

2009

# Michael Ward v. Caroline Coats Graydon : Brief of Appellee

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca3](https://digitalcommons.law.byu.edu/byu_ca3)



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Bryce D. Panzar; Blackburn and Stoll; Brad C. Smith; Stevenson and Smith.

Craig S. Cook.

---

## Recommended Citation

Brief of Appellee, *Ward v. Graydon*, No. 2009714 (Utah Court of Appeals, 2009).

[https://digitalcommons.law.byu.edu/byu\\_ca3/1418](https://digitalcommons.law.byu.edu/byu_ca3/1418)

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at

[http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

IN THE UTAH COURT OF APPEALS

---

MICHAEL WARD,

Plaintiff, Appellant,  
and Cross-Appellee,

vs.

CAROLINE COATS GRAYDON,  
Defendant and Appellee,

Appellate No. 2009714-CA  
District Court No. 080903379

and

PETER COATS,

Defendant, Appellee,  
and Cross-Appellant.

---

**BRIEF OF PETER COATS**

---

Appeal from the Judgment of the  
Third Judicial District Court, Salt Lake County  
Honorable Denise P. Lindberg

---

BRYCE D. PANZER, No. 2509  
BLACKBURN & STOLL, LC  
Attorney for Respondent-Appellee  
Caroline Coats Graydon  
257 East 200 South, Ste. 800  
Salt Lake City, Utah 84111

CRAIG S. COOK, Bar No. 713  
Attorney for Appellee and  
Cross-Appellant Peter Coats  
3645 East Cascade Way  
Salt Lake City, Utah 84109  
Telephone: (801) 485-8123

BRAD C. SMITH, NO. 6656  
STEVENSON & SMITH, PC  
Attorney for Plaintiff, Appellant  
Cross-Appellee Michael C. Ward  
3986 Washington Blvd.  
Ogden, Utah 84403

FILED  
UTAH APPELLATE COURT  
SEP 13 2010

## TABLE OF CONTENTS

	Page
JURISDICTION.....	1
STATEMENT OF ISSUES PRESENTED ON APPEAL AND STANDARD OF APPELLATE REVIEW.....	1
CONSTITUTIONAL PROVISIONS, STATUTES AND RULES.....	2
NATURE OF THE CASE.....	2
PROCEEDINGS BELOW.....	3
STATEMENT OF FACTS.....	3
SUMMARY OF ARGUMENT.....	5
ARGUMENT.....	7
POINT I. THE LOWER COURT ERRED IN AWARDING SUMMARY JUDGMENT AGAINST PETER ON THE SOLE BASIS THAT HE HAD “DEFAULTED” BY NOT FILING ANY RESPONSIVE MEMORANDA OR AFFIDAVITS.....	7
POINT II. THE UNDISPUTED FACTS AGREED UPON BY ALL PARTIES INCLUDING PETER DO NOT GIVE RISE TO ANY LIABILITY OF PETER FOR HIS CONDUCT IN THE HAGEN REAL ESTATE OFFER.....	13
POINT III. THE LOWER COURT ERRED IN FAILING TO GRANT RULE 59(A)(6) RELIEF FROM ITS PRIOR ENTRY OF SUMMARY JUDGMENT AND ABUSED ITS DISCRETION IN SO DOING.....	17
CONCLUSION.....	20
ADDENDUM	

## CASES CITED

<u>Crookston v. Fire Ins. Exchange,</u> 860 P.2d 937, 938 (Utah 1992).....	2
<u>Coulter and Smith v. Russell,</u> 976 P.2d 1218, 1221 (Utah App. 1999).....	2
<u>Davis v. Grand County Service Area,</u> 905 P.2d 888 (Utah 1995).....	19
<u>Deats v. Commercial Banks,</u> 6 P.2d 1191 (Utah App. 1987).....	19
<u>Frisbee v. K &amp; K Construction Co.,</u> 676 P.2d 387 (Utah 1984).....	10
<u>Hansen v. Stewart,</u> 761 P.2d 14 (Utah App. 1988).....	20
<u>Lach v. Deseret Book,</u> 746 P.2d 802 (Utah 1987).....	9
<u>Lamb v. B &amp; B Amusement Corp.,</u> 869 P.2d 926 (Utah 1993).....	10
<u>McCorvey v. State Dep't. of Transportation,</u> 868 P.2d 41, 44 (Utah 1993).....	18
<u>Moonlight Electric Assn. v. Oquirrh Systems, Inc.,</u> 767 P.2d 125, 127 (Utah App. 1988).....	17
<u>Orton v. Carter,</u> 970 P.2d 1254, 1256 (Utah 1998).....	1, 2
<u>Orvis v. Johnson,</u> 177 P.3d 600, 601 (Utah 2008).....	11
<u>Saltis v. Afflect,</u> 105 P.2d 176 (Utah 1940).....	19
<u>Scott v. Major,</u> 980 P.2d 214 (Utah App. 1999).....	9

