

2007

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

Utah Court of Appeals

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

WILLIAM KURT DOBSON,

Plaintiff-Appellee,

v.

CINDY DELAUGHTER COOPER,

Defendant-Appellant.

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:

Court of Appeals Case No.

20070525

District Court Case No. 050922651

**Appeal from the Third Judicial District Court
In and for Salt Lake County, State of Utah
The Honorable Robert Faust**

BRIEF OF APPELLEE

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- ORAL ARGUMENT REQUESTED -

**FILED
UTAH APPELLATE COURTS**

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STATEMENT OF JURISDICTION OF THE APPELLATE COURT

On June 6, 2007, Third District Court Judge Robert Faust issued a Memorandum Decision granting the Plaintiff's Motion for Summary Judgment, consolidating the civil and divorce actions, 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. As the decision to grant Plaintiff's Motion for Summary Judgment is a final judgment in the civil fraud action, the Utah Court of Appeals has jurisdiction over this matter pursuant to Utah Code Ann. § 78-2a-3(j).

STATEMENT OF THE ISSUES

- I.** Whether The District Court Erred By Finding That There Were No Disputed Issues Of Material Fact Sufficient To Preclude Granting Plaintiff's Motion For Summary Judgment?
- II.** Whether The Evidence Presented To The District Court Was Sufficient To Prove That All Of The Elements Of Fraudulent Misrepresentation Were Met?
- III.** Whether The March 1, 2007 Affidavit Of Cindy Cooper Is Competent Evidence When It Is A Self-Serving Sham Affidavit?

STANDARD OF REVIEW

The district court held that “the plaintiff has established the elements of fraud, as a matter of law, and is therefore entitled to summary judgment.” (R. 751.) “In the context of a summary judgment motion, which presents a question of law, we [the Court of Appeals] employ a correctness standard and view the facts and all reasonable inferences drawn therefrom in the light most favorable to the non-moving party.” *Dowling v. Bullen*, 2004 UT 50, ¶ 7, 94 P.3d 915.

At the district court level, summary Judgment is appropriate when the movant shows “both that there is no *material issue* of fact and that the movant is entitled to judgment as a matter of law. Utah R. Civ. P. 56(c). Where the moving party would bear the burden of proof at trial, the movant must establish each element of his claim in order to show that he is entitled to judgment as a matter of law.” *Orvis v. Johnson*, 2008 UT 2, ¶ 10, 177 P.3d 600 (emphasis added).

STATEMENT OF THE CASE

Nowhere is the simple nature of this civil fraud case more easily summarized than in Judge Faust's Memorandum Decision. The Memorandum Decision was the result of Mr. Dobson's successful Motion for Summary Judgment. Plaintiff's Motion for Summary Judgment was filed after fact discovery had been completed. (R. 270-72.) Oral Argument was heard on Plaintiff's Motion for Summary Judgment on May 10, 2007, (R. 773), and Judge Faust issued a Memorandum Decision on June 6, 2007 granting Plaintiff's Motion. (R. 751-54.)

Judge Faust indicated in the June 6, 2007 Memorandum Decision this case stems from a divorce action involving Mr. Dobson and Ms. Cooper, formerly Ms. Dobson. (R. 751.) "On May 25, 2004, Judge Henriod entered a Divorce Decree which was premised on the parties' Settlement Agreement." (*Id.*) "In this action, the Plaintiff [Mr. Dobson] contends that the Defendant, his ex-wife [Ms. Cooper], defrauded him in the divorce action in order to obtain a more favorable settlement agreement." (*Id.*)

The undisputed facts establish as a matter of law that Ms. Cooper "***repeatedly misrepresented*** her medical condition, including indicating that she had been diagnosed with advanced stages of cancer." (R. 752 (emphasis added).) "The undisputed evidence is that the Defendant [Ms. Cooper] had never been

diagnosed with any type of cancer.” (*Id.*) “Defendant [Ms. Cooper] perpetuated the misrepresentations concerning her medical condition for the purpose of inducing the Plaintiff [Mr. Dobson] to reach a favorable settlement with her.” (*Id.*) “Accordingly, the settlement agreement is invalid and therefore set aside.” (*Id.*) “Further, the Divorce Decree which is premised on the invalid settlement agreement is vacated.” (*Id.*)

STATEMENT OF RELEVANT FACTS

Mr. Dobson and Ms. Cooper were married to one another on April 29, 1989. During their marriage, the parties had three children: Margaret Lela Dobson (DOB 3/3/1994); Kristen Elizabeth Dobson, (DOB 4/20/1995); and William Cortland Dobson (DOB 11/4/1999). (R. 11.) On July 3, 2003, Mr. Dobson filed a Petition for Divorce in the matter *Dobson v. Dobson*, Case No. 034904073, Third Judicial District Court, Salt Lake County, state of Utah. (*Id.*) Therein, Mr. Dobson requested that the court enter orders pertaining to child support in accordance with the child support guidelines set forth in Utah Code Ann. §§ 78-45-7.2 – 7.21. (*Id.*)

