

1999

Mosdell v. Mosdell : Brief of Appellee

Utah Court of Appeals

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Recommended Citation

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IN THE UTAH COURT OF APPEALS

KATHLEEN WILLIAMS MOSDELL,

Plaintiff/Appellee.

v.

DALE McBRIDE MOSDELL,

Defendant/Appellant.

Appellate Case No. 991100-CA

Argument Priority No. 15

BRIEF OF APPELLEE

Appeal from the order of the
District Court of the Fifth Judicial District,
the Honorable Robert T. Braithwaite, presiding.

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JURISDICTIONAL STATEMENT

The Utah Court of Appeals has jurisdiction in this matter pursuant to Utah Code Ann. § 78-2a-3 (1996).

STATEMENT OF ISSUES

Issue I

Sub-Issue A

Were the trial court's findings of fact and conclusions of law, although not specifically entitled as such, regarding defendant's misrepresentations of his retirement account and disability income, adequate so as to prevent remand when the record is replete with evidence upon which the court relied in making its decisions?

Sub-Issue B

Was the trial court's omission of specific findings of fact with respect to its acceptance of plaintiff's answers to defendant's first discovery request, its refusal to modify defendant's alimony obligation, and its award of attorney fees to plaintiff negligible so as to prevent remand when the record is replete with evidence upon which the court relied in making its decisions?

Issue II

Did the trial court properly grant plaintiff's request that the answers to defendant's first discovery request be accepted by the court, although not filed within thirty days of service, when party attorneys had agreed answers were not due during settlement

negotiations?

Issue III

Was the trial court's opinion that defendant had misrepresented the value of his retirement account during stipulation negotiations a sufficient change in circumstances so as to justify awarding plaintiff one-half of the additional retirement disbursement?

Issue IV

Was the trial court's opinion that defendant had misrepresented the possibility of his receiving future disability income during stipulation negotiations a sufficient change in circumstances so as to justify awarding plaintiff \$6,000 in alimony?

Issue V

Did the trial court properly refuse to modify defendant's alimony obligation when he failed to prove that plaintiff did not have need of the amount of alimony she was receiving, that she was able to support herself, and that he did not have the ability to provide support?

Issue VI

Was the trial court's failure to follow Rule 4-501(1)(B) in the granting of a protective order a *non-issue* when compliance or noncompliance with the rule would not have affected the outcome in the case?

Issue VII

Is defendant's argument concerning his motion for partial summary judgment a

non-issue when the record is void of any evidence that a notice to submit was filed or that a judgment on the motion was ever entered by the court?

Issue VIII

Did the trial court properly award attorney fees to plaintiff when its decision was based upon evidence in the record that plaintiff had a financial need for attorney fees, that defendant had the ability to pay, and that the requested award was reasonable?

DETERMINATIVE RULES

Rule 9. Pleading special matters, states in pertinent part:

(b) *Fraud, mistake, condition of the mind.* In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally. Utah R. Civ. P. 9(b).

Rule 36. Request for admission, states in pertinent part:

(a) Request for Admission.

(1) A party may serve upon any other party a written request for the admission, for purpose of the pending action only, of the truth of any matters within the scope of Rule 26(b) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. The request for admission shall contain a notice advising the party to whom the request is made, that pursuant to Rule 36, the matters shall be deemed admitted unless said request is responded to within 30 days after service of the request or within such shorter or longer time as the court may allow. . . .

(2) Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within thirty days after service of the request, or within such shorter or longer times as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of 45 days after service of the summons and complaint upon him.

(b) *Effect of admission.* Any matter admitted under this rule is conclusively

established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of Rule 16 governing amendment of a pretrial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits. Utah R. Civ. P. 36(a)(1), (a)(2), (b).

Rule 52. Findings by the court, states in pertinent part:

(a) *Effect.* In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58A . . . Requests for findings of fact are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. . . . It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. . .

(c) *Waiver of findings of fact and conclusions of law.* Except in actions for divorce, findings of fact and conclusions of law may be waived by the parties to an issue of fact. . . Utah R. Civ. P. 52(a), (c).

Rule 4-501. Motions, states in pertinent part:

(1)(D) *Notice to submit for decision.* Upon the expirations of the five-day period to file a reply memorandum, either party may notify the clerk to submit the matter to court for decision. The notification shall be in the form of a separate written pleading and captioned "Notice to Submit for Decision." The notification shall contain a certificate of mailing to all parties. If neither party files a notice, the motion will not be submitted for decision. Utah R. Jud. Administration 4-501(1)(D).

STATEMENT OF THE CASE

I. Nature of the Case.

This is an appeal from the trial court's modification of a decree of divorce.

II. Course of the Proceedings.

Plaintiff filed a Verified Complaint of Divorce on April 18, 1997. (R. 3-17.) The

parties executed a written stipulation regarding the issues of their divorce. (R. 23-36, 40-3.) The court entered a Decree of Divorce on May 21, 1997. (R. 62-76.)

Plaintiff filed a Verified Petition to Modify Decree of Divorce in August, 1997. (R. 79-89.) Defendant also filed a petition to modify the decree on January 7, 1998. (R. 124-9.) He also filed an amendment. (R. 163-70.)

Trial was conducted on both petitions on January 14, 1999. The court entered an "Order Modifying Decree of Divorce" on November 22, 1999. (R. 485-8.)

III. Disposition in the Court Below.

The final order modifying the decree of divorce states in part:

"Having fully reviewed the evidence presented at the January 14, 1999 Bench Trial, and having heard supplemental arguments and received supplemental motions and memoranda, the Court finds that a substantial change in circumstances has occurred since the issuance of the May 21, 1997 Decree of Divorce - namely that a substantial change has occurred in the reported financial circumstances and place of residence of the parties, and that the former Decree was based on misrepresentations made by Defendant regarding his finances." (R. 485-8.)

The court's order also admitted the answers to defendant's first discovery request. (R. 487.) It further awarded plaintiff \$6,000 above the original alimony award because of previously undisclosed disability income received by defendant: \$24,353.80, half of the \$48,707.59 previously unreported by defendant from his retirement program; and \$6,800 for attorney fees and costs associated with the bringing of the petition to modify. (R. 486-7.)

STATEMENT OF THE FACTS

Plaintiff and defendant were married on November 10, 1973. (R. 17.) They had five children, two of whom have been adults during the time period relevant to these proceedings. (R. 16.) During the marriage, defendant acquired a degree as a medical doctor, and obtained licensure in Idaho. (R. 14-15.)

In early 1997, plaintiff left the parties' home in Idaho with the three minor children and relocated to Cedar City, Utah. (R. 14.) Defendant became depressed, terminated his employment as a physician in Idaho and relocated to Southern Utah to be near his children. (R. 12.) A decree of divorce was later entered on May 21, 1997. (R. 62-76.)