<u>Watkiss &amp; Campbell v. Foa &amp; Son,</u> 808 P.2d 1061, 1066 (Utah 1991) .....	18
<u>Wilcox v. Anchor Water Co.,</u> 164 P.3d 355 (Utah 2007).....	9
<u>Winters v. Schulman,</u> 977 P.2d 1218, 1221 (Utah App. 1999).....	1

## STATUTES CITED

Rule 7, U.R.C.P.....	9
Rule 56, U.R.C.P.....	9, 12
Rule 59, U.R.C.P.....	2, 16, 17, 19
Rule 60, U.R.C.P.....	2, 16
Utah Code Ann. §78A-4-103.....	1
Utah R. App. T. 3(a).....	1
24(i), U.R.A.P.....	3

## JURISDICTION

This is an appeal by defendant Peter Coats (“Peter”) from the August 17, 2009 Summary Judgment Order and the December 10, 2009 Order denying post-trial relief issued by Judge Denise Lindberg. Jurisdiction to hear this appeal is conferred on the Utah Court of Appeals pursuant to Utah Code Ann. §78A-4-103 and Utah R. App. T. 3(a).

### STATEMENT OF ISSUES PRESENTED ON APPEAL AND STANDARD OF APPELLATE REVIEW

Issue on Appeal No. 1: Did the lower court err in granting Summary Judgment against Peter on the sole basis that he had “*defaulted* by filing no opposition to Plaintiff’s Motion for Summary Judgment. (emphasis added).” Does the failure to respond to a opposing party’s motion for summary judgment automatically allow a court to enter judgment against the non-moving party regardless of the merits of the moving party’s motion for summary judgment? Whether a party is entitled to summary judgment is a question of law reviewed by appellate courts for “correctness.” Winters v. Schulman, 977 P.2d 1218, 1221 (Utah App. 1999). “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).

Issue on Appeal No. 2: When the facts are undisputed, does the trial court have an independent obligation to determine if the underlying claim of the moving party is sufficient, as a matter of law, in which to enter judgment against the non-

moving party? Specifically, was Peter's mere refusal to place all proceeds from the sale of the property into an escrow desired by Appellee Caroline Graydon (Caroline) a sufficient reason to find him liable for the failed real estate sale and assess him over \$300,000 in damages? Whether a party is entitled to summary judgment is a question of law reviewed by appellate courts for "correctness".

Coulter and Smith v. Russell, 976 P.2d 1218, 1221 (Utah App. 1999).

"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).

Issue on Appeal No. 3: Did the trial court err in failing to grant post-judgment relief pursuant to Rule 59 of the Utah Rules of Civil Procedure when there was insufficient evidence to find Peter liable for over \$300,000 damages simply because he refused to place the proceeds of the sale in an escrow account demanded by Caroline? The question as to post-trial rulings by a lower court are reviewed under an abuse of discretion standard which requires no reasonable basis for the decision and so unreasonable that it be classified as arbitrary and capricious or a clear abuse of discretion. Crookston v. Fire Ins. Exchange, 860 P.2d 937, 938 (Utah 1992).

#### CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Peter does not believe any constitutional provisions; statutes or rules are determinative in this matter.

## NATURE OF THE CASE

This is an appeal from the final judgment of the Third District Court, the Honorable Denise P. Lindberg presiding, finding in favor of Appellant Michael Ward (Michael) and against Peter in a dispute involving the proposed sale of Salt Lake County real property owned jointly by Peter and Michael.