On October 7, 2003, Ms. Cooper had a lesioned mole removed from her back, that was sent to pathology for examination. (R. 302-04.) On October 13, 2003, Dr. Clayton met with Ms. Cooper and explained to her that:

The lesion excised on the left back returns with a diagnosis of dysplastic nevus with mild to moderate cellular atypia. The margins are reported as clear. I have reviewed this finding with the patient and have explained that I would like a copy of the report to go to her primary care doctor and she is given a copy for this purpose.

I have also explained that, if there are other lesions which have an irregular pigment pattern, they should be removed as well. I have explained that there is concern that lesions of this type may go on to become malignant. She is to return in about 2 to 3 weeks for next check.

(R. 306.)

Ms. Cooper told Tamara Dobson, Mr. Dobson's sister in law, that "she had a biopsy on the spot and that it came back positive for melanoma and that it was about a stage 3 ½." (R. 309.) On October 22, 2003, Ms. Cooper's counsel at the time sent a letter to Mr. Dobson's counsel indicating that "Cindy has been experiencing at least two significant health problems which will require the continuance of the hearing scheduled for next Wednesday, October 29, 2003." (R. 721-22.) The October 22, 2003 letter goes on to say that "a suspicious mole on Cindy's back was discovered. It has been diagnosed as cancerous melanoma." (*Id.*)

On October 22, 2003, Ms. Cooper met with Dr. Dirk Noyes and his physical exam revealed a 1.5 cm biopsy site on her left flank that was well healed. (R. 385.) "The remainder of her complete physical exam did not reveal any evidence of further suspicious skin lesions." (*Id.*) On an excused absence form, Dr. Noyes states that Ms. Cooper will be unable to attend Court on October 29, 2003. (R. 387.) He states that she "is having a wide excision of melanoma." (*Id.*) The wide excision of melanoma referenced in the excused absence note occurred on November 4, 2003, and was actually a "conservative excision[,] . . ." (R. 385.) The November 4, 2003 wide excision biopsy report indicated that sections of skin and soft tissue revealed a healing surgical wound consistent with prior surgical trauma.

(R. 389.) No residual atypical moles or other skin lesions or proliferations were identified. (*Id.*) The margins around the excision site were examined and were negative. (*Id.*) Ms. Cooper did not have any form of melanoma cancer.

On December 31, 2003, Ms. Cooper represented to Judge Stephen L. Henriod via Affidavit of Respondent, Dated December 31, 2003, that: “If I were required to work today I would not be able to earn funds sufficient to justify my absence from the home. Furthermore, my health would not permit it. I was recently diagnosed with stage three melanoma cancer. This has required surgery including surgery to remove a growth from my thyroid. I am in very precarious health” (R. 379.)

In her deposition, which occurred on December 2, 2006, Ms. Cooper was asked the following questions with regards to Paragraph 15 of her December 31, 2003 Affidavit that was presented to Judge Henriod:

Q. Had a doctor ever told you you had state three melanoma cancer?

A. No.

. . .

Q. Is it fair to say that what’s in that paragraph is inaccurate regarding there being a surgery to remove a growth on your thyroid?

A. That’s inaccurate.

(R. 336.) Further, when asked in her deposition whether any doctor ever discussed any melanoma gradation with her, specifically a stage three melanoma, Ms.

Cooper responded “[n]o, they never told me.” (R. 332.)

In a January 04, 2004 email from Ms. Cooper to Mr. Dobson, Ms. Cooper states that “[t]here are excellent doctors in Dallas that are highly recommended that deal with melanoma. . . . My focus is to get the children settled and get healthy, a relationship would hardly fit at this point.” (R. 341.) In a January 21, 2004 email from Ms. Cooper to Mr. Dobson, Ms. Cooper states “[w]ould you like them [the kids] to have Mom work at McDonalds while she does her Cancer treatments and then have the kids be key latch kids?” (R. 340.) Ms. Cooper told Tamara Dobson that she would need to get chemotherapy in Dallas. (R. 310.) By January of 2004, Ms. Cooper had told Mr. Dobson that her cancer was a stage 4 melanoma, that it had spread to her thyroid and that she might not live. (R. 392-93, R. 323.) Ms. Dobson testified in her deposition that a Dr. Clayton “said if we wouldn’t have gotten this mole you would have been dead within a year.” (R. 322.) Ms. Cooper never underwent chemotherapy and never underwent radiation. (R. 326.)

