Cindy's progress. Kurt never suggested that he was concerned with Cindy's health in any way or that Cindy's health made any difference to him. Kurt never discussed the severity of Cindy's condition nor the likelihood of recovery. Kurt never offered to help with the children, even when Cindy asked (begged) him to do so in the Fall of 2003 when Cindy was at her sickest. Kurt never sent a flower or brought a meal. One time Kurt did tell Cindy: "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. R. 583–84, ¶47.

28. Although Cindy considered her sickness serious in the fall of 2003, Cindy never thought she was going to die. Cindy was really worried and concerned but never thought she was going to die. Cindy never told anybody that she was going to die. R. 583, ¶46; R. 588, ¶59; R. 591, ¶69.

29. At no time did Cindy's legal counsel tell Kurt or Kurt's legal counsel that Cindy was dying. To the contrary, Cindy's legal counsel represented to Kurt's counsel that Cindy wanted to move to Texas, Cindy wanted to buy a house in Dallas, Texas and Cindy was ready to move on with her life. R.438, ¶32, R. 435, ¶24, 436, ¶30, 435, ¶24.

30. Kurt and Cindy never had any discussions about Cindy's death (as Kurt alleges). Kurt and Cindy made no plans about an impending death (as Kurt alleges). Cindy never told Kurt in December 2003 (or at any other time) that Cindy had six months to live or that Cindy's life was being shortened for any reason (as Kurt alleges). Cindy never told Kurt that her cancer had spread to her liver and kidneys (as Kurt alleges). Cindy and Kurt never had any discussions about what to do with the children in case of Cindy's death (as Kurt alleges). Cindy never told Kurt that Cindy was going to die in six (6) months (as Kurt alleges). Interestingly, it took five (5) months from late December 2003 to get the Decree of Divorce agreed to and entered. R. 586, ¶52 and ¶55; R. 586–87, ¶56.

31. Kurt's legal counsel never left any impression that Cindy's health or medical condition had any bearing on settlement. 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 Cindy's condition that would in any way indicate that Kurt considered Cindy's condition a factor in the settlement of the case. R. 431, ¶¶9-10, R. 433–34, ¶19, 436, ¶29, R. 438, ¶33.

32. There was no time when Kurt requested from Cindy or her counsel further information regarding Cindy's health concerns. Kurt did not ask for medical records. Kurt did not subpoena medical information. Kurt did not ask that Cindy sign any waivers in connection with her medical records. Kurt did not ask for an independent medical examination. If Kurt came to the conclusion that Cindy was about to die he did so on his own and without any help from Cindy. R. 433, ¶18, 436, ¶30.

33. Kurt, in contrast, made it abundantly clear that he had a medical condition that could result in a stroke. Kurt's health condition was so important to him that it was provided for in the Decree of Divorce yet there was no mention of Cindy's health and medical conditions in the Decree. R. 437–38, ¶31. *See also* R. 561–63, ¶6. A copy of the Decree of Divorce is attached hereto as Addendum "B."

34. Kurt was anxious to have the divorce entered and concluded quickly so that he could marry another. R. 586, ¶54.

35. In the end, all the settlement proposals and the Settlement Agreement and Decree of Divorce were drawn up by either Kurt or Kurt's attorney. R. 586, ¶53.

36. Kurt and Cindy were divorced on May 25, 2004. Kurt remarried in May 2004 — within a week after Kurt and Cindy divorced. Cindy remarried July 29, 2004, 60 days after Kurt and Cindy divorced. R. 578, ¶35.

37. 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.

* * * * *

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.

R. 561–63, ¶6. A copy of the Decree of Divorce is attached hereto as Addendum “B.”

38. Cindy had no intention to defraud any person. When Cindy made the statement she did in the December 31, 2003 affidavit she had no intention to misstate any fact but she

read the affidavit, written by counsel, too quickly and inadvertently stated that the melanoma was a stage 3 and that it was her thyroid she had surgery on. What Cindy was trying to say was that she had been really ill and she had a melanoma and she was deeply concerned about its severity. Cindy did not make the statement knowingly believing it to be false or recklessly. R. 594, ¶84.

SUMMARY OF ARGUMENT

The lower court erred in granting Kurt's Motion for Summary Judgment based upon the following:

First: Summary Judgment Is Unavailable to Kurt Because Material Factual Disputes Exist.

It is crucial to a motion for summary judgment that there be undisputed material facts. However, there were countless issues of fact that were disputed in this matter making the lower court's conclusions inappropriate and the granting of the Motion for Summary Judgment reversible error.

Second: Fraud Claims Involve Determining State of Mind. State of Mind Determinations Are Best Left to Trial.

State of mind, generally, cannot be determined on summary judgment. State of mind determinations are best left to the jury or the trial court sitting without a jury to determine after a trial on the matter.

Third: Material Issues of Fact Exist on All of the Nine Elements of Fraud

That Kurt must Prove to Recover. Viewing All the Evidence and Factual Inferences in a Light Most Favorable to Cindy, a Reasonable Trier of Fact could Determine That Kurt Fails to Prove All, or Any One, of the Elements of a Claim for Fraud.

There were countless factual matters before the court that would, taking them in a light most favorable to Cindy cause a reasonable trier of fact to conclude that Kurt had not been defrauded by Cindy. A claim for fraud has nine elements of fact that have to be proved in order to recover. Failure to prove any one of the nine elements of fact means that the complainant has failed to prove his case. There are facts in this matter presented by Cindy that makes each of the nine elements of fact disputed, leaving them subject to the determination of the facts by the trier of fact after the conducting of a trial where evidence is presented and credibility tested.

Each of these reasons supporting the denial of Kurt's Motion for Summary Judgment and the reversal of the lower court will be discussed below.

ARGUMENT

POINT 1: SUMMARY JUDGMENT SHOULD NOT HAVE BEEN AWARDED TO KURT BECAUSE MATERIAL FACTUAL DISPUTES EXIST. THEREFORE, THIS COURT SHOULD REVERSE THE LOWER COURT'S RULING THAT GRANTED THE MOTION FOR SUMMARY JUDGMENT AND REMAND THIS MATTER FOR TRIAL.

Utah law has defined the standard for granting a motion for summary judgment. The motion, to be granted, must be based upon undisputed facts. Utah R. Civ. Proc. 56. The

lower court is required 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); *see also Dikeou v. Osborn*, 881 P.2d 943, 945 (Utah App. 1994); *Hamblin v. City of Clearfield*, 795 P.2d 1133, 1135 (Utah 1990). After reviewing the facts in the light most favorable to the non-moving party, summary judgment must be denied if there is a dispute *as to any material issue of fact*. *See Lucky Seven Rodeo Corp. v. Clark*, 755 P.2d 750, 752 (Utah App. 1988); *see accord Atlas Corp. v. Clovis Nat'l Bank*, 737 P.2d 225, 229 (Utah 1987); *K.O. v. Denison*, 748 P.2d 588, 590 (Utah Ct. App.1988). Utah appellate courts have repeatedly held that “[i]t is inappropriate for courts to weigh disputed material facts in ruling on a summary judgment.” *Lucky Seven Rodeo Corp. v. Clark*, 755 P.2d 750, 752 (Utah App. 1988); *see also Spor v. Crested Butte Silver Mining, Inc.*, 740 P.2d 1304, 1308 (Utah 1987); *W.M. Barnes Co. v. Sohio Natural Resources Co.*, 627 P.2d 56, 59 (Utah 1981); *Oberhansly*, 751 P.2d at 1156. As the Utah Court of Appeals in *Lucky Seven Rodeo* explained:

It matters not that the evidence on one side may appear to be strong or even compelling. ***One sworn statement under oath is all that is needed*** to dispute the averments on the other side of the controversy and create an issue of fact, precluding the entry of summary judgment.