## PROCEEDINGS BELOW

Pursuant to Rule 24(i), Utah Rules of Appellate Procedure, Peter adopts by reference the Statement of the Case made in Caroline's Brief page 4.

## STATEMENT OF FACTS

Pursuant to Rule 24(i), Utah Rules of Appellate Procedure, Peter adopts the Statement of Facts contained in Caroline's Brief, pages 5-12 with the following exception:

Although there was an order in the divorce action that prohibited Coats and Graydon from disposing of or encumbering marital assets, Graydon had reason to fear that Coats would violate the court order if he received the proceeds of sale. This was because Coats had violated the court's order before, by encumbering the marital home and by placing encumbrances and easements against the North and South Parcels. These facts, in part, were the basis for POA Order entered by Judge Lindquist in the divorce action. R. 311-12 (¶7). (Caroline's Brief, p. 10).

Peter would indicate that while there had been prior historic disputes during the long litigation of the divorce action, the divorce court judges had imposed strict prohibition against Peter encumbering or liquidating any of the potential marital property and therefore any current "fear" that Caroline had of such dissipation was completely misplaced and unjustified.



Peter adopts by reference the entire “Corrected Statement of Facts” contained in Michael’s Reply Brief, pages 1-6.

The undisputed facts occurring in this particular lawsuit have been well described by both parties in their briefs and therefore Peter has no need to repeat them. However, it is relevant to understand one of the issues in the parallel divorce action between Peter and Caroline. In the Third District Court Case No. 014902286 between Caroline Hayes Graydon and Peter Coats, Judge Atherton in November of 2008 found Peter in contempt of court for failing to respond to discovery and therefore ordered his Answer struck and a Default entered. The Supplemental Judgment and Findings of Fact and Conclusions of Law were prepared solely by Caroline’s attorney with no input or opposition from Peter. A judgment in the amount of \$523,508 was entered in Caroline’s favor against Peter for Peter’s alleged interference with the David Hagen sale of the property. This is the same sale that forms the basis of Michael’s lawsuit against both Peter and Caroline in the instant case.

This award was appealed to this Court in Case No. 20080992. Peter contended that even in a default situation the lower court had an obligation to examine the evidence before entering a judgment against him and that there was no evidence of his liability because of this failed sale. Both Michael and Caroline have referred to Caroline’s award of \$500,000 in their various briefs. A copy of the pertinent portion of Peter’s Appellant Brief is contained in the Addendum to this Brief.

Because of an outstanding attorney fee issue, this Court dismissed the appeal, without prejudice, and remanded the case for a lower court hearing. Judge Atherton has scheduled this matter for September 9, 2010. Once this hearing has been held and a final judgment entered, Peter will once again appeal the underlying divorce judgment including this award of over \$500,000 to Caroline based upon the failed Hagen sale.

In any event, any argument made in this appeal by either Michael or Caroline based upon the \$500,000 + judgment in the underlying divorce action is tenuous at best and should not be relied upon in the instant case until such judgment becomes final.

#### SUMMARY OF ARGUMENT

1. Peter did not think it necessary to retain legal counsel in the lower court when his nephew Michael brought this action against him. Peter did not participate in any of the briefing concerning the cross motions for summary judgment. Upon learning of the oral argument, Peter attended the hearing and spoke to the Court regarding his understanding and concerns. The lower court essentially ruled that Peter had “defaulted” by failing to file any responsive pleadings or affidavits to the motions for summary judgment and therefore granted Michael’s judgment against him for over \$300,000. This “default” justification was contained in the written Order.

Peter contends that the lower court erred in solely basing its decision upon his failure to respond. There is no rule of civil procedure requiring a party to

respond to a motion for summary judgment nor is there a “default” penalty defined for such failure. Instead, the law is clear that the moving party has the burden to show that there is no material dispute of facts and, as a matter of law, the moving party should prevail. Thus, the burden was upon Michael to produce sufficient evidence and arguments in order for summary judgment to be granted. Whether Peter responded or not is immaterial to Michael’s burden. It is analogous to a criminal defendant remaining silent while the state must prove its case. It was therefore error to grant summary judgment merely because Peter did not file any responsive documents.