Ms. Cooper’s representations to Mr. Dobson about her cancer “had a tremendous impact on [Mr. Dobson’s] thinking about my children and the bitter divorce battle that had been ongoing.” (R. 393.) Ms. Cooper’s “claim of a very

serious and most likely terminal form of cancer was the primary motivating factor that caused me to begin negotiations to settle the divorce and to make sure the children were well cared for.” (*Id.*) “By March, Defendant claimed that her cancer had now spread to her liver and kidneys and that her prognosis was very poor and that although she had been at the Huntsman Cancer Institute in Salt Lake City, that the best Melanoma specialists in the world were in Texas.” (*Id.*) “Given the swift progression of her claimed cancer, this resulted in an equally swift and generous Settlement Agreement.” (*Id.*)

Mr. Dobson relied on Ms. Cooper’s representations that she had cancer. (*Id.*) He relied on those representations in agreeing to the terms of the Settlement Agreement, upon which the Decree of Divorce was predicated. (*Id.*) Pursuant to the Settlement Agreement Ms. Cooper received about \$2600.00 in child support above and beyond what would have been statutorily required. (*Id.*)

On May 26, 2004, pursuant to a stipulated agreement filed by Mr. Dobson and Ms. Cooper, the Honorable Stephen Henriod entered a Decree of Divorce in the Dobson matter. (R. 413-23.) The Decree states that neither party is to receive alimony from the other. (*Id.*) However, the Decree awards monthly child support to Ms. Cooper in the amount of \$4,500. (*Id.*) Ms. Cooper was aware that the \$4,500 child support award agreed upon in the Settlement Agreement significantly

exceeded the amount that Mr. Dobson would have been required to pay to her each month pursuant to the Utah statutory guidelines that govern child support awards. (R. 318.) In July of 2004, two months after the decree of divorce was entered, Cindy Cooper remarried. (R. 315.) The settlement agreement contained only remuneration in the form of child support because Ms. Cooper indicated she desired at some point to be remarried, thus alimony was unacceptable to her. (R. 321.)

Mr. Dobson eventually learned he had been defrauded by Ms. Cooper, and during August of 2005, Mr. Dobson filed a Motion to Adjust Child support where he stated via an August 3, 2005 Affidavit that:

I have also now learned that my agreement to pay \$4500.00 in child support rather than splitting that as half alimony and half child support as originally negotiated was the result of deliberate deception by Respondent. She told me she had cancer which turns out to be *false*. . . . She also represented to me that she needed to be in Texas to be close to her family for emotional support and help with the children through cancer treatments. This turns out to be *false*. Come to find out, she in fact had plastic surgery to lose weight and I have never been informed of any cancer treatment for any reason.

(R. 401 (emphasis in original).)

To the best of Mr. Dobson's knowledge since the Decree of Divorce he now believes that Ms. Cooper did not have stage 3 or 4 melanoma, or any known stage of melanoma, and cancer had never spread to her thyroid as represented prior to the

Settlement Agreement and Decree of Divorce, nor did Ms. Cooper undergo chemotherapy as was represented, nor did she undergo any major surgery other than the skin excision or cosmetic plastic surgery. (R. 393-94.)

SUMMARY OF ARGUMENT

This Court should affirm the district court's June 6, 2007 Memorandum Decision. There were no genuine disputes of material fact sufficient to preclude the district court's determination that summary judgment in favor of Mr. Dobson was appropriate. Ms. Cooper has herself admitted that she stated numerous times that she had stage three or four melanoma cancer, and Ms. Cooper admits now that this was false. The factual allegations made at the district court are taken from either Ms. Cooper herself, her physicians, or sworn Affidavits. Ms. Cooper did not present the trial court, or this Court, with any ***genuine*** dispute with regard to any of Mr. Dobson's factual allegations. Ms. Cooper attempted to "muddy" the factual allegations before the trial court by referring to matters immaterial to whether or not she fraudulently misrepresented having cancer to Mr. Dobson. However, with regard to whether she defrauded Mr. Dobson, the alleged "disputes" of fact were not genuine or material in any manner.