Lucky Seven Rodeo, 755 P.2d at 752 (emphasis added); *see accord Holbrook Co. v. Adams*, 542 P.2d 191, 193 (Utah 1975). “[A]ll doubt as to the existence of a genuine issue of

material fact must be resolved against the party moving for summary judgment.” *Hayden v. First Nat. Bank of Mt. Pleasant*, 595 F.2d 994, 996-997, (5th Cir. 1979).

Furthermore, in considering a motion for summary judgment, the lower court is to "view the facts, including all inferences arising from those facts, in a light most favorable to the party opposing the motion and will allow the summary judgment to stand only if the movant is entitled to judgment as a matter of law on the undisputed facts." *Kilpatrick v. Wiley, Rein & Fielding*, 909 P.2d 1283, 1289 (Utah App. 1996); *see also Republic Group, Inc. v. Won-door Corporation*, 883 P.2d 285, 288-89 (Utah App. 1994).³

Cindy was the non-moving party for the Motion for Summary Judgment below and she is entitled to have the facts, *including all inferences from those facts*, construed in her favor. Cindy has presented material and compelling facts that provide a complete defense to allegations of Kurt and, most importantly for the purposes of a motion for summary judgment, constitute disputed material facts. These facts implicitly conflict with the facts alleged by Kurt. While Kurt might not agree with and will undoubtedly will try to contest the factual assertions made by Cindy, that is the essence of a conflict in the testimony which

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In fraud cases the burden is “upon the plaintiffs to prove the fraud charged by clear and convincing evidence.” *Pace v. Parrish*, 247 P.2d 273, 274-75 (1952). Failure to prove each element by “clear and convincing evidence” is fatal to a fraud claim. Each of the “elements must be proved with reasonable certainty by evidence, and that the absence of any one of such elements would be fatal to the plaintiff’s case.” *Jones v. Pingree*, 273 P. 303, 305 (1928). If a single element of fraud is not proven then the alleged fraud did not occur.

precludes the granting of a motion for summary judgment. The ultimate determination as to the controlling facts must be left to the trier of the facts — either the trial court sitting without a jury or a jury — after the presentment of witnesses and evidence where credibility can be assessed on direct and cross examination and factual inferences can be made.

POINT 2: FRAUD CLAIMS INVOLVE DETERMINING STATE OF MIND. STATE OF MIND DETERMINATIONS ARE BEST LEFT TO TRIAL WHERE THE TRIER OF FACT CAN DETERMINE THE STATE OF MIND AFTER HEARING ALL THE EVIDENCE. THEREFORE, THIS COURT SHOULD REVERSE THE LOWER COURT’S RULING THAT GRANTED THE MOTION FOR SUMMARY JUDGMENT AND REMAND THIS MATTER FOR TRIAL.

It has been long established that state of mind generally cannot be determined on summary judgment. “In cases which involve delving into the state of mind of a party, the granting of summary judgment is especially questionable.” *Norton v. The City of Marietta*, 432 F.3d 1145, 1154 (10th Cir. 2005); *Seamons v. Snow*, 206 F.3d 1021, 1028 (10th Cir. 2000). The very issue is the credibility of the parties. “Such a credibility determination is appropriately made only by the fact finder: It is not the purpose of a motion for summary judgment... .” *Plotke v. White*, 405 F.3d 1092, 1103 (10th Cir. 2005). “Judgments about intent are best left for trial and are with the province of the jury” and are not to be left to summary judgment. *Plotke v. White*, 405 F.3d 1.

As will be discussed more specifically herein, Kurt's and Cindy's states of mind are in question in this case. At least five of the nine elements of fraud require a determination of state of mind

POINT 3: KURT DOES NOT MEET THE ELEMENTS OF FRAUD SINCE, VIEWING ALL THE EVIDENCE AND FACTUAL INFERENCES IN A LIGHT MOST FAVORABLE TO CINDY, KURT FAILS TO PROVE ALL THE ELEMENTS OF A CLAIM FOR FRAUD. IN PARTICULAR THERE ARE CONTESTED ISSUES OF MATERIAL FACT ASSOCIATED WITH EACH ELEMENT OF KURT'S FRAUD CLAIM. THEREFORE, THIS COURT SHOULD REVERSE THE LOWER COURT'S RULING THAT GRANTED THE MOTION FOR SUMMARY JUDGMENT AND REMAND THIS MATTER FOR TRIAL.

The Utah Supreme Court has established that *all* the elements of fraud must be met to recover for 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. Each of the “elements must be proved with reasonable certainty by evidence, and that the absence of any one of such elements would be fatal to the plaintiff’s case.” *Jones v. Pingree*, 273 P. 303, 305 (1928).

Kurt fails to establish, *with undisputed facts*, all the elements of fraud. A discussion of the facts and where they are disputed is set forth below in the order of the elements as reflected in the *Pace v. Parrish*, *supra*, decision.

Inasmuch as there were disputed facts, Kurt’s Motion for Summary Judgment the lower court should have been denied leaving the matter to the trier of fact to resolve after the presentment of witnesses and evidence where credibility can be assessed on direct and cross examination and factual inferences can be made. The trier of fact will be required to determine the contested issues of fact. The lower court, on a motion for summary judgment, seeing evidence only on paper, is not the trier of fact to determine the factual issues at this time.

Each of the nine fraud elements will be discussed separately herein.

ELEMENT 1: A representation must be made:

There is evidence Cindy never said that she was about to die which is

what Kurt claims that he relied upon in negotiating the divorce settlement.

For a defendant to be responsible for fraud that party has to have made a representation. That is the first of nine elements that must be proved. *Sugarhouse Fin, Co. v. Anderson*, 610 P. 2d 1369 (Utah 1980).

Kurt bases his whole action on the premise that he acted in reliance that Cindy was going to die. Yet, Cindy never said that she was going to die. The “she is going to die” conclusion was, at best, an uneducated, untrained, non-physician, layman’s, jump-to, leap-of-faith, extrapolated, pessimistic, and speculative conclusion made by Kurt — not Cindy. Kurt had wished that Cindy would die and told her so but Cindy never shared that wish nor did she ever represent that she was going to die or was on the brink of death. It was Kurt who claims to have made the determination, without ever making inquiry of Cindy, Cindy’s lawyer or Cindy’s medical professionals or any other medical professionals, that Cindy was going to die.⁴ Statement of Facts ¶¶ 23, 26, 27, 28, 29, 30, 31 and 32.

Cindy never made any statement to Kurt that she was about to die. Yet Kurt claims that he made decisions on how he was going to settle the Divorce Action based upon Cindy being about to die. That was done at the same time that Cindy was saying otherwise. After

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It is interesting that Kurt is disappointed that Cindy did not die and now sues Cindy for her failure to do so. If that is not a “damned if you do and damned if you don’t” situation it is pretty hard to come up with any.

December 31, 2003, Cindy represented to Kurt that she was “doing a lot better,” “doing fine,” and “we have resolved most of the problems.” Further, Cindy’s lawyer told the Court *in Kurt’s presence and in the presence of Kurt’s attorney* that the “treatments have been successful.” Even before this time Kurt’s own sister reported to Kurt that Cindy did not appear to be concerned about her health. Statement of Facts ¶¶ 23, 26, 27, 28, 29, 30, 31 and 32.

Based on Kurt’s claims, and in spite of all that had been told him by Cindy, Cindy’s lawyer and Kurt’s own sister, and failing to seek any medically trained counsel, Kurt still comes (if we are to believe Kurt) to a conclusion when he signed the Settlement Agreement in late April 2004 that Cindy is about to die.

Cindy never made the representation that Kurt claims to rely upon (that she was about to die). Kurt actually made up a representation (that Cindy was about to die) from what was said even though Cindy had affirmed her good health several times prior to the Settlement Agreement being entered. Cindy cannot be responsible for Kurt hearing something that was never said. Statement of Facts ¶¶ 23, 26, 27, 28, 29, 30, 31 and 32.