2. Peter contends that even if the undisputed material facts are viewed most favorably to Michael, he is unable to prevail against Peter as a matter of law. To do so, the lower court would have to find that Peter violated some type of duty to Michael relating to the attempted purchase of the North Parcel by Mr. Hagen. The facts show otherwise. The Hagen offer was conditioned upon obtaining a quitclaim deed from Caroline in order to remove her cloud of title. Caroline refused to do so unless all proceeds from the sale were placed in a special escrow account administered by the divorce court. Peter was not obligated by court order to do so and therefore refused. Caroline consequently refused to sign a quitclaim deed and this failure resulted in the sale’s demise.

Michael has cited no authority requiring Peter, as a matter of law, to establish the desired escrow of Caroline in order to persuade her to release her

interest. Without such an underlying duty there can be no liability on the part of Peter for this failed sale.

3. Rule 59 Utah Rules of Civil Procedure provides that a new trial may be granted (or a summary judgment vacated) if the court finds the evidence insufficient to justify the verdict or other decision or that it is against law. (Rule 59(a)(6)). The lower court erred in failing to vacate its prior judgment based upon the insufficiency of the evidence that Peter was responsible for the failed sale. The mere fact that Peter refused to establish an escrow in accordance with Caroline's wishes does not make Peter liable to Michael.

## ARGUMENT

### POINT I

#### THE LOWER COURT ERRED IN AWARDING SUMMARY JUDGMENT AGAINST PETER ON THE SOLE BASIS THAT HE HAD "DEFAULTED" BY NOT FILING ANY RESPONSIVE MEMORANDA OR AFFIDAVITS.

On July 20, 2009 a hearing was held before the lower court as to the various motions for summary judgment filed by the parties. Michael had filed dual motions for summary judgment against Peter and Caroline. Caroline filed a motion for summary judgment against Michael. Peter, on the other hand, had filed no motions nor had he responded to those of the other parties with either memoranda or affidavits.

Peter attended this hearing and requested to speak on his own behalf. The following dialogue occurred between Peter and the lower court:

MR. COATS: Your Honor, if I may go ahead.

THE COURT: Okay. Well, actually, Mr. Coats, you effectively defaulted on this matter. You never responded to this motion. You never indicated that you were even going to appear today. I'm not really sure what it is that you would be adding by way of oral argument because frankly neither side has had the opportunity to receive or prepare for any argument that you might make today. That is essentially an ambush of both sides. Neither of them have the opportunity to consider any argument that you might make today because you chose not to file any response.

\* \* \*

MR. COATS: If I may have a little bit of leeway on this?

THE COURT: Okay.  
(Tr. Hearing July 20, 2009, pp. 21-2).

Subsequently, the court made the following ruling at the conclusion of the hearing.

So I am—I think that I'm still where I started out, the Summary Judgment should be granted for Ms. Graydon and denied as against Ms. Graydon as to Mr. Coats. Mr. Coats' failure to respond to the motions really I think put counsel at a disadvantage here today, but I think that it was important to give Mr. Coats at least the opportunity to create a record of his position. But as against Mr. Coats because I am reading your motion as being a motion as against both defendants that the lack of opposition or even Mr. Coats' statement here today I don't believe are sufficient to defeat your Motion for Summary Judgment as against Mr. Coats. Okay. So I am granting the summary judgment as to Mr. Coats. *Id.* at 31-32.

On August 17, 2009 the Court executed its "Order on Summary Judgment Motions and Judgment". As pertains to Peter, the Court stated:

On the ground that defendant Peter Coats defaulted by filing no opposition to the Plaintiff's Motion for Summary Judgment, said Motion is hereby granted as against defendant Peter Coats. Accordingly, Judgment is hereby granted in favor of plaintiff Michael Ward and against defendant

Peter Coats in the sum of \$315,242.72 together with interest thereon at the post-judgment rate of 2.4% per annum. . . Costs are awarded to plaintiff Michael Ward and against defendant Peter Coats. (R. 322).

In essence, the lower court granted judgment of over \$300,000 against Peter because Peter failed to file any response to the summary judgment motion of Michael. The lower court termed this as a “default” in terms of the summary judgment proceeding. The lower court committed reversible error in this characterization and in its analysis.