The facts regarding Ms. Cooper's treatment and removal of her mole are not in dispute and evidence Ms. Cooper fraudulently misrepresented her condition to Mr. Dobson, as well as the Court. It is undisputed she told Kurt, as well as others, she had melanoma cancer. It is undisputed she utilized this claim to influence Mr. Dobson into being induced to be generous beyond reason in the settlement

agreement. It is undisputed that Mr. Dobson relied to his extreme detriment upon Ms. Cooper's representation that she had melanoma cancer, as Mr. Dobson was ignorant to the fact that Ms. Cooper was lying. It is undisputed that the settlement agreement was in fact generous in providing child support well beyond that required by Utah law. It is undisputed that Ms. Cooper did not have melanoma cancer, that her claim was absolutely false, and that she knew this the entire time she was telling Mr. Dobson, and others, that she had terminal melanoma cancer. Simply, Mr. Dobson was defrauded by Ms. Cooper's representation that she had melanoma cancer.

As a result of the aforementioned, this Court should enter an order affirming the district court's June 6, 2007 Memorandum Decision.

ARGUMENT

I. The District Court Correctly Determined That There Were No Disputed Issues Of Material Fact.

Utah R. Civ. P. 56 requires that “judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no *genuine issue* as to any *material fact* and that the moving party is entitled to a judgment as a matter of law.”

(emphasis added). It has been long recognized by Utah Courts that “[t]he foregoing rule does not preclude summary judgment simply whenever some fact remains in dispute, but only when a material fact is *genuinely* controverted.”

Heglar Ranch, Inc. v. Stillman, 619 P.2d 1390, 1391 (Utah 1980) (emphasis added). Appellant cites this Court to a number of cases indicating the motion for summary judgment standard, and every case cited correctly indicates that there must a *genuine* issue of *material* fact to preclude summary judgment. (Brief of Appellant at pages 22-25.)

One aspect of the motion for summary judgment standard that is missing from the Brief of Appellant, but that has been stated by the Supreme Court of Utah, is that “[a]llegations of a pleading or *factual conclusion of an affidavit* are insufficient to raise a genuine issue of fact.” *Winter v. Northwest Pipeline Corp.*, 820 P.2d 916, 919 (Utah 1991) (emphasis added). One example of an attempt by

Ms. Cooper to create an issue of fact through her post-deposition affidavit is found in paragraph 12 of the Brief of Appellant. In that paragraph, citing her affidavit for support, Ms. Cooper indicates that she thought she had melanoma after having a mole removed because Dr. Noyes wrote on a note that she had a melanoma. (Brief of Appellant at page 8.) Ms. Cooper tells this Court that Dr. Noyes gave her that note. Reading paragraph 12, one gets the impression Dr. Noyes was very concerned about this “melanoma.” However, the real fact of the matter is that Cindy Cooper testified in her deposition that she got this note because “I went in and said can you give me an excuse [not to attend a hearing before Judge Henriod], so they wrote down that I had melanoma.” (R. 323.) In reality, Ms. Cooper had a non-cancerous mole removed from her back. (R. 389.)

Mr. Dobson is confident that upon this Court’s review of the factual content of the record that is material to his fraudulent misrepresentation claim, this Court will determine, as the trial court did, that there are no genuine disputes of material fact. Ms. Cooper presents many “alleged” disputes of immaterial facts, and many non-genuine purported disputes, but does not present any genuine disputes of material fact.

Here, even on appeal, Ms. Cooper is still attempting to litigate a divorce and not a fraud action. Many facts related to the divorce are simply immaterial to the

issue of whether or not Ms. Cooper committed a fraudulent misrepresentation when she lied to Mr. Dobson and the Third District Court. *See* (Brief of Appellant at ¶¶ 3, 4, 5, 6, 7, 8, 26, 27, 29, 31, 32, 33, 34, 35, 36, 37 (all immaterial to Mr. Dobson’s fraudulent misrepresentation claim).)

Further, facts relating to Ms. Cooper’s general well-being and health, are immaterial to the extent they do not *specifically* address her alleged diagnosis of melanoma cancer, her learning she did not have melanoma cancer upon a biopsy of a mole removed from her back, and her subsequent repeated misrepresentations and lies that she did in fact have terminal melanoma cancer that would require chemotherapy treatment. *See* (Brief of Appellant at ¶¶ 9, 10, 16, 17, 18, 19, 20, 21, 22, 25, 27, 28, 29, 30) (all immaterial to an alleged diagnosis of melanoma cancer and subsequent negative biopsy and thus, immaterial to Mr. Dobson’s fraudulent misrepresentation claim).) Other facts contained in the fifty-one page Brief of Appellant are just obviously irrelevant, let alone immaterial, to this action and appeal. *See* (Brief of Appellant at ¶¶ 10, 21, 22, 24, 27, 29.)

Also, “speculation falls short of creating a genuine issue of material fact sufficient to survive summary judgment.” *Gildea v. Guardian Title Co. of Utah*, 970 P.2d 1265, 1270 (Utah 1998). Thus, it matters not that something “should have signaled” or that someone else thinks someone “showed no concern.” *See*

(Brief of Appellant at ¶¶ 23-24.) Paragraphs 23 and 24 are both clearly speculative allegations, they do not contain material facts.