The parties were awarded joint legal custody of the children, with plaintiff being designated the primary custodian and defendant being awarded statutory visitation. (R. 73-5.) The child support and alimony obligations were "subject to judicial review ... at any time, without the necessity of alleging and establishing any substantial change of material circumstances..." (R. 72-3.)

Prior to the divorce, settlement discussions were held in which defendant was unrepresented by counsel. (R. 521.) Rptr. Tr. P. 8:5-25, 9:1-22 (Jan. 14, 1999). Defendant was notified by plaintiff's counsel, Willard Bishop ("Bishop"), that in order to reach a settlement, it was essential for Bishop to have a comprehensive picture of the parties' financial circumstances. (R. 521.) Rptr. Tr. P. 9:2-7. Throughout the course of the marriage, plaintiff had not been well-informed of the details of the couple's finances.

(R. 521.) Rptr. Tr. P. 19:25, 20:1-3. Defendant was informed that Bishop intended to go through a formal discovery process in which all of the information regarding the couple's finances would be in put writing under oath. (R. 521.) Rptr. Tr. P. 9:5-7, 17:11-16.

Expressing his desire to resolve matters quickly and keep attorney fees minimal, defendant persuaded Bishop to negotiate the settlement and prepare the decree of divorce on the same day. (R. 521.) Rptr. Tr. P. 8:23-25, 9:1-16, 16:7-13, 17:10-16. Defendant indicated his willingness to answer questions truthfully and provide accurate and comprehensive information regarding the parties' finances in order to avoid formal discovery. (R. 521.) Rptr. Tr. P. 9:7-11, 17:13-16.

A meeting was held on May 2, 1997, in which Bishop, plaintiff and defendant were present. (R. 521.) Rptr. Tr. P. 9:14-18. Defendant was told that both Bishop and plaintiff were relying entirely on him to furnish complete and accurate financial information. (R. 521.) Rptr. Tr. P. 17:17-19, 19:11-25, 20:1-12, 29:13-20, 30:5-11. During this discussion, the couple's finances were examined in depth. (R. 521.) Rptr. Tr. P. 9:19-21. Based strictly on defendant's verbal representations of the parties' financial circumstances, the parties then stipulated to the terms of a decree of divorce. (R. 23-36.) (R. 521.) Rptr. Tr. P. 17:5-19, 19:11-25, 20:1-12.

At the time of the settlement negotiations, defendant remained unemployed due to his depression. (R. 33.) However, plaintiff had been informed that defendant had a significant disability insurance policy. (R. 521.) Rptr. Tr. P. 10:5-8. In order to

determine if the defendant had a source of income from which child support and alimony could be paid. Bishop questioned defendant concerning disability income. (R. 521.)

Rptr. Tr. P. 14:18-25, 15:1-20, 82:5-22, 83:7-21.

Defendant represented to plaintiff and Bishop that he had made application for disability payments, but had been turned down. (R. 88-9, 521.) Rptr. Tr. P. 10:9-11, 14:21-24, 29:3-7, 82:11-12. Bishop testified that defendant said it would not make any difference if he reapplied because he had been told he was never going to qualify. (R. 521.) Rptr. Tr. P. 14:24-25, 15:1-10. He said he would have to borrow money from family or elsewhere to pay child support until he was employed. (R. 73, 521.) Rptr. Tr. P. 15:9-15, 83:11-17. Defendant testified that at the time the divorce decree was entered, there was no anticipation that he would receive disability income. (R. 521.) Rptr. Tr. P. 83:7-10.

Based on his representations that he had no income, nor did he contemplate having any, other than through eventual employment, defendant was ordered to pay plaintiff \$900 per month in child support. (R. 73.) Once employed as a surgeon and/or physician, defendant was to increase child support payments to \$1,500 per month, and begin alimony payments of \$1,500 per month. (R. 72-3.)

In June of 1997, defendant's disability application was in fact approved. (R. 498.) Def. Ex. #6. He began receiving payments of \$5,000 per month, retroactive to May of 1997, and through February of 1998. (R. 498, 521.) Def. Ex. #6, Rptr. Tr. P. 86:2-6.

Defendant did not inform plaintiff that he was receiving disability payments. (R. 521.) Rptr. Tr. P. 88:14-17.

Additionally, during the settlement discussions referred to above, defendant was asked about the value of his retirement account. (R. 521.) Rptr. Tr. P. 18:20-25. He represented the retirement account as between \$12,000-\$14,000, and said there would be no further deposits. (R. 87, 521.) Rptr. Tr. P. 19:1-3, 81:18-23. Defendant made no mention to Bishop or plaintiff that his former employer, Blackfoot Medical Clinic, held annual board meetings in March or April in which it determined pension plan fund distributions based on the previous year's income. (R. 521.) Rptr. Tr. P. 107:6:25, 108:1-7.

Defendant did not have any documentation to verify his retirement information, but was again told that Bishop and plaintiff were relying solely on the accuracy of his representations due to his preference to bypass formal discovery. (R. 521.) Rptr. Tr. P. 19:8-25, 20:1-12, 25:15-21. Defendant maintained that he needed the entire \$12,000-\$14,000 in the account to pay the couple's outstanding debts, including Chapter 13 bankruptcy payments of \$3,500 per month. (R. 31, 521.) Rptr. Tr. P. 117:13-18. Plaintiff stipulated to award her interest in the retirement program to defendant based strictly on his represented appraisal of \$12,000-\$14,000. (R. 31, 87-8, 521.) Rptr. Tr. P. 30:5-11. The value of the retirement account was in fact \$60,767.59-\$48,707.59 after early withdrawal. (R. 498, 521.) Def. Ex. #6, Rptr. Tr. P. 86:16-24.

On August 11, 1997, plaintiff filed a petition to modify the decree of divorce. (R. 79-89.) Among other things, she alleged that defendant's representations concerning the possibilities of receiving disability income and additional retirement disbursements were false, and that the former decree was based on such misrepresentations. (R. 87-9.) She requested that defendant's disability income be apportioned equally between the two or be used as a basis to increase child support and alimony, and that she be awarded one-half of the additional funds in the retirement account and attorney's fees. (R. 82, 87.)

Defendant's first discovery request was filed on or about October 23, 1997. (R. 101-11.) A motion to compel discovery was served on plaintiff on December 2, 1997. (R. 112-23.) Both Bishop and James M. Park ("Park"), plaintiff's former counsel, maintain there was an understanding with defendant's attorney, Sam Draper ("Draper"), that an extension of time to answer the discovery requests was granted until the parties determined that a stipulation for settlement was not possible. (R. 413-16.) Draper maintains he did not agree to such an extension. (R. 422.)

On May 11, 1998, Park sent a letter to Draper questioning defendant's filing of a motion to compel when the parties were negotiating settlement. (R. 415-16.) Draper did not respond. (R. 415-16.) The court issued the order compelling discovery on May 18, 1998. (R. 156-7.) Plaintiff filed answers to the discovery request on July 13, 1998. (R. 418.) The determination that a stipulation for settlement was not possible was not made until that time. (R. 415.)