Rule 56 of the Utah Rules of Civil Procedure is only appropriate when there is no genuine issue as to any material fact *and* the moving party is entitled to a judgment as a matter of law. Wilcox v. Anchor Water Co. 164 P.3d 355 (Utah 2007). Summary judgment should be granted only when it is clear from undisputed facts that the opposing party cannot prevail. Lach v. Deseret Book, 746 P.2d 802 (Utah 1987).

Rule 7 of the Utah Rules of Civil Procedure provides an orderly method in which a motion for summary judgment may be made. Subsection c (3)(A) and (B) outlines the form in which the moving party’s memoranda and affidavit should take and discusses the opposing party’s memoranda and affidavit. By following this procedure a trial court can easily see the agreed and disputed facts and areas of law by both parties.

If the non-moving party chooses not to file counter-affidavits or other evidence disputing the facts of the moving party, the facts of the moving party are considered to be undisputed. Scott v. Major, 980 P.2d 214 (Utah App. 1999). On

the other hand, even if the opposing party fails to file an affidavit, summary judgment will still be denied if the affidavit of the moving party shows on its face that there is a material issue of fact still present. Frisbee v. K & K Construction Co., 676 P.2d 387 (Utah 1984).

In the instant case because Peter did not file any counter affidavits to the summary judgment motion of Michael, it can be assumed that Peter did not dispute any of the material facts relied upon by Michael in his motion. The substance of these facts is not important here but will be discussed in the next section relating to the specific legal theory required by Michael to prevail. The only question that remains germane to this section of Peter's Brief is whether the complete failure to respond to Michael's motion allows a "default" to be entered by the lower court against him.

It is fundamental that the parties moving for summary judgment must establish the right to such judgment based on applicable law as applied to the undisputed material issues of fact. Lamb v. B & B Amusement Corp., 869 P.2d 926 (Utah 1993). The Utah Supreme Court in a recent decision clarified the burden and obligations of parties in summary judgment proceedings and reversed both the trial court and this Court's affirmance of a motion for summary judgment. The Utah Supreme Court stated:

A summary judgment movant must show both that there is no material issue of fact and that the movant is entitled to judgment as a matter of law. Utah R. Civ. P. 56(c). *Where the moving party would bear the burden of proof at trial, the movant must establish each element of his claim in order to show that he is entitled to judgment as a matter of law.* In

order to meet his initial burden on summary judgment, therefore, Orvis must present evidence sufficient to establish that judicial estoppel is *appropriate under the facts of the case, and that no material issue of fact remains*. The burden on summary judgment then shifts to the non-moving party to identify contested material facts, or legal flaws in the application of judicial estoppel. Orvis v. Johnson, 177 P.3d 600, 601 (Utah 2008)(emphasis added).

Thus, viewing the instant case in the abstract only, it is clear that a non-moving party cannot “default” his opponent’s motion for summary judgment since to permit such doctrine would negate the requirement that the moving party must show both that there is no material issue of fact and that the movant is entitled to judgment as a matter of law. In other words, the actions or inactions of the non-moving party should not affect the validity of the motion for summary judgment and the analysis that must be made by the trial court as to whether it should be granted based upon the sole efforts of the moving party.

This burden is no different than what occurs in a criminal case. The state has the burden to prove guilt of an accused. The defendant is not required to take the stand and negate the accusation of the state. The prosecutor in a criminal case can have his case dismissed as a matter of law without a defendant having to do anything if the prosecutor fails to meet his initial burden of proof. Here, the requirement is no different.

A simple example of this summary judgment requirement illustrates this principle. Assume that this litigation involves a car accident between Michael and Peter. Michael files an affidavit that states that he was driving through an



intersection in which Peter was waiting and that Michael proceeded into the intersection against the red light crashing into Peter.

Michael moves for summary judgment on the basis that the facts of the accident are undisputed. Peter files no counter affidavits because he also agrees to this set of facts. Under the lower court's reasoning, Michael would be awarded summary judgment as a matter of law even though his "facts" shows that he is legally liable for running the red light in violation of applicable law. In reality, however, under the Utah Supreme Court standard the lower court must look at these claims and conclude the even though the facts are undisputed they do not support Michael's claim of liability against Peter and therefore must be denied even though Peter filed no opposing motion or papers.

