1976

Egan v. Egan : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE

STATE OF UTAH

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GARY STEWART EGAN,

Plaintiff-Respondent and Cross Appellant,

vs.

NANCY LEE EGAN,

Defendant-Appellant and Cross Appellee.

Case No. 14522

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BRIEF OF RESPONDENT AND CROSS APPELLANT

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APPEAL FROM THE JUDGMENT OF THE
THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
THE HONORABLE ERNEST F. BALDWIN, JR., DISTRICT JUDGE

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BRIEF OF RESPONDENT AND CROSS APPELLANT

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STATEMENT OF CASE

1. IDENTIFICATION OF PARTIES

(1) The Plaintiff below in this action, GARY S. EGAN, is the Respondent and Cross Appellant on this appeal. GARY S. EGAN was the Defendant in the case of Nancy Lee Egan v. Gary S. Egan, Docket No. D-14489, a divorce action filed in the Third Judicial District Court in and for Salt Lake County, State of Utah, a case to which the present case is corollary.

(2) The Defendant below in this action, NANCY LEE EGAN, is the Appellant and Cross Appellee on this appeal. NANCY LEE EGAN was the Plaintiff in the divorce action of Nancy Lee Egan v. Gary S. Egan (cited supra).

2. NATURE OF THE ACTION

This appeal arises from a judgment entered following a trial before the Civil Division of the Third Judicial District Court in and for Salt Lake County, State of Utah, Honorable Ernest F. Baldwin, Jr., District Judge, presiding, wherein GARY S. EGAN brought an INDEPENDENT ACTION pursuant to Rule 60(b), Utah Rules of Civil Procedure for relief from a default judgment entered in Civil Action D-14489, a divorce case. The Trial Court found in favor of Plaintiff GARY S. EGAN (Respondent here) and entered judgment granting only partial relief pursuant to Rule 60(b)(6)&(7) U.R.C.P. from the prior Divorce Decree. From that final order, the Defendant below, NANCY LEE EGAN, appeals and the Plaintiff below, GARY S. EGAN, cross-appeals.

3. ISSUES PRESENTED ON APPEAL AND CROSS APPEAL.

(1) On Appeal:

Whether the Trial Court erred in granting partial relief from the prior judgment.

(2) On Cross Appeal:

Whether the Trial Court erred in failing to grant complete relief from the default judgment as sought by the Plaintiff below.

DISPOSITION IN TRIAL COURT

On November 5, 1975, Plaintiff-Respondent GARY S. EGAN's Rule 60(b) U.R.C.P. Independent Action For Relief From Judgment came on for non-jury trial before the Civil Division of the Third Judicial District Court in and for

Salt Lake County, State of Utah, Honorable Ernest F. Baldwin, District Judge, presiding. Plaintiff-Respondent GARY S. EGAN sought relief from a default Divorce Decree made and entered on September 11, 1974 by the Domestic Relations Division of the same district in Civil Action D-14489, Honorable Peter F. Leary, District Judge, presiding. After a two-and-one-half day trial and the parties having concluded their evidence, the Trial Court requested counsel to submit Memoranda of Points and Authorities on various issues of law raised during trial.

On January 20, 1976, after a series of post-trial motions and oral arguments, the Trial Court entered Findings of Fact and Conclusions of Law, finding that the underlying SETTLEMENT AGREEMENT entered into between the parties (dated September 14, 1974)(R.3) was void by reason that it was based upon an erroneous assumption and mutual mistake of fact (i.e. that the child Melinda Sarah Egan was his biological child, when in fact she was not.) (Findings of Fact ¶17)(R.135) (Conclusions of Law ¶2)(R.136)

Accordingly, on January 20, 1976, the Trial Court entered a judgment granting only partial relief from the prior Divorce Decree relieving the Plaintiff GARY S. EGAN from the further support of the child MELINDA SARAH EGAN and deleting all reference to the child from the Divorce Decree. From that judgment, NANCY LEE EGAN appeals and GARY S. EGAN cross appeals.

RELIEF SOUGHT ON APPEAL

The Appellant NANCY LEE EGAN seeks a reversal of the Trial Court's judgment granting partial relief from judgment requesting this Court to reinstate the terms of the original Divorce Decree requiring GARY S. EGAN to support the child MELINDA SARAH EGAN. The Respondent and Cross Appellant GARY S. EGAN seeks:

(1) an equitable review of both the facts and the law pursuant to Rule 72(a) U.R.C.P.;

(2) that the Court set aside the entire Decree of Divorce, except for that portion dissolving the marriage; and

(3) for an order remanding the divorce action to the Domestic Relations Division for trial upon the merits.

STATEMENT OF FACTS

GARY S. EGAN and NANCY LEE EGAN were married to each other on November 18, 1964 in Salt Lake City, Utah (R.13). The marriage lasted some nine and one half years; one child, Allison Egan, age 11, was born the legitimate issue of the marriage (R.6). In early May of 1974, the parties separated and on May 28, 1974 NANCY LEE EGAN filed a Complaint for absolute divorce. Although living separately, both parties testified to having sexual relations together during the month of June 1974 (TR.25&76). The Defendant NANCY LEE EGAN also testified that she had sexual relations

with another man, not her husband, during the month of June 1974 (TR.77-78). In July of 1974, NANCY LEE EGAN learned that she was pregnant with another child and filed an Affidavit with the Court dated August 5, 1974 stating that: "Another child to be born of the marriage is expected in February 1975." (TR.82 & Plaintiff's Ex. 11). NANCY LEE EGAN informed the Plaintiff GARY S. EGAN that the unborn child was his child and there is no conflict in the testimony that she reassured him of the fact that the expected child was in fact his child on a number of subsequent occasions (TR.30, 55,62,69,70,102,104,108). The parties discussed reconciliation and settlement throughout the month of August and the first half of September 1974; however, on September 16, 1974, based upon NANCY EGAN's representations as to the paternity of the unborn child, GARY EGAN entered into a STIPULATION & SETTLEMENT AGREEMENT (R.16) and signed an APPEARANCE AND CONSENT TO DEFAULT so that the divorce could proceed by default and without contest (TR.6, Ex.P-10). Thereafter on September 19, 1974, the Court approved the STIPULATION & SETTLEMENT AGREEMENT and entered default judgment and final Decree of Divorce based upon and in accordance with its terms (R.6-23).