Defendant filed a petition to modify the divorce decree on January 3, 1998. (R. 124-9.) In his amended petition to modify, filed June 4, 1998, defendant sought to reduce his alimony obligation. (R. 165-6.) He claimed that although he was again working as a physician, he was making less money than he had forecasted. (R. 163.)

On October 7, 1998, defendant served a subpoena on the Bureau Manager of the State of Utah's Department of Occupational & Professional Licensing to testify regarding records created as part of an investigation into his application for licensure. (R. 343-5.) The Division had classified the records contained in its investigative files as "protected." (R. 349.) The Division filed a motion for a protective order on October 22, 1998. (R. 336-42.) The court, stating that defendant had failed to file any persuasive authority or reasons to set aside the protected status of the Division's records, granted the order on October 28, 1998. (R. 375-7.)

On September 23, 1998, defendant filed a motion for partial summary judgment on the issues of the retirement account and the disability income. (R. 264-8.) Plaintiff timely filed a memorandum in opposition to which defendant timely replied. (R. 273-80.) The record is completely void of any further action either on the part of the defendant or the plaintiff. No notice to submit was ever filed, and no written order was entered. Defendant now claims that the motion was somehow denied.

A bench trial was held on January 14, 1999. (R. 521.) Testimony contrary to defendant's request for admissions was allowed, subject to defendant's objection. (R.

521.) Rptr. Tr. P. 10:4-25, 11:1-15, 12:1-25, 13:1-25, 14:1-13 (January 14, 1999). The court allowed plaintiff to file a memorandum supporting the claim that her answers to defendant's discovery request be accepted by the court. (R. 417-19.) Defendant was also allowed to file a memorandum in opposition. (R. 420-3.)

The trial court then entered its "Order Modifying Decree of Divorce." (R. 485-8.)

SUMMARY OF ARGUMENT

The trial court entered sufficient findings of fact and conclusions of law in its order modifying the parties divorce decree with respect to the issues of defendant's disability income and additional retirement disbursements. It found that a substantial change in circumstances had occurred in the reported financial circumstances of the parties, and that the former decree of divorce was based on misrepresentations by the defendant. It concluded that plaintiff was, therefore, entitled to \$6,000 additional alimony half of defendant's retirement program. Hence, remand is not necessary on these issues.

The trial court did not enter specific findings of fact concerning its decisions to accept plaintiff's answers to defendant's first discovery request, its refusal to modify defendant's alimony obligation, and its award of attorney fees to plaintiff. Therefore, plaintiff does not object to remand on these issues.

However, plaintiff maintains that the record provides ample evidence supporting the trial court's decisions with respect to all contested issues, and remand will not alter the outcome in the case. Thus, plaintiff requests, in the interest of judicial economy, that

this Court exercise its power to weigh the evidence in the record and substitute its own judgment for that of the trial court. Due regard should be given to the opportunity of the trial court to judge the credibility of the witnesses.

Defendant contends that because plaintiff did not respond to discovery requests within thirty days after service, the requests for admission were deemed admitted. However, plaintiff maintains there was a verbal agreement between party attorneys that answers to discovery requests were not due until such time as settlement negotiations broke down. Because the answers to the discovery requests were served timely when it was determined settlement was not possible, they were never deemed admitted. Therefore, the trial court did not allow plaintiff to withdraw her answers to discovery requests, it simply validated the verbal agreement between party attorneys and accepted her answers accordingly.

The trial court appropriately awarded plaintiff one-half of defendant's previously undisclosed retirement account. It found that defendant's misrepresentations amounted to a substantial change in circumstances, and fraud was adequately plead and proven.

The trial court appropriately awarded plaintiff an additional \$6,000 in alimony due to defendant's receipt of disability income. Again, it found that defendant had misrepresented the possibility of receiving future disability income. This established a substantial change in circumstances and provided a compelling reason to modify the original decree.

The trial court properly refused to alter defendant's alimony obligation. Defendant failed to prove plaintiff did not have need of the amount of alimony she was receiving, that she was able to support herself, and that he did not have the ability to provide support.

The trial court's grant of a protective order to the Division of Occupational and Professional Licensing did not affect the outcome in this case. The evidence defendant sought from the Division could only have possibly helped him establish the threshold issue of a substantial change in circumstances. However, defendant was also required to prove plaintiff's lack of a need for support, her ability to support herself, or his inability to pay. He failed to do so. Therefore, the trial court would have still refused to alter his alimony obligation, and the grant of the protective order is a non-issue.

Defendant's motion for partial summary judgment was never submitted for decision, nor is there any evidence it was ever denied. Therefore, defendant's motion for partial summary judgment is a non-issue because this Court is not in a position to review a decision that was never made.

And, finally, the trial court acted properly when awarding attorney fees to plaintiff. Its decision was based upon evidence in the record that plaintiff had a financial need for attorney fees, that defendant had the ability to pay, and that the requested award was reasonable.

ARGUMENT

I. A. The trial court entered sufficient findings of fact and conclusions of law with respect to the issues of the retirement account and disability income.

Rule 52(a) of the Utah Rules of Civil Procedure provides that “[i]n all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon. . . . It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court.” Utah R. Civ. P. 52(a). No oral findings of fact and conclusions of law were recorded at the close of this bench trial.

A. Although not specifically entitled as such, the trial court’s order modifying the parties’ decree of divorce includes findings of fact and conclusions of law.

Although the trial court did not precisely entitle any portions of its written order to read “Findings of Fact” and/or “Conclusions of Law,” both were indeed included. In its order to modify the decree of divorce, the trial court “found” that a substantial change in circumstances had occurred in the reported financial circumstances of the parties, and that the former decree of divorce was based on misrepresentations made by the defendant. (R. 486-8.) Specifically, the court indicated that the misrepresentations referred to included defendant’s previously undisclosed disability income and unreported disbursements into his retirement account. (R. 486.) These could certainly be construed as the trial courts “findings of fact.”

The court then separately “concluded,” among other things, that due to defendant’s misrepresentations concerning his disability income and retirement account, the plaintiff should be awarded \$6,000 above the original alimony award, half of defendant’s retirement program. (R. 486-7.) Again, although not precisely entitled as such, it is not a stretch for this Court to construe these as the trial court’s “conclusions of law,” thus fulfilling the requirements of Rule 52(a).

B. Due regard should be given to the opportunity of the trial court to judge the credibility of the witnesses.

Rule 52(a) also provides that “[f]indings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.” Utah R. Civ. P. Rule 52(a). In Wilson v. Wilson, the Supreme Court of Utah concluded that “[t]he trial judge has considerable latitude of discretion in [equitable divorce proceedings] and ... his judgment should not be changed lightly, and in fact, not at all, unless it works such a manifest injustice or inequity as to indicate a clear abuse of discretion.” 296 P.2d 977, 981 (Utah 1956).

In the this case, no such clear abuse of discretion is present. The record provides ample testimony validating the court’s finding that defendant misrepresented his financial situation during the settlement negotiations which led up to the couple’s original stipulation.

The trial court was presented with testimony that defendant was told he was being

relied upon to tell the truth about the couple's financial situation. (R. 521.) Rptr. Tr. P. 17:17-19, 19:11-23, 20:1-12, 29:13-20, 30:5-11 (Jan. 14, 1999). The record manifests that defendant made representations that his application for disability income had been denied, and that there was no possibility he would receive disability income in the future. (R. 521.) Rptr. Tr. P. 14:24-25, 15:1-10. Furthermore, the record contains testimony to establish that defendant misrepresented the possibility of future funds being disbursed into his retirement account. (R. 521.) Rptr. Tr. P. 19:1-3, 81:18-23.

Although the record contains testimony to the contrary, due regard must be given to the trial court's ability to judge the credibility of the witnesses. In Minger v. Mineer, the Supreme Court of Utah stated, "...we accord considerable deference to the judgment of the trial court and interpose our own judgment only where the evidence clearly preponderates to the contrary or the trial court abuses its discretion or misapplies principles of law." 706 P.2d 1060, 1062 (Utah 1985).

When, as in this case, it is evident from the record that the trial court had substantial evidence upon which to base its decisions, it is unreasonable to conclude that a manifest injustice or inequity occurred so as to indicate a clear abuse of discretion. As declared in Wilson v. Wilson, the trial court's judgment should not be changed lightly. 296 P.2d 977, 981 (Utah 1956). And, whereas adequate findings of fact and conclusions of law were entered concerning defendant's misrepresentations of his retirement (Issue III) and disability income (Issue IV), these issues do not require remand or a substitute

judgment of this Court.

C. Alternatively, this Court should weigh the evidence and substitute its own judgment for that of the trial court.

Should this Court conclude that the trial court did not enter sufficient findings of fact and conclusions of law so as to satisfy Rule 52(a) of the Utah Rules of Civil Procedure with respect to the retirement account and disability income issues, it has the power to weigh the evidence and substitute its own judgment for that of the trial court. Wilson v. Wilson, 296 P.2d 977, 981 (Utah 1956). If this occurs, this Court should enter findings supporting the order of the trial court due to the adequacy of the information contained in the record and the ability of this Court to determine upon which facts the trial judge relied in entering his judgment.

In Montoya v. Montoya, the Supreme Court of Utah stated, “[a]lthough this Court has power in an equity case such as this to weigh the evidence and substitute our judgment for that of the trial court, we decline to do so where we have *no means of knowing upon which facts the trial judge relied* in entering his judgment.” 696 P.2d 1193, 1195 (Utah 1985) (emphasis added). The Court also noted that the record was deficient in many critical aspects. Id.

Furthermore, in Parish v. Parish, the Supreme Court of Utah declared its power in equity cases to make findings or direct the trial court to make findings in accordance with the evidence where the record is sufficient. 35 P.2d 999, 1001 (Utah 1934). However, the court found that the evidence nor the nature of the case were such that it should either

make findings or direct what findings should be made. Id. The trial court had entered no finding to support its judgment, and the evidence clearly showed that the trial court's order was erroneous. Id. The case was remanded. Id.

Unlike the case of Montoya v. Montoya, the record in the present case is not deficient in enabling this Court to determine upon which facts the trial court relied in entering its judgment. As referred to above, there is ample evidence in the record to persuade this Court to enter findings of fact and conclusions of law upholding the judgment of the trial court.

Likewise, the present case can be distinguished from Parish v. Parish in that there is no evidence which *clearly* shows the judgment of the trial court to be erroneous. Therefore, should this Court not be persuaded that sufficient findings of fact and conclusions of law were included in the trial court's order, it should not require remand. Instead, this Court should substitute its findings in accordance with the evidence contained in the record, again according considerable deference to the judgment of the trial court.

I. B. The record is replete with evidence to support the trial court's decisions regarding its acceptance of plaintiff's answers to defendant's first discovery request, its refusal to modify defendant's alimony obligation, and its award of attorney's fees to plaintiff.

Although plaintiff does not strongly object to this Court's remand of the three above issues (the trial court's acceptance of plaintiff's answers to defendant's first discovery request, its refusal to modify defendant's alimony obligation, and its award of

attorney's fees to plaintiff) for entry of proper findings of fact, she is convinced it will not alter the conclusions in this case. The record has ample supportive evidence to demonstrate upon which facts the trial court relied in entering its conclusions pertaining to these issues.

- A. The record supports the trial court's decisions so as to prevent any abuse of discretion.

To repeat, "[t]he trial judge has considerable latitude of discretion in [equitable divorce proceedings] and ... his judgment should not be changed lightly, and in fact, not at all, unless it works such a manifest injustice or inequity as to indicate a clear abuse of discretion." Wilson v. Wilson, 296 P.2d 977, 981 (Utah 1956). Where, as here, the record contains satisfactory evidence to support the judge's decision, there has plainly been no clear abuse of discretion.

1. Evidence supports the court's acceptance of the plaintiff's answers to defendant's first discovery request.

The record contains the sworn affidavit of plaintiff's former counsel, Bishop, declaring a verbal agreement between he and defendant's counsel, Draper. (R. 414.) The agreement was that during the parties' settlement negotiations, plaintiff was granted an indefinite extension of time to respond to pending matters, including discovery requests. (R. 413-14.)

The record further contains the affidavit of plaintiff's subsequent counsel, Park, who states it had been his understanding that answers to the discovery requests would not

be required until the parties determined that a stipulation for settlement was not possible. (R. 415.) That determination was not made until the responses for discovery requests were filed. (R. 415.) This information was included in plaintiff's memorandum in support of plaintiff's request that the answers to defendant's first discovery request be accepted by the court. (R. 417-19.)

The trial court also considered defendant's objection and memorandum in opposition to plaintiff's request that the answers to defendant's first discovery request be accepted by the court. (R. 420-3.) Based on all of the evidence before it, the court concluded that plaintiff's answers were admitted to the court. (R. 489.)

2. Evidence supports the court's refusal to modify defendant's alimony obligation.

The record contains evidence which demonstrates plaintiff's need for alimony and her inability to support herself. She was attending school full-time, and was not working. (R. 205, 521.) Rptr. Tr. P. 40:25, 41:1-3 (Jan. 14, 1999). She was receiving Pell Grants and help from others in order to maintain herself and her two children. (R. 205.) She did not have any assets from which to borrow money to support herself. (R. 521.) Rptr. Tr. P. 40:9-24. If defendant had paid the alimony of \$1500 per month as required by the divorce decree, plaintiff would not have had need of government or other assistance, and could have properly supported herself and two children living with her. (R. 205.)