Had the Utah State Legislature intended that the mere non-response to a summary judgment be fatal to a litigant, it would have so provided in the rules just as it has done for litigants who fail to answer complaints. Instead, Rule 56 was designed to short cut litigation when additional litigation is not required. It does not eliminate the burdens and requirements of the various parties under this shortened procedure.

Thus, the lower court's conclusion that Peter had "defaulted" by his failure to respond is incorrect as a matter of law and must be reversed.

## POINT II

### THE UNDISPUTED CONDUCT OF PETER DURING THE HAGAN OFFER DOES NOT GIVE RISE TO ANY LIABILITY TO MICHAEL MERELY BECAUSE THE SALE FAILED

As noted *supra*, merely because facts are shown to be undisputed does not automatically entitle a moving party to a judgment against a non-moving party. The second hurdle that must be jumped by a summary judgment movant is a showing that the undisputed facts equate to liability as a matter of law. If there is no liability based upon such facts then there can be no judgment against the non-moving party.

In the instant case, both Michael and Caroline filed various supporting memoranda and affidavits explaining and detailing the circumstances of the Hagen offer and its subsequent failure. Michael and Caroline vigorously disagreed as to the legal duty and status of Caroline concerning the property and her failure to agree to a quitclaim deed. However, both the parties agreed entirely as to the sequence of facts that prevented the \$5,200,000 sale from occurring.

Both Michael and Caroline acknowledge that Peter and Michael accepted the offer made by David Hagen after having made a counter offer involving several conditions; including the requirement that Caroline quitclaim her interest in the property. This requirement was added because Caroline had filed various encumbering documents including a *lis pendens* against the property. Both parties

agree that Caroline was not on the title to the property and was not a party to the sales contract with Mr. Hagen.

The undisputed facts also show that Caroline demanded that the proceeds of the sale, after proper deductions, be placed in an escrow account established by the divorce court until the divorce was final. Caroline maintained that she was concerned Peter would dissipate the funds prior to the divorce being final if such an escrow was not established.

All parties and the undisputed material facts show that Peter refused to agree to such an escrow based on his belief that he was entitled to manage the proceeds himself as long as he did not dissipate or hide any assets as had been prohibited by several divorce court orders.

Consequentially, therefore, Peter would not agree to put the proceeds in an escrow; Caroline would not agree to quitclaim her interest in the property without the escrow; and without the quitclaim deed of Caroline, the sale to Hagen failed.

Michael argued that Caroline was under a legal obligation to release her liens on the property since she did not have a title interest and was not entitled to any of the property proceeds until the divorce court awarded it. The lower court disagreed with this assessment and held that Caroline was under no obligation to sign a quitclaim deed to the property and was therefore, as a matter of law, not liable for the failed sale.

The correctness of this ruling is now the main event in the instant appeal between Michael and Caroline as contained in their respective briefs previously

filed with this Court. If this Court finds that Caroline was obligated to clear the title that she had encumbered, then her liability for the failed sale becomes actionable again. If, on the other hand, she had no legal obligation to give Peter, Michael, and Mr. Hagen a quitclaim deed then there can be no liability on her part for failing to do so.

Regardless of the dispute between Michael and Caroline in this appeal, the undisputed evidence in the record by both of these parties shows that Peter's only claimed transgression was his failure to agree to a court-run escrow in accordance with Caroline's wishes. Neither of the parties has cited any authority requiring Peter to have done so. Peter was, in fact, completely within his rights to demand the full proceeds of the sale of his property be paid to him so that he could manage the funds pending any division by the divorce court. He was not obligated to put the funds into any escrow desired by Caroline.

His complete right to reject the escrow prior to foreclosure is even better seen in light of Caroline's subsequent effort to capture the proceeds after the foreclosure sale. In a hearing to determine the distribution of the proceeds by the trustee, Judge Trease ordered that all funds be released in their entirety to Peter subject to any subsequent order by the divorce court. Judge Trease stated the following

Regarding the second argument, then, by Ms. Graydon, that she has priority over these funds based on her marital interest, I don't agree with that as well and deny her claim, then, under that argument as well. I think—I'm convinced that Ms. Graydon does not have a statutory interest. And although she may have an interest in the future, certainly, or a claim on

these funds by virtue of the divorce that is ongoing, I don't think that her claim places her in priority over Mr. Coats. And secondly, a plain reading of the statute, I think, requires me to establish priorities of the parties. And again, as I have indicated, that does not mean that I'm saying that Mr. Coats gets this money in the clear, so as to speak, if there is a court order out there that these funds not be disbursed or dissipated pursuant to a divorce order or a divorce order from the divorce court.