On or about September 20, 1974, immediately after NANCY's Court appearance on the default divorce and after the final Decree had been entered,[1] NANCY and GARY EGAN went to lunch

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[1] The divorce became final upon entry of the Decree (R.6,¶1)

together at Auerbach's tea room (TR.43). During lunch, NANCY EGAN informed GARY EGAN for the first time of the possibility that the child then in gestation may not be his (TR.38,42,43). GARY EGAN testified that he was not certain of her motives for telling him this, but when the child was born on March 28, 1975 and he had an opportunity to observe the child, he became convinced for the first time that the infant Melinda Sarah Egan was in fact not his child (R.61). Immediately thereafter GARY EGAN contacted Dr. Charles D. Scott, Medical Geneticist, for expert advice as to the determination of paternity. Dr. Scott suggested GARY retain legal counsel without delay. EGAN did so and on June 30, 1975, an independent action was brought for relief from judgment in accordance with Rule 60(b) U.R.C.P. (R.1). At trial upon the merits two of the three blood group examinations ordered by the Court prior to trial were admitted into evidence, both of which positively excluded GARY STEWART EGAN from paternity (R.132). The two blood tests admitted at trial were conducted pursuant to Plaintiff's motion under § 78-25-18 Utah Code Annotated (1953)(R.70), the one remaining test conducted upon Defendant's motion was not offered by her counsel at time of trial (TR.86). Based upon extrinsic evidence in accordance with Lopes v. Lopes, 30 Utah 2d 393, 518 P.2d 687 (1974), the Court thereupon made the finding that the child Melinda Sarah Egan was not the natural and biological child of the Plaintiff GARY S. EGAN nor the legitimate issue of the marriage (Finding of Fact ¶4 and Conclusion of Law ¶3, R.132).

Although the Trial Court did find that the child Melinda Sarah Egan was conclusively proved, beyond a reasonable doubt, not to be the child of GARY S. EGAN, the Court found that the representations of paternity made by NANCY LEE EGAN to GARY S. EGAN did not constitute fraud, but were made under a mistaken belief and upon an erroneous assumption (Conclusion of Law ¶2, R.136).

Accordingly, the Court found that the Contract or SETTLEMENT AGREEMENT entered into by the parties (dated September 16, 1974) was based upon a mutual mistake of fact and the erroneous assumption that the child Melinda S. Egan (born after the divorce became final) was the child of the Plaintiff GARY S. EGAN; and that the AGREEMENT OF SETTLEMENT was therefore void or voidable (Finding of Fact ¶17, R.135). Based upon the finding that the underlying Contract or AGREEMENT OF SETTLEMENT was void, the Court granted partial rescission of the Agreement and entered a judgment granting partial relief from the future application of the judgment (viz. the support terms of the judgment) pursuant to Rule 60(b)(6)&(7), the Court finding that it was no longer equitable that the judgment have prospective application (R.139).

On appeal, the Defendant NANCY LEE EGAN claims in the absence of an express finding of fraud on her part the Trial Court erred in granting the Plaintiff partial relief from a judgment requiring the support of a child even though the child is admittedly not the child of GARY EGAN. The

Plaintiff GARY S. EGAN contends the Court's action was not an abuse of discretion, but asserts the entire Agreement was based upon a false and erroneous assumption that the child was his and that NANCY had been a true and faithful wife, that the entire Agreement should be set aside and the entire matter should be remanded to the Family Relations Division for hearing, the matter not having been previously litigated as the Divorce Decree was taken by default.

RESPONDENT'S ARGUMENT ON APPELLANT'S APPEAL

POINT I

THE TRIAL COURT IS VESTED WITH BROAD DISCRETION IN GRANTING RULE 60(b)(5)(6)&(7) RELIEF AND THE COURT'S JUDGMENT WAS NOT AN ABUSE OF DISCRETION.

At the outset it should be noted that the Appellant NANCY LEE EGAN made no claim at trial and makes no claim on this appeal that the child MELINDA SARAH EGAN is the child of GARY S. EGAN. She does admit that she misled him during settlement negotiation (TR.108) but contends that because he did not discover that the child was not his child before three months had elapsed, that he should be responsible for the lifetime support of another man's child.

Such a contention before a court of equity seems incredible if not preposterous. Why she does not seek support from the child's real father is not known, but in all events, that question is not before the Court on this appeal.

1. Relief under Rule 60(b) is not limited to three months under the sections applicable here.

In Points I & II of pages 7 and 9 of NANCY LEE EGAN's

Brief, the Appellant advances the argument that the three month limitation on bringing a Rule 60(b) motion under subsections (1),(2),(3)&(4) somehow prevents a party from being entitled to relief under subsections 60(b)(5)(6)&(7) in the event the party seeking the relief from judgment should also bring an Independent Action for relief as prescribed in Rule 60(b).

The complete text of Rule 60(b) reads as follows:

> (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; Etc. On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) when, for any cause, the summons in an action has not been personally served upon the defendant as required by Rule 4(e) and the defendant has failed to appear in said action; (5) the judgment is void; (6) the judgment has been satisfied, released or discharged, or a prior judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is not longer equitable that the judgment should have prospective application; or (7) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1),(2),(3), or (4), not more than 3 months after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action. Id. Rule 60(b) (Emphasis Supplied)

It is clear from a reading of the Rule that there is no time limitation on relief pursuant to Rule 60(b)(5)(6)or(7), nor is there any time limitation upon bringing an Independent Action other than "within a reasonable time". Appellant's position, if it is understood correctly, is that a moving party cannot bring one single action seeking relief from judgment under 60(b)(5)(6)or(7) if "fraud upon the court" is one of his legal theories, but must instead bring two separate actions, i.e. one by motion under subsections (5), (6)&(7) in the original proceeding and a second by way of Independent Action in a totally separate proceeding or suit in equity.

Under Appellant's theory, the party seeking relief would have to duplicate legal expenses, witness, testimony, experts, evidence, legal argument, etc. in each action.

Such a duplicative procedure would indeed be a novel approach to litigation, as usually the courts are concerned with such items as time, expense and efficient utilization of judicial resources, etc.

There is no question but that an action sounding in fraud upon the Court under Rule 60(b) must be brought in an Independent Action, but nothing in the language of the Rule suggests a limitation on a party's ability to seek relief under alternative theories pursuant to subsections 60(b)(5)(6)&(7) at the same time and in the same action.

In fact, the language of the Rule stated in the disjunctive "or" rather than in the conjunctive "and" suggests exactly the opposite, for example, the last two lines of

Rule 60(b) read as follows:

> "This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action." (Emphasis added)

The use of the disjunctive word "or" suggests that after the initial three month limitation has past, an action for relief from judgment under subsections (5)(6)&(7) may be brought either by motion in the original action or together with other equitable theories in a Separate Suit In Equity under the Rule 60(b) "Independent Action" clause.

Justice Ellett's concurring opinion in McGavin v. McGavin, 27 Utah 2d 200, 494 P.2d 283 (1972) as well as the Court's unanimous decision in Shaw v. Pilcher, 9 Utah 2d 222, 341 P.2d 949 (1959) lead one to conclude that after the three month period has expired, a party would most prudently bring his Rule 60(b) action for relief from judgment by way of a Separate Suit In Equity. Rule 60(b)(5)(6)&(7) being the equitable provisions of the Rule, (see Warren v. Dixon Ranch, 123 Utah 416, 260 P.2d 741,742 (1953)), it seems only sensible that all equitable claims be joined in the same action rather than instituting two different actions at the same time.

POINT II

THE SUPREME COURT OF THE STATE OF UTAH HAS ON AT LEAST FIVE PREVIOUS OCCASIONS SUSTAINED RULE 60(b) RELIEF FROM JUDGMENT BASED UPON "MISTAKE OF FACT" OR "ERRONEOUS ASSUMPTION" LONG AFTER THE THREE MONTH LIMITATION HAD EXPIRED.

This Court is currently considering the question of whether the Trial Court erred in granting Plaintiff GARY STEWART EGAN relief from the "prospective application" of the default judgment ordering him to pay $125.00 per month for the support of a child Melinda Egan, a child which the Trial Court positively determined not to be the child of the Plaintiff. Plaintiff contended that the judgment was based upon fraud, mistake or the "erroneous assumption" on the part of all parties that the child was the child of the parties when in fact subsequent events proved that it is not. Plaintiff seeks affirmance of the relief granted pursuant to Rules 60(b)(6)&(7) of the Utah Rules of Civil Procedure which provide as follows:

> "The court may in the furtherance of justice relieve a party . . . from a final judgment . . . for the following reasons:
>
> (6) . . . it is no longer equitable that the judgment should have prospective application; or
>
> (7) any other reason justifying relief from the operation of the judgment." (Emphasis supplied)

The Appellant NANCY LEE EGAN, by her Brief, would have this Court believe that either the Trial Court did not have such power or that the provisions of Section 60(b)(6)&(7) are inapposite to the case presently at Bar. Appellant's Brief cites selected Utah cases decided under Rule 60(b) and then alludes to cases decided under the Federal Rules of Civil Procedure for support. As a reading of the cases cited in Appellant's Brief discloses, there is nothing even remotely

bearing upon the issue now before the Court; however, at the outset, one important distinction should be noted: The Federal Rules of Civil Procedure provide a time period of one year from entry of judgment in which to bring a motion for relief from judgment pursuant to Rule 60(b)(1),(2),(3)&(4), Federal Rules of Civil Procedure, whereas the Utah Rules require that such a Motion be brought within three months from date of judgment; furthermore, the Federal Courts do not become involved in domestic relations law. For these two reasons, the equitable considerations involved between the State and Federal Courts are quite different.

This Brief shall concern itself strictly and exclusively with the law of the State of Utah and decided only under Rule 60(b)(6)&(7) of the Utah Rules of Civil Procedure and particularly focus upon judgments that were entered based upon "erroneous assumptions" or predicated upon a defective understanding of the attendant facts. These cases unquestionably stand for the proposition that Rule 60(b)(6)&(7) is a broad grant of equitable power which is given to the District Court in order to interdict an otherwise unjust or unconscionable result brought about by reason of a prior and final judgment.

The first case on point of Stewart v. Sullivan, 29 Utah 2d 156, 506 P.2d 74 (1973) is a case that does appear in the annotations of the Utah Code immediately following Rule 60(b),

but which was left out of Appellant's scholarly summary of cases. In Stewart, Plaintiff's counsel mistakenly believed that he had answered Defendant's Interrogatories, when in fact he had not. Consequently, Plaintiff's Complaint was dismissed with prejudice under Rule 37 for failure to make discovery. Some thirteen months later, Plaintiff retained new counsel and moved the Trial Court to grant relief from the thirteen month old Judgment of Dismissal with prejudice and to modify said judgment to provide for dismissal without prejudice in order that a new action could be filed. Judge Stewart M. Hanson, Sr. granted the motion for relief from judgment and modified the existing order and the Defendant appealed to the Utah Supreme Court. In sustaining the Trial Court's granting of relief from prior judgment and subsequent modification of the order, the Utah Supreme Court held per Justice Tuckett:

> "The provisions of Rule 60(b)(7) are sufficiently broad to permit the Court to set aside its former order which appeared to have been entered upon an 'erroneous assumption' and to enter a new order based upon the record before it." (Emphasis Supplied) (Id. at 506 P.2d 76.)

A second Utah case (involving an erroneous assumption) not mentioned in Appellant's Brief is Kelly v. Scott, 5 Utah 2d 159, 298 P.2d 821 (1956). In the Kelly case, a real estate broker sued a seller for his real estate commission earned in connection with the sale of the seller's house and took judgment against the seller. Some eleven months later the seller sued the purchaser of the house for failure to perform

the sales agreement. The Trial Court determined the real estate sales contract to be void and unenforceable by reason of a failure of a condition precedent. The Trial Court then on motion of the seller granted him relief from the eleven month old judgment in favor of the real estate broker because the judgment had been entered upon the "erroneous assumption" that there was in existence a valid and enforceable real estate sales contract, when in fact, there was not. The real estate broker, on a subsequent motion to the Trial Court, persuaded the Court, Judge Ellett, to reinstate the judgment for his sales commission. On appeal, the Utah Supreme Court reversed the Trial Court, holding:

> "It is clear that the judgment for the [broker] . . . was predicated on the belief by both parties before the court that an enforceable contract between the [purchasers] and [sellers] existed. Under these circumstances, the Judgment should have been vacated in its entirety pursuant to the motion made by Appellant in accordance with Rule 60(b)(6) Utah Rules of Civil Procedure . . ." Id. at 298 P.2d 823. [Emphasis Supplied]

In Ney v. Harrison, 5 Utah 2d 217, 299 P.2d 115 (1956), a divorced husband and wife were sued by (the assignee of) a real estate broker for a sales commission earned in selling their apartment house. The wife erroneously believed that her husband had the responsibility of defending her in the action and failed to answer. Subsequently, a default judgment was taken against her. Some eleven months later she moved the Court for relief from the judgment and the Trial Court set the judgment aside. On appeal, the

Utah Supreme Court through Justice Crockett affirmed the Trial Court's granting relief from judgment eleven months later and held:

> "Defendant did not request relief until nearly 11 months had elapsed and hence, the only applicable section of Rule 60(b) upon which she could rely was (7). [Defendant's] motion was supported by an affidavit in which the major ground for relief was that she had mistakenly believed that she was fully protected by a divorce decree ordering her ex-husband to pay any real estate commission arising from the sale of the apartments.
>
> Plaintiff argues that this is a mistake of law and not within the purview of Rule 60(b) . . .
>
> The trial court could well record this as among the class of cases that Rule 60(b)(7) was intended to govern and to permit [Defendant] to justify her failure to answer on the ground that the divorce decree required her husband to bear the obligation and required him to defend the action for her. Id. at 299 P.2d 1116" [Emphasis supplied]

In the Utah case of Dixon v. Dixon, 121 Utah 259, 240 P.2d 1211 (1952), the parties to a divorce action stipulated to the entry of a temporary order. Several months later, one of the counsel for the parties "erroneously believing" that the stipulation was a final one prepared a Final Order in accordance with the Stipulation and had it entered by the Court. The Plaintiff moved for relief from the Judgment after the three month motion period had expired. The Trial Court granted relief to the Plaintiff pursuant to Rule 60(b)(7) and the Defendant appealed. The Supreme Court affirmed and held:

> "The record . . . clearly indicates that the signing and entry of such formal Order was done upon the "erroneous assumption" that it conformed to a direction of the Court . . .

> In light of the allegations of Plaintiff's petition requesting that it be set aside, it would work upon her a grave injustice to permit the order to stand. Under Rule 60(b) U.R.C.P., a Judgment or Order may be set aside for any reason other than those specified in reasons 1 to 6 "Justifying Relief From the Operation of The Judgment" if the motion is made within a reasonable time . . .
>
> Furthermore, in the absence of a rule to that effect the court perhaps had an inherent power to set the former order aside. See, In Re Evans, 42 Utah 282, 130 p. 217." (Id. at 240 P.2d 1213, 14.) (Emphasis Supplied)

The Dixon v. Dixon case clearly demonstrates the breadth of the Court's equitable power in the last line of the case quoted.

Finally, the case of Warren v. Dixon Ranch, 123 Utah 416, 260 P.2d 741, 742 (1953) carefully outlines the equitable power and discretion of the Court in granting relief from unjust, unfair or inequitable judgments. In Dixon Ranch, the Court per Justice McDonough stated with respect to Rule 60(b):

> "The allowance of a vacation of judgment is a creature of equity designed to relieve against the harshness of enforcing a judgment, which may occur through procedural difficulties, the wrongs of the opposing party, or misfortunes which prevent the presentation of a claim or defense. Rule 60(b) of the Utah Rules of Civil Procedure outlines the situations wherein a party may be relieved from a final judgment, among which is mistake, inadvertence, surprise, or excusable neglect claimed hereby the appellant. Equity considers factors which may be irrelevant in actions at law, such as the unfairness of a party's conduct, his delay in bringing or continuing the action, the hardship in granting or denying relief. Although an equity court no longer has complete discretion in granting or denying relief it may exercise wide judicial discretion in weighing the factors

> of fairness and public convenience, and this court on appeal will reverse the trial court only where an abuse of this discretion is clearly shown. Salt Lake Hardware Co. v. Nielson Land & Water Co., 43 Utah 406, 134 P. 911; McWhirter v. Donaldson, 36 Utah 293, 104 P. 731."

From a brief survey of the Utah cases turning upon the issue of relief from prior judgments pursuant to Rule 60(b)(6)&(7), U.R.C.P., two concrete conclusions can be drawn:

1. Rule 60(b)(6)&(7) are a broad and plenary grant of equitable power which enables the Court to do whatever it deems necessary to do justice between the parties; and

2. whatever decision the Trial Court comes to with respect to granting or withholding relief from judgment will not usually be disturbed by the Supreme Court on Appeal, except where a clear abusive discretion is shown.

Applying the law announced in the above cited cases to the facts of the Egan case, the case at Bar, some undisputed premises can be stated.

1. The child Melinda Sarah Egan is not the biological offspring of the Plaintiff GARY EGAN. (R.134,¶4&136¶3)

2. The Plaintiff GARY EGAN has paid some $1,875.00 in child support for the child to date, plus he has been ordered to pay an additional $900.00 in hospital bills incurred by reason of the child's birth. (R.7)

3. Unless this Court sustains the prospective relief from the future application of this

judgment granted by the Trial Court, GARY EGAN will pay NANCY EGAN $27,000.00 over the next 18 years as child support for a child that is not his. (R.6&7)

4. The Trial Court, pursuant to a separate suit in equity for relief from judgment under Rule 60(b), has found on the basis of equity that EGAN is entitled to relief from the future application of judgment. (R.137)

5. The Stipulation, Waiver and Consent to Default was made and entered upon mistaken belief or erroneous assumption of fact that the child was his biological offspring (TR.120).

6. At the time the Stipulation and Consent to Default were entered, EGAN had no opportunity to learn the true facts and no opportunity to learn the true facts was available until March 28, 1975 when the child was born, which was six months after the Divorce Decree was entered. (TR.82)

7. EGAN brought his action for relief from judgment within nine months after entry of the Decree and within three months after the child was born and it first became possible to take a blood sample from the child in order to determine true paternity.

It is respectfully submitted that the District Courts of the State of Utah have granted, and the Supreme Court on Appeal has affirmed, relief from the future application of a

final judgment in cases much less egregious than the EGAN case. "Mistaken belief" or "erroneous assumption" has served as a basis for relief from judgment under Rule 60(b)(6)&(7) in at least five prior Utah cases cited above in this Respondent's Brief; to-wit:

Where the parties believed a contract to be valid and enforceable when in fact it was not, the Supreme Court affirmed 60(b)(6) relief from judgment 11 months later. Kelly v. Scott, supra.

Where the lawyer for a party mistakenly believed he had answered interrogatories, the Supreme Court affirmed 60(b)(7) relief 13 months later. Stewart v. Sullivan, supra.

Where a woman erroneously believed her husband would defend an action for her, the Court granted 60(b)(7) relief 11 months later. Ney v. Harrison, supra.

Where a temporary Stipulation & Settlement Agreement was mistaken for a final one, the Court sustained Rule 60(b) relief granted 9 months later. Dixon v. Dixon, supra, etc.

Certainly, if those cases constitute a sufficient basis for Rule 60(b)(6)&(7) relief from judgment, an error in belief or erroneous assumption as substantial as the paternity or non-paternity of a child and the responsibility for its lifetime support is a much stronger reason to grant relief indeed.

The Plaintiff EGAN requests the Court to consider the equities attendant in the present action and sustain the

relief granted by the Trial Court from the future or "prospective application of judgment" under Rule 60(b)(6) or for "any other reason justifying relief from the operation of judgment" under Rule 60(b)(7).

To deny EGAN relief and allow the judgment based on error to stand will not do justice between the parties and will bring about an unconscionable and unjust result that will continue for the next 17 years.

POINT III

ALL ISSUES UPON WHICH THE COURT BASED ITS DECISION WERE RAISED IN THE PLEADINGS AND ALL ISSUES WERE TRIED WITH THE FULL KNOWLEDGE, CONSENT AND PARTICIPATION OF THE APPELLANT.

1. The issue of negligent misrepresentation or mistaken misrepresentation was raised in the pleadings.

The Appellant's Brief at Point III claims error by reason that the Trial Court failed to grant relief on the basis of fraud, but instead bottomed its judgment upon erroneous assumption and mutual mistake of fact. The Appellant claims that the issue of mistake was never raised in the pleadings and that he had no opportunity to meet and defend against such an issue during time of the trial. Appellant's contention finds no basis in fact. Rule 8(a) of the Utah Rules of Civil Procedure requires: "a short, plain statement of the claim showing the pleader is entitled to relief."

The Plaintiff's original verified Complaint filed in this action in the second opening paragraph states: 2. "That this Action for Relief from judgment . . . is brought pursuant to

and in accordance with Rule 60(b) of the Utah Rules of Civil Procedure." (R.1 at ¶2) In paragraph 12 of Plaintiff's Complaint, Plaintiff set forth that one of the bases of his claim for relief from judgment was the "negligent misrepresentation of a material fact." (R.3,¶12)

Rule 60(b) contains seven subsections upon which relief can be granted which include:

> (1) Mistake, inadvertence, surprise, etc.;
> (2) newly discovered evidence etc.;
> (3) fraud . . . misrepresentation or other misconduct of an adverse party;
> (4) when . . . the summons in an action has not been personally served upon the defendant etc.;
> (5) the judgment is void;
> (6) the judgment has been satisfied . . . or it is no longer equitable that the judgment should have prospective application; or
> (7) any other reason justifying relief from the operation of the judgment.

The Defendant was certainly on notice of what issues were to be raised and litigated at time of trial as they were set forth with great detail in the Complaint.

Secondly, the Plaintiff, in accordance with the strict requirement of Rule 9(b) U.R.C.P. set forth and plead the issue of fraud with "particularity" as defined in Pace v. Parrish, 122 Utah 141, 247 P.2d 273 (1953), all other claims were averred generally. [See ¶11(1)through(9)]

One can scarcely conceive of any more simple and

plain statement of what the Plaintiff intended to allege, raise and prove at trial.

A negligent misrepresentation of a material fact is a false statement of fact based not upon a conscious intention to deceive, but upon a mistake or erroneous assumption about the true state of the facts. PROSSER, The Law of Torts, 3d ed. § 100 misrepresentation and mistake P. 701 (1964).

Finally, at the conclusion of trial, the Court requested counsel for each of the parties to submit memoranda of law on several points, one of the points requested by the Trial Court was whether the Court could grant relief from judgment on a showing of anything less than actionable fraud (R.84, 101,107). Defendant's counsel was given notice and opportunity to brief and argue the point prior to judgment on that occasion as well.

2. The Appellant has failed to demonstrate what evidence or points were not adduced by reason of the Court's finding of mistake instead of fraud.

The Appellant contends she was not able to meet or defend against the issue of mistaken misrepresentation or erroneous assumption at time of trial; however, no mention is made of the manner in which she was prejudiced, what evidence was not heard by the Court, how the trial would have been conducted differently, or how a different result might have been reached.

Negligent misrepresentation or mistaken representation of material fact is certainly a lesser included element of an

allegation of fraud lacking only the requirement of a conscious intention. PROSSER, The Law of Torts, 3d. ed. § 100 misrepresentation and mistake (1964).

Surely it cannot be seriously contended that NANCY EGAN was not grossly mistaken when she assured GARY EGAN on numerous occasions (TR.30,55,62,69,70,102,104,108) that the child to be born was his child. The Court found absolutely without question that it was not his child and Appellant does not even now contend that it is. NANCY EGAN herself testified that she told GARY EGAN the child was his because she thought it was (R.108). That statement, being admittedly false, if not conscious fraud, can only then be a mistake.

Finally, for the sake of examining Appellant's argument only, how could NANCY EGAN have testified differently, given that Plaintiff sought rescission by reason of honest mistake rather than intentional fraud. What possible different questions could have been asked of GARY EGAN on cross-examination to defend against an allegation of mistaken belief rather than intentional deceit. There is no allegation that a mistake had not, in fact been made, but only that Defendant would have conducted her case differently to defend against mistake as opposed to fraud. The Appellant has not, however, advised the Court how the evidence would have been different or what evidence for this reason did not

come to light. The Appellant does not quarrel with the facts as the Court found them or allege they are different from the Plaintiff's version, but only that the defense of the case would have been different, if NANCY EGAN had been defending against a less difficult case for the Plaintiff to prove. Appellant's argument seems a non sequitur for the reason that it is.

ARGUMENT ON RESPONDENT'S CROSS APPEAL

POINT IV

THE TRIAL COURT'S CONCLUSIONS ARE NOT SUPPORTED BY THE EVIDENCE. THE RESPONDENT AND CROSS APPELLANT DID PROVE EACH AND EVERY ELEMENT OF FRAUD AND IS ENTITLED TO RESCISSION OF THE ENTIRE SETTLEMENT AGREEMENT AND COMPLETE RELIEF FROM THE ENTIRE DIVORCE DECREE.

This is not a case where the Appellant asks the Supreme Court on appeal to retry the case on the record, to believe the testimony of his witnesses and disbelieve the testimony of the opponent's witnesses in contravention to the findings of the Trial Court. The Cross Appellant is well aware of the futility of that approach periodically taken by disgruntled litigants whose cases are replete throughout the reporting system. The Cross Appellant would not waste his time nor the Court's with such an appeal.

This case is unique in that there are no facts or testimony in dispute. The Trial Court was not faced with accepting or rejecting the testimony of either party. It did not have to believe one party and disbelieve another as the evidence was consistent in all respects. The reason the Cross Appellant seeks equitable review of both the law and the facts pursuant

to Rule 72(a) U.R.C.P. is that as each and every element of fraud was proved and no dispute in the testimony existed, the Trial Court could not reasonably find any other way under the present state of the case law; or in short, the Trial Court could not reasonably draw the inferences that it did given the state of the objective facts developed at trial.

The case of Pace v. Parrish, 122 Utah 141, 247 P.2d 273 (1952) has long been the definitive case on the law of fraud in the State of Utah.

Applying the nine elements set forth in Pace v. Parrish to the undisputed facts of the case, the Respondent and Cross Appellant requests that this Court on review see if it can draw the same inferences and conclusions from the objective and uncontroverted facts as did the Trial Court.

(1) That a representation was made;

No dispute on the representation, both parties testified the same: that NANCY LEE EGAN told GARY S. EGAN that she was pregnant with a child in July of 1974 and repeatedly assured him that the child was his continuously from July through September 19, 1974 (TR.30,55,62,69,70,102,104,108).

(2) concerning a presently existing material fact;

No dispute in testimony here, both parties testified to the same thing. NANCY EGAN told GARY EGAN she was then pregnant with his child (TR.30, 55,62,69,70,102,104,108).

(3) which was false;

No dispute here. The Trial Court found that the child was positively not the child of GARY EGAN based upon two separate blood tests (R.134 ¶4, 136 ¶3).

(4) which the representator either

(a) Knew to be false, or

(b) made recklessly, knowing that she had insufficient knowledge upon which to base such representation.

No dispute in the testimony on this point. NANCY testified at trial that during the month of June 1974, while she was living apart from her husband, she had sexual relations with another man, not her husband (TR.77&78)

Moreover, thereafter on September 20, 1974, the day after the Divorce Decree had been entered (the divorce became final upon entry) NANCY told GARY for the very first time that she did not know whose child it was that she was carrying (TR.43) and that such knowledge was weighing heavily on her mind (TR.43).

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

There is no dispute on the issue of intention to induce GARY EGAN to rely on NANCY's representations that Melinda was GARY's child, as under direct examination by her own counsel, in answer to his question:

"What was the purpose of your telling Gary that it was his child?"

Answer: "I don't understand."

"Why did you tell Gary he was the father of the child?"

Answer: "Because I thought Gary Egan was the father." (TR.108)

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

No dispute that it is reasonable for man to believe his wife when she tells him she is pregnant with his child; moreover, not only GARY, BUT NANCY herself testified that GARY EGAN had no way of knowing that the child was not his child. (TR.83). NANCY also testified that GARY seemed to believe her when she told him the child was his (TR.83).

(7) did in fact rely upon it;

The proof that GARY EGAN relied upon NANCY's statements as to paternity is better than mere testimony, he signed an AGREEMENT to pay $125.00 per month for eighteen years to support the child (R.16).

(8) and was thereby induced to act;

No dispute that GARY acted by entering into the AGREEMENT to pay his wife child support for the child to be born and to pay the hospital bills incurred in connection with its birth (R.16) or that he actually performed the terms of the AGREEMENT (TR.9,10&11).

(9) to his injury and damage;

It is undisputed that GARY EGAN has paid support for the child of $1,800.00, paid all hospital expenses incurred in

connection with the birth of $900.00, agreed to pay his former wife $470.00 per month and given up his right to appear in Court to contest the issues raised in the divorce complaint, all on the assumption that the child was his and he had the responsibility for its support and maintenance. (TR.9-13)

The above cited paragraphs and citations to the transcript and record reflect the undisputed testimony at time of trial. This evidence is not controverted, the facts are objective and both parties testified to the same thing; nevertheless, the Trial Court found as follows: That NANCY LEE EGAN did not act recklessly knowing that she had insufficient knowledge and that GARY EGAN did not reasonably rely upon her representations to him (Findings of Fact R.134).

The facts are not disputed, only the inferences drawn from the facts by the Trial Court are challenged on this appeal.

In all candor, can reasonable minds differ that if a woman who admittedly had sexual intercourse with two men during the same month and who felt the need to confess her deep concern over the paternity of the child to her husband the day after the Divorce Decree was entered, did not that person have the very same concerns the day before the Decree was entered when her husband questioned her specifically on the very point of paternity. And if she had such doubts about paternity, did she not represent material facts to her husband "upon insufficient knowledge to base such a representation", in accordance with Element No. 4(b) of Pace v. Parrish, supra;

The Trial Court's conclusion, that NANCY EGAN's representations as to paternity were made for two months upon blithe naivete' up until the Decree was entered, and then suddenly the very next day lightning struck and she realized for the very first time that the child may not be her husband's, is ridiculous.

The same kind of reasoning applies to the Court's finding that GARY EGAN did not rely upon NANCY's representations. Actions speak much louder than words and GARY's execution of the SETTLEMENT AGREEMENT conclusively proves that he believed NANCY and that he relied upon what she told him. Elsewise, why would he have signed an AGREEMENT to pay $27,000.00.

If based upon the undisputed testimony of the parties, GARY EGAN did not prove fraud and the Trial Court's conclusions drawn from the objective facts are sustained by this Court on appeal, then fraud cannot be proved in Utah without the admission of the party who perpetrated the fraud that he specifically intended to defraud the individual injured. It is submitted that that is a case we shall never live to see. This is a case where the facts as established at trial simply do not support the Court's conclusions.

As stated, the Cross Appellant does not ask the reviewing Court to evaluate the credibility of the witnesses, to believe his witnesses and disbelieve the witnesses of the Defendant. On the contrary, he requests this Court to review the undisputed facts to see whether they square with the conclusions drawn by the Trial Court. It is respectfully submitted that they do not.

POINT V

THE PLAINTIFF GARY EGAN HAS PLEAD AND PROVED ACTIONABLE COMMON LAW FRAUD ENTITLING HIM TO FULL RESCISSION ON THE AGREEMENT.

The Utah law is undisputed that the burden is upon the Plaintiff to prove fraud by clear and convincing evidence, Pace v. Parrish, 122 Utah 141, 247 P.2d 273 (1952). The Utah Supreme Court has refined the definition of clear and convincing in the case of C.I.T. Credit Corp. v. Sohm, 15 Utah 2d 262, 391 P.2d 293 (1964) wherein the Court held:

> Perhaps another way of stating the Rule is that it must be proved by a clear preponderance of the evidence. If it is clear and preponderates, presumably it is also convincing . . .
>
> Id. at 294, P.2d 391

The general rule that fraud must be affirmatively proved by a "clear preponderance of the evidence" does not mean that fraud must be established in every case by direct evidence. In most cases fraud is proved by reference to the circumstances and the legitimate inferences that may reasonably be drawn therefrom; or as often stated, fraud may be inferred from the circumstances of the transaction. McQuire v. Corbett, 119, C.A. 2d 244, 259 P.2d 507 (1953); Zimmerman v. Loose, 162 Colo. 80, 425 P.2d 803 (1967); Carrel v. Lux, 101 Ariz. 430, 420 P.2d 564 (1966), 37 C.J.S., Fraud, §§ 94-115.

In the case at Bar several facts warrant mention here.

1. At trial under examination by Plaintiff's counsel, NANCY EGAN at first denied having sexual relations with any other man besides GARY EGAN prior to the time she learned of her pregnancy (TR.73). However, later after conferring with

her own counsel, the same question was put to NANCY EGAN a second time, but this time by her own lawyer (TR.77). The second time the answer was different and she admitted having had sex relations with another man. When asked the name of this individual, NANCY EGAN refused to answer the question (TR.112); based upon the demeanor and apparent frankness and candor of this witness, admittedly it is for the Trial Court to determine whether or not that testimony is reliable or even believable. However, when the Appellant Court on Equitable Review examines the law and the facts such points became relevant.

2. NANCY EGAN herself testified that GARY EGAN inquired on a number of occasions whether the child in gestation was his child and she herself testified that she reassured him on each and every occasion that the child was in fact his (TR.83). Not until September 20, 1974 when the Order and Decree had been safely entered did she mention to Plaintiff the possibility that the child was not his (TR.43). Surely if she had doubts on September 20, 1974 it is logical to assume that she had the same doubts on September 18, 1974, the day before when EGAN had signed the SETTLEMENT AGREEMENT and CONSENT TO DEFAULT.

This point is of primary significance as when GARY EGAN asked NANCY if it were his child, she had a <u>duty</u> to disclose any doubts she might harbor. Since she did not disclose those doubts to GARY EGAN before he signed but waited until the day after the Decree was safely entered and the divorce was final, it is strong evidence that she willingly, consciously and knowingly concealed those facts from him and vitiates any inference or claim of "honest mistake."

3. Finally, NANCY EGAN consciously misled both the Court and the Plaintiff when she filed her August 5, 1974 Affidavit with the Court stating the child was due in February, when in reality the child was not due until some two months later, at the end of March. Putting the time of conception, in the mind of the Plaintiff GARY EGAN at least, safely back during the time the parties were living together in wedlock. (Ex. P-11)

When the Court views the statements made and the behavior of the Defendant NANCY LEE EGAN prior to September 19, 1974, in light of all the surrounding circumstances, particularly with respect to her statements and behavior on September 20, 1974 after the Decree was entered, it compels the reasonable inference and irrefutable conclusion that when NANCY EGAN told GARY there was no question but that the child was his, that she knew precisely what she was doing and used it as leverage to induce Plaintiff to execute the SETTLEMENT AGREEMENT; that the statements made by her were false and she knew at the time she made the statements that she had insufficient knowledge upon which to base her representations as to paternity.

Such willful and reckless disregard for the truth or the sufficiency of her knowledge, while knowing the Plaintiff was strictly relying on the truth of her statements, is precisely the kind of "reckless" and wanton behavior described in Pace v. Parrish to support a finding by the Court of actionable common law fraud. In all fairness the Court can come to no other conclusion.

POINT VI

THE COURT SHOULD GRANT RELIEF FROM THE ENTIRE JUDGMENT AND NOT JUST A PORTION THEREOF, WITH THE EXCEPTION OF THE DISSOLUTION OF THE MARRIAGE ITSELF, AS APPELLANT'S CONDUCT CONSTITUTES EXTRINSIC MISREPRESENTATION.

At time of trial the Lower Court was uncertain as to how much relief should be granted. Fortunately to this question there is a quick and easy answer: that is the Court must vacate as much of the judgment as justice requires. See, Warren v. Dixon Ranch, 123 Utah 416, 260 P.2d 741, 742 (1953); McGavin v. McGavin, 27 Utah 2d 200, 494 P.2d 283 (1972)(concurring opinion of Ellett, J.J. at P. 284 P.2d); Valley Bank & Trust v. Gerber, 526 P.2d 1121 (1974). The case authority in Utah is quite clear that the party seeking relief is only entitled to relief from the application of the judgment with respect to those issues that have not been previously litigated. Here the distinction between "intrinsic" and "extrinsic" facts, misrepresentation and misconduct comes into play. In the leading case of Glover v. Glover, 121 Utah 326, 242 P.2d 298 (1952), the Utah Supreme Court per Chief Justice Wolf reversing the Lower Court held that if some act, misrepresentation or misconduct on the part of one party prevented the adverse party from exhibiting fully his case, by fraud or deception, keeping him away from court or by a "false promise of compromise" and for that reason there has never been a real contest, then this is classified as extrinsic misconduct and the injured party is entitled to relief from judgment and to have his day in court on those issues.

If on the other hand the fraud, misrepresentation, or misconduct goes to some issue that has been litigated or upon which a trial has been had, then it is denominated as "intrinsic" fraud or misconduct and the parties are not again entitled to be heard on those issues. Haner v. Haner, 13 Utah 2d 299, 373 P.2d 577 (1962). The policy reason for this concept is that a trial on an issue should put an end to the controversy involving the issue, whereas if an individual by reason of the misconduct of his opponent is prevented from or relinquishes his opportunity to present some issue to judicial determination, he has not had his day in court or been afforded his right of "due process" of law on those issues. The Court's holding in the Glover case that the aggrieved party was entitled to a new trial on all issues not previously litigated was recently affirmed in Clissold v. Clissold, 30 Utah 2d 430, 519 P.2d 241 (1974). Justice Crockett suggested the Rule was even less restrictive in the Haner case, supra, where he commented:

> "It is sometimes said that when a judgment is attacked collaterally on the ground that it was obtained by fraud or deceit it will be set aside only for extrinsic fraud. But we are in accord with the indications in the Restatement of Judgments that this is too limited. It seems more realistic to say that when it appears that the processes of justice have been so completely thwarted or distorted as to persuade the court that in fairness and good conscience the judgment should not be permitted to stand, relief should be granted. . . . Inasmuch as the parties and their witnesses were present and these issues were contested during the trial, if there were in fact misrepresentations and fraud, as plaintiff claims,

> they would have occurred within the trial itself (thus intrinsic to it) and therefore would not have been of the type of fraud characterized as extrinsic fraud, explained above." (Id. at 13 Utah 2d 300.)

Applying the law to the facts of the present case, the Plaintiff GARY EGAN was induced by NANCY's representations to sign both a STIPULATION & SETTLEMENT AGREEMENT and a WAIVER, APPEARANCE & CONSENT TO DEFAULT; laboring at the time under the belief he had a legal and moral responsibility to support his wife and children, all such representations and events took place outside the court room. NANCY's representations had the effect of keeping GARY outside of court as under the facts as represented to him there was no question or contest as to paternity. Had the misrepresentations not been made, no AGREEMENT to support nor CONSENT TO DEFAULT would have been entered and GARY would have had his day in Court. Because of the misrepresentations of fact made to him by NANCY he waived his right to appear and litigate and no trial was had on any issue. Dausuel v. Dausuel, 195 Fed. 2d 774 (1952). It does not seem to advance the cause of justice to hold that if a party can use the Court as an instrumentality of her fraud, then the injured party is barred forever from using the Court in seeking redress. If this were the case one would not seek judicial resolution of disputes but assiduously avoid it. No trial or hearing was ever had upon the merits of this claim and all issues contained in the Judgment and Decree of September 19, 1974 came in via Stipulation and Settlement Agreement and therefore went uncontested. In light of the surrounding facts and the nature of the misrepresentations, GARY EGAN is entitled to relief from the

entire economic portion of judgment as a matter of law. Clissold v. Clissold, supra, and Glover v. Glover, supra.

POINT VII

THE TRIAL COURT ERRED IN ORDERING PLAINTIFF TO PAY HOSPITAL EXPENSES INCURRED IN CONNECTION WITH THE BIRTH OF THE CHILD AND EXPERT WITNESS FEES INCURRED IN CONNECTION WITH BLOOD TESTS INTRODUCED AT TRIAL PROVING THE CHILD WAS NOT HIS.

1. The hospital expenses cannot possibly be determined to be family expenses.

The Trial Court erred in refusing to relieve GARY EGAN from payment of the $900.00 in hospital expenses incurred in connection with the birth of the child Melinda. The Court admittedly has some discretion here, but the Trial Court specifically found, and the reason it gave for failure to grant relief was that the hospital expenses incurred for the birth of the child were "family expenses".

The Court's conclusion totally overlooks the fact that the child was not GARY EGAN's child and therefore not an expense of his family nor were such expenses incurred during the marriage.

Section 30-2-9 Utah Code Annotated (2dRepl.Vol.3,1976) states:

> FAMILY EXPENSES--JOINT AND SEVERAL LIABILITY.--The expenses of the family and the education of the children are chargeable upon the property of both husband and wife or of either of them, and in relation thereto they may be sued jointly or separately.

However Section 30-2-5 Utah Code Annotated (2dRepl.Vol.3 1976) states:

> SEPARATE DEBTS BEFORE AND AFTER MARRIAGE.--Neither husband nor wife is liable for the debts or liabilities

> of the other incurred before marriage, and, except as herein otherwise declared, they are not liable for the debts of each other contracted after marriage; nor are the wages, earnings or property of either, or the rents or income of the property of either, liable for the separate debts of the other. (Emphasis added)

The divorce became final and absolute upon entry of the Decree (R.6). Since the Decree was entered on September 19, 1974 (R.12) and since the hospital expenses were not incurred until March 28, 1975, long after the marriage had been dissolved, the hospital expenses cannot possibly be legally determined to be a "family expense".

2. The Trial Court erred in failing to grant the Plaintiff his expert witness costs in proving true paternity.

Although the Trial Court ordered three separate and independent blood tests to be used in connection with the proof of paternity at time of trial, (R.24,70,72) and though the Plaintiff GARY EGAN prevailed on the issue of paternity at trial (R.134 ¶4), the Court refused to grant Respondent his costs incurred for blood group examination and expert witness fees to prove paternity at time of trial. (R.157).

§§ 78-25-18, et. seq., Utah Code Annotated (Supp. 1975) Utah's Evidence Code on Blood Tests in Civil Suits where paternity if a factor reads as follows:

> 78-25-18. BLOOD TESTS FOR CHILD AND ALLEGED PARENTS IN CIVIL ACTION AND BASTARDY PROCEEDINGS IN WHICH PARENTAGE IS A RELEVANT FACT.--In any civil action or in bastardy proceedings in which the parentage of a person is a relevant fact, the court shall order the child and alleged parents to submit to blood tests.

> 78-25-19. BLOOD TEST--WHO TO MAKE.--The test may be made by no more than three qualified examiners of blood types, not restricted to physicians, who shall be appointed by the court . . .
>
> 78-25-20. EXAMINER AS WITNESS.--The court shall call the examiner as a witness to testify to his findings, and the examiner is subject to cross-examination by the parties . . .
>
> 78-25-21. ADMISSIBILITY OF RESULTS IN EVIDENCE.--The results of the tests shall be received in evidence where the conclusion of all examiners, as disclosed by the tests, is that the alleged father is not the actual father of the child, and the question of paternity shall be so resolved. . . .
>
> 78-25-23. COSTS OF EXAMINATION.--The court shall determine the reasonable compensation to be paid to an examiner appointed by the court, and, in its discretion, may order that the parties pay the costs in such proportions as it shall prescribe . . .

As described above, the Court ordered two blood group analyses pursuant to Plaintiff's motion, both of which positively excluded Plaintiff from possible paternity. The Plaintiff incurred expenses in the sum of $801.50 in connection with these tests. (See Memorandum of Costs and Disbursements, R.169)

Originally the Court granted these costs to Plaintiff GARY EGAN (R.139)(169), then later on motion of the Defendant NANCY EGAN, the Court reduced the award by $795.00.

Unquestionably, the Court has a certain degree of discretion in awarding costs, but in the case at Bar, the Court was not concerned with the attendant equities, but expressed concern with the Defendant's ability to pay costs. Such a finding constitutes an abuse of discretion as the

respective party's ability to pay should never enter into the question of whether a party is entitled to judgment. Elsewise General Motors could never be awarded a judgment.

On appeal, the Cross Appellant seeks an order from this Court directing the Trial Court to grant further relief from judgment which presently orders him to pay $900.00 in hospital bills for Melinda Egan and $795.00 in expert (blood test) witness costs.

POINT VIII

GARY EGAN IS ENTITLED TO JUDGMENT AGAINST NANCY EGAN FOR ALL DAMAGES SUSTAINED BY HIM RESULTING FROM HER INCORRECT STATEMENTS.

The Trial Court denied recovery of compensatory damages to GARY EGAN on grounds that the injuries complained of occurred during the marriage and that in Utah a husband may not recover damages from his wife (R.136 ¶7). The Court missed the fact that the money was paid to NANCY <u>after</u> the divorce had become final. As the Court granted partial rescission from the Settlement Agreement it would follow that Plaintiff would be entitled to restitution of all monies paid pursuant to the Agreement before it was rescinded. This is provided by § 30-2-6 Utah Code Annotated (Repl. Vol. 3, 1976), which reads as follows:

> ACTIONS BASED ON PROPERTY RIGHTS.--Should the husband or wife obtain possession or control of property belonging to the other before or after marriage <u>the owner of the property may maintain an action therefor, or for any right growing out of the same, in the same manner and to the same extent as if they were unmarried</u>.

The Cross Appellant is aware of the case of Rubalcaua v. Gisseman, 14 Utah 2d 344, 384 P.2d 389 (1963), but submits that case is totally in inapposite to the case at Bar. The Supreme Court should overrule the Trial Court's finding that the doctrine of Intra Family Immunity applies in the case at Bar by virtue of the Utah Married Woman's Act § 30-2-1 et. seq. Utah Code Annotated (1953) and because the parties were not married when the injury occurred.

Plaintiff is legally entitled to restitution from NANCY for the money paid prior to rescission of the Settlement Agreement.

POINT IX

TO REQUIRE GARY EGAN TO PAY SUPPORT FOR A CHILD JUDICIALLY PROVED NOT TO BE HIS WOULD CONSTITUTE A DENIAL OF DUE PROCESS AND EQUAL PROTECTION OF THE LAW.

The only time that the issue of paternity was litigated in an adversarial hearing was when Plaintiff brought his Rule 60(b) action for relief from judgment. At that hearing the evidence was conclusive and uncontroverted that the child Melinda was not GARY's child. To require GARY EGAN to pay further support for this child would violate the due process and equal protection clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States. Reed v. Reed, 404 U.S. 71, 92 S. Ct. 251, 30 L. Ed.2d 225 (1971); Fronteiro v. Richardson, 411 U.S. 671, 93 S. Ct. 1764, 36 L. Ed.2d 583 (1973); Nebbia v. New York, 291 U.S. 502, 54 S. Ct. 505, 78 L. Ed. 940.

CONCLUSION

The case before the Court on Appeal is not one where the parties are bitterly attempting to vindicate their emotional injuries or assuage damaged egos at the children's expense. This case is simply one where a dutiful estranged husband acted over zealously in his attempts to save his marriage by conciliating his wife in a Settlement Agreement in hopes of ultimate reconciliation. Without question he acted imprudently in signing an Agreement to pay hospital bills and child support for his wife's expected child; but it does not seem unreasonable that in his then present frame of mind that he would be reticent to charge his wife with adultery or reluctant to go into Court to contest the legitimacy of her child, when all the while she assured him that the child she was carrying was his child, and when he had no reason to doubt her. After NANCY gave birth to a child from whose physical appearance GARY obviously could not have fathered, GARY acted promptly to correct his error. As the child was not born until some six months after the Divorce Decree was entered, there was no reasonable way that GARY could have determined paternity prior to birth; as no one would suggest endangering the mother or child with prenatal blood tests before the child was born.

The Respondent simply cannot conceive that it would be fair or just for the Court to order him to pay $27,000.00 to support another man's child. The Trial Court also believed that Equity and Justice would be better served if GARY were released from the future applica-

tion of the support judgment and set that portion of the Decree aside. Presumably, NANCY can seek support of her child from the child's natural father, the man who justly should support the child.

On cross appeal, it would seem here that the Trial Court was too generous and too compassionate with NANCY in allowing all other terms of the Divorce Decree to stand. Those issues were never litigated and are not res adjudicata. The Settlement Agreement and Decree were unquestionably based entirely upon false premises that NANCY had been a true and faithful wife and that GARY had both a legal and moral obligation to support his family. Surely had GARY been advised of the true state of the facts and the real reason why his wife was leaving him, he would not have struck such an unconscionable bargain. Because NANCY was able to use the Court as an instrument of her misrepresentation should not, in all good conscience, preclude forever a remedy from the wrong. The Case should now be referred to the Domestic Relations Division for a hearing on the merits of the case with all parties now fully understanding the true facts.

Finally, the Court on equitable review should overrule the Trial Court's failure to relieve GARY from $900.00 in hospital bills, $795.00 in expert witness fees and order restitution to GARY of the $1,800.00 paid to date to NANCY for the support of Melinda. If the law is to be a means to

achieve justice and not merely a mechanism to serve itself, then justice must be done between the parties and GARY EGAN must be fully relieved from a Divorce Decree never before litigated and based entirely upon error.

Respectfully submitted,

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Admitted by Motion for the
purpose of this case only.

Attorney for GARY S. EGAN

CERTIFICATE OF SERVICE

Certified that a true and correct copy of the foregoing Brief was served upon Richard M. Day, 455 South Third East, Salt Lake City, Utah, and to Gordon F. Esplin, 216 East Fifth South, Salt Lake City, Utah, by depositing a copy of same in the U.S. mails, postage prepaid thereon.

DATED this 14 day of September, 1976.

Deanne Fowler