Defendant did not show his inability to provide support. Although he claimed in his amended petition to modify the decree of divorce that his gross monthly income was

\$7,000, his financial declaration showed that his gross income was \$11,666.68 per month. (R. 165, 226.) Even after deductions, defendant stated that his monthly is \$7,534.05, and his debts and obligations \$4,700. That leaves a surplus of \$2,834.05. In addition, defendant testified that at the time of trial he was making even more than his financial declaration had stated due to an increase in his practice. (R. 521.) Rptr. Tr. P. 1-19. Thus, defendant did not present evidence to show that he could not meet the alimony obligation.

3. Evidence supports the court's award of attorney fees to plaintiff.

First, there is evidence which demonstrates plaintiff's financial need for an award of attorney fees. At trial, plaintiff was asked if she had the funds to pay the legal fees she had incurred as a result of these proceedings. (R. 521.) Rptr. Tr. P. 40:3-7. She answered that she did not. (R. 521.) Rptr. Tr. P. 40:8. She was not working at all because she was attending school full-time. (R. 521.) Rptr. Tr. P. 40:25, 41:1-3. She did not have any assets from which to borrow to pay attorney fees. (R. 521.) Rptr. Tr. P. 40:9-24.

Second, there is evidence that defendant had the ability to pay attorney fees. His gross income was in excess of \$11,666.68 per month. (R. 226, 521.) Rptr. Tr. P. 97:1-15. He stated in his financial declaration that his debts and obligations totaled \$4,700. (R. 226.)

And third, the requested award is reasonable. Nothing is said in the record or in

any affidavit claiming that the fees requested were unreasonable in amount.

- B. This Court should weigh the evidence and substitute its own judgment for that of the trial court.

Therefore, in the interest of judicial economy, this Court should weigh the evidence and enter adequate findings based on the evidence contained in the record. Such findings should therefore include: 1) a finding that the party attorneys had a verbal agreement to allow discovery requests to remain unanswered until settlement negotiations broke down, [in support of the trial court's acceptance of plaintiff's answers to defendant's first discovery request]; 2) a finding that the trial court's refusal to modify defendant's alimony obligation was based on the financial condition and needs of the plaintiff, her ability to support herself, and the ability of defendant to provide support; and 3) a finding that the trial court's decision to award attorney fees was based upon evidence of the plaintiff's financial need for attorney fees, the ability of the defendant to pay, and the reasonableness of the requested award.

- II. The trial court properly granted plaintiff's request that the answers to defendant's first discovery request be accepted by the court because they were never deemed admitted due to an agreement between party attorneys.**

Defendant contends the request for admissions should be deemed admitted because plaintiff's answers were not filed within thirty days after service. Utah R. Civ. P. 36(a)(2). However, plaintiff maintains that the attorneys for the parties agreed that the answers would not be due until it was determined that a settlement agreement could not be negotiated. Thus, the plaintiff did not ask the trial court to permit withdrawal of her

admissions under Rule 36(b). Utah R. of Civ. P. 36(b) (1999). Rather, she asked the court to accept answers that were not filed until settlement negotiations broke down.

The record contains the sworn affidavit of plaintiff's former counsel, Bishop, declaring a verbal agreement between he and defendant's counsel, Draper. (R. 414.) The agreement was that during the parties' settlement negotiations, plaintiff was granted an indefinite extension of time to respond to pending matters, including discovery requests. (R. 413-14.)

The record further contains the affidavit of plaintiff's subsequent counsel, Park, who states it had been his understanding that answers to the discovery requests would not be required until the parties determined that a stipulation for settlement was not possible. (R. 415.) That determination was not made until the responses for discovery requests were filed. (R. 415.) In fact, Park sent Draper a letter questioning his motion to compel because the parties were still negotiating settlement. (R. 415.) Upon no response, Park sent Draper another letter requesting that he respond to the letter regarding settlement. (R. 415.) Again, Draper did not respond, and Park subsequently filed the answers. (R. 415.)

None of the authorities cited by defendant address the matter which was before the trial court. In this case, both the attorneys for the plaintiff state there was a verbal agreement with the defendant's attorney for an open extension of time to answer the discovery requests until it was determined whether a settlement could be reached. (R.

418.) It is well-known in the field of legal practice that attorneys routinely make verbal agreements regarding discovery which vary from the formal Rules of Civil Procedure.

Wherefore, this is not an action in which the trial court allowed the plaintiff to withdraw admissions under Rule 36(b), Utah R. Civ. P. 36(b). Instead, it is an action in which the trial court determined that the verbal agreement between party attorneys was valid, and therefore the answers were not due until such time as settlement negotiations were terminated. Since plaintiff's answers were timely served when negotiations broke down, they were not automatically deemed admitted under Rule 36(a)(1), and not conclusively established under Rule 36 (b), Utah R. Civ. P. 36(a)(1), (b). Therefore, all of the evidence presented regarding the relevant admissions was properly allowed at trial.

III. The trial court properly determined defendant's misrepresentation of his retirement account constituted a substantial change in circumstances, and therefore, appropriately awarded plaintiff one-half of the additional retirement disbursement.

In the present case, the trial court determined that a substantial change in circumstances had occurred in the reported financial circumstances of the parties, and that the former decree of divorce was based on previously unreported income of the defendant. (R. 486-8.) That determination is to be presumed valid by this Court, and should not be overturned absent a finding by this Court that there is *no reasonable basis* for the trial court's decision. Crookston v. Fire Ins. Exch., 860 P.2d 937, 938 (Utah 1993) (emphasis added).

In Moore v. Moore, this Court stated it "... will not overturn a trial court's

modification of a divorce decree absent a clear abuse of discretion or manifest injustice.” 872 P.2d 1054, 1055 (Utah App. 1994). Further, in Moon v. Moon, the Supreme Court of Utah stated that “the determination of the trial court that there [has or has not] been a substantial change of circumstances ... is presumed valid, and we review the ruling under an abuse of discretion standard.” Moon v. Moon, 973 P.2d 431, 437 (1999), cert. denied, 982 P.2d 89 (Utah 1999).

A. Plaintiff made a prima facie showing of a substantial change in circumstances.

The threshold requirement for relief in a petition for modification of a decree of divorce is a showing of a substantial change in circumstances of the parties occurring since the entry of the decree and not contemplated in the decree itself. Toone v. Toone, 952 P.2d 112, 114 (Utah App. 1998); Hill v. Hill, 968 P.2d 866, 869 (Utah App. 1998). In this case, defendant experienced a substantial increase in his income after the decree of divorce was entered. (R. 498, 521.) Def. Ex. #6, Rptr. Tr. P. 86:16-24 (Jan. 14, 1999). Defendant’s representations regarding his income were material factors upon which plaintiff relied during stipulation negotiations. (R. 521.) Rptr. Tr. P. 19:8-25, 20:1-12, 25:15-21. The specific changes in defendant’s income, namely the possibilities of receiving future disbursements into his retirement account, were not incorporated into the original decree due to defendant’s misrepresentations. (R. 62-76.)