And so, accordingly, I am finding that Mr. Coats has priority over these funds, subject, of course, to the payment of the amount for attorneys' fees that Mr. Smith (the trustee) has indicated on the record and will indicate in the future regarding his appearance in court today. And I'm ordering that the funds be released in its entirety, subject to payment of Mr. Smith's attorney's fees, to Mr. Coats. (Civil No. 070906540, December 17, 2007, pp. 8-9).

Caroline, according to the undisputed evidence, made no effort to go to the divorce court and request that Peter be ordered to establish a court-run escrow either before or after the foreclosure had occurred. Caroline already had several separate orders from the divorce court judges and commissioners prohibiting Peter from liquidating any assets he had or may acquire and may have felt that such an effort would be futile.

If, however, Caroline had specifically obtained a divorce court order requiring the proceeds of the Hagan sale be placed in a special escrow, Peter's position would be completely different since he would then have been under a legal duty to comply with Caroline's wishes. As to what actually transpired, however, he was under no duty to either Michael or Caroline to pay his proceeds into a court-run escrow and exercised his right to so decline. While this decision causally resulted in Caroline's refusal to quitclaim her interest in the property, such refusal cannot be traced to Peter's legitimate action.

Thus, at the time the motion for summary judgment was filed by Michael there was no liability theory upon which Michael could recover from Peter based upon Michael's own undisputed facts. Had Peter made a cross-motion for summary judgment against Michael, the trial court should have granted such motion. However, in the absence of such motion the lower court should have denied the motion of Michael and set the matter for trial.

It is respectfully requested that this Court, as a matter of law, reverse the Summary Judgment entered against Peter and enter judgment in his favor based upon the uncontested facts and established legal principles.

### POINT III

#### THE LOWER COURT ABUSED ITS DISCRETION IN FAILING TO GRANT RULE 59(A)(6) RELIEF FROM ITS PRIOR ENTRY OF SUMMARY JUDGMENT

After judgment was entered against Peter on August 17, 2009 he retained counsel to represent him in further proceedings. On August 31, 2009 Peter's new counsel filed a Motion for New Trial and/or to Alter or Amend Judgment and a Motion for Rule 60(b) relief. (R. 326-368).

Peter and Michael briefed the motions and on December 10, 2009 the Honorable Denise P. Lindberg denied all the motions of Peter. (R. 411-13; *see* Addendum to this Brief). Although Judge Lindberg specifically addressed Peter's claim for relief based upon excusable neglect and surprise which are not raised in this appeal, she did not specifically deal with Peter's claim that the Summary

Judgment was in violation of Rule 59(a)(6): “insufficiency of the evidence to justify the verdict or other decision; or that it is against law.” Judge Lindberg in her Minute Entry Order stated the following:

On August 31, 2009, Coats, now represented by counsel, filed the present motion. Plaintiff has opposed the motion and explained why Coates is not entitled to relief from judgment under either Rule 59 or Rule 60. The Court agrees entirely with the plaintiff’s analysis and incorporates herein by reference. The analysis therein more than adequately supports the court’s determination that Coats’ motions fail.

It is well established that a party may file a Rule 59 motion following entry of a summary judgment even though there has technically been no trial.

Moonlight Electric Assn. v. Oquirrh Systems, Inc., 767 P.2d 125, 127 (Utah App. 1988). *See also*, Watkiss & Campbell v. Foa & Son, 808 P.2d 1061, 1066 (Utah 1991) (“on analysis of Rule 59(a) and the rationale behind this leads us to conclude that such a [Rule 59] motion is, nonetheless, procedurally correct.”)

The question as to “insufficiency of the evidence” in a Rule 59 motion applies the same test utilized by this appellate Court in deciding the insufficiency of evidence on appeal. To support an insufficiency of the evidence claim “the one challenging the verdict must marshal the evidence in support of the verdict and then demonstrate that the evidence is insufficient when viewed in the light most favorable to the verdict.” McCorvey v. State Dep’t. of Transportation, 868 P.2d 41, 44 (Utah 1993). On a motion for a new trial based on an insufficiency of evidence, the trial court should review the evidence and every reasonable

inference fairly drawn from it in a light most favorable to the jury's verdict. Deats v. Commercial Banks, 746 P.2d 1191 (Utah App. 1987).