It is also speculative, let alone disingenuous, to assert now that “Cindy had no intention to defraud any person . . . 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. . . .

Cindy did not make the statement knowingly believing it to be false or recklessly.”

(Brief of Appellant at ¶ 38, R. 594, ¶ 84.) Not only are these statements pure speculation, conjecture, and hypothesis, they ignore the simple legal rule that affidavits are sworn statements, presumed to be admissible in evidence. *See* Utah R. Civ. P. 56(e). Further, when Affidavits are made in bad faith “the court shall forthwith order the party presenting them to pay the other party the amount of reasonable expenses which the filing of the affidavits caused, including reasonable attorney’s fees, and any offending party or attorney may be adjudged guilty of contempt.” Utah R. Civ. P. 56(g). Accordingly, Ms. Cooper’s attempt to retract, or minimize, a false statement made in a sworn affidavit should be viewed with skepticism, especially when the statement helped her at the time it was made.

Simply, Ms. Cooper has repeatedly lied about her melanoma cancer and she knew full well she was misrepresenting such to Judge Henriod. (R. 752 (Judge Faust’s

Memorandum Decision holding “Defendant repeatedly misrepresented her medical condition[.]”).)

Finally, Appellant’s alleged facts found in paragraphs 31 and 32 of the Brief of Appellant are particularly telling. These facts address what Ms. Cooper would have this Court believe is Mr. Dobson’s lackadaisical attitude towards Ms. Cooper’s health and medical condition and also that Mr. Dobson, or his legal counsel, never informed Ms. Cooper or her legal counsel that Mr. Dobson was concerned about Ms. Cooper’s health and medical care. These facts indicate the manner in which Ms. Cooper engages in double-speak to obtain her desired end result. On the one hand, Ms. Cooper wants this Court to believe she was fine and healthy and never told Mr. Dobson about her melanoma cancer, yet on the other hand, she wants this Court to feel as if Mr. Dobson was uncaring and unsympathetic to Ms. Cooper’s condition. The fact is, Ms. Cooper told Mr. Dobson she had melanoma cancer and she did so knowing full well that Mr. Dobson would be induced to act on that false information. Otherwise, she would not have mentioned this false misrepresentation to Mr. Dobson, especially in light of the undisputed limited frequency of their conversations and the overall tense circumstances surrounding their divorce.

Clearly there are not any genuine disputes of material fact in this situation.

The facts material to whether or not Ms. Cooper engaged in a fraudulent misrepresentation are undisputed and quite apparent. Ms. Cooper cannot rely on immaterial facts to “muddy” the facts and create factual disputes. Factual disputes must be genuine. Factual conclusions in affidavits will not suffice and cannot be considered by this Court. *See Winter*, 820 P.2d at 919. Here, the trial court was correct in finding no genuine dispute as to any material facts. This Court should affirm that determination.

II. The District Court Was Correct In Granting Plaintiff’s Motion For Summary Judgment Because The Evidence Presented Clearly And Convincingly Met Each Of The Elements Of Fraudulent Misrepresentation.

Initially, Mr. Dobson would note that Defendant and Appellant Ms. Cooper did not affirmatively indicate that this was an issue for appeal. Rather, this issue was indicated only in a footnote to the Brief of Appellant. Ms. Cooper’s position is that “the granting of summary 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 court[] . . .” (Brief of Appellant at p. 1-2.) However, because there are no disputes of material fact, Mr. Dobson will address this issue, as this Court might be inclined to undertake this analysis even in light of Ms. Cooper’s failure to properly present this issue on appeal.

In Divorce actions, Utah courts have allowed the aggrieved party to bring an

independent action to obtain relief from fraudulent conduct similar to that of Ms.

Cooper. For example:

It has long been recognized by state and federal courts alike that an independent equitable action for relief from a prior judgment is available in addition to those remedies afforded under Rule 60(b). An independent action for fraud under facts as alleged by the defendant here may be appropriate because an intentional act by a party in a divorce action which prevents the opposing party from making a full defense amounts to fraud upon the opposing party, as well as upon justice, justifying a court in setting aside the decree so obtained. Public interest requires that no spouse be defrauded by the other in obtaining a decree of divorce. More importantly, when fraud is properly pleaded, it is not important whether the decree is entered after litigation or by consent.