In order for a material change in circumstances to be contemplated in a divorce decree there must be evidence, preferably in the form of a provision within the decree

itself, that the trial court anticipated the specific change. Durfee v. Durfee, 796 P.2d 713, 716 (Utah App. 1990). There is no evidence in the decree itself which establishes the fact that additional disbursements into defendant's retirement account may be forthcoming. (R. 62-76.) Accordingly, plaintiff established a prima facie case of a substantial change in circumstances which allowed the trial court to consider modification.

B. Fraud was plead with adequate particularity.

Plaintiff's verified petition to modify states that during the contacts and negotiations between the parties leading up to the stipulated agreement, defendant represented that he was not receiving any disability income, that he was not covered by any policy which would grant him any disability income, that his application for coverage under a disability insurance program had been denied, and that he would not be receiving disability income. (R. 88-9.) The petition claims that as a result of those representations, plaintiff agreed to certain provisions pertaining to child support and alimony. (R. 88.)

Additionally, the petition to modify asserts that at the time the parties were discussing a resolution of their differences, defendant represented that his retirement program contained certainly not more than \$14,000, and that there would be no further deposits into that program. (R. 87.) It likewise states that based on those representations, plaintiff agreed that defendant should be awarded the retirement program. (R. 87.)

The terms "fraud" and "misrepresentation" are often used simultaneously to mean essentially the same thing. See Utah R. Civ. P. 60(b)(3). Rule 9 of the Utah Rules of

Civil Procedure requires that the circumstances constituting all contentions of fraud or mistake be stated with particularity. Utah R. Civ. P. 9(b). Plaintiff certainly plead misrepresentation, another term for fraud, and did so including the particular circumstances which constituted such misrepresentation. (R. 87-9.)

On appeal, defendant contends that plaintiff did not plead fraud. However, defendant stated in his mot on for partial summary judgment that it was the contention of the plaintiff that defendant, through *fraud* or misrepresentation, obtained property which should have been divided between the parties. (R. 265-6 (emphasis added).) If fraud was not plead, it is indeed unusual for defendant to claim that it was.

C. Evidence produced at trial supported defendant's fraud.

In order to prevail on a claim of fraud, all the elements must be established by clear and convincing evidence. Cheever v. Schramm, 577 P.2d 951, 954 (Utah 1978). Those elements include: 1) a representation; 2) concerning a presently existing material fact; 3) which was false; 4) which the representor either (a) knew to be false, or (b) made recklessly, knowing that he had insufficient knowledge upon which to base such representation; 5) for the purpose of inducing the other party to act upon it; 6) that the other party, acting reasonably and in ignorance of its falsity; 7) did in fact rely upon it; 8) and was thereby induced to act; 9) to his injury and damage. Pace v. Parrish, 247 P.2d 273 (Utah 1952).

It was established at trial that defendant did, indeed, make representations

concerning his retirement account. (R. 521.) Rptr. Tr. P 10:9-11, 14:21-24, 29:3-7, 82:11-12 (Jan. 14, 1999). The value of defendant's retirement account was a material fact in determining the amount of child support and alimony. (R. 521.) Rptr. Tr. P. 15:5-9.

The value of the retirement account reported by defendant was between \$12,000-\$14,000, with no additional disbursements forthcoming. (R. 521.) Rptr. Tr. P. 19:1-3, 81:18-23. That representation turned out to be false. The true value of the account was \$60,767.59 \$48,707.59 after early withdrawal. (R. 521.) Rptr. Tr. P. 86:16-24.

Defendant admitted at trial that he had been aware that his former employer held annual board meetings in which it determined pension plan fund distributions based on the previous year's income, and that such board meetings were held in March or April, but the results were not known until June or July. (R. 521.) Rptr. Tr. P. 108:1-19. The decree of divorce was entered in May. (R. 62-76.) Wherefore, even if defendant did not know the correct amount of his retirement account at the time the decree was entered, *at the least*, defendant represented the amount in his retirement account *recklessly*, knowing that he had insufficient knowledge upon which to base such representation.

Defendant knew plaintiff was relying strictly on his representations concerning his retirement account in order to make her decisions concerning child support and alimony. (R. 521.) Rptr. Tr. P. 17:5-19, 19:11-25, 20:1-12. It was reasonable for plaintiff to rely on defendant's representations as she was not informed concerning the couple's finances, and defendant claimed he would tell the truth. (R. 521.) Rptr. Tr. P. 9:7-11, 17:13-16.

19:25, 20:1-3. Plaintiff was induced to act upon defendant's false and/or reckless representations as manifested by the decree of divorce. (R. 62-76.) To her detriment, she was awarded far less child support and alimony. (R. 62-76.)

In Shelton v. Shelton, this Court, quoting Clissold v. Clissold, 519 P.2d 241, 242 (Utah 1974), stated:

[a] material misrepresentation or concealment of assets or financial condition as a result of which alimony or property awarded is less or more than otherwise would have been provided for is a proper ground for which the court may grant relief to the party who was offended by such misrepresentation or concealment, absent other equities such as laches or negligence. . . . However, before relief can be granted, it must be determined that the alleged misrepresentation or concealment constitutes conduct such as fraud, as would basically afford the complaining party relief from the judgment. 885 P.2d 807, 808 (Utah App. 1994).

Here, the facts and evidence before the trial court certainly support a prima facie showing of fraud, fulfilling each express element. The court found that defendant had, indeed, misrepresented his retirement account, and therefore, appropriately awarded plaintiff one-half of the true value.

IV. The trial court properly awarded an additional \$6,000 to plaintiff as alimony due to defendant's receipt of disability income.

Before modifying an alimony award, the court must find a "substantial change in circumstances not foreseeable at the time of the [parties'] divorce." Utah Code Ann. § 30-3-5(7)(g)(i) (1999); see Throckmorton v. Throckmorton, 767 P.2d 121, 124 (Utah App. 1988). In this case, there is nothing in the decree itself to demonstrate that disability income was contemplated by the parties, and therefore, it is not considered

foreseeable at the time of divorce. (R. 62-76.)

Again, in Moon v. Moon, this Court stated that “[t]he determination of the trial court that there [has or has not] been a substantial change of circumstances ... is presumed valid,” and the ruling is reviewed under an abuse of discretion standard. 973 P.2d 431, 437 (1999), cert. denied, 982 P.2d 89 (Utah 1999). Further, the Court mentioned that its review of the record showed that the trial court’s ruling was supported by the evidence. Id. at 438.

A. The trial court’s decision was clearly supported by the evidence.

Plaintiff established a prima facie case of changed circumstances. Defendant misrepresented the possibilities of his receiving disability income. (R. 521.) Rptr. Tr. P. 10:9-11, 14:21-24, 19:1-3, 29:3-7, 81:18-23, 82:11-12 (Jan. 14, 1999). The record contains testimony that defendant stated there was no possibility of his receiving disability income in the future. (R. 521.) Rptr. Tr. P. 14:24-25, 15:1-10. Disability income was a material consideration in determining the amount of defendant’s alimony obligation. Finally, disability income was not contemplated in the original decree. (R. 62-76.)

B. Defendant’s misrepresentation represented a compelling reason to modify.

Plaintiff agrees that to hold that a change in circumstances can overcome a stipulation in all cases...opens the door for abuse. Kinsman v. Kinsman, 748 P.2d 210, 212 (Utah 1988). Plaintiff further agrees that, as stated in Epstein v. Epstein, “[e]quity is

not available to reinstate rights and privileges voluntarily contracted away simply because one has come to regret the bargain made.” 741 P.2d 974, 976 (Utah App. 1987).

Property settlement agreements incorporated into stipulated decrees should, indeed, not be modified absent compelling reasons. Land v. Land, 605 P.2d 1248, 1251 (Utah 1980).

However, in this case, plaintiff was misled as to material facts, and therefore, did not enter into the bargain knowingly. She did not ask the trial court to modify the alimony amount simply because she had come to regret the bargain made. On the contrary, a *substantial* change in circumstances had occurred which included deceit on the part of defendant. This represents a compelling reason to modify.

As stated, in order for this Court to overturn a trial court’s modification of a divorce decree, it must find that “the evidence clearly preponderates against the findings or that the trial court has abused its discretion.” Thompson v. Thompson, 709 P.2d 360, 362 (Utah 1985). This is unquestionably not the case here. Indeed, the evidence clearly preponderates that the finding of the trial court concerning a change in circumstances as pertaining to alimony was well-supported. Wherefore, the trial court properly awarded an additional \$6,000 to plaintiff as alimony due to defendant’s receipt of disability income.

V. The evidence in the record supports the trial court’s refusal to modify defendant’s alimony obligation.

The Supreme Court of Utah has stated that the criteria for determining reasonable alimony include the financial condition and needs of the wife, her ability to support herself, and the ability of the husband to provide support. Gramme v. Gramme, 587 P.2d

144, 147 (Utah 1978). Trial courts have broad discretion in making alimony awards.

Haumont v. Haumont, 793 P.2d 421, 423 (Utah App. 1990). This Court has stated that it will not upset a trial court's award of alimony so long as it is within the appropriate legal standards. Johnson v. Johnson, 855 P.2d 250, 252 (Utah App. 1993).

- A. Defendant failed to prove plaintiff did not have need of the amount of alimony she was receiving, that she was able to support herself, and that he did not have the ability to provide support.

There is evidence which demonstrates plaintiff's need for alimony and her inability to support herself. She was attending school full-time, and was not working. (R. 205, 521.) Rptr. Tr. P. 40:25, 41:1-3 (Jan. 14, 1999). She was receiving Pell Grants and help from others in order to maintain herself and two minor children. (R. 205.) She did not have any assets from which to borrow money to support herself. (R. 521.) Rptr. Tr. P. 40:9-24. If defendant had paid the alimony of \$1,500 per month as required by the divorce decree, plaintiff would not have had need of government or other assistance, and could have properly supported herself and two children living with her. (R. 205.)

Defendant did not show his inability to provide support. Although he claimed in his amended petition to modify the decree of divorce that his gross monthly income was \$7,000, his financial declaration showed that his gross income was \$11,666.68 per month. (R. 165, 226.) Even after deductions, defendant stated that his monthly is \$7534.05, and his debts and obligations \$4,700. (R. 225.) That leaves a surplus of \$2,834.05. In addition, defendant testified that at the time of trial he was making even more than his

financial declaration had stated due to an increase in his practice. (R. 521.) Rptr. Tr. P. 97:1-19. Thus, defendant did not present evidence to show that he could not meet the alimony obligation.

B. This Court should enter findings consistent with the evidence in the record and with the conclusion of the trial court.

Plaintiff does not dispute the fact that the trial court's order does not include specific findings as to the issue of alimony. Nevertheless, this Court has the power to weigh the evidence and substitute its own judgment for that of the trial court. Wilson v. Wilson, 296 P.2d 977, 981 (Utah 1956). It can do so when it has some means of knowing upon which facts the trial judge relied in entering his judgment. Montoya v. Montoya, 696 P.2d 1193, 1195 (Utah 1985). The record must contain sufficient evidence to support the trial judge's conclusions. Parish v. Parish, 35 P.2d 999, 1001 (Utah 1934).

As illustrated above, the record in this case is clear. Therefore, in the interest of judicial economy, this Court should weigh the evidence and enter adequate findings based on the information in the record. Such findings should include a determination that the trial court's refusal to modify defendant's alimony obligation was based on the financial condition and needs of the plaintiff, her inability to support herself, and the ability of defendant to provide support.

VI. The trial court's grant of a protective order to the Division of Occupational and Professional Licensing did not affect the outcome in this case.

Plaintiff does not refute that the motion for a protective order was ruled upon

before defendant was given an opportunity to reply. The motion was filed on October 22, 1998. (R. 336-42.) The court, stating that defendant had failed to file any persuasive authority or reasons to set aside the protected status of the Division's records, granted the order on October 28, 1998. (R. 375-7.) This does not appear to be in compliance with Rule 4-501(f)(B) which provides that a party has ten days from the date of service of a motion to file a response. Utah R. Jud. Administration 4-501(f)(B). Notwithstanding, plaintiff maintains that even if defendant had been allowed to respond and had remarkably convinced the trial court that the Bureau Manager from the state's Department of Professional Licensure ("the Division") was not sheltered from testifying concerning information designated as "protected," it would not have affected the trial court's decision not to reduce defendant's alimony obligation.

- A. The information which could have been provided by the Division would have only helped defendant prove his threshold requirement of a substantial change in circumstances.

The information defendant wished to obtain from the Division was evidence to indicate that plaintiff had somehow sabotaged his efforts to obtain a license to practice medicine in Utah. (R. 165.) Had defendant been able to put on this evidence, it would have only helped to establish a substantial change in circumstances which occurred after the time of the divorce. However, that is only a threshold issue.

- B. Defendant failed to show plaintiff's lack of need or ability to support herself, or that he was unable to provide support.

As mentioned above, the court must also consider the financial condition and

needs of the wife, her ability to support herself, and the ability of the husband to provide support. Gramme v. Gramme, 587 P.2d 144, 147 (Utah 1978). To repeat, plaintiff showed that she was attending school full-time and receiving government assistance. (R. 205.) She did not have any assets from which to borrow money to support herself. (R. 521.) Rptr. Tr. P. 40:9-24 (Jan. 14, 1999). Defendant had a gross monthly income in excess of \$11,666.68. (R. 226, 521.) Rptr. Tr. P. 97:1-19. His debts and obligations were \$4,700. (R. 225.) He had the financial ability to pay alimony of \$1,500 per month.

C. The issuance of the protective order is a non-issue.

If procedure under Rule 4-501(1)(B) had been followed correctly, and somehow the protective order had been denied, defendant would only have been able to use the Division's testimony to possibly establish the threshold issue of a substantial change in circumstances. Then, even if established, that substantial change in circumstances would not have been enough to modify alimony. Due to defendant's inability to establish *all* of the criteria necessary in order for a court to reduce his alimony obligation, it is unimportant that the Protective order was not issued in accordance with Rule 4-501(1)(B).

VII. There is no issue concerning defendant's motion for partial summary judgment as the record is void of any evidence that a notice to submit was filed or that a judgment was ever entered by the court.

Rule 4-501(1)(D) of the Utah Rules of Judicial Administration requires that a party seeking a decision on a motion must file a "Notice to Submit for Decision." Utah R. Jud.

Administration 4-501(1)(D). The rule further states that if neither party files a notice, the motion will *not* be submitted for decision. Id. (emphasis added).

In the present case, defendant did indeed file a motion for partial summary judgment, which was then opposed by plaintiff. (R. 265-8, 272-6.) However, defendant failed to comply with Rule 4-501(1)(D) by neglecting to file a notice to submit for decision. There is no evidence in the record whatsoever that the trial court ever ruled on this motion. Furthermore, defendant admits that a written order was never entered. Therefore, this Court has nothing to rely upon to support defendant's contention that his motion for summary judgment was denied, and is accordingly not in a position to review a decision that was never made.

VIII. The evidence in the record supports the trial court's award of attorney fees to plaintiff.

Utah Code Ann. § 30-3-3 (1993) grants trial courts the power to award attorney fees in divorce actions. See Crouse v. Crouse, 817 P.2d 836, 840 (Utah App. 1991). "Both the decision to award attorney fees and the amount of such fees are within the sound discretion of the court." Id., Chambers v. Chambers, 840 P.2d 841, 844 (Utah App. 1992). The award, however, must be based on evidence of the receiving spouse's financial need for attorney fees, the ability of the other spouse to pay, and the reasonableness of the requested award. Id. There is evidence to support each of these in within the record.

A. The trial court's decision was based upon evidence in the record that

plaintiff had a financial need for attorney fees, that defendant had the ability to pay, and that the requested award was reasonable.

First, there is evidence which demonstrates plaintiff's financial need for an award of attorney fees. At trial, plaintiff was asked if she had the funds to pay the legal fees she had incurred as a result of these proceedings. (R. 521.) Rptr. Tr. P. 40:3-7 (Jan. 14, 1999). She answered that she did not. (R. 521.) Rptr. Tr. P. 40:8. She was not working at all because she was attending school full-time. (R. 521.) Rptr. Tr. P. 40:25, 41:1-3. She did not have any assets from which to borrow to pay attorney fees. (R. 521.) Rptr. Tr. P. 40:9-24.

Second, there is evidence that defendant had the ability to pay attorney fees. His gross income was in excess of \$11,666.68 per month. (R. 226, 521.) Rptr. Tr. P. 97:1-15. He stated in his financial declaration that his debts and obligations totaled \$4,700. (R. 225.)

And third, the requested award is reasonable. Nothing is said in the record or in any affidavit claiming that the fees requested were unreasonable in amount.

Ordinarily, when fees in a divorce were awarded below to the party who then prevails on appeal, fees will also be awarded to that party on appeal. Bell v. Bell, 810 P.2d 489, 494 (Utah App. 1991) (quoting Burt v. Burt, 799 P.2d 1166, 1171 (Utah App. 1990)). Plaintiff was awarded attorney fees below. (R. 486.) Upon her success in responding to this appeal, she should likewise be awarded reasonable attorney fees which have resulted. Moore v. Moore, 872 P.2d 1054, 1056 (Utah App. 1994).

- B. This Court should enter findings consistent with the evidence in the record and with the conclusion of the trial court.

Plaintiff does not dispute that the trial court's order does not included specific findings as to the issue of attorney fees. Notwithstanding, because there is ample evidence in the record to enable this Court to discern upon which facts the trial judge relied in entering his judgment, remand is not necessary. Wilson v. Wilson, 296 P.2d 977, 981 (Utah 1956), Montoya v. Montoya, 696 P.2d 1193, 1195 (Utah 1985), Parish v. Parish, 35 P.2d 999, 1001 (Utah 1934).

Again, in the interest of judicial economy, plaintiff asks this Court to weigh the evidence and enter adequate findings based on the information in the record. Such findings should include a determination that the trial court's award of attorney fees was based on plaintiff's financial need for attorney fees, the ability of defendant to pay, and the reasonableness of the requested award.

CONCLUSION

For the foregoing reasons, plaintiff respectfully requests this Court to: 1a) determine as adequate the trial court's findings of fact and conclusions of law with respect to defendant's misrepresentations of his retirement account and disability income, or, in the alternative, enter its own findings of fact and conclusions of law consistent with the trial court's decision and the evidence in the record; 1b) enter appropriate findings of fact concerning the trial court's acceptance of plaintiff's answers to defendant's first discovery request, its refusal to modify defendant's alimony obligation, and its award of

attorney fees to plaintiff consistent with the trial court's decisions and evidence in the record; 2) uphold the trial court's acceptance of plaintiff's answers to defendant's first discovery request; 3) uphold the trial court's award of one-half of defendant's retirement disbursement to plaintiff; 4) uphold the trial court's award of \$6,000 alimony to plaintiff; 5) uphold the trial court's refusal to modify defendant's alimony obligation; 6) determine that the trial court's issuance of the protective order is a non-issue; 7) determine that defendant's argument concerning partial summary judgment is a non-issue; and 8) uphold the trial court's award of attorney fees to plaintiff.

Dated this 5th day of September, 2000.

Respectfully submitted,

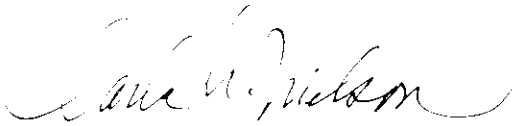
A handwritten signature in dark ink, appearing to read 'K. H. Mueller', is written over a horizontal line.

Karl H. Mueller

PROOF OF SERVICE

I, Carla M. Nielson, certify that on September 6th, 2000, I served two copies of the attached Brief of Appellee upon Samuel G. Draper, attorney for the appellant in this matter, by mailing it to him by first class mail with sufficient postage prepaid to the following address:

Samuel G. Draper
243 East St. George Boulevard, Suite 265
St. George, UT 84770

A handwritten signature in cursive script, reading "Carla M. Nielson", written in dark ink. The signature is fluid and stylized, with a long horizontal flourish extending to the right.

Carla M. Nielson