The undisputed evidence in the Rule 59 proceeding is the same undisputed evidence that was before the lower court in the original Summary Judgment proceeding. The same arguments previously made in the prior section of this Brief are applicable here. The only conduct of Peter that Michael and Caroline complain about in the transaction with Hagen is Peter's refusal to put the money in escrow thereby causing Caroline to refuse to execute a quitclaim deed.

Peter's action was not unlawful, in breach of contract, or in violation of any court order. Peter was perfectly entitled to request management of the proceeds until such time as he was required to do otherwise. He was not required to appease Caroline in order to satisfy the condition of the real estate contract by obtaining her quitclaim deed. Thus, the evidence is clearly insufficient that he did anything intentionally or wrongfully to prevent the sale of the property to Mr. Hagen.

While a lower court has wide latitude in its discretion as to whether or not it will give Rule 59 relief, the exercise of judicial discretion must be based upon some facts justifying its decision. Saltis v. Afflect, 105 P.2d 176 (Utah 1940). Clearly, a new trial should be granted when prejudicial error has occurred or substantial justice has not been done. Davis v. Grand County Service Area, 905 P.2d 888 (Utah 1995). Finally, a new trial may be granted under Rule 59



whenever there is evidence that would have permitted entry of judgment for the losing party. Hansen v. Stewart, 761 P.2d 14 (Utah App. 1988).

During the original summary judgment proceeding the lower court did not have the benefit of legal input from Peter since he was not represented by counsel. However, the Rule 59 proceeding gave the lower court a second chance to examine the case after careful legal briefing by both counsel for Peter and Michael. The lower court abused its discretion by failing to correct its prior error of imposing a judgment of over \$300,000 to be entered wrongfully against Peter based upon “default” alone and in light of the undisputed facts which show no actionable conduct giving rise to any liability claim.

### CONCLUSION

The lower court erred in finding against Peter on the sole basis that he had “defaulted” by failing to file any responsive pleadings in the summary judgment proceeding. The lower court did not require Michael to satisfy his burden to show both undisputed facts and liability as a matter of law.

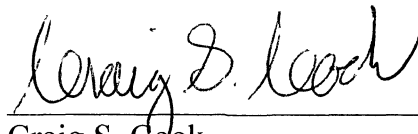
When the agreed upon facts of all parties are examined in detail they reveal that Peter did not do any act or fail to perform any act that would make him liable to Michael for the failed Hagen sale. Peter was entitled to demand that he be allowed management of the proceeds from the sale and, in spite of Caroline’s opposition, was free to reject a court established escrow.

Finally, the lower court failed to correct its prior error by affirming the summary judgment against Peter in the Rule 59 proceeding even though the court

was provided with extensive legal input and authorities from Peter that was not available during the original hearing.

For these reasons, Peter respectfully requests that this Court vacate the prior judgment of the lower court and enter judgment of dismissal in his favor.

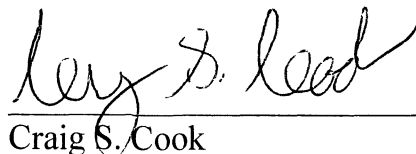
Dated this 7<sup>th</sup> Day of September, 2010

A handwritten signature in cursive script, reading "Craig S. Cook", written over a horizontal line.

Craig S. Cook  
Attorney for Peter Coats

#### MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Brief to Brad Smith, Attorney for Plaintiff-Appellant Michael Ward, 3986 Washington Blvd., Ogden, Utah 84401 and to Bryce Panzer, Attorney for Defendant-Appellee Carolyn Coats Graydon, 257 East 200 South, Suite 800, Salt Lake City, Utah 84111 this 7<sup>th</sup> day of September, 2010.

A handwritten signature in cursive script, reading "Craig S. Cook", written over a horizontal line.

Craig S. Cook

# ADDENDUM

### 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 7<sup>th</sup> 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	<u>\$2,909,016.70</u>
- 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: