

2008

Graydon v. Coats : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

CAROLINE HAYES GRAYDON,
fka CAROLINE HAYES COATS,

Appellee.

vs.

Case No. 20080992

PETER COATS.

Appellant.

APPELLANT'S BRIEF

Appeal from the Judgment of the
Third Judicial District Court, Salt Lake County
Honorable Judith Atherton

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STATEMENT OF JURISDICTION

The statutory provision that confers jurisdiction to this Court is §78-2A-3(2)(h), U.C.A.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the lower court err as a matter of law in concluding that a 2002 Settlement Agreement entered into by the parties was void “and without any legal effect by virtue of the fact that Petitioner had at all times herein been represented by counsel and that any agreements between the parties have not been approved by her counsel.” and that Rule 4-504 UCJA invalidated the agreement without signature of Appellee’s counsel. A trial court’s conclusions of law in civil cases are reviewed for correctness. S.S v. State, 972 P.2d 439, 440-41 (Utah 1998). “Correctness” means that no particular deference is given to the trial court’s ruling on questions of law. Orton v. Carter, 970 P.2d 1254, 1256 (Utah 1998).

2. Did the lower court abuse its discretion in ordering a default judgment be entered against Respondent for alleged failure to comply with discovery? While trial courts have broad discretion, that discretion must be exercised within legal parameters set by appellate courts. Cummings v. Cummings, 821 P.2d 472 (Utah App. 1991). Furthermore, to ensure the court acted within its broad discretion, the facts and reasons for the court’s decision must be set forth fully in appropriate findings and conclusions. Barnes v. Barnes, 857 P.2d 237 (Utah App. 1993).

3. Did the lower court, in accordance with Utah law concerning default judgments, err by awarding damages to Appellee Caroline for a failed real estate sale of the North Parcel where there was no credible evidence that the sale failed because of the

conduct of Appellant Peter and therefore there was insufficient evidence to justify such an award? A finding of fact will be adjudged clearly erroneous if it violates the standards set by the appellate court, is against the clear weight of the evidence, or the reviewing court is left with a definite and firm conviction that a mistake has been made even though there is evidence to support the finding. Cummings, supra at 476. Although appellate courts give great deference to a trial court's factual finding, conclusions of law arising from those findings are reviewed for correctness and given no special deference on appeal. Rehn v. Rehn, 974 P.2d 306 (Utah App. 1999).

4. Did the lower court, in accordance with Utah law concerning default judgments, err in awarding attorneys' fees to Appellee when there was insufficient evidence of need and reasonableness? Although appellate courts give great deference to a trial court's factual finding, conclusions of law arising from those findings are reviewed for correctness and given no special deference on appeal. Rehn v. Rehn, 974 P.2d 306 (Utah App. 1999).

PERTINENT UTAH STATUTES AND RULES

The following statutes and rules are relevant to this appeal: Section 30-3-4(1)(b), U.C.A.; Rule 54, U.R.C.P.; Rule 55, U.R.C.P.; and Rule 4-504, UCJA (as of 2002 prior to appeal Nov. 2003). A copy of these statutes and rules are contained in the Appendix to this Brief.

STATEMENT OF THE CASE

This domestic relations action was commenced in 2001 by Appellee Caroline Graydon (hereinafter Caroline) against her husband Peter Coats (hereinafter Peter). Caroline sought dissolution of the marriage, custody and support of the two minor

children, award of the marital home, and equitable division of “several parcels of real property.” (R. 1-2). After over seven years of litigation, a default was entered in October, 2008 by Judge Judith Atherton for violation of URCP Rule 37 discovery and a judgment was entered on November 10, 2008.

This appeal is taken from various interlocutory orders entered throughout the litigation as well as from the “Supplement Decree of Divorce.”

STATEMENT OF FACTS

During the seven years of litigation, numerous procedural events have occurred concerning a variety of issues such as child support, alimony, medical care, visitation, etc. In addition, there have been three separate appeals to this Court prior to the final Judgment being ordered. Fortunately, none of these matters are directly relevant to this appeal. *The specific facts pertinent to each legal issue now raised will be extensively discussed in each argument section of this Brief, infra.*

Appellant Peter believes it is nevertheless useful for this Court to have an overview of the major procedural events which occurred in this seven-year litigation in order to better understand the specific issues raised in this appeal. (This overview will only focus upon undisputed facts and events. No record references will be made herein).

Appellant Peter and Appellant Caroline were married on December 10, 1993. In December of 1994 the couple’s first child Audrey was born and on April 20, 1999 their second child, Ashley, was born.

Appellee Caroline filed this action for divorce on April 6, 2001. Shortly thereafter various orders were entered by the commissioner and court relating to alimony, child support, and visitation.

Although they both had attorneys, in April of 2002 the parties entered into settlement negotiations between themselves. An agreement was prepared by Appellee Caroline and signed by Appellant Peter. *This document is the subject matter of the first issue in this appeal and will be discussed in detail infra.* Because the commissioner and court rejected the claimed Settlement Agreement, the divorce litigation continued. Various hearings concerning the children and marital assets were held through 2002 and 2003.

In November of 2003, Judge Lewis scheduled a status conference. Although Appellant Peter was not specifically ordered to attend, his absence resulted in Judge Lewis entering a default judgment against him and striking his answer and defenses. Judge Lewis entered Appellee Caroline's proposed Findings of Fact and Conclusions of Law and signed them on January 12, 2004 essentially awarding Appellee Caroline all of the property owned by Appellant Peter before, during, and after the separation of the parties. Throughout 2004 Appellee Caroline's attorney filed several amended Judgments to include additional property owned by Appellant Peter. In September 2004 an appeal was taken to this Court on the basis that Appellant Peter had been deprived of all of his property without due process of law and proper procedure in granting a default. *See, Coats v. Coats*, No. 20040784.

Simultaneously a Rule 60(b) motion was filed before Judge Lewis requesting that her prior judgment be set aside and that the matter be allowed to proceed to trial. On March 3, 2005 Judge Lewis granted the Rule 60(b) motion and set aside the prior orders. In addition, after taking testimony, the Court granted a bifurcated decree awarding Appellee custody of the children subject to Appellant Peter's parent time. Child support

and alimony was also awarded. The Court reserved the issues regarding the property distribution and other financial matters. The parties stipulated to dismissal of the appeal to this Court and on August 1, 2005 the matter was dismissed.

In June of 2005 Appellant Peter's mother, Isabel Coats, filed a complaint in Third District Court concerning a parcel of South Jordan property known as the "North Parcel". This property was acquired subsequent to the parties' marriage. Appellant Peter purchased an adjoining piece of land known as the "South Parcel" approximately one and one-half years prior to the parties' marriage. *The third issue of this appeal involves the sale of the North Parcel and will be discussed infra.*

On November 3, 2005 a hearing was held before the Honorable Leslie Lewis concerning Appellee Caroline's claim that Appellant Peter was in contempt of court. Appellee Caroline's attorney, Alvin Lundgren, asserted that Appellant Peter was in contempt of court for failing to provide requested documentation pursuant to a discovery request. Stephen Homer, Appellant Peter's attorney, confirmed that Peter had delivered to him three large boxes of documents including those requested by Mr. Lundgren and admitted that if there was any fault involved, it was that of Mr. Homer. In spite of Mr. Homer's full acceptance of responsibility for failing to deliver discovery documentation, Judge Lewis sentenced Appellant Peter to be incarcerated for thirty days in the county jail because of the discovery failure and other claimed contempts of court.

A second appeal was taken to this Court in Case No. 20051027. Subsequently, this Court ordered Appellant Peter's early release from incarceration and subsequently reversed the contempt of court on the basis that Judge Lewis failed to conduct an evidentiary hearing in violation of due process in criminal contempt matters.

During this same hearing on November 3, 2005 Appellee Caroline was given a power of attorney as to all real property owned by Appellant Peter including the power to sell it. Subsequently, an order was signed on November 21, 2005 that was feared by Appellant Peter to make this power of attorney a final order rather than an interlocutory one. Because the order itself could not be located in the clerk's office, a third appeal was filed with this Court. In Case No. 20051148 it was subsequently determined that the missing order that was signed did not relate to the power of attorney nor was it a final order and therefore Appellant Peter subsequently dismissed the matter on February 6, 2006.

In the latter part of 2006, Isabel Coats moved to schedule a trustee's sale of the North and South Parcels of the South Jordan property. On March 15, 2007 the property was sold at auction for \$3,600,000 to various relatives of Appellant Peter. Following the trustee's sale, the trustee, Brad Smith, equally divided the excess proceeds in the amount of \$1,794,392 between Appellant Peter and Appellee Caroline.

During these many years of litigation both parties had retained a variety of counsel and law firms. Appellee Caroline's attorneys filed minimal discovery requests prior to 2006. During 2006 and 2007 her counsel made no further requests for discovery. It was not until August 8, 2008 that newly retained attorney Kellie Williams filed a "Motion to Compel Discovery Responses and to Enter Respondent's Default." **At this time Appellant Peter was without counsel.** *The issue of discovery and the resulting default will be discussed in the second legal argument, infra.*

On October 2, 2008 Judge Atherton entered a Minute Entry finding that Appellant Peter has failed to respond to discovery since the Court had no other pleading or other

responses confirming submission of discovery to Appellee Caroline. The Court noted, “Respondent’s Answer is stricken, his default is hereby entered.”

On October 7, 2008, the date originally set for trial, a hearing was held for the purpose of determining the contempt of Appellant Peter relating to three matters. These included cohabitation with a female in violation of visitation orders, child support arrearage, and failure to attend mediation. Additional testimony was taken concerning the Appellant Peter’s failure to provide discovery and damages to be awarded in the divorce. After the conclusion of a one-day hearing Appellant Peter was ordered to be incarcerated for thirty days, with fifteen days suspended upon completion of certain requirements. Appellant Peter served the full sentence ordered by the Court.

On November 10, 2008 the lower court entered its “Supplemental Findings of Fact and Conclusions of Law” and “Supplemental Decree of Divorce.” The Supplemental Decree judgment was recorded in the Registry of Judgments on November 12, 2008. *The third issue of this appeal involves the question as to whether the lower court erred in the amount of the award relating to the North Parcel of the South Jordan property and as to the award of attorneys’ fees infra.*

On November 5, 2008 the Honorable Anthony Quinn granted the Petition of Appellant Peter’s brother David F. Ward for the appointment of a limited conservator of the financial affairs of Peter M. Coats. The court appointed another brother, Jonathon M. Coats, as conservator in order to protect Peter Coats’ estate and avoid waste or dissipation of his estate. (Case No. 083901575).

On November 26, 2008 an appeal was filed on behalf of the conservator with this Court. Subsequently, a Rule 60(b) motion was filed with Judge Atherton on December 24, 2008 requesting that the November 12, 2008 judgment be set aside.

On January 7, 2009 the probate court granted the motion of conservator Jonathon M. Coats to terminate the conservatorship for Peter M. Coats in Civil No. 083901575.

On February 5, 2009 Judge Atherton entered the following Minute Entry:

This matter is before the Court on Petitioner's Notice to Submit on Respondent's Rule 60(b) motion to set aside judgment. This case has been appealed and, therefore, all district court proceedings are stayed. This Court will take no action pending the decision of the Court of Appeals.

On March 16, 2009 Appellee Caroline filed a motion to dismiss the appeal on the basis that because the conservatorship had been terminated, Peter Coats, as an individual, could not continue to litigate in this Court. Shortly thereafter, Appellant Peter filed a motion for substitution as an individual from the conservatorship. On April 7, 2009 this Court granted Appellant Peter's motion to substitute parties and denied Appellee Caroline's motion to dismiss.

Judge Atherton issued a memorandum decision on April 23, 2009 denying Rule 60(b) relief for Appellant Peter and affirming the validity of the November 12, 2008 judgment.

SUMMARY OF ARGUMENTS

1. When two litigating parties enter into a settlement agreement supported by consideration and put the agreement into a form of a "decree" for the judge's signature, the agreement is not void merely because an attorney does not also sign it. Rule 4-504 UCJA was never intended to invalidate settlement agreements. A party to a lawsuit is entitled to enter into a settlement agreement with or without the approval of their own

attorney. The absence of an attorney's approval should not affect the underlying agreement of a binding contract. When a court rules that the settlement agreement is invalid but that one party must return the consideration received with 48 hours as a condition for voiding it, the failure to return the consideration validates the agreement.

2. While a court is given discretion in deciding if discovery violations require sanctions, it is error to default a party representing himself who believes that he has complied with discovery requests by producing documents throughout a seven year period but who has failed to properly document the discovery as required by the Rules of Procedure. The evidence shows that the failure to comply with discovery rules by Appellant Peter was not done willfully or in bad faith but occurred because of his reliance on his previous attorneys and his sincere belief that the discovery requests were satisfied.

3. Even when a default is taken against a litigant, the law requires that the court consider competent evidence before reducing a claim to a judgment. Here, the claim was made that Appellant intentionally blocked the sale of real estate that was later foreclosed. The court awarded to the Appellee one half of the difference between the offer on the real estate contract and the amount obtained from the foreclosure. There was no evidence presented by Appellee as to what occurred to prevent the sale from closing. Mere conclusions that Appellant "did not cooperate" do not constitute sufficient evidence to justify an award of over \$500,000.

4. Before attorney fees can be awarded to an opposing party strict standards must be met. In this case the approved attorney fees total over \$240,000 for only the Appellee's fees. There is no evidence in the record that the Appellee is in financial need of assistance from her former spouse in light of her award of over \$900,000 from sale of

a piece of highly appreciated farmland purchased at the beginning of the marriage by Appellant. In addition, there is no evidence as to the reasonableness of the fees that encompass nearly 200 pages of charges; many of which are duplicated because of multi counsel involvement and concern litigation with third parties. The findings and evidence do not justify an award of over \$240,000 in opposing attorney fees.

ARGUMENT

POINT I

THE LOWER COURT ERRED WHEN IT VOIDED A SETTLEMENT AGREEMENT BETWEEN THE PARTIES MADE ON APRIL 16, 2002 UPON GROUNDS CONTRARY TO CONTRACT LAW AND BASED ON THEN EXISTING RULE 4-504 UCJA

Statement of Applicable Facts

1. The parties were married on December 10, 1993 in Highland, Utah.
2. It is undisputed that a “General Agreement” was prepared and executed by the parties on June 16, 1998 which attempted to establish the terms for any forthcoming divorce including property distribution and child support for their only child at the time, Audrey. Appellee Caroline acknowledged the existence of this Agreement and the absence of any attorneys in its input during the October 7 hearing before the trial court. (Tr. Oct. 7, 2008, p. 113). (*See* Appendix to this Brief).
3. The parties elected to stay married and had a second child Ashley born in April 1999.
4. This action was commenced by Appellee Caroline on April 10, 2001 seeking dissolution of their marriage, custody, and support of their two minor children and equitable division of “several parcels of real property.”

5. At the time of filing the complaint, attorney Brian C. Harrison represented Appellee Caroline and Appellant Peter retained attorney Barbara Richmond.

6. On May 17, 2001 a hearing was held before Commissioner Susan Bradford who entered a Mutual Restraining Order against both parties from bothering or harassing each other or disposing or selling marital assets, awarded Appellee Caroline temporary custody of the minor children and use of the marital home, awarded alimony and child support retroactive to the date of service, and established visitation guidelines.

7. Appellant Peter and Appellee Caroline began settlement discussions in December of 2001 at a McDonald's restaurant. They wanted to avoid "racking up thousands of dollars in attorneys fees" and running the case into the ground. They initially agreed that Appellee Caroline would get \$100,000 within two years, a building site, \$1,200 a month for child support and \$460 for alimony. This was written on a napkin to outline the agreement. (Hearing Aug. 22, 2002, p. 12) (R.1664; *See* Appendix to Brief).

8. In April of 2002 after further discussion, Appellee Caroline prepared a document on her word processor in the form of a court order to be signed by Judge Lewis. It is unknown why Appellee Caroline did not choose a traditional contract form in preparing the agreement. On April 16, 2002 both parties signed the document. (*See* Appendix to this Brief). It should be noted that Appellant Peter was unable to obtain the original signed copy of this document until October 2007 when formal discovery in a collateral lawsuit was served on Brian Harrison, Appellee Caroline's previous attorney. (R. 2075-77).

9. The “Decree of Divorce” prepared by Appellee Caroline established that both parties would pay their own debts and obligations incurred during the marriage, that Appellant Peter would pay child support in the amount of \$600 per month per child, that he would maintain the minor children and the Appellee Caroline as beneficiaries on policies of medical and life insurance and that each party should pay one-half of any medical or dental costs not covered by the policies. The “Decree” also provided that Appellant Peter “agrees to pay Appellee Caroline the sum of \$10,000 cash by April 20, 2002” and that “Appellant Peter agrees to pay Appellee Caroline an additional \$90,000 payable in increments of \$45,000 within two years.” Finally, Paragraph 10 provided that “Appellant Peter will quit claim one fully improved building site or equivalent of Appellee Caroline’s choice in Shadow Ridge Phase I valued at approximately \$120,000 to Appellee Caroline upon recording of subdivision.”

10. It is also undisputed that on April 23, 2002 Appellant Peter Coats gave a check to Caroline Coats in the amount of \$9,920. On the back of the check, endorsed by Appellee Caroline Hayes Coats, is the notation “Final settlement of \$100,000 plus one lot net balance due \$90,000”. (R. 1824-25; *See* Appendix to this Brief). During the October 2008 hearing Appellee Caroline acknowledged endorsing this check below the quoted language.

11. In an Affidavit filed with the District Court on January 15, 2009 (R. 2468-71) Appellant Peter stated:

After receiving the money Appellee and I jointly went to the office of attorney Brian Harrison. We jointly told him that we had reached a settlement agreement and wanted him to do the necessary paperwork in order to obtain a final divorce. Mr. Harrison informed me that he could not do that as long as attorney Barbara Richmond represented me separately. He stated, however, that

if I no longer retained her as a separate attorney he could represent both of us in finalizing the divorce. (Peter Affidavit, ¶¶ 8 and 9).

Appellant Peter further stated in his Affidavit:

Accordingly, I contacted Ms. Richmond that day and told her that I would no longer need her services since we had reached an agreement. The following day, April 24 I received the balance of my retainer \$662 from the Richmond firm. (Peter Affidavit, ¶10)(R. 337 for copy of refund check; *See* Appendix to Brief)

Peter finally stated:

Mr. Harrison stated to us that the agreement looked satisfactory to him except it needed more specific language with regard to child support since it needed language that child support would be calculated on our prior year's income. He informed us that he would work on the agreement and put it in proper form for Judge Lewis' signature. I assumed that the divorce action was settled and awaited verification from Mr. Harrison that Judge Lewis had signed the papers. (Peter Affidavit, ¶¶ 11, 12). (R. 2468-72; *See* Appendix to this Brief).

12. The April 16, 2002 "Decree of Divorce" was not presented to Judge Lewis for her signature by Mr. Harrison. The divorce continued.

13. A contempt of court hearing was held on August 2, 2002 before Commissioner Susan Bradford. After Mr. Harrison addressed the court requesting various forms of relief against Appellant Peter, attorney James Woodall spoke on Peter's behalf concerning the Settlement Agreement. Mr. Woodall had only been retained that day by Peter to represent him in this proceeding. (Aug. 22, 2002 Tr. 11-13).

14. The representations made by attorney Harrison to Commissioner Bradford are as follows: First, he acknowledged that he received the signed document on April 16, 2002 at his office. (Aug. 22, 2002 Tr. pp. 17-18); second, he acknowledged that Caroline later wrote a note to him saying "Brian, please submit this to the judge and get it signed." (Tr. 20-21). Harrison stated that there were a lot of omissions in the proposed document:

... and I was at that time instructed to do a final settlement proposal. These are clearly settlement negotiations and he is no worse off for having made a

payment to her because he certainly gets credit for that, but what they're trying to suggest is, they can compel a settlement even while she's represented by counsel and there's been no court order. And I think that's wrong. (Tr. 21-22).

He further asserted the following:

And you'll note in these—note the various omissions in that—this—this decree omits addressing many of the issues that are raised in the pleadings and that's why she instructed me then to take what they had done at that point in the negotiations and put it into a final form that hit all of the issues and then send it back to her, which I did, and then negotiations broke down. (Tr. 18).

15. After hearing arguments, the Court ruled that because the Agreement was not both reduced to writing and signed off by her attorney, U.C.J.A. 4-504, ¶¶ 3 and 4 precluded its enforcement. (Tr. 22). The Court stated:

Clearly, this was not reduced to writing and signed off by the attorneys. You both knew you had attorneys. You can make all the deals you want, but you are entitled, while you still have attorneys of record, to get their input., And until your attorneys withdraw, you have attorneys. And in this case, Ms. Coats never had her attorney withdraw, she has an attorney; however Mr. Coats has paid \$9,920 in detrimental reliance on what he thought was an agreement. Now, granted, one of you can think that there is an agreement and the other not and that's not an agreement. This wasn't reduced to writing, entered into the court and binding. To me, it's clear you have a disagreement; however, Mr. Coats is out \$9,920.

16. A Minute Entry s was entered on August 22, 2002 stating “Appellee Caroline will provide the Appellant Peter within 48 hours a certified check for the \$9,920”. (R. 191).

17. On October 3, 2002 an order was signed by Judge Lewis as to the August 22, 2002 hearing. Among other things the Court ordered “All prior agreements between the parties are void and without any legal affect by virtue of the fact that Appellee Caroline has at all times been represented by counsel and that any agreement between parties have not been approved by counsel.” She also stated, “Appellee Caroline is ordered to repay

to Appellant Peter the sum of \$9,920 within forty-eight (48) hours.” (Emphasis added, R. 192-94).

18. Up until October 7, 2008 there had been no further judicial proceedings relating to the April 16, 2002 “Divorce Decree” prepared by Appellee Caroline. In the October 7, 2008 hearing this Agreement was discussed during cross-examination of Caroline by Peter. Whenever Peter attempted to question Caroline concerning the meaning of the Agreement her counsel objected on the basis that the October 3, 2002 Order of Judge Lewis was final and binding. Appellee Caroline did acknowledge, however, that she did not pay him the \$9,920 within 48 hours as ordered by Judge Lewis and Commissioner Bradford. (Oct. 7, 2008 Tr. p. 119). She also acknowledged endorsing the check for \$9,920 under the language relating to the \$100,000 settlement on the back of the check. (Tr. 136).

19. Appellant was ultimately stopped from further cross examination of Appellee because of his continued references to this April 2002 agreement. (Oct. 7, 2008 hearing, p. 138).

ARGUMENT

A. The April 16, 2002 Agreement Was A Legally Valid Contract Of Settlement Between The Parties That Should Have Been Given Effect in 2002 Thereby Affecting All Subsequent Litigation.

It is undisputed that the parties on two occasions attempted to settle their marital separation by reaching written agreements that were satisfactory to both of them. The June 1998 “General Agreement” was written during a time period in which the marriage was faltering. Subsequently, however, the parties stayed together and, in fact, had

another child. Nevertheless, this Agreement illustrates a desire by the parties to peacefully resolve a marriage separation.

After the divorce was subsequently initiated and after going through several preliminary judicial proceedings, the parties once again attempted to resolve their marriage separation. At the time there were minimal assets from the marriage. Petitioner Caroline acknowledged that she prepared a document entitled “Decree of Divorce” which was ultimately signed by both parties on April 16, 2002. She further acknowledged that Respondent Peter, in accordance with the terms of the “Divorce Decree,” paid to her the sum of \$9,920 *via* a check which she endorsed containing final settlement language.

The law of Utah is clear that agreement between parties in matters of marriage and divorce is encouraged. The Utah Supreme Court in 1986 held that “It should be noted that in general, prenuptial agreements concerning the disposition of property owned by the parties at the time of their marriage are valid as long as there is no fraud, coercion or material nondisclosure.” Huck v. Huck, 734 P.2d 417, 419 (Utah 1986); *see also* Berman v. Berman, 749 P.2d 1271, 1273 (Utah Ct. App. 1988).

Likewise, the Supreme Court has stated that post-nuptial agreements are a type of contract and are generally subject to basic contract principles. In re: Estate of Beasley, 883 P.2d 1343, 1351 (Utah 1994). Moreover, post-nuptial agreements are generally scrutinized under the same standards as those applied to pre-nuptial agreements. Reese v. Reese, 984 P.2d 987, 994 (Utah 1999). There is no evidence in the record showing that this agreement entered into by the parties was done so under fraud, coercion or material non-disclosure. In Andreini v. Hulptren, 860 P.2d 916 (Utah 1993), the Utah Supreme Court adopted the legal standard for duress and explained that the two types of duress

that may invalidate and contract are duress by physical compulsion and duress by improper threat.

The Supreme Court has stated, “because a post-nuptial agreement is subject to contract principles, it must be supported by adequate consideration.” In re: Estate of Beasley, 883 P.2d at 1351. “Consideration may be found when there is any act or forbearance bargained for and given in exchange for the promise of another.” Pierce v. Pierce, 994 P. 2d 193, 199 (Utah 2000). The exchange of funds and the promises of each contained in the document are adequate consideration to make a valid contract agreement.

The agreement prepared by the Petitioner Caroline indicates that the parties had agreed to the terms of the divorce and were only seeking court approval of those terms. Had the agreement not been written in the form of a court order, it is doubtful that the Commissioner and the Court would have even considered UCJA 4-504. This mutual agreement in contemplation of divorce was a legally valid contract of law that should have been given great consideration by the court in the resolution of this divorce.

B. The Commissioner and Judge Lewis Erred In Relying Upon UCJA 4-504 as a Basis For Invalidating the Settlement Agreement Reached By The Parties.

Essentially, Commissioner Bradford invalidated the Agreement admittedly prepared and signed by Appellee Caroline and signed by Appellant Peter on the basis that it had not been approved by her attorney in accordance with then existing Rule UCJA 4-504. (Aug. 22, 2002 Tr. p. 22). This ruling was erroneous.

In Goodmansen v. Liberty Vending Systems, 866 P.2d 581 (Utah App. 1993) a trial court ruled in favor of the plaintiff that a valid settlement had been reached by the parties pursuant to a number of letters, phone calls, and other written documents. The

defendant appealed on the basis that (1) no settlement had been reached and (2) Rule 4-504(8) precluded enforcement of the agreement even if one did exist.

As to the first argument, the Court noted that the three letters between the parties constituted a binding settlement agreement between them. In addition, the Court found that the conduct of the parties indicated that both parties believed a settlement agreement had been reached especially in light of the fact that the plaintiff cancelled the trial date based upon the settlement agreement. 866 P.2d at 589.

As to the second argument relating to Rule 4-504, the Court noted that an amendment in 1991 clarified the intent of the rule by stating that the rule was not intended to change existing law with respect to the enforceability of unwritten agreements and that nothing in the rule should be construed to limit the power of any court, upon a proper showing, to enforce a settlement agreement or any other agreement which had not been reduced to writing. In affirming the lower court the Court of Appeals stated:

The correspondence between Lawrence and Becker dated March 22, 1991 constitutes a binding settlement agreement. The conduct of both parties supports this conclusion. The trial court has the power to enforce this agreement pursuant to basic contract principles, and Rule 4-504 of the Code of Judicial Administration does not preclude its enforcement. *Id.* at 592.

See also, John Deere Co. v. A & H Equipment, 876 P.2d 880 (Utah App. 1994) (“We hold that the settlement agreement between A & H and Deere was enforceable despite the fact that it had not been reduced to writing, signed by the parties, and entered on the minutes of the court”).

The facts in this case are even more compelling for an enforceable agreement. Appellee Caroline physically prepared the document containing the terms of settlement.

Both parties signed the document. Appellant Peter gave to Appellee Caroline a check for \$9,920.00 in accordance with the Agreement and Appellee Caroline endorsed the check with a restrictive endorsement over her writing.

Moreover, Appellant Peter was told by attorney Harrison that he would be unable to finalize the Agreement as long as counsel separately represented Appellant Peter. The actions of Appellant Peter in dismissing his attorney were similar to the actions in the Goodmansen case of vacating the trial date. Had Appellant Peter not been misled in dismissing his competent divorce attorneys, it is highly conceivable that they would have presented the Settlement Agreement to the District Court for proper approval.

In addition, the underlying basis of Judge Lewis' decision is also incorrect. She stated in her October 3, 2002 Order, "All prior agreements between the parties are void and without any legal effect by virtue of the fact that Petitioner Caroline has at all times herein been represented by counsel and that any agreements between the parties have not been approved by her counsel."

Respondent Peter has been unable to find any rule or case law which states that parties to litigation cannot settle a dispute between themselves without approval of their attorneys. In fact, Rule 1.2 of the Utah Rules of Professional Conduct enumerates certain exclusive areas of client control, which includes "whether to accept an offer of settlement."

The Utah Supreme Court has held that a contractual provision granting an attorney control over the settlement of a lawsuit is void as against public policy. Potter v. Ajax Mining Co., 61 P. 999, 1003 (1900). This Court rejected a similar claim of an

attorney in Parents Against Drunk Drivers v. Graystone Pine Homeowners Assn., 789 P.2d 52 (Utah App. 1990).

However, the ruling of Judge Lewis seems to be the reverse of normal rules relating to settlements. Clearly, two attorneys cannot enter into a settlement agreement without the approval of their clients nor could a party enter into a settlement agreement with the other party's attorney without the approval of that other party.

The ruling of Judge Lewis would preclude, as a matter of law, the parties to a lawsuit from ever attempting to settle their dispute privately without mandatory input from their attorneys and mandatory approval of such agreement by their attorneys. There exists no such rule and therefore the decision of the court in voiding these agreements as a matter of law was clear error.

The Commissioner and Judge Lewis failed to consider a legally valid agreement reached between two parties concerning their own marital affairs that were based upon the circumstances best known to them. Appellant Peter entered into this Agreement in good faith and paid to Appellee Caroline the agreed-upon amount in reliance upon the terms and conditions of the Agreement. It was improper for the Commissioner and Judge Lewis to arbitrarily dismiss this Agreement as if it had never occurred thereby negating the concept of contract and settlement agreements.

C. The Failure of Appellee Caroline to Comply With the Commissioner and Court Order to Repay the \$9,920 Within 48 Hours of the Date of the Orders Revives the Terms of the Agreement.

Commissioner Bradford noted with emphasis the unfairness of claiming the Agreement was invalid but keeping the proceeds from the "invalid Agreement". She stated:

Okay. You don't have a deal. Unless you're both on the same page, your attorneys reduce it to writing and your attorneys of record sign off on it, you don't have a deal; however, it is inherently unfair for Mr. Coats to have believed there was a deal, it doesn't get reduced to writing by your attorneys and he's out \$9,920. That needs to be paid to him immediately, as in within the next 48 hours, he needs a certified check for those funds. He is out those dollars. You can't have it both ways and so you give him back the money immediately. (Emphasis added). (Oct. 3, 2002 hearing, p. 23).

The evidence is undisputed that this money was never paid within 48 hours of either the August 22 hearing before the Commissioner or the October 3, 2002 Order of Judge Lewis to the same effect. In fact, Appellee Caroline has produced no evidence that this money was ever paid back to Appellant Peter at any time and in any form.

The return of the funds to Appellant Peter was clearly a condition imposed by both the Commissioner and the Court to invalidating the Settlement Agreement. As it now stands, Appellee Caroline claims the Settlement Agreement is invalid but nevertheless has kept the nearly \$10,000 given to her pursuant to the terms of the Agreement. Her blatant failure to timely return the funds in direct violation of the Court's order should restore the validity of the Agreement as between the two parties and should again be considered by the District Court in formulating the proper divorce decree.

The order of Judge Lewis voiding the Settlement Agreement was interlocutory and non-appealable. Copier v. Copier, 939 P.2d 302 (Utah App. 1997). Had the Court honored the Settlement Agreement, much of the six years of subsequent litigation may not have occurred.

POINT II

THE LOWER COURT ERRED IN DEFAULTING APPELLANT PETER WHERE THE RECORD SHOWS HE WAS ACTING IN GOOD FAITH TO COMPLY WITH DISCOVERY

Statement of Applicable Facts

1. During the course of this protracted litigation both parties have been represented by a number of separate attorneys and law firms. Attorney Brian Harrison originally represented Appellee Caroline from April 2001 until August 2003. Attorney Alvin Lundgren was retained in August of 2003 and continued as Appellee Caroline's counsel until March of 2006. At that time attorney Michael Mohrman took over the case on behalf of Appellee Caroline until July of 2008 when Appellee Caroline's present counsel Kellie Williams entered her representation of Appellee Caroline. Attorney Bryce Panzer was also retained by Appellee Caroline to assist in the collateral case involving the foreclosure of real estate.

2. Appellant Peter initially retained attorney Barbara Richmond in April of 2001 to represent him. She formally withdrew in May of 2002 after Appellant Peter as told that the Settlement Agreement could not be submitted to Judge Lewis as long as he retained his own attorney. Appellant Peter was unrepresented until August of 2002 when he retained James Woodall. Mr. Woodall withdrew as counsel in December 2003 and Appellant Peter was unrepresented until August 2004 with the retention of attorney Bruce Oliver. Concurrently, for the purpose of appeal only, attorney Craig S. Cook assisted Mr. Coats beginning in September 2004. Mr. Oliver continued representing Appellant Peter until April 2005. On April 30, 2005 attorney Stephen Homer began representation of Appellant Peter and continued until November 2005. At that time attorney David Drake

was retained to represent Appellant Peter and continued representation until January 2008. Since that time Mr. Coats has represented himself.

3. The discovery requests in this case were made as follows: March 11, 2002 by attorney Brian Harrison; December 12, 2002 by attorney Brian Harrison; February 1, 2005 by attorney Alvin Lundgren, and December 9, 2005 by attorney Alvin Lundgren.

4. On January 28, 2005 a letter was sent from Bruce Oliver to Alvin Lundgren stating "Please find enclosed herewith the court ordered documentation, verification and accounting for each lien in question for the above-named matter." (R. 506).

5. On November 3, 2005 a hearing was held before the Honorable Leslie Lewis concerning contempt of court. Mr. Lundgren asserted that Appellant Peter was in contempt of court for failing to provide requested documentation. Mr. Homer, Appellant Peter's attorney, stated to the court that Appellant Peter had delivered to him three large boxes of documents containing documents requested by Mr. Lundgren and that if there was any fault involved it was that of Mr. Homer. He explained that he was unable to arrange a time for Mr. Lundberg to come to his office for examination of the documents.

The following dialogue occurred between Judge Lewis and Mr. Homer:

THE COURT: Just because the court ordered it does it make it seem important to you?

MR. HOMER: No, Your Honor, I knew it was very important. This is a very complex issue. The discovery itself, the documents that Mrs. Wilkerson, the subpoenaed witness brought to me consisted of three large boxes.

THE COURT: Uh huh.

MR. HOMER: Okay? In the course of all this we have had more than just this lawsuit happening okay?

THE COURT: I still don't understand why the boxes were not made available for opposing counsel.

MR. HOMER: Well I was thinking that they were. Because we were trying, and I told him he could come out and that that was going to be his.

THE COURT: I really fail to see why counsel would stand up in court and lie about that.

MR. HOMER: I don't think he stood up and lied, Your Honor.

THE COURT: He said they were not made available to him.

MR. HOMER: Well, it's not like I—

THE COURT: Orders have been signed

MR. HOMER: Well, it wasn't like I refused his request.

THE COURT: No, you didn't facilitate it.

MR. HOMER: Well, and like you said, I'll take the heat for that.

THE COURT: Assuming your client gave it to you, and I'm not so sure of that.

MR. HOMER: Well, he did. He honestly did. (Tr. Nov. 3, 2005, pp. 17-19)

6. During the years 2006, 2007 and the first half of 2008 no further requests for past or new discovery were made by Appellant Caroline's various counsel. On July 28, 2008 attorney Kellie F. Williams entered her appearance as counsel (R. 1740) for Appellee Caroline in place of Michael Mohrman. Ten days later she filed a "Motion to Compel Discovery Response and to Enter Respondent's Default." (R. 1746-78). Relying on Rule 37 U.R.C.P. Ms. Williams claimed the sanction of default was appropriate if Appellant Peter did not respond to all discovery requests by September 5, 2008. In this motion she included all of the previous discovery requests that she claimed had not been answered. A large number, if not the majority of these discovery requests required production of documents rather than answers to interrogatories. *See, e.g.*, R. 1754, 1759, 1764, 1777-78.

7. On August 28, 2008 a hearing was held before Commissioner Blomquist with Appellee Caroline being represented by Kellie Williams and Appellant Peter representing himself. The hearing concerned two matters: three alleged contempts by Peter and the request for sanctions for discovery. Commissioner Blomquist certified for evidentiary hearing the issues of (1) non-participation of mediation, (2) overnight guests with children present, and (3) non-payment of child support. As to the discovery requests of Appellee Caroline, the Minute Entry states: "All documentation and discovery shall be provided to Petitioner's counsel by September 5, 2008." (R. 1790-91). The Commissioner stated, "I'm going to recommend that all documents requested and all discovery be responded to by September 5, 2008 at 5:00 p.m. or that Ms. Coats' default may be entered." (Tr. August 28, 2008, p. 25).

8. Appellant Peter represented to the Commissioner at the hearing that he had responded to the requests of Mr. Harrison and to Mr. Lundgren by giving him 850 photocopied documents that he requested. The following dialogue occurred:

THE COURT: Well, sir, I've already ruled on the issue and now you're presenting argument after I've ruled? If you have indeed responded to this discovery, provide

MR. COATS: I have.

THE COURT: Respond accordingly.

MR. COATS: I apologize, Your Honor, I ..

THE COURT: Well, sir at this point I have ruled. If you have responded if you can simply notify that in your responses to Ms. Williams And, sir, I made my recommendations on that, and, again, if you've already responded, just simply indicate that to Ms. Williams so she has that information.

MR. COATS: That's great. (R. 28-29).

9. On September 5th 2008 Appellant Peter *pro se* filed a document entitled “Respondent’s Object [*sic*] to Commissioner’s Recommendation.” In the document concerning discovery he stated, “Respondent answered all previous interrogatories and requests.” (Para. 4 of Document). He added, “In November 2005, Janet Wilkerson delivered financial records to Respondent’s attorney, Stephen Homer, as requested by Plaintiff’s attorney Alvin Lundgren. Mr. Lundgren had hundreds of pages of documents photocopied. Attorney for the Petitioner Caroline Alvin Lundgren and Michael Mohrman had those documents. Peter Coats has fully complied with the production of documents. Karin Darias, CPA, is faxing all financials and tax returns from 1999 to 2008 to Kellie Williams.” (R. 1826-27). (*See* Appendix to this Brief).

10. In a reply filed by attorney Kellie Williams on September 15, 2008 the following response relating to discovery was made:

“At no place in the court file, or in any attorneys’ files for either Petitioner or Respondent will the Court find or can Petitioner locate Respondent’s answer to any of the interrogatories. They were simply never responded to in any fashion. The Requests for Production of Documents that Respondent has been ordered to reply to are attached as Exhibit “E” and incorporated herein by reference. Again, at no point did Respondent serve responses upon Petitioner or Petitioner’s counsel. Indeed, at some point in time, Respondent may have ‘dumped’ paperwork in someone’s lap, indicating that they were responsive. Petitioner’s counsel had no knowledge or what is or how it was provided. At no time has Respondent provided organized or responsive paperwork or documents, or identified what paperwork or documents were responsive to what requests.” (R. 1974-79).

11. On September 15th Petitioner Caroline’s counsel filed a “Motion for Entry of Default”. In this document is the narrative of a conversation between Petitioner Caroline’s counsel and Respondent Peter. The document states:

“Respondent interrupted Petitioner’s counsel and stated that his discovery responses had already been provided and that Petitioner’s counsel needed to talk to Mike Mohrman. Petitioner’s counsel explained to Respondent that he had

already talked to Mike Mohrman, and that Mr. Mohrman's office had not received any discovery responses from him. Respondent indicated that Petitioner's counsel needed to talk to Alvin Lundgren. Petitioner's counsel informed Respondent that there had been no *formal* responses to the discovery and that *formal* responses to the interrogatories and requests were needed." (emphasis added, R. 1931-34).

12. On September 22, Petitioner Caroline filed a document listing her trial exhibits. One hundred and fifty three separate items were designated. (R. 2082-93).

13. On September 30 Petitioner Caroline's counsel filed an "Affidavit of Attorney *In re*: Witness and Exhibit Exchange." (R. 2145-57). In this document Exhibit "B" contains a letter dated September 26, 2008 to Mr. Coats acknowledging receipt of 43 trial exhibits but complaining they were not in proper form. (R. 2155-57).

14. On October 2, 2008 the lower court entered a Minute Entry and Order. The Minute Entry states in part:

Petitioner alleges that Respondent failed to comply with the Order on the Motion to Compel. Respondent has failed to respond to Petitioner's Motion for Entry of Default and this Court has no other pleadings or other response confirming the submission of discovery to Petitioner. Therefore, because Respondent has failed to respond to Petitioner's Motion, this Court's review of the pleadings and for good cause appearing, Petitioner's Motion for Entry of Default is granted. Respondent's Answer is stricken, his default is hereby entered. (R. 2161-62). (Emphasis added).

15. On October 7, 2008 a hearing was held before the Honorable Judith Atherton. This is the date that was reserved for the trial of the domestic litigation. Instead, it was used for the contempt of court issues previously certified by the Commissioner including the sleepover of the parties' children with adults present, failure to mediate, and child support. The court also heard testimony concerning the contempt of court charge relating to Appellant Peter's failure to comply with discovery requests.

During this evidentiary hearing Appellee Caroline's counsel questioned Peter concerning the alleged failure to comply with discovery that resulted in the entry of the default. Peter was asked if he ever produced a written document responding to Appellee's Exhibits 47, 48, 49 and 50 and he replied, "Yes." (*Id.* at 150). When asked where the answers were he replied, "The answers are filed with the Court." He stated that he turned in the documents requested to Mr. Harrison's office on April 23, 2002. (*Id.* at 151). The question was asked, "Well, you never responded to the discovery, did you?" Answer, "I did." (*Id.* at 152). The following dialogue occurred between Appellee Caroline's attorney and Appellant Peter:

- Q. In reviewing 54 pages of a docket, there's not one indication that at any time in this divorce action that you ever responded to discovery, not one item, not one certificate of delivery.
- A. That's your words.
- Q. And that you've been certified—you've been certified for contempt for not responding to discovery time and again in this case, haven't you? So I'm asking you to show me—give me any document that has a response to discovery. Where did you ever do that. You have not, have you?
- A. I have and if we're given a break of 15 minutes I will find it in the court records. (*Id.* at 153-54).

16. In denying Rule 60(b) relief, the lower court noted the history of document request. The Court then stated:

This Court now concludes that Respondent was given numerous opportunities, and in fact was ordered numerous times to comply with discovery over a 6 and ½ year period. The record is replete with instances of Respondent's failure to respond to discovery, orders requiring him to do so, and a finding that his attitude was one of "stonewalling". Because Respondent was given an opportunity to address this issue on numerous occasions by this Court and the evidence is not simply sufficient but overwhelming justifying the entry of his default for his failure to abide by the court orders. (R. 2515).

ARGUMENT

A. The Lower Court Erred in Entering a Default Judgment When the Evidence Shows that His Conduct Did Not Justify the Severe Remedy of Losing His Right to Trial.

It is fundamental that a default judgment is an unusually harsh sanction for failure to comply with discovery and should be meted out with caution. Darrington v. Wade, 812 P.2d 452 (Utah App. 1991). Furthermore, judgments by default are not favored by the courts nor are they in the interest of justice and fair play. Heathman v. Fabian & Clendenin, 377 P.2d 189 (Utah 1962). These principles are especially relevant in cases where a litigant represents himself and is not familiar with all of the formal requirements of the Utah legal system.

Discovery sanctions are intended to deter misconduct and require a showing of **willfulness, bad faith, or fault**. Utah Dept. of Transportation v. Osguthorpe, 892 P.2d 4 (Utah 1995):

The striking of pleadings, entering of default, and rendering of judgment against a disobedient party are the most severe of the potential sanctions that can be imposed upon a non-responding party and because of the severity of this type of sanction, ‘the trial court’s range of discretion is more narrow than when the court is imposing less severe sanctions.’ Utah Dept. of Transp. v. Osguthorpe, *Id.* at 7-8.

There is no question that Mr. Coats during these proceedings has been difficult to deal with by all concerned, including his own attorneys. His demeanor before the various commissioners and judges illustrates Appellant Peter’s difficulty in focusing on specific matters and issues. The appointment of a conservator for Appellant Peter was necessitated because of his behavior.

The discovery in this lawsuit has been minimal. Only Appellee Caroline’s first two attorneys requested interrogatories and production of documents early in the lawsuit.

Certainly, it would have taken little effort on the part of any attorney representing Mr. Coats to answer or object to the questions propounded. Some of the questions, for example, concerning the sexual history of Mr. Coats, should have been objected to as being completely irrelevant.

The fact remains, however, that no formal discovery answers were filed by any of the attorneys for Mr. Coats and therefore the record on its face shows no formal compliance with the prior requests as outlined by the Rules of Civil Procedure.

Appellant Peter submits that there were many informal exchanges of information among the various attorneys that satisfied the requirement of discovery even though not properly documented.

For example, in January 2005, Mr. Oliver, Respondent Peter's attorney, supplied Mr. Lundgren with documentation concerning the very important liens involved in this matter. Because Respondent Peter worked out of the marital home, nearly all of his records were maintained in the house he had to abandon and were under the control of Petitioner Caroline. In November of 2005, Mr. Coats prepared boxes of documents for Mr. Lundgren, pursuant to his request for information, and gave them to his attorney, Mr. Homer. As evidenced by the hearing of November 3, 2005 it was Mr. Homer's failure to exchange these documents with Petitioner Caroline's attorney that created any problem with discovery. Mr. Lundgren was ultimately able to examine and copy all of those documents.

For two and one-half years after that hearing, neither Mr. Lundgren nor Mr. Mohrman filed any motions for past requests nor made any formal requests for additional information. It was not until August of 2008 that Petitioner Caroline's present counsel

requested a default be entered for failure to formally answer the discovery. At this point in time Mr. Coats represented himself and had no benefit of prior counsel who may have participated with the prior counsel of Appellee Caroline in satisfying the requirements for discovery.

It is apparent that Mr. Coats believed he had complied with discovery and did not understand the formal requirements of certificates needing to be filed with the Court-- even when pressed by Petitioner Caroline's counsel. His statements during the Commissioner hearing and the subsequent objections he filed clearly illustrate his belief that he had complied with discovery. Moreover, he retained an accountant to send all current tax returns to the Petitioner Caroline as requested. In addition, his detailed testimony during the October 7 hearing again illustrated his belief that all discovery documents had been supplied as requested.

Furthermore, Appellant Peter attempted to comply with the Court's order regarding exhibit exchange by emailing a number of documents to Appellee Caroline's counsel even though they were not properly designated or numbered.

While there is no doubt that Appellant Peter violated the Rules of Civil Procedure in failing to formally comply with discovery requests, Appellant Peter believed he had supplied the actual necessary information to Caroline's attorneys through informal exchanges.

An examination of Appellee Caroline's own designation of exhibits for trial reveals a tremendous amount of information and documents, much of which was obtained from Appellant Peter's files. While Appellee Caroline's counsel has claimed several times that she could not proceed to trial without answers to the 2002-2005

discovery requests, Appellee Caroline never gave concrete examples of how her case substantially suffered as a result of this failure. It would appear from an examination of Appellee Caroline's exhibits that sufficient evidence was available to Appellee Caroline for trial especially as to those documents relating to the South Jordan property that contains all of the wealth in this litigation.

B. The Lower Court Erred in its October 2, 2008 Order by Concluding That Appellant Peter Had Not Responded to Discovery Requests.

The Court on October 2, 2008 stated, in part, "this Court has no other pleading or other responses confirming the submission of discovery to Petitioner." (R. 2161-62).

In fact, the September 5, 2008 document of objections to Commissioner's Recommendation specifically stated that he "had answered all previous interrogatories and requests." (R. 1826-27). Moreover, the document filed by Appellee Caroline on September 15, 2008 related the claim of Appellant Peter that Mr. Lundgren had the discovery requests. (R. 31-34).

Thus, the basis of the defaulting order is fatally flawed by the court's failure to recognize Peter's responses, efforts, and beliefs—regardless of any formal deficiency that existed. Likewise, the testimony of Appellant Peter during the October 7 hearing gave the court the chance to hear his beliefs as to discovery prior to entry of the default judgment on November 12, 2008.

POINT III

THE FINDING AND JUDGMENT OF THE LOWER COURT RELATING TO DAMAGES FROM THE SALE OF THE “NORTH PARCEL” ARE CLEARLY ERRONEOUS AND ARE AGAINST THE CLEAR WEIGHT OF THE EVIDENCE.

Statement of Applicable Facts

1. Prior to marrying Appellee Caroline, Appellant Peter purchased farmland located next to the Jordan River for \$5,000 an acre on a long-term contract. This has been referred throughout this lawsuit as the “South Parcel”, South Jordan, Utah. (R. 336).

2. Shortly after marrying Appellee Caroline, Appellant Peter purchased additional land adjoining the original property in order to avoid being landlocked. This has been referred to as the “North Parcel”, South Jordan, Utah. (*Id* at 2355).

3. This farmland greatly increased in value throughout the 1990’s and through the real estate boom of 2000 to 2005.

4. On February 13, 2007 an offer was made by David Hagen to purchase the North Parcel for a purchase price of \$5,000,000 with six additional terms. Appellant Peter made a counter-offer for the amount of \$5,200,000 with ten terms and conditions. The counter-offer was accepted. (Petitioner’s Ex. 98 from Oct. 7, 2008 Transcript). (*See* Appendix to Brief).

5. After defaulting Appellant Peter, the lower court made Findings of Fact concerning the North Parcel. The Court found that the property was foreclosed upon and the trustee’s sale netted \$3,600,000. The Court further found that “Respondent caused the prior sales to fail, including one sale of the North Parcel for \$5,200,000.” (R. 2335).

6. The Court then entered the following Finding:

21. Because of the foreclosure sale to Respondent's relatives, Petitioner and Respondent each received only approximately \$931,000, for a difference of \$523,580 each, which is the cost that should be assessed to Respondent and paid to Petitioner as damages for Respondent's dissipation and contempt. The sum should be paid to Petitioner from the sale of the South Parcel of the South Jordan property as set forth below in paragraph 26. (R. 2336).

7. The Court then entered a "Supplemental Decree of Divorce" as follows:

16. Due to the foreclosure sale to Respondent's relatives, Petitioner and Respondent each received approximately \$931,000, rather than \$1,454,508.30, for a difference of \$523,508, each. That loss and cost shall be assessed to Respondent and paid to Petitioner as damages for Respondent's dissipation and contempt. The sum shall be paid to Petitioner from the sale of the South Parcel of the South Jordan property, as set forth below in paragraph 21. (R. 2349).

ARGUMENT

A. Utah Law Requires a Showing of Competent Evidence Even Against A Party in Default.

Utah law requires a litigant who has defaulted the opposing party to nevertheless produce sufficient evidence to justify a default judgment. Rule 55(b)(2), U.R.C.P. provides the following:

By the Court. In all cases the party entitled to a judgment by default shall apply to the court therefore. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings and order such references as it deems necessary and proper.

The divorce code similarly provides that:

A decree of divorce may not be granted upon default or otherwise except upon legal evidence taken in the cause. If the decree is to be entered upon default of the respondent, evidence to support the decree may be submitted upon the affidavit of the petitioner with the approval of the court. U.C.A. §30-3-4 (1)(b).

This Court has enunciated these principles by noting that while a default judgment establishes, as a matter of law, that a defendant is liable to a plaintiff, nevertheless it is still incumbent upon the non-defaulting party to establish by competent evidence the

amount of recoverable damages and costs that are claimed. Amica Mut. Ins. Co. v. Schettler, 768 P.2d 950 (Utah App. 1989). Likewise, the Utah Supreme Court has held that to enter a default judgment for unliquidated damages, a judge must review the complaint, determine whether the allegations state a valid claim for relief, and award damages in an amount that is supported by some valid evidence. Skanchy v. Calcados Ortope SA, 952 P.2d 1071 (Utah 1998). *See also*, Pierce v. Pierce, 732 P.2d 92 (Utah 1986); Russell v. Martell, 681 P.2d 1192 (Utah 1984); and Pitts v. Pine Meadow Ranch, 589 P.2d 767 (Utah 1978).

Appellate courts give great deference to the trial court's findings of fact in divorce cases and will not overturn them unless they are clearly erroneous. Kessimakis v. Kessimakis, 977 P.2d 1226 (Utah App. 1999). A finding of fact will be adjudged clearly erroneous if it violates the standards set by the appellate court, is against the clear weight of the evidence, or the reviewing court is left with "a definite and firm conviction that a mistake has been made" although there is evidence to support the finding. Cummings v. Cummings, 821 P.2d 472, 476 (Utah App. 1991).

As will be demonstrated in the next section Appellee Caroline failed to meet her burden to produce competent evidence that she was entitled to an award of over \$500,000 for the alleged interference by Appellant Peter in the sale of the North Parcel.

B. When All of the Evidence Available to the Lower Court is Marshaled in Support of the Findings and Judgment of the Alleged Deficiency, There is Insufficient Evidence to Support Such an Award.

In order to challenge a trial court's findings of fact on appeal, the challenger "must marshal all the evidence in support of the findings and then demonstrate that the evidence is

insufficient to support the findings in question.” Phillip v. Hatfield, 9904 P.2d 1108, 1109 n.1 (Utah App. 1995). *See also*, Larsen v. Larsen, 888 P.2d 719, 723 (Utah App. 1994).

The lower court granted Appellee Caroline’s Motion for Entry of Default on October 2, 2008 and ordered that the non-related “certified contempt issues” would be addressed on Tuesday, October 7, 2008, the time originally set for trial. (R. 2161-62).

On October 6, 2008 Appellee Caroline moved for the taking of “Petitioner’s Testimony In Support Of Default Judgment And Entry Of Supplemental Decree.” (R. 2273). The motion requested that the court permit Appellee Caroline to provide evidence “at the conclusion of the contempt trial on Tuesday, October 7th in order to assist and permit the fair and equitable settlement of the estate”. (R. 2273-74).

Also, on October 6, 2008 Appellee Caroline filed both a “Petitioner’s Verified Amended Trial Brief” and a “Petitioner’s Trial Brief.” (R. 2170-2221; R. 2222-75). The only discernible difference between the two “Briefs” is a notarized signature of Appellee Caroline and her affirmation that “she understands the contents thereof, and that the same is true of her own personal knowledge, except as to those matters stated upon information and belief, and as to those matters, she believes the same to be true.” (R. 2220).

The hearing held on October 7, 2008 was noticed for the purpose of the prior certified contempt charges: failure to mediate, improper overnight visitation, and delinquent child support. (R. 166-67). The Court stated, “The only matter before the Court, as you know, is just contempt today,” (Oct. 7, 2008 Tr. pp. 7-8). However, many additional areas of testimony were allowed including evidence relating to the final judgment and damages.

Appellant Peter shall now marshal the evidence relating to the sale of the North Parcel most favorably to the findings of the lower court and Appellee Caroline.

(1) Marshaled evidence taken from Petitioner's Verified Amended Trial Brief.

"Thereafter, Isabel Coats and David Ward moved to schedule trustees' sales of the North and South Parcels. Despite many viable offers to purchase the North Parcel for at least \$5,000,000, the actions of Respondent thwarted a sale. The evidence will establish that the North Parcel could have been sold for a gross price of \$5,200,000, and that Petitioner was agreeable to such sale, so long as the share of the proceeds attributable to Peter Coats (or the marital estate's) interest in the property was escrowed pending determination by this Court as to an appropriate distribution. Yet Peter Coats refused to close the sale under those circumstances, and the North Parcel was sold at a trustee's sale on March 15, 2007, for a bid of \$3,600,000 to Respondents relatives . . . (R. 2190-91)."

"North Parcel (South Jordan). This property was foreclosed upon, as set forth herein, and the proceeds divided, as set forth above. This property was acquired subsequent to the parties' marriage. Petitioner claims that Respondent dissipated this asset by refusing to close a favorable sale prior to the trustee's sale. (R. 2198)".

"Respondent caused the foreclosure of the North Parcel of the South Jordan property to the financial detriment of the marital estate. While that property could have been sold for at least \$5,000,000, and likely, \$5,200,000, the foreclosure resulted in the property being purchased by Respondent's relatives for \$3,600,000, which is a loss, or dissipation, which Respondent caused of at least \$1,400,000. (R. 2201)."

North Parcel (South Jordan). This was a marital asset, as it was acquired subsequent to the marriage. Any monies previously received either by Petitioner should be confirmed in her. However, pursuant to Petitioner's Exhibit 16, the property was foreclosed upon and the trustee's sale netted \$3,600,000. The evidence is clear, however, that Respondent caused the prior sales to fail, including one for the North Parcel for \$5,200,000 (*See*, Petitioner's exhibit 98, addendum #2, to Real Estate Purchase Contract). Had Respondent cooperated in the sale of the North Parcel, the parties' proceeds therefrom would have been approximately as follows:

Total Sales Price:	\$5,200,000.00
Commissions & Cost of Sales (7%)	<364,000.00>
1995 Trust Deed, 1999 Note & Brad Smith	
Attorneys Fees (see P16)	<1,610,210.97>
Sub Total	\$3,225,789.00
Michael Ward 9.82%	< 316,772.48>
Balance to be Divided	\$2,909,016.70
÷ 2 equals	\$1,454,508.30

(R. 2215).

“Because of the foreclosure sale to Respondent’s relatives, Petitioner and Respondent each received only approximately \$931,000.00, for a difference of \$523,508.00, each which is the cost that should be assessed to Respondent and paid to Petitioner as damages for Respondent’s dissipation and contempt. That sum should be paid to Petitioner from the sale of the South Parcel of the South Jordan property as set forth below. (R. 2216).”

(2) Marshaled evidence from October 7, 2008 hearing:

Examination of Caroline Coats by her counsel:

Q. You indicated that at least the North Parcel of the South Jordan Property was sold at trustee’s sale on a foreclosure. Prior to that foreclosure did you have a good faith offer on the North Parcel of that prop—North Parcel of the South Jordan property from a Mr. Hagen for \$5,200,000?

A. Yes. My counsel has received a copy of it.

Q. If you would locate Petitioner’s Exhibit 98, which is—it’s in four of six. (*Id.* at 52).

* * *

Q. As to this real estate purchase contract Petitioner’s Exhibit 98 did Mr. Hagen and the purported purchaser, as set forth on the first page, and Mr. Coats—or excuse me, did Mr. Hagen offer to purchase the property for \$5,200,000 in a counter offer, Addendum No. 2 to that contract?

A. Yes. Yes.

Q. Do you know why this sale did not proceed?

A. Yes, the buyer couldn’t close on the property because of Peter’s refusal to cooperate to get it sold. (*Id.* at 55).

Q. Who bought the North Parcel of the South Jordan property at foreclosure sale?

A. At the sale Peter’s brother, David Ward, made the bid for \$3,600,000. However, it appears that all of his family—David’s children and his wife, all divided the amounts of interest that—

interest ownership that they would have in it, so it looks like they all purchased it.

Q. So Mr. Hagen a few months before had offered \$5,200,000 and Mr. Coats' family members instead at a foreclosure sale got it for \$3,600,000; is that correct?

A. Yes. (*Id.* at 59).

* * *

Q. Are you currently involved in any civil litigation regarding Michael Ward?

A. Yes.

Q. Ask you to turn over back to—this is six of six—Exhibit 140. Tell me what that is.

A. It's the docket with the case where Michael Ward is suing Peter and me.

Q. Turn over the Petitioner's Exhibit 141 tell me what that is.

A. It's the Complaint where Michael is suing Peter and me.

Q. Michael Ward is Peter Coats' nephew?

A. Yes.

Q. What's the nature of the action, the civil action that he sued you for?

A. That he believes he's entitled to the proceeds—if the property is sold for the \$5,200,000 that he should be able to have 9.82% of the \$5,200,000

Q. Versus the \$3,600,000?

A. Versus the \$3,600,000. (*Id.* at 62-63).

* * *

Examination of Appellant Peter by counsel for Appellee Caroline:

Q. How come the North Parcel wasn't sold for the \$5,200,000?

A. Because no one bid it high enough.

Q. Mr. Hagen did.

A. No, he did not. He would have purchased it. It was open for anyone to purchase.

Q. Well, we have a fully signed offer from him. Why didn't you complete that?

A. The difference between a signed offer and a closing—I've got divorce decrees that are over here and are signed and signed and signed. It doesn't mean I'm closed. (*Id.* at 155).

(3) Marshaled Evidence from Petitioner's Exhibits introduced into evidence during October 7, 2008 hearing:

Exhibit 98 is a real estate purchase contract for land with an offer by David Hagen in the amount of \$5,000,000. (*See* Appendix to this Brief). The original offer contained six additional terms as contained in Addendum No. 1. The offer was made on February 13, 2007.

A counter-offer was made by Peter Coats and Michael Ward raising the purchase price to \$5,200,000 as well as adding ten other terms or omitting terms of the buyer. The counter-offer was accepted by the buyer on March 6, 2007 and an additional addendum was made extending the due diligence time for the buyer to inspect the property. This was accepted on March 10, 2007.

Exhibit 141 is a Complaint filed in the Third Judicial District Court by Michael Ward against Caroline Coats Graydon and Peter Coats. (*See* Appendix to this Brief). A portion of the Complaint reads as follows:

23. In the months prior to the trustee's sale, defendant Peter Coats worked diligently to procure a purchaser for the property.

24. In the weeks and days preceding the foreclosure sale, defendant Peter Coats was the procuring cause of various offers of purchase. At least one of the offers of purchase was to purchase only the North Parcel for \$5,200,000. Plaintiff Michael Ward and defendant Peter Coats accepted that offer.

25. Defendant Caroline Coats Graydon did not accept this offer.

26. In the weeks and days preceding the trustee's sale, both defendants made proposals or demands for conditions for closing. Plaintiff told both defendants that he would accept either set. Defendants never agreed on a set of closing instructions and did not accept any offer. None of the offers to purchase were ever accepted since defendant Caroline Coats Graydon would not accept any offer. (P. 6 of Complaint).

(C) Appellee Caroline Produced Insufficient Evidence In The Record To Substantiate A Deficiency Judgment Of Over \$500,000 From The Sale Of The North Parcel.

A review of the prior evidence shows that the Appellee Caroline failed to meet the standards of evidence required even in a default judgment. The evidence, taken most favorably to Caroline shows Peter's active participation in the offer made by Mr. Hagen. Peter added an additional \$200,000 to the purchase price that would have been divided with Caroline. He added additional conditions and terms that were readily accepted by Mr. Hagen. The evidence shows that the offer of \$5,200,000 was a valid contract subject to the various conditions imposed by both the buyer and the seller.

It is undisputed that the sale did not go through. However, there is no evidence to explain why the sale failed. A signed real estate contract is binding on both buyer and seller unless there is an "out" provided. Appellant Caroline gives only mere conclusions that "Peter did not cooperate" for this failed sale. It is common knowledge that many real estate contracts are not closed because of various reasons including financing, title, inability to meet conditions, and buyer's right to terminate after inspection. Mr. Hagen did not sue Appellant Peter for non-performance that would have likely occurred had

Peter arbitrarily failed to convey title. Interestingly, the lawsuit brought by Peter's nephew even alleges that the reason for the failed sale was Carolyn's refusal to accept terms.

In summary, it is unknown from the present record what events actually occurred to prevent the closing of this sale. In no case, however, can this failure be imputed to Peter causing a penalty of over \$500,000 in Appellee Caroline's favor.

As a matter of law, the portion of the judgment giving Appellee Caroline a credit of \$523,508 should be vacated.

POINT IV

THE LOWER COURT ERRED IN IMPOSING A JUDGMENT AGAINST APPELLANT PETER IN THE AMOUNT OF \$240,220 FOR APPELLEE CAROLINE'S ATTORNEYS FEES WHEN THERE IS NO EVIDENCE THAT SUCH FEES ARE BASED ON NEED AND REASONABLENESS

Statement of Applicable Facts

It is undisputed that attorney Brian Harrison originally represented Appellee Caroline from April 2001 until August 2003. Attorney Alvin Lundgren was obtained in August of 2003 and continued as her counsel until March of 2006. At that time attorney Michael Mohrman took over the case on behalf of Appellee Caroline until July 2008 when Caroline's present counsel, Kelly Williams, entered her representation. Attorney Bryce Panzer was also retained by Appellee Caroline to assist in collateral cases involving real estate.

Finding No. 24 of the "Supplemental Findings of Fact and Conclusions of Law" states:

Petitioner has previously paid Mr. Alvin Lundgren, the sum of \$50,243.68. As set forth in Mr. Lundgren's Affidavit, this was primarily due to the contemporaneous acts of Respondent. Petitioner has paid Michael K. Mohrman the sum of \$156,711. Further, Petitioner has paid Bryce D. Panzer, \$105,456. It is unknown as yet what the final attorneys' fee due to Kellie F. Williams of Corporon & Williams will be, it is presumed it will be upwards of \$40,000. Pursuant to the Order In re: Contempt, it is reasonable that Respondent be ordered to pay Petitioner's attorneys and courts costs, except for those Petitioner has paid to Bryce D. Panzer, which fees to Bryce D. Panzer is reserved. The total award to Petitioner, therefore, should be \$240,220.07 which includes Petitioner's fee paid to, or owed to Kelly F. Williams, payment to her in an updated Affidavit of Attorneys' Fees, submitted subsequent to trial. (R. 2337).

The "Supplemental Decree of Divorce" states the following:

19. Respondent is ordered to pay Petitioner, Petitioner's attorneys' fees and court costs in the total sum of Petitioner in the amount of \$240,220.07, which shall be paid from the sale of the South Parcel of the South Jordan property, as set forth below in paragraph 21. (R. 2351).

ARGUMENT

A. Applicable Legal Standard Regarding Attorneys' Fees.

The award of attorneys' fees for an opposing party must be based on evidence of both financial need and reasonableness. Rasbin v. Rasbin, 752 P.2d 1331 (Utah App. 1988). In order to award attorneys' fees, the trial court must find that the requesting party is in need of financial assistance and the fees requested are reasonable. Rich v. Rich, 784 P.2d 465 (Utah App. 1989); Bagshaw v. Bagshaw, 788 P.2d 1057 (Utah App. 1990).

As noted by the Utah Supreme Court:

Reasonable attorneys' fees are not measured by what an attorney actually bills, nor is the number of hours spent on the case determinative in computing fees . . . [a court] may consider, among other factors, the difficulty of the litigation, the efficiency of the attorneys in presenting the case, the reasonableness of the number of hours spent on the case, the fee customarily charged in the locality for similar services, the amount involved in the case and the result obtained and the expertise and experience of the attorneys involved." Cabrea v. Cottrell, 694 P.2d 622, 624-25 (Utah 1985).

B. Marshaling Of The Evidence Regarding Attorneys Fees.

(1) Marshaled evidence taken from Petitioner's Verified Amended Trial Brief.

"In the instant case, it is abundantly clear that Petitioner does not have the funds to pay the attorneys' fees that have been incurred, primarily due to the actions of Respondent. These actions include Respondent's delaying tactics of the prosecution of this matter, as well as numerous instances of contempt and dissipation of assets. Petitioner submits that the evidence also indicates Respondent's potential encouragement and support of his family members in filing civil suits against Petitioner. The Petitioner's attorneys' fees for the divorce proceeding and civil litigation exceed \$340,000. Had Petitioner not been able to obtain monies from the sale of the North Parcel, she would not have been able to pay her attorneys. Petitioner should not have been required to cannibalize her assets in order to pay those fees. (R. 2208)."

(2) Marshaled evidence from October 7, 2008 hearing:

Questioning of Appellee Caroline by her attorney:

Q. Mr. Alvin Lundgren represented you initially in this lawsuit after Mr. Harrison—brief time that Mr. Harrison represented you is that correct?

A. Yes.

Q. Did you pay pursuant to this declaration of Alvin R. Lundgren, did you pay him \$50,243 in attorneys' fees.

A. Yes.

Q. Turning over to No. 150 after Mr. Lundgren, did Mr. Michael Mohrman represent you?

A. Yes.

Q. Pursuant to this Affidavit of Fees Petitioner's Exhibit 150 was drafted by Mr. Mohrman did you as represented pay him \$156,711?

A. Yes.

- Q. Turn over to No. 151, Declaration of Bryce D. Panzer regarding attorneys' fees . . . did you pay Mr. Panzer as of the date of September 17, 2008 \$105,456?
- A. Yes.
- Q. If you look at page 8 of this Affidavit it appears that he represented you and spent 307 hours of litigation regarding the North and South Parcels that were finally foreclosed on.
- A. Yes.
- Q. Okay. Why did you have Mr. Panzer represent you in the property issues at the same time you had divorce counsel.
- A. Because those properties pertained to part of the divorce and he was experienced, he is an experienced real estate, I needed his expertise.
- Q. Okay, then turning over to Petitioner's Exhibit 152 you retained me to hopefully bring closure to your seven-year divorce case, is that correct?
- A. Yes.
- Q. Have you paid thus far \$30,000 to me for that representation?
- A. Yes.
- Q. Has Mr.—to your knowledge and recollection has Mr. Coats contributed any money to your attorneys' fees?
- A. No.
- Q. Why did you, why have you incurred these horrendous attorneys' fees?
- A. Because this process has continued to go on and on and there was never, nobody has ever been held responsible to actually abide by any court rulings. We've had to go back time and time again to try to get things enforced.
- Q. When you said nobody I presumed—
- A. I'm sorry

Q. You mean who?

A. I'm sorry, Peter.

Q. Okay, in addition to this ongoing civil litigation and lawsuits that have been ongoing

A. Yes

Q. And that continues to this day?

A. Yes.

Q. If you hadn't been paid the monies from the foreclosure of the North Parcel, would you have been able to even keep counsel?

A. I don't know. Probably not. (Emphasis added, Oct. 7, 2008 Tr. pp. 66-68)

(3) Marshaled Evidence from Petitioner's Exhibits introduced into evidence

Exhibit 149, Declaration of Alvin Lundgren showing incurred fees of \$50,243 at rates of \$200 and \$220 an hour.

Exhibit 150, Affidavit of Michael Mohrman, total attorney's fees and costs of \$156,711 (Para. 6 of Complaint). Mr. Mohrman charged \$275 per hour.

Exhibit 151, Affidavit of Bryce Panzer detailing fees of \$105,456 incurred in five separate actions involving the divorce and third party litigation. Mr. Panzer charged \$250 an hour.

Exhibit 152, Affidavit of Kellie Williams showing a total bill of \$27,485 at an hourly rate of \$290 per hour.

There are 191 of pages of bills included in the attorney fee exhibits.

C. The Findings of the Lower Court Are Insufficient to Justify An Award of Over \$200,000 in Attorneys' Fees to Appellee Caroline.

While the trial court has authority to award attorneys fees in a divorce pursuant to U.C.A. §30-3-3 (1995) such an award “must be based on the evidence of the financial need of the receiving spouse, the ability of the other spouse to pay, and the reasonableness of the requested fees. Willie v. Willie, 866 P.2d 547, 555 (Utah App. 1993). The failure to consider any of the enumerated factors is grounds for reversal of the fee issue. Rudman v. Rudman, 812 P.2d 73, 77 (Utah App. 1991).

There is no evidence in the record to justify a conclusion that Appellee Caroline is in financial need of attorneys’ fees being paid by Appellant Peter. It is undisputed that in 2007 she was received a lump sum of \$931,000 from the sale of the North Parcel (Oct. 7, 2008 hearing, p. 61). Her answer to her own counsel indicates that she isn’t sure if she even needs this money to pay her attorneys, *supra*. In addition, the marital home awarded to her is worth over \$475,000. No effort was made to establish her yearly income or expenses.

As noted by this Court in a similar case:

Although the trial court concludes that Plaintiff’s attorneys’ fees were ‘necessary’, there is no finding regarding plaintiff’s need for an award of attorneys’ fees. As a result, the Findings and Conclusions are insufficient to allow a meaningful review of the trial court’s ruling, especially in the face of the award of substantial marital assets. Marshal v. Marshal, 915 P.2d 508, 517 (Utah App. 1996).

Likewise, the reasonableness of these fees is highly questionable. By utilizing so many lawyers during this period there was undoubtedly much duplication and loss of continuity in the litigation. A cursory review of these bills also shows collateral litigation with third parties not directly involving Appellant Peter. A line by line examination of these bills is required by a neutral party to determine if the hundreds of charges meet the legal standard required to impose their payment on Peter.

For these reasons, therefore, the Judgment in favor of Appellee Caroline and against Appellant Peter in the amount of \$240,228 should be vacated.

CONCLUSION

If the commissioner and court had correctly applied the agreement fairly reached by the parties, this litigation would have most probably ceased six years ago. Had the farm property purchased by Appellant Peter not risen to astronomical value, this divorce would have been long over. The agreement was a valid settlement instrument which should have received consideration by the court and not been voided because of an administrative rule that was designed to regulate pleadings in the court system. This agreement is still binding on the parties especially since Appellee Caroline failed to return the consideration ordered by the court.

The failure of Appellant Peter to formally comply with discovery requests requires the imposition of some type of sanction. However, to deprive him of a trial and an opportunity to present evidence in what now is a multi million-dollar divorce case is an abuse of discretion. His failure to formally document discovery was not done in bad faith justifying this drastic measure.

The award of over \$500,000 in damages to Appellee Caroline for the sale of the North Parcel cannot be allowed to stand even assuming *arguendo* that the 2002 agreement is not valid and that the default of Peter is sustained. There is no evidence in the record showing why the sale of the North Parcel was not closed. It is common knowledge that many real estate contracts do not result in final closings because of a variety of reasons. The claim made by Appellee that “Peter failed to cooperate” in the

sale is not based on any factual foundation. In addition, it was against his own interest to derail any sale. This award must be vacated.

Finally, the award of over \$240,000 in opposing attorney fees must also be vacated. There is no evidence in the record that Appellee Caroline is in need of assistance to pay these fees especially since she was given over \$900,000 from the sale of the North Parcel—an outcome that consumed many attorney hours against other third parties. Likewise, the lengthy billings of over 175 pages by 5 different law firms do not demonstrate reasonableness as is required to permit such a huge award. It too must be vacated.


Appellant Peter requests this Court grant the appropriate relief as to the claims made herein.

Respectfully submitted this 27th day of May, 2009.



Craig S. Cook
Attorney for Respondent-Appellant

I hereby certify that I mailed a true and correct copy of the foregoing to Kellie F. Williams, Corporon & Williams, Attorney for Appellee, 405 South Main Street, Suite 700, Salt Lake City, Utah 84111 this 27th day of May, 2009



Kathy Davies