At the least, there is a conflict in the testimony regarding Element 1, thereby precluding the granting of summary judgment. Consequently, this Court should reverse the lower court and remand this matter to the lower court for a trial on the merits.

ELEMENT 2: **The representation must be concerning a presently existing material fact:**

There is evidence that the representation made in December 2003 was not to a presently existing material fact of Cindy's condition in April and May 2004.

Kurt claims that a statement made on December 31, 2003 that Cindy had a stage 3 melanoma and had surgery on her thyroid induced him to enter into the terms of the Decree of Divorce, where the terms of which were stipulated to on April 27, 2004 (some four (4) months after the December 31, 2003 statement) and entered by the Court on May 26, 2004 (some five (5) months later).⁵

The representation made on December 31, 2003 was not a representation made of her health on April 27, 2004. In fact, by February 2004 Kurt was given updated health

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Kurt made other claims in his Complaint that he (1) relied on a statement that Cindy would not remarry and that Cindy would not be able to have steady employment which he abandoned below, presumably because he realized that there is no legal support for claims based upon representations made to future speculative facts. The alleged misrepresentations Cindy made when she said she was "unable to maintain employment and that she had no intention of remarrying due to her illness"(See ¶23. Complaint.) are not statements of material fact inasmuch as they are statements as to future conduct and as such are not representations as to a material fact nor expressions of intent as to abandon an existing right. *Ravarino v Price*, 260 P.2d 570, 573 (Utah 1953).

Cindy's two alleged statements are both contingent upon her remaining ill. Kurt makes no allegations that Cindy ever made statements regarding the likelihood of her healing or the estimated time it would take for her to heal. Both of Cindy's alleged statements seem to imply that upon healing she might be able to maintain employment and might reconsider her intention to remarry. Cindy's statements were not future promises of performance made in a contractual setting nor an abandonment of her right to work or remarry. The statements merely expressed Cindy's opinion with respect to employment and remarriage during her sickness and as such do not constitute a material fact.

information by Cindy herself. And, by April 27, 2004 Cindy and Kurt had numerous encounters (including an in-court proceeding where Kurt and Kurt's legal counsel were present) where Kurt was informed by Cindy or her legal counsel that she was doing well at that time. Those interactions were:

- ▶ **December 2003: Mediation sessions late December:** No mention of Cindy's health ever came up. R. 577, ¶33, R. 577-78, ¶34.⁶
- ▶ **January 1, 2004: Cindy told Kurt:** That Cindy was going to move to Dallas, Texas to live to be closer to Cindy's mother and father.
- ▶ **January 8, 2004: Cindy told Kurt:** "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." R. 579-80, ¶¶37 and 38.
- ▶ **January 2004: Cindy told Kurt:** That Cindy going to buy a home in Dallas. R. 578, ¶36.
- ▶ **January 21, 2004: Cindy told Kurt:** That Cindy was going to raise the children. R. 579-80, ¶38.
- ▶ **February 2004: Kurt told Cindy:** "It looks like you replaced me pretty fast. You must not be too sick if you are jetting off to

⁶ On December 23, 2003 Kurt and Cindy had mediation scheduled. That was Cindy's birthday. Cindy arrived with her lawyer. Cindy and her lawyer waited for Kurt to arrive. After about an hour Kurt was called who said that he was in California for vacation with Zivile, his girlfriend. Later that day Cindy 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?" R. 577-78, ¶34.

Dallas every other weekend.”

Cindy told Kurt: “I’m doing a lot better. I’m doing fine. I think that we have resolved most of the problems [referring to her health].”

R. 580–81, ¶40.

- ▶ **January\ February 2004:** **Cindy told Kurt:** That Cindy was going to return to work.
- ▶ **February 2004:** **Kurt told Cindy:** Cindy would beg Kurt to take the children after working 12 hour shifts and attempting to raise three kids on her own. R. 585–86, ¶51.
- ▶ **March 2004:** **Cindy’s lawyer made this statement in open court with Kurt and Kurt’s lawyer present:** After referring to the melanoma went on to state that “these treatments [the melanoma treatments] are successful. R. 581–82, ¶42, R. 436, ¶28.
- ▶ **March 2004:** **Kurt told Cindy:** “Gosh, I can’t remember the last time you went to a concert.” “It looks like you are having a lot of fun.”

Cindy told Kurt: “I’m having a great time. Life goes on.” “I’m feeling great. I haven’t felt this good in months.”

Kurt told Cindy: “I’m glad you are feeling better.” R. 582, ¶43.
- ▶ **April 2004:** **Kurt told Cindy:** You are “looking really good.” “So I guess you are okay.”

Cindy told Kurt: “Yeah, I’m feeling better and I’m moving on with my life and moving to Texas.” Cindy said that she was considering marrying David.

Kurt told Cindy: You should marry someone “who was rich.”
R. 582–83, ¶44

- ▶ **May 2004:** **Cindy told Kurt:** That Cindy was probably going to marry David.

When Cindy is telling Kurt that she is “doing fine” and “moving on” Kurt never (never, never, never) asks her: “But what about your cancer?” or “But what about your thyroid?” The statement of “fact” that Kurt says that he is relying upon never became part of any conversation with Cindy. The trier of fact will be able to conclude, based upon the circumstances and the interactions that there is a reason he never asks. A reasonable inference is that Cindy’s health is the furthest thing from Kurt’s mind. Statement of Facts ¶¶ 26, 27, 28, 30 and 32.

The facts as they were represented to Kurt at the time of the signing of the Settlement Agreement were that Cindy was “doing fine,” expressed in multiple ways and at multiple times. Statement of Facts ¶26. The statements made on December 31, 2003 do not represent a “presently existing material fact” for the signing of the Settlement Agreement on April 27, 2004. Kurt wants to take a statement that was made four months earlier and superimpose it upon the facts that were in existence when the Settlement Agreement was actually signed and when the Decree of Divorce was entered months later and after any misstatement had been corrected on multiple times and in multiple circumstances. Statement of Facts ¶ 26.

At the least, there is a conflict in the testimony regarding Element 2, thereby

precluding the granting of summary judgment. Consequently, this Court should reverse the lower court and remand this matter to the lower court for a trial on the merits.

ELEMENT 3: The representation must be false:

There is evidence that the December 2003 representation, though technically inaccurate, was not false in its gist or sting.

On December 31, 2003 Cindy, in an affidavit to the Court, represented that she had been ill. The affidavit provided that she had stage 3 melanoma and an operation on her thyroid. The “gist” or “sting” of what Cindy said in her affidavit was undoubtedly true even though the details were not entirely accurate. It was like saying that one is wearing a blue shirt when the shirt in fact lavender. The essence is that one is wearing a shirt. Cindy clearly understood that she had a melanoma. Cindy also had kidney problems. Cindy had very real and serious symptoms that caused her significant distress and concern. Cindy knew that she was ill. Cindy was incapacitated by her health condition for many months in the latter half of 2003. Cindy was even frightened by her health condition and because of the collision of all her health concerns into a very devastating 3-4 month block she was certainly considering that she had significant health concerns. Cindy expressed her situation in a way that reflected what she thought she was experiencing and what she had been told by medical professionals she had — a melanoma and at the same time serious other painful and uncomfortable conditions that could reflect greater problems. When she read the affidavit prior to signing

Cindy did not catch that the statement referred to her thyroid instead of her kidneys. Clearly, however, that is a distinction without a difference and is evidence that on New Years Eve 2003 that Cindy did not carefully read the affidavit prepared by her lawyer. Cindy had several surgical procedures with her kidneys and three surgeries with the melanoma, all of which suggest that the error in her statement was neither knowingly false or reckless. Statement of Facts ¶¶ 9-21 and 25.

At the least, there is a conflict in the testimony regarding Element 3, thereby precluding the granting of summary judgment. Consequently, this Court should reverse the lower court and remand this matter to the lower court for a trial on the merits.

ELEMENT 4: **The representor must either (a) know the representation to be false, or (b) made the representation recklessly, knowing that he had insufficient knowledge upon which to base such representation.**

There is evidence that Cindy did not know the representation to be false and did not make the statement recklessly, knowing that she had insufficient knowledge upon which to base such a representation.

NOTE: This element requires the determination of Cindy's state of mind that is inappropriate on a motion for summary judgment. See Point 2 above.

Even if the December 31, 2003 statement is the operative statement that Kurt relied upon and that statement is inaccurate the gist or sting of that statement was accurate to the

extent that Cindy knew it. Cindy is not a physician and cannot be expected to use medical terms completely accurately. (Neither can Kurt justifiably rely upon Cindy's representation as will be discussed *infra*.) Clearly, all Cindy knew was what she had been told by doctors and that she had been very sick for a several month period with multiple symptoms. During this time she experienced pain through her back area, nausea and vomiting, urinating blood, hair falling out, abnormal menstrual cycles, excessive weight loss, anxiety and depression.⁷ Cindy read the December 31, 2003 affidavit quickly and ended up misspeaking that she had undergone operations on her thyroid when she should have said kidneys where she underwent at least three procedures. Cindy thought that she was extraordinarily ill and indeed she was.⁸ She had been diagnosed by a physician⁹ that she had a melanoma, a potentially danger skin cancer. Statement of Facts ¶¶ 9-21 and 25.

⁷ R. 322; 325; 331; 569, ¶13; 573–74, ¶22; 694, ¶6: From June 2003 to December 2003, Cindy had extensive medical problems surrounding the time of her excision including extensive back pain, nausea and vomiting, urinating blood, hair falling out, abnormal menstrual cycles, excessive weight loss, and anxiety and depression. These medical problems resulted in Cindy being emotionally fragile and believing that her melanoma was very serious.

⁸ R. 576, ¶30: Cindy made at least thirty-eight doctors visits from August 2003 to May 2004.

⁹ R. 323; 387; 570–71, ¶16: Dr. R. Dirke Noyes (“Dr. Noyes”), an oncologist, wrote on an excused absence form to the trial court that Cindy was “having a wide excision of melanoma.”

Kurt wants to hold Cindy to the precision of a doctor yet come to his own conclusion (in his non-doctor layman's conclusion) that Cindy was dying. All Cindy intended to convey was that she was ill (which she was) and that her illness had been significant (which it was). But Cindy did not catastrophize her condition. Kurt wants to hold Cindy to the precision of a doctor yet come to his own conclusion (in his non-doctor layman's conclusion) that Cindy was dying. All Cindy intended to convey was that she was ill (which she was) and that her illness had been significant (which it had). Cindy did not intend to convey that she was dying and did not say she was dying. Cindy made no implication that she was dying. Statement of Facts ¶¶23, 26, 27, 28, 29 and 30.

Further, taken in the context of other statements made later (some within 10 days of the signing of the Affidavit and within at most only a few days from the receipt of the Affidavit by Kurt) that she was "doing a lot better," "doing fine," and "we have resolved most of the problems" how could one say that at the time of the entry of the Settlement Agreement and ultimately the Decree of Divorce (five months after the original statement) that Cindy had knowingly or recklessly misrepresented the facts. Prior to the signing of the Settlement Agreement of April 27, 2004 Cindy had clearly and straightforwardly told Kurt that she was "doing fine." How many times and in how many ways does Kurt have to hear that Cindy was "doing fine" before he believes it? Instead, Kurt wants the court to believe that he can rely on a statement made in December 2003 instead of the statements made by

Cindy after that date reflecting her then current state of health. Statement of Facts ¶ 26

At the least, there is a conflict in the testimony regarding Element 4, thereby precluding the granting of summary judgment. Consequently, this Court should reverse the lower court and remand this matter to the lower court for a trial on the merits.

ELEMENT 5: The representation must be for the purpose of inducing the other party to act upon it.

There is evidence that Cindy did not make the representation for the purpose of inducing the other party to act upon it.

NOTE: This element requires the determination of Cindy's state of mind that is inappropriate on a motion for summary judgment. *See* Point 2 above.

The statement made by Cindy was in the context of a temporary order where Cindy asserts that she was unable to work and, therefore, should not have income ascribed to her for the purpose of temporary child support and temporary alimony. Apart from whether Cindy had a stage 3 melanoma or not Cindy had been extremely ill and represented that she

was ill to the Court. Given Cindy’s then recent past medical history of bed rest and pain (including kidney pain) her conclusion was that she would not be able to work, at least in the short term. While Kurt claims that Cindy made later representations about bad ongoing health Cindy clearly and unequivocally denies that she did. Furthermore it is interesting that Kurt sets forth no claim that in any conversation she and Kurt had that Cindy’s health was ever used a leverage for a child support term that is “remarriage proof.” Kurt does not report (because there is nothing to report) that Cindy said or even suggested to him that he should enter the “remarriage proof” Settlement Agreement because he will not have to abide by it for long because she was about to die. Even if she did make such a suggestion Kurt had every power to refuse to accept it.

At the least, there is a conflict in the testimony regarding Element 5, thereby precluding the granting of summary judgment. Consequently, this Court should reverse the lower court and remand this matter to the lower court for a trial on the merits.

ELEMENT 6: The other party receiving the representation, must act reasonably and in ignorance of its falsity.

Kurt did not act reasonably and in ignorance of its falsity.

NOTE: This element requires the determination of Kurt’s state of mind that is inappropriate on a motion for summary judgment. See Point 2 above.

The 10th Circuit Court of Appeals in analyzing the Utah fraud standard explained that “in the context of a negligent misrepresentation action, . . . the plaintiff has a duty to act reasonably to protect its own interests.” *Fullmer v. Wohlfeiler & Beck*, 905 F.2d

1394, 1397 (10th Cir. 1990). The nature of litigation and negotiations is intrinsically adversarial and as such places parties at arms length to deal with one another. Parties in such adversarial contexts cannot justifiably rely on the statements of the adverse party. As expressed in the Florida court's opinion in *Smith v. Hollingsworth*, 96 So. 394:

There can be no ground for complaint against representations where the hearer lacked the right to rely thereon, because he had reason to doubt the truth of the representation, as where the transaction was entered into upon the express understanding of both parties that a material fact might exist of which one of them was ignorant, or where a party has expressly said that he would not be bound by his representations, ***or was obviously hostile to the hearer and interested in misleading him.***

(Emphasis added.) 12 Ruling Case Law, 352; 26 Corpus Juris, 1141, 1142; *Smith v. Hollingsworth*, 85 Fla. 431, 96 So. 394. That element of hostility that should place a party on notice (as recognized by the Florida opinion) precludes a party claiming that he justifiedly relied on the statement without at least making some independent inquiry. That higher degree of skepticism required of litigants is recognized as follows:

Where fraud is asserted as a basis for vacating or setting aside a judgment or decree, it must appear that the judgment or decree was in fact procured by fraud. Moreover, the complaining party normally must be able to show that he or she was *free from fault, neglect, or inattention* and that he or she relied on the wrongful conduct to his or her injury.

24 Am. Jur. 2d Divorce and Separation § 434 (Emphasis Added).

In a Utah case (*Cheever v. Schramm*, 577 P.2d 951, 954 (Utah 1978)) the Utah Supreme Court outlines guidelines for determining if reliance is reasonable. The lower court held the reliance unreasonable. In affirming, the Utah Supreme Court stated:

In determining whether one claiming fraud has reasonably relied upon a misrepresentation, factors such as respective age, intelligence, experience, mental condition, and *knowledge of each party should be considered, along with their relationship, their access to information, and the materiality of the representations.*

(Emphasis added.) *See also, Pace v. Parrish*, 247 P.2d 273, 274-75 (1952); RESTATEMENT (SECOND) OF TORTS § 537 (1977). Consequently, the knowledge of the parties, their relationship (divorcing spouses) and the materiality of the misrepresentation need to be taken into account to determine if the aggrieved party acted with reasonable diligence.

The Utah Court of Appeals dealt with this issue of reasonable reliance in the case of *Maack v. Resource Design & Const., Inc.*, 875 P.2d 570 (Utah 1994). The court in *Maack*, relied heavily on the opinion of the court in *Klas v. Van Wagoner*, 829 P.2d 135 (Utah Ct. App. 1992), which based its decision of failing to find fraud, because the aggrieved party's "conduct did not rise to the level of ordinary diligence." *Id.* at 141. The court further held, persuaded by the reasoning in *Sokolosky v. Tulsa Orthopaedic, Inc. Pension Trust*, 566 P.2d 429 (Okla. 1977), that fraud may not be predicated on alleged false statements the truth "which could have been ascertained with reasonable diligence by the party asserting their falsity." *Sokolosky v. Tulsa Orthopaedic, Inc. Pension Trust*, 566 P.2d 429, 431 (Okla. 1977) (*quoting Onstott v. Osborne*, 417 P.2d 291, 293 (Okla. 1966)).

Moreover, the Utah Supreme Court has held that a plaintiff has a duty to make an investigation and inquiry in to the representation according to the dictates of reasonable care. *Gold Standard, Inc. v. Getty Oil Co.*, 915 P.2d 1060, 1068 (Utah 1996). The court stated:

While the question of reasonable reliance is usually a matter within the province of the jury, there are instances where courts may conclude as a matter of law, there was no reasonable reliance.

Id. at 1067.

The *Gold Standard*, *supra*, opinion further went on to explain that even if a false statement is found to have been made, when there are subsequent communications which would correct the misrepresentation then reliance is unreasonable *as a matter of law*. *Id.* at 1067–68; *see also Mikkelson v. Quail Valley Realty*, 641 P.2d 124, 126 (Utah 1982). The *Gold Standard* court even further held that “[a] party cannot rely upon oral statements by the opposing party in light of contrary . . . information. 915 P.2d at 1068.

Kurt could not justifiably rely on the statements he claims he relied upon.

- First:** It was not reasonable for Kurt to extrapolate from Cindy’s statement made in December 31, 2003 that she was going to die imminently. *See* discussion with regard to Element 1 above.
- Second:** It was not reasonable for Kurt to rely on a statement on December 31, 2003 when there was ample communication between Kurt and Cindy that the “treatments are successful,” that Cindy was “doing a lot better,” “doing fine,” and “we have resolved most of the problems.” *See* discussion with regard to Element 4 above.
- Third:** Kurt and Cindy were in litigation and were adverse, extremely contentious and untrusting. Kurt had the full power of the Court to determine such a large conclusion that Cindy was about to die. *See* discussion immediately below.

Cindy and Kurt were adversaries in a divorce proceeding and a particularly hostile divorce action at that. In such an environment it is essential that Kurt exercise reasonable diligence to discover the truth as to statements affecting his interests. If Kurt intended to rely

on a belief that Cindy was about to die (a representation that she never made) you would expect that Kurt show some diligence to ascertain that to be the fact apart from his own uneducated medical conclusions. It seems reasonable that the bigger the factor in a very contentious, adversarial setting, the more scepticism one should have in the veracity of the statement. Further, any conclusion that Cindy is about to die is clearly speculative of a prospective event and subject to change as the person obtains medical care and attention. *Cindy could actually get better.*

Given Kurt's claim that he relied on the statement he inexplicably remains silent and fails to do anything to confirm it at a time that he had all the tools to find out information. Kurt had the greatest of all litigation powers — the subpoena power — and other discovery tools to obtain documents and testimony from doctors or others who at the least have the education, training and experience upon which an opinion of Cindy's life or death could be made. But what does Kurt do? Nothing! What does he say to Cindy? Nothing! He does not even make any inquiry of Cindy of her treatments and the prognoses of her living or dying. Kurt simply — without the foundation of education, training and experience — leaps to the conclusion that Cindy is about to shortly die and fails to make any inquiry to determine the reasonableness of his conclusion. He sought no doctors' opinions or in any way crossed any threshold of reasonable inquiry. Statement of Facts ¶¶ 30-33.

Was Kurt's reliance reasonable? No it was not. Nonetheless, reasonableness is a jury issue and not one to be decided on a motion for summary judgment. It is the jury that needs to determine the reasonableness of a party's actions. *See e.g. Maack*, 875 P.2d 570 at 577

(See *Price-Orem*, 713 P.2d 55, 59 (Utah 1986)).

Kurt does not claim that Cindy prevented him from making his case during the divorce proceedings. Kurt could not reasonably rely on Cindy's statements made during litigation because of the hostile nature of the proceedings, his failure to exercise due diligence or to take reasonable steps to discover the truth or untruth. Further, the claimed misrepresentation could change at any time --- such as Cindy living. Furthermore, Cindy had continually confirmed and reconfirmed her health state as "doing a lot better," "doing fine," and "we have resolved most of the problems."

Litigation by its nature is adversarial and in divorce proceedings can become very emotionally charged and especially adversarial. Perhaps there is no field of law where emotions are so charged and volatile. Divorce actions create a hostile environment where one's interests are at stake to be lost. This is the kind of hostile situation which the Florida court in *Hollingsworth*, *supra*, refers to which precludes the allegedly deceived party from relying on the representations of the other party. Furthermore, in order for Kurt to be free from "fault, neglect, or inattention" he could have exercised the standard and easily used tools of discovery available during litigation. He was represented by counsel, had the subpoena power, and plenty of opportunities to use it to verify Cindy's statements that he claimed he relied upon. Use of any of these methods would have verified the truth or uncovered the untruth. Kurt's reliance on Cindy's statements amidst a hostile environment of litigation and failing to be free from "fault, neglect, or inattention" makes his reliance unjustifiable. *Maack*, 875 P.2d 570 at 577. Statement of Facts ¶¶4.

Further, it is reasonable that on the evidence that will be presented that a jury could conclude that the statement Kurt claims induced him to act is merely a pretext for Kurt to avoid the agreement that he had previously made to pay child support. Kurt looks for a nail to hang his buyer's remorse hat.

At the least, there is a conflict in the testimony regarding Element 6, thereby precluding the granting of summary judgment. Consequently, this Court should reverse the lower court and remand this matter to the lower court for a trial on the merits.

ELEMENT 7: The plaintiff must have in fact relied upon the representation.

There is evidence that Kurt did not in fact rely upon the representation.

NOTE: This element requires the determination of Kurt's state of mind that is inappropriate on a motion for summary judgment. See Point 2 above.

As noted above, Kurt has made other claims in his Complaint that he relied on a statement that Cindy would not remarry and that Cindy would not be able to have steady employment which he now abandons. There are further and other reasons for Kurt's actions that the trier of fact will be required to determine. Based upon the facts of this matter, taken in a light most favorable to Cindy, the jury could infer that Kurt acted not in response to any representation of Cindy' but because: (1) Kurt thought Cindy would never remarry, (2) Kurt wanted to marry his girlfriend who was in the United States from overseas (Kurt married her within a week of divorcing Cindy) or (3) Kurt wanted to avoid sharing a large financial windfall from a "multi million dollar . . . investment" where Kurt's income and bonuses

would increase from his then \$200,000.00\year level that was just months away and which he had concealed from Cindy. The windfall never materialized but the prospect for huge financial gain surely is a motivating factor to get the divorce closed and over. Either way, there are plenty of other reasons that may be the motivating factor for Kurt's decision to settle as he did that have no relation to the claimed misrepresentations. Statement of Facts ¶¶8 and 36.

In addition, how could Kurt rely on the statement when he had been fully advised that Cindy was doing well over and over again and even acknowledged that Cindy was doing better.¹⁰ See discussion for Element 2 above.

At the least, there is a conflict in the testimony regarding Element 7, thereby precluding the granting of summary judgment. Consequently, this Court should reverse the lower court and remand this matter to the lower court for a trial on the merits.

ELEMENT 8: The representation must have induced the aggrieved party to act.

There is evidence that Kurt was not induced to act by the representation.

NOTE: This element requires the determination of Kurt's state of mind that is inappropriate on a motion for summary judgment. See Point 2 above.

¹⁰ R. 582, ¶43: In late March 2004 or early April 2004, Cindy told Kurt described her condition as follows: "I'm having a great time. Life goes on . . . I'm feeling great. I haven't felt this good in months." To which Kurt responded, "I'm glad you are feeling better."

There as never any indication that Cindy's heath condition was ever on Kurt's mind. To the contrary, the evidence is that sufficient for the trier of fact to conclude that Cindy's health condition was the furthest thing from Kurt's mind. Cindy's health was never a topic of conversation between Cindy and Kurt other than Cindy telling Kurt that she is "doing a lot better," "doing fine," and "we have resolved most of the problems." *See* discussion for Element 2 above. Kurt never made an effort to challenge Cindy's representation regarding her health nor did Kurt's lawyer ever inquire of Cindy' s health. It was quite frankly a non-issue in the case. Throughout the months there was no indication from anyone on Kurt's side that he was relying on the health condition expressed in the December 31, 2003 affidavit and certainly no evidence that Kurt expressed any belief to anyone on Cindy's side that Kurt thought Cindy was on the eve of death. Interesting, when the Decree was entered it had been five months since Kurt had concluded that Cindy was going to be dead in six months, yet Cindy was looking better (so much better that even Kurt commented on her appearance) and acting more energetic. *See* Statement of Facts ¶¶ 23 and 26-32.

It is also interesting that at the time the final documents for settlement were agreed upon there was discussion as to Kurt's medical condition and that was accounted for but there was no discussion as to Cindy's medical condition. If Cindy's medical condition was such a major motivating factor for Kurt it should have been reflected in the paragraph setting forth child support. Yet the discussion was all about Kurt and his health. That would have been the most likely time for Kurt to raise Cindy's health but he did not. *Statement of Facts* ¶33.

Cindy was on her way to be married again, to move to Dallas, to raise the children and to start a new life — and Kurt knew it. Kurt was also on his way to be married and start a new life with his girlfriend. Kurt, knowing that Cindy was going to be married soon, should have encouraged him to move the child support in an opposite direction by designating some of it as alimony. There is a good and supportable reason for that — Kurt did not want further inquiry into the assets and this was a method of transferring assets. The jury will have the opportunity to determine whether that “extra” child support was in fact a tool to even the property distribution that was so heavily weighted in favor of Kurt. Statement of Facts ¶¶ 7.

There is a strong inference that Kurt is using the December 31, 2003 affidavit as a pretext to disavow the Decree of Divorce.

At the least, there is a conflict in the testimony regarding Element 8, thereby precluding the granting of summary judgment. Consequently, this Court should reverse the lower court and remand this matter to the lower court for a trial on the merits.

ELEMENT 9: There must be an injury and damage.

There is Evidence that Kurt suffered no injury and damage.

The ninth element of fraud described in *Parrish, supra*, requires that the moving party have suffered “injury or damage.” “The measure of damages for fraud is the difference between the value of property received and the value it would have had if the representations were true.” *Terry v. Panek*, 631 P.2d 896, 897 (Utah 1981) (citing *Pace v. Parrish*, 247 P.2d 273 (Utah 1952)). Kurt suffered no damages from reliance on the alleged misrepresentations

since the property distribution of the divorce decree heavily favored Kurt with respect to the value of assets known and included several assets which values were unknown. Further there were certain psyche rewards to stopping the litigation and going on with one's life.

Even if Kurt was fraudulently induced into entering the Settlement Agreement Kurt suffered no damage as a result of reliance on the statements and without damages there can be no fraud. *Jones v. Pingree*, 273 P. 303, 305 (1928). Kurt wants this court to isolate the child support from the rest of the Decree of Divorce in an attempt to show that Kurt is paying far more than what he would have been required if the child support guideline was followed. Yet the Decree has to be viewed as a whole since it was settled as a whole. The allocation of assets in the divorce decree heavily favored Kurt. During the divorce proceedings, Cindy made many concessions of assets to Kurt because of his desire to retain certain property (i.e. race car, Porsche automobile) of high value. As a result of the disproportionate share of assets in Kurt's favor. Kurt conceded to the reallocation of assets that would otherwise be due to Cindy on divorce though the payment of enhanced child support. The arrangement resulted in a distribution of assets agreed upon by both parties. The method chosen by the parties allowed the closure of the case without valuing all the assets since valuing assets that Kurt had hidden would have been extraordinarily costly, time consuming and difficult. The method chosen made the distribution remarriage proof (prevented termination for remarriage) and bankruptcy proof (Kurt could not discharge his obligation to Cindy by seeking bankruptcy protection). That is a perfectly logical and legitimate method of assuring that Cindy would get from the 15 year marriage what she was

otherwise entitled to obtain. Statement of Facts ¶¶ 7.

The child support guidelines are just that — guidelines — and child support awards can exceed the guideline amounts. Utah Code Ann. §78-45-7.12. Since at the time of divorce Kurt was by his own admission making \$200,000.00\year base (or \$16,666.66\month) and the guideline table only goes to \$10,100.00\month (or \$121,200.00\year) Kurt's income exceeded the table by \$78,800.00 or 65%. Utah Code Ann. §78-45-7.14. Paying \$4,500.00\month in child support on an income of \$16,666.66\month does not seem outrageous and unjustifiable. Further, by Kurt's own admission Kurt was expecting an increase in his salary and bonuses and wealth that would have softened the award. Kurt was clear in his demand that the child support would not be increased.

In divorces everything is linked to everything else. That is not a jury issue. Property distribution, alimony, debt allocation, child support and related issues are all issues are reserved exclusively for the Court acting in its equitable powers in the divorce action.

At the least, there is a conflict in the testimony regarding Element 9, thereby precluding the granting of summary judgment. Consequently, this Court should reverse the lower court and remand this matter to the lower court for a trial on the merits.

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. Summary judgment is not appropriate when there are contested issues of material facts. It is abundantly clear that substantial and material facts are contested. As such, we respectfully

suggest that the lower court's granting of the Motion for Summary Judgment be reversed and the matter be sent back to the Third District Court for trial.

ORAL ARGUMENT REQUESTED.

DATED this 9th day of January 2008.

HOLMAN & WALKER LC



D. Miles Holman

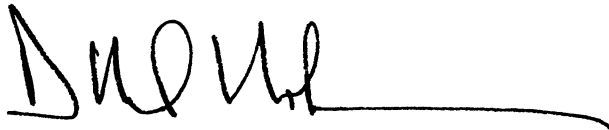
**Attorneys for Defendant and Appellant
Cindy Cooper**

CERTIFICATE OF SERVICE

I hereby certify that this 9th day of January 2008 I mailed, postage prepaid, the foregoing **Appellant's Brief** to the following:

William Kurt Dobson
Pro Se
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Midvale, Utah 84047

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D. Miles Holman

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Cindy Cooper**

ADDENDUM “A”

MEMORANDUM DECISION

(Order from which appeal is taken)

COPY SENT TO CLERK
5-11-07
JMS

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

WILLIAM KURT DOBSON,	:	MEMORANDUM DECISION
Plaintiff,	:	CASE NO. 050922651
vs.	:	(Consolidated Case No. 034904073)
CINDY DELAUGHTER COOPER,	:	
Defendant.	:	

This matter came before the Court for a hearing on May 10, 2007, in connection with the Plaintiff's Motion for Summary Judgment. At the conclusion of the hearing, the Court took the matter under advisement to further consider the parties' written submissions, the relevant legal authority and counsels' oral argument. Being now fully informed, the Court rules as stated herein.

LEGAL ANALYSIS

This case stems from a divorce action involving the Plaintiff and Defendant. On May 25, 2004, Judge Henriod entered a Divorce Decree which was premised on the parties' Settlement Agreement. In this action, the Plaintiff contends that the Defendant, his ex-wife, defrauded him in the divorce action in order to obtain a more favorable settlement agreement.

After considering the parties' respective legal arguments, the Court determines that the Plaintiff has established the elements of fraud, as a matter of law, and is therefore entitled to summary judgment.

Specifically, the undisputed material facts establish that in the divorce action, the Defendant repeatedly misrepresented her medical condition, including indicating that she had been diagnosed with advanced stages of cancer. The undisputed evidence is that the Defendant had never been diagnosed with any type of cancer. The Court concludes that the Defendant perpetuated the misrepresentations concerning her medical condition for the purpose of inducing the Plaintiff to reach a favorable settlement with her. Accordingly, the Court grants the Plaintiff's Motion for Summary Judgment.

After taking this matter under advisement, the undersigned Judge discovered that he is also presiding over the parties' divorce case (Case No. 034904073). Given that the Court has jurisdiction over both cases and in light of the overlapping factual and legal issues presented in both the divorce case and the present civil case, the Court determines that consolidation of both cases is appropriate under Rule 42 of the Utah Rules of Civil Procedure. Further, the protocol at Third District Court is to consolidate later-filed cases into previously filed cases. Therefore, the present case is consolidated into Case No. 034904073.

Next, in granting of the Plaintiff's Motion for Summary Judgment, it should be clear that the Court rules that he was fraudulently induced into entering into the parties' settlement agreement in the divorce action. Accordingly, the settlement agreement is invalid and therefore set aside. Further, the Divorce Decree which is premised on the invalid

settlement agreement is vacated. The divorce action is to proceed in the typical manner and the Court will consider any damages stemming from the civil case in the context of the overall property division. It should be noted that such damages, if any, will be offset by any advantages that the Plaintiff has received since the entry of the Divorce Decree by the parties' agreed upon property settlement that may have actually benefitted him.

This Memorandum Decision will stand as the Order of the Court, granting the Plaintiff's Motion for Summary Judgment, consolidating the divorce and civil action, setting aside the parties' settlement agreement, vacating the Divorce Decree and directing the parties to proceed with their now-consolidated divorce action in the typical manner.

Dated this _____ day of June, 2007.

ROBERT P. FAUST
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision, to the following, this_____day of June, 2007

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ADDENDUM “B”

DECREE OF DIVORCE

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7/11/04 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
CINDY DELAUGHTER DOBSON,)	Judge Stephen L. Henriod
Respondent.)	Commissioner Susan Bradford

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

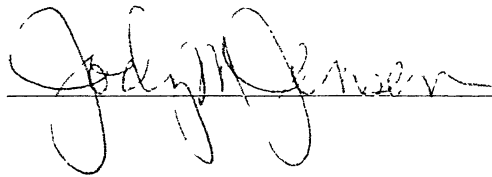
APPROVED:

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



ADDENDUM “C”

STATEMENT

FROM

DR. R. DIRKE NOYES

03/18/2002 01 12 8015718 J

CINDY DOBSON

PAGE 01

FROM DESIGN-A-BLIND

PHONE NO 801 685 0811

Oct 22 2003 03 57PM P2

Oct-22-03 02:40P

P.01

EXCUSED ABSENCE

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

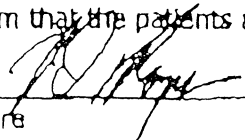
Patient Cindy Dobson

Has been under my care for the period

From Oct 22nd 03

To Oct 30th 03

I confirm that the patient's absence was physician advised

Signature 

Special Instructions:

maybe be extended due to recovery
time. It is to have surgery on the
27th of October, she will be unable
to attend court. It is treating a wide excision
of melanoma

ADDENDUM “D”

STATEMENT

FROM

DR. GEORGE W. MIDDLETON

MIDDLETON UROLOGICAL ASSOCIATES

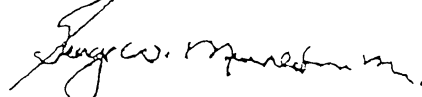
A PROFESSIONAL CORPORATION
110 MEDICAL TOWERS
1060 EAST FIRST SOUTH
SALT LAKE CITY, UTAH 84102
PHONE 801-7463

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

03/18/2002 01:12 8015716
10/21/2003 08:52 8015718506

CINDY DOBSON
CINDY DOBSON

PAGE 02
PAGE 01

DEA #A16566008

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

INDEPENDENCE SO. LIBERTY HALL
181 EAST 5000 SOUTH SUITE 110
MURRAY UTAH 84107
(801) 206-0664

Name Cindy Dobson
Address _____ Date 10/21/2003
R Cindy has stress in both kidneys
that are painful & require care for
the next 2-3 weeks - including her
attending a hearing

-8091

☐ Remy _____ times PRN NR
George W. Middleton M.D. _____ M.D.
SUBSTITUTION PERMITTED _____ DISPENSE AS WRITTEN

ADDENDUM “E”

DETAILED LISTING OF PROPERTY DISTRIBUTION

	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 ⁵	\$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)
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Additional Items Kurt Received Not in Decree of
Divorce

(s)	Porsche	\$80,000.00
(t)	Trailer	\$25,000.00

KNOWN TOTAL: \$757,250.00

To Cindy :

	ITEM OF PROPERTY	Equity
(a)	Lexus Automobile	\$10,000.00
(b)	½ Silicon Optics, Inc. Stock (Cindy never received this stock)	Never received from Kurt
(c)	½ S5 Wireless stock	\$0⁶
(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

At the time of divorce, Cindy 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 Cindy 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 Cindy until after he left company and the stock is currently worthless. Dave has told Cindy that the company is attempting to gain new investors. He said that in time, the stock may regain its value, but Cindy have no assurance that it will. If Kurt had given the stock to Cindy immediately following the divorce, Cindy would have been able to sell it for at least some value.

(h)	Two Large Mirrors	\$1,000.00
(i)	Secretary Desk	\$2,000.00
(j)	Paintings and Framed Photographs	\$5,000.00
(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 (Cindy had to sell the BMW to live off of during the divorce proceedings)	\$17,000.00
(m)	Repayment from 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

R. 565–68, ¶11.

ADDENDUM “F”

SETTLEMENT AGREEMENT

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

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

WILLIAM KURT DOBSON,)	
Petitioner,)	SETTLEMENT AGREEMENT
vs.)	Civil No. 034904073
CINDY DELAUGHTER DOBSON,)	Judge Stephen L. Henriod
Respondent.)	Commissioner Susan Bradford

Petitioner William Kurt Dobson and respondent Cindy Delaughter Dobson, hereby stipulate and agree as follows:

Jurisdiction & Grounds

1. Petitioner is an actual and bona fide resident of Salt Lake County, State of Utah, and has been for at least three months immediately preceding the commencement of this action.
2. Petitioner and respondent are husband and wife, having been married on the 29th day of April, 1989, in Jackson County, State of Mississippi.