Bayles v. Bayles, 1999 UT App 128, ¶ 16, 981 P.2d 403 (internal marks and citations omitted); *see Kelley v. Kelley*, 2000 UT App 236, ¶ 57, 9 P.3d 171 (holding that in Utah divorce proceedings, fraud, deceit, and perjury constitute a fraud upon the court); *Masters v. Worsley*, 777 P.2d 499, 500-03 (Utah App. 1989) (holding that because actionable torts between married people should not be litigated in a divorce proceeding, an independent cause of action could be maintained).

Utah courts have long recognized that “[m]any cases . . . find[] a ground for setting aside final divorce decrees, since present in a great many of the cases are fraudulent misrepresentations to, or concealments from either the other spouse or the court, or both, which have brought the particular case within the rule that a

judgment may be attacked in a proper proceeding and set aside for fraud.”

Johnson v. Johnson, 116 Utah 27, 207 P.2d 1036, 1038-39 (Utah 1949) (citing cases).

The elements of a claim for fraudulent misrepresentation are:

(1) a representation; (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.

Larsen v. Exclusive Cars, Inc., 97 P.3d 714, 716, 2004 UT App 259 ¶ 7; *see Masters*, 777 P.2d at 501-02. Here, the trial court held that Mr. Dobson “has established the elements of fraud, as a matter of law, and is therefore entitled summary judgment.” (R. 751.)

The trial court correctly determined that Ms. Cooper had knowingly made a false representation concerning a presently existing material fact when she “repeatedly misrepresented her medical condition, including indicating that she had been diagnosed with advanced stages of cancer.” (R. 752.) Ms. Cooper told Tamera Dobson that she had a stage 3 ½ melanoma. (R. 309.) Ms. Cooper represented, through her legal counsel at the time, that she had “cancerous melanoma.” (R. 721-22.) On December 31, 2003, Ms. Cooper represented to

Judge Henriod, and the Third District Court via Affidavit, that she had been “recently diagnosed with stage three melanoma cancer.” (R. 379.) She indicated this required surgery to remove a growth from her thyroid. (*Id.*) In e-mail messages to Mr. Dobson, Ms. Cooper indicated that she would treat her melanoma in Dallas. (R. 340-41.) Ms. Cooper told Tamara Dobson she would need to undergo chemotherapy in Dallas. (R. 310.) Ms. Cooper told Mr. Dobson in January of 2004 that her cancer was advanced to a stage four and that it was in her thyroid and that she might not live. (R. 392-93, R. 323.)

At the Motion for Summary Judgment hearing, Mr. Stirba correctly argued that:

. . . She was claiming that she had Stage 3 melanoma. She didn’t have Stage 3 melanoma, she never has had melanoma, period. She did have a growth or a - - a - - (inaudible) on her back, which was removed, which obviously, it’s a mole, obviously, the doctor is always somewhat suspicious of the possibility that there might be some cancerous tissue in the mole. . . . She has never had melanoma. . . .

. . . [M]elanoma is a very specific term. Look in any medical dictionary and it will tell you, it’s a cluster of malignant cells. That’s what it is, it’s cancer. She’s never had cancer, she’s never had treatment for cancer, she’s never been diagnosed with cancer. She doesn’t have any of those medical phenomena whatsoever.

So, to suggest that somehow she has a melanoma and keep saying she has a melanoma, is patently false. And that’s one of the problems here because she submits an affidavit back in December of ’03, I believe, to the Court for purposes of opposing temporary

support and she basically, without any equivocation, she said that, ‘I was recently diagnosed with Stage 3 melanoma cancer.’ Patently, clearly false. It’s a lie. And it’s an affidavit to the Court.

She then goes on to say, This has required surgery, including surgery to remove a growth on my thyroid. That’s absolutely false. That’s absolutely false. In her deposition, she testified [it] never happened.

(R. 773, pages 4-6.)

On appeal, Ms. Cooper abandons the “I have cancer” line of facts, which interestingly is all Mr. Dobson plead as a representation, and now tries to mislead this Court that the alleged “fraudulent misrepresentation” is that she said she was “going to die.” (Brief of Appellant at 27-29.) Mr. Dobson is at a loss as to how – suddenly – on appeal, an entirely new alleged “fraudulent misrepresentation” comes forth *from the Defendant*. The fraudulent misrepresentation is, and always has been, Ms. Cooper’s undisputed and repeated misrepresentation of her medical condition of having melanoma cancer. However, Ms. Cooper did indicate to Judge Henriod that she “was in very precarious health[.]” (R. 379.) She also did testify in her deposition that Dr. Clayton told her if they had not found the non-cancerous mole that she would be dead in a year. (R. 322.) It is very likely this was also a false representation by Ms. Cooper.

The fact is that Ms. Cooper did not have melanoma cancer, and she knew she didn’t have melanoma cancer. The fact is she lied. This analysis does not

require any inquiry into Ms. Cooper's state of mind, as is suggested on appeal, because the facts are not in dispute, Ms. Cooper said she had cancer, but testified under oath she knew she did not. For example, the trial court correctly found that the "undisputed evidence is that the Defendant [Ms. Cooper] had never been diagnosed with any type of cancer." (R. 752.) In fact, when pressed on the truthfulness of her Affidavit presented to Judge Henriod, Ms. Cooper admitted in her deposition that she lied in her Affidavit because a doctor never told her she had stage three melanoma, and that it was an inaccurate statement in her affidavit that she required surgery to remove a growth from her thyroid. (R. 336.) In fact, no doctor ever told Ms. Cooper about any "gradation" of her purported melanoma cancer, because she never had melanoma cancer. (R. 332.) Ms. Cooper learned on November 4, 2003 that the biopsy on her excision was negative. (R. 389.) Yet, thereafter she falsely represented not only to the Third District Court, but also to numerous others, including Mr. Dobson, that she had melanoma cancer. Simply, the only logical conclusion is that as a matter of law Ms. Cooper did knowingly make a false representation concerning a presently existing material fact, and thus the first four elements of a fraud claim are present.

Judge Faust further held that Ms. Cooper "perpetuated the misrepresentations concerning her medical condition for the purpose of inducing

the Plaintiff [Mr. Dobson] to reach a favorable settlement with her.” (R. 752.) The facts indicate that Ms. Cooper’s misrepresentations and lies about having melanoma cancer were perpetuated for the purpose of making Mr. Dobson speed up the settlement of the divorce action they were engaged in, and to make him take pity on her in the settlement negotiations based on her purported inability to work, need for cancer treatments, and possibility of imminent death. Ms. Cooper made these representations in affidavit form, to the Third District Court Judge Henriod in the divorce action. There is no plausible explanation for why Ms. Cooper would repeatedly lie to the Third District Court, to Kurt Dobson, and to others, other than she thought it would enhance her bargaining position with Mr. Dobson. For example, at the Motion for Summary Judgment hearing, Mr. Stirba argued to Judge Faust the following:

There is no fact, there is no reasonable inference that anybody can draw to suggest that somehow when he says, I relied upon it, that that isn’t obviously patently true. There is no other reason for her to have lied to the Court and there’s no other reason, reasonably, that she would have lied to him, but for her desire to get an enhanced settlement in the divorce proceeding.

(R. 773, page 13.)

Ms. Cooper attempted before the trial court, and again here on appeal, to conveniently state, after the fact, that she read the affidavit presented to Judge Henriod quickly and inadvertently (R. 594.). However, unfortunately for Ms.

Cooper, the trial court recognized that Ms. Cooper's misrepresentations and lies regarding her melanoma cancer were anything but inadvertent, in fact they were repeated. (R. 752.) Regardless, in relying on Ms. Cooper's misrepresentations, "[t]he full measure of [Mr. Dobson's] duty was to use reasonable care and observation in connection with these representations." *Schuhman v. Green River Motel*, 835 P.2d 992, 996 (Utah App. 1992). Clearly, Mr. Dobson is using reasonable care and observation in relying on misrepresentations made by Ms. Cooper in an affidavit form, regardless of whether Ms. Cooper now disingenuously claims such misrepresentations were by mistake.

A perfect example of Ms. Cooper's obvious purpose of inducing Mr. Dobson to act upon her purported cancer misrepresentation is that Ms. Cooper asked Mr. Dobson via electronic mail message: "[w]ould you like [the kids] to have Mom work at McDonalds while she does her Cancer treatments and then have the kids be key latch kids?" (R. 340.) This email also references an inability to work. (*Id.*) Clearly, Ms. Dobson is bringing her health, and the ramifications thereof, into play to obtain a more sturdy bargaining position in the divorce action, and specifically to obtain more child support than required by Utah statute. Clearly Ms. Cooper's purpose was to induce Mr. Dobson to act upon her misrepresentation of having melanoma cancer. It is also clear that Ms. Cooper did

in fact induce Mr. Dobson to act and that he did so to his detriment.