FILE COPY

3. Irreconcilable differences have developed between the parties, making continuation of their marriage impossible. The parties have been living separate and apart since June 2003. The parties agree that each is entitled to a decree of divorce from the other on grounds of irreconcilable differences of the marriage.

Purpose

4. Petitioner has filed a petition for decree of divorce and respondent has filed a counter-petition for decree of divorce, both of which are currently pending before the court. The parties by this agreement intend to fully resolve all issues incident to said petitions and to the dissolution of their marriage. The parties understand and acknowledge that this agreement, upon execution, will be binding on them, and further, that the terms of this agreement will be incorporated into a decree of divorce dissolving the bonds of matrimony that presently exist between them.

Consent to Default

5. Respondent hereby acknowledges receipt of a copy of the summons and petition for decree of divorce filed herein July 3, 2003, consents that her default may be entered herein, and agrees that a decree of divorce incorporating the terms of this agreement may be entered by the court upon petitioner's affidavit of jurisdiction and grounds without further notice to her.

Legal Custody

6. 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.

7. The parties stipulate that they each are fit and proper persons to be awarded the care and custody of minor children and that they each have loving and valuable relationships with their children, which they should work together to support. The parties agree that they should be awarded joint legal custody of their children.

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

9. The parties agree to 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.

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

11. The parties agree that they will each be entitled to make day-to-day and emergency medical decisions for the children when the children are in their care.

12. The parties agree that they will each immediately notify the other in the event of a medical emergency involving the children.

13. The parties agree that they will each be entitled to direct access to all school, medical, and other records pertaining to the children.

14. The parties agree that they will each provide the other with their current address and telephone number within 24 hours of any change.

Primary Residence

15. The parties agree that respondent's residence will be designated as the children's primary residence. Respondent is currently in the process of relocating with the children to the Dallas, Texas area where she will be establishing a residence for herself and the children.

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

17. The parties agree that, at a minimum, petitioner will 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.

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

19. The parties agree that petitioner will be solely responsible for the costs of transportation for all parent-time with the children, except for the parent-time set forth in 17.b. and 17.c. above, for which respondent will be solely responsible.

Child Support

20. Commencing the first day of the month following the month in which this agreement is signed, the parties agree that petitioner will 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, the parties agree that petitioner will 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, the parties agree that petitioner will 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.

21. The parties acknowledge that 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.

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

23. The parties agree that petitioner will 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.

24 The parties agree that petitioner will be solely responsible for the children's orthodontia and dental expenses

25 The parties agree that petitioner will establish a college fund for the children and contribute \$200 per month to it, commencing the month following the month in which this agreement is signed. The children will be the sole and exclusive beneficiaries of said fund, and petitioner will not access it for purposes other than the children's higher education expenses except upon respondent's express written approval. Said funds will be applied to the children's higher education expenses in equal amounts or as agreed by the parties in writing. Petitioner will provide yearly statements to respondent.

26 The parties agree that respondent will 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.

27 The parties agree that the any increase or decrease in the parties' respective incomes will not be grounds for modification of the foregoing child support obligations, either upward or downward, except that a decrease in respondent's income due to verified disability & impairment will be grounds for a downward modification.

Tax Exemptions

28 The parties agree that petitioner will be entitled to claim the dependency exemptions for the minor children.

Property Division

29. The parties agree that the marital residence, which is currently under contract for sale, should be awarded to petitioner. Petitioner will be entitled to reside in the home as designated in the contract of sale and will be entitled to the proceeds from the sale.

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

31. The parties agree that respondent should be awarded stock in Silicon Optics, Inc. and S5 Wireless equal to one-half of petitioner's ownership interest in these companies as of the date this agreement is signed. The parties agree that petitioner's interest in Spectrum5 Racing should be awarded to him, free and clear of any interest therein of respondent's. As of the date of this document, Petitioner owns 615,000 shares of stock in S5 Wireless, and 50% of the stock of SiliconOptics, Inc., and will provide stock certificates or equivalent documents to Respondent within 90 days of the execution of this agreement.

32. The parties agree that petitioner should be awarded all cash, retirement, and investment accounts titled in his name, including the Merrill Lynch 401(k) and the Wells Fargo checking accounts, and respondent should be awarded all cash, retirement and investment accounts titled in her name.

33. The parties agree that the Lexus should be awarded to respondent. Respondent will be solely responsible for the balance remaining on the Bank One loan secured by the Lexus and will ensure that the loan is paid in full on or before the date this agreement is signed.

34. The parties agree that the houseboat, airplane, jet skis, GTR, machine equipment, safe, guns, digital camera and video camera should be awarded to petitioner.

35. The parties agree that respondent should be 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.

36. The parties agree that petitioner should be awarded his personal effects and the remaining home furnishings not specifically awarded to respondent as set forth above.

37. The parties agree that petitioner will make copies of the family videotapes and photographs and provide them to respondent.

Cash Award

38. The parties agree that petitioner should pay to respondent the sum of \$50,000 forthwith upon execution of this agreement. Of this amount, \$25,000 will come from the Wells Fargo account in his name.

Debt Allocation

39. The parties agree that petitioner will be responsible to pay or assume the following debts: Citifinancial, Chase, HFC, Chevron, and Nordstrom.

40. The parties agree that respondent will 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.

41. 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 will be solely and separately responsible for paying it and will hold harmless and indemnify the other party thereon. Neither party will incur debt in the other parties' name, nor be responsible for any debt incurred by the other party, from the date this agreement is signed. The parties will ensure that all joint accounts are closed forthwith upon the signing of this agreement.

Alimony

42. Respondent, by signing this agreement, waives any claim she may have to alimony, either now or in the future. Respondent specifically acknowledges and agrees that her waiver cannot be overcome by any change in circumstance, foreseen or unforeseen, and that the terms of this agreement were negotiated in express consideration of this irrevocable waiver.

Income Taxes

43. The parties agree that they will file joint tax returns for the years 2001, 2002, and 2003. Petitioner will be solely responsible for all tax liability owing in these years. The parties will file separately in 2004 and thereafter.


Attorney Fees

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

Full Disclosure

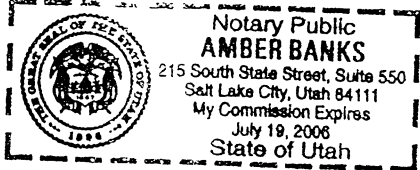
45. The parties acknowledge that they have fully disclosed all material facts regarding assets and liabilities of the parties or the marriage. If it is later determined that assets or liabilities have not been allocated between the parties expressly in this agreement and the decree contemplated herein, for whatever reason, including the failure of either party to disclose those assets or liabilities then, in that event, 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. Both parties expressly waive any claim, right or assertion that the distribution and allocation of non-disclosed or unallocated assets must be pursued by an independent action. In the event of a Petition to Modify, contemplated herein, the moving party's standard of proof shall be a preponderance of evidence and shall not be limited to the establishment or proof of fraud by the other party.

DATED this 27th day of April, 2004.


KURT DOBSON
Petitioner

SUBSCRIBED AND SWORN TO before me by KURT DOBSON this 27th day of

April, 2004.



Amber Banks
NOTARY PUBLIC

APPROVED

Paige Bigelow

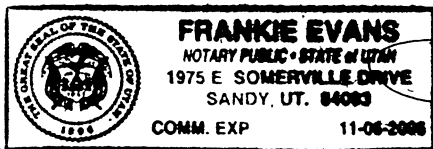
PAIGE BIGELOW
Attorney for Petitioner

DATED this 28 day of April, 2004.

Cindy Dobson
CINDY DOBSON
Respondent

SUBSCRIBED AND SWORN TO before me by CINDY DOBSON this 28 day of

April, 2004.



Frankie Evans
NOTARY PUBLIC

APPROVED:

Miles D. Holman

MILES D. HOLMAN
Attorney for Respondent