In fact, Mr. Dobson himself admits that he was induced to act, and in fact did rely to his detriment upon Ms. Cooper's melanoma cancer misrepresentations which he was ignorant to the falsity thereof. For example, Mr. Dobson indicates that Ms. Cooper's cancer misrepresentations "had a tremendous impact on my thinking about my children and the bitter divorce battle that had been ongoing." (R. 393.) Ms. Cooper's "claim of a very serious and most likely terminal form of cancer was the primary motivating factor that caused me to begin negotiations to settle the divorce and to make sure the children were well cared for." (*Id.*) "By March, Defendant claimed that her cancer had now spread to her liver and kidneys and that her prognosis was very poor and that although she had been at the Huntsman Cancer Institute in Salt Lake City, that the best Melanoma specialists in the world were in Texas." (*Id.*) "Given the swift progression of her claimed cancer, this resulted in an equally swift and generous Settlement Agreement." (*Id.*) Again, Mr. Dobson relied on Ms. Cooper's representations that she had cancer. (*Id.*) He relied on those representations in agreeing to the terms of the Settlement Agreement, upon which the Decree of Divorce was predicated. (*Id.*) Pursuant to the Settlement Agreement Ms. Cooper received about \$2600.00 in child support above and beyond what would have been statutorily required. (*Id.*) The monthly

overpayment of child support accrued from May 26, 2004 until June 6, 2007 when the district court set aside the settlement agreement and vacated the divorce decree.

The district court clearly elicited that “in granting of the Plaintiff’s Motion for Summary Judgment, it should be clear that the Court rules that [Mr. Dobson] was fraudulently induced into entering into the parties’ settlement agreement in the divorce action.” (R. 752.) The evidence presented on summary judgment is clear and convincing that Mr. Dobson has met each of the elements of his fraud claim as a matter of law such that summary judgment in his favor was correct. The alleged “disputes” of fact presented by the Appellant are not genuine, nor are they material. Ms. Cooper perpetuated a fraud on the court, and on Mr. Dobson. Again, as elicited in *Schuhman*, Mr. Dobson does not have to second-guess, or question, facts presented to the court in Affidavit form. 835 P.2d at 996.

Simply, Ms. Cooper lied to the court, to Mr. Dobson, and to others to induce Mr. Dobson to act to his detriment and to her benefit in reaching a settlement agreement and decree of divorce. As a matter of law, Ms. Cooper’s conduct amounts to a fraudulent misrepresentation and this Court should affirm the district court’s Memorandum Decision.

III. The March 1, 2007 Affidavit Of Cindy Cooper Is A Self-Serving Sham Affidavit And Should Not Be Considered.

The factual allegations in the Brief of Appellant cite almost exclusively to

the March 1, 2007 Affidavit of Cindy Cooper. Ms. Cooper conveniently procured this Affidavit after she had been deposed in the fraud action. Given the fact that Ms. Cooper testified under oath in her deposition that she lied in a previous affidavit submitted to Judge Henriod, this Court should immediately be skeptical of this self-serving affidavit filed after her deposition. (R. 336 & 379.)

Notwithstanding, Utah Courts have clearly indicated that “[t]he general rule is that in a summary judgment proceeding, when a party takes a clear position in a deposition, that is not modified on cross-examination, [s]he may not thereafter raise an issue of fact by h[er] own affidavit which contradicts h[er] deposition, unless [s]he can provide an explanation of the discrepancy.” *Harnicher v. University of Utah Medical Center*, 962 P.2d 67, 71 (Utah 1998); *Webster v. Sill*, 675 P.2d 1170, 1172 (Utah 1983). “To raise a genuine issue of fact, an affidavit must do more than reflect the affiant’s opinions and conclusions.” *Webster*, 675 P.2d at 1172 (citing *Walker v. Rocky Mountain Recreation*, 29 Utah 2d 274, 508 P.2d 538 (1973)).

Both at the trial court, and now on appeal, Ms. Cooper has contradicted her deposition testimony with the subsequent March 1, 2007 sham affidavit. There is no explanation for the discrepancies in the March 1, 2007 sham affidavit. The March 1, 2007 sham affidavit attempts to describe away harmful deposition


testimony, but there is no indication why there is a discrepancy between the deposition, and the affidavit. Truth be told, the March 1, 2007 affidavit is a sham affidavit procured in a complete attempt to conjure out of nowhere disputes of fact. The trial court was not misled by these efforts, and this Court should also not be so misled.

CONCLUSION

Given the arguments made herein, Mr. Dobson respectfully requests that this Court affirm the district court's Memorandum Decision granting summary judgment to Mr. Dobson on his fraudulent misrepresentation claim, setting aside the settlement agreement, and vacating the decree of divorce.

Dated this 11th day of April 2008.

STIRBA & ASSOCIATES

By: 
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Attorneys for Plaintiff - Appellee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11 day of April, 2008, I caused to be served a true copy of **BRIEF OF APPELLEE** by the method indicated below, to the following:

D. Miles Holman
Holman & Walker LC
9533 South 700 East, Suite 100
Sandy, Utah 84070

☒ (X) U.S. Mail, Postage Prepaid
☐ () Hand Delivered
☐ () Overnight Mail
☐ () Facsimile