

1999

Mosdell v. Mosdell : Brief of Appellant

Utah Court of Appeals

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Recommended Citation

Brief of Appellant, *Mosdell v. Mosdell*, No. 991100 (Utah Court of Appeals, 1999).

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IN THE UTAH COURT OF APPEALS

KATHLEEN WILLIAMS MOSDELL,

Plaintiff/Appellee,

v.

DALE McBRIDE MOSDELL,

Defendant/Appellant.

Appellate No. 991100-CA

Argument Priority No. 15

BRIEF OF APPELLANT

Appeal from the orders of the District Court of the Fifth
Judicial District, the Honorable Robert T. Braithaite,
Presiding.

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JURISDICTION OF THE UTAH COURT OF APPEALS

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

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Issue No. 1

Was the trial court required to make findings of fact and conclusions of law when modifying the parties' divorce decree? The interpretation of the Utah Rules of Civil Procedure is a question of law, and is reviewed for correctness. State v. Cosey, 873 P.2d 1177, 1181 (Utah App. 1994). Requests for findings are not necessary for purposes of review. Rule 52(a), Utah Rules of Civil Procedure (2000).

Issue No. 2

Did the trial court err by allowing the plaintiff to withdraw admissions made in pretrial discovery and to present evidence regarding those issues at trial? The applicable standard of review is a modified abuse of discretion standard established by Langeland v. Monarch Motors, 952 P.2d 1058 (Utah App. 1998). Defendant raised his objection to admission of testimony on the relevant issues at trial (R. 530-3).

Issue No. 3

Did the trial court properly award the plaintiff one-half of the additional retirement disbursement received by defendant? The standard of review for to overturn a trial court's modification of a decree of divorce is a showing 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).

Issue No. 4

Did the trial court properly award \$6,000 to plaintiff as alimony due to defendant's receipt of disability income? The standard of review for to overturn a trial court's modification of a decree of divorce is a showing 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).

Issue No. 5

Did the trial court properly refuse to modify defendant's alimony obligation? The standard of review for to overturn a trial court's modification of a decree of divorce is a showing 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).

Issue No. 6

Did the trial court properly grant the "Protective Order" without allowing the defendant an opportunity to respond the underlying motion? The question of whether the court erred in granting the motion without an opportunity to respond is governed by Rule 4-501 of the Utah Code of Judicial Administration and is therefore a matter of statutory construction which is reviewed for correctness. State v. Petersen, 810 P.2d 421, 424 (Utah 1991). Defendant has never waived any objection to the issuance of the protective order, and was never given an opportunity to object before the motion was granted.

Issue No. 7

Did the trial court properly deny defendant's motion for summary judgment? The grant or denial of a motion for summary judgment is reviewed for correctness.

Thompson v. Jess, 979 P.2d 322, 325 (Utah 1999).

Issue No. 8

Did the trial court properly award attorneys fees to the plaintiff? The decision to award attorney fees and the amount of such fees are within the trial court's sound discretion. Crouse v. Crouse, 817 P.2d 836, 839 (Utah Ct. App. 1991).

DETERMINATIVE RULES

Rule 9. Pleading special matters.

(a)(1) Capacity. It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party. When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, he shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge, and on such issue the party relying on such capacity, authority, or legal existence, shall establish the same on the trial.

(2) Designation of unknown defendant. When a party does not know the name of an adverse party, he may state that fact in the pleadings, and thereupon such adverse party may be designated in any pleading or proceeding by any name, provided, that when the true name of such adverse party is ascertained, the pleading or proceeding must be amended accordingly.

(3) Actions to quiet title; description of interest of unknown parties. In an action to quiet title wherein any of the parties are designated in the caption as "unknown," the pleadings may describe such unknown persons as "all other persons unknown, claiming any right, title, estate or interest in, or lien upon the real property described in the pleading adverse to the complainant's ownership, or clouding his title thereto."

(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.

(c) Conditions precedent. In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity, and when so made the party pleading the performance or occurrence shall on the trial establish the facts showing such performance or occurrence.

(d) Official document or act. In pleading an official document or act it is sufficient to aver that the document was issued or the act done in compliance with law.

(e) Judgment. In pleading a judgment or decision of a domestic or foreign court, judicial or quasi-judicial tribunal, or of a board or officer, it is sufficient to aver the judgment or decision without setting forth matter showing jurisdiction to render it. A denial of jurisdiction shall be made specifically and with particularity and when so made the party pleading the judgment or decision shall establish on the trial all controverted jurisdictional facts.

(f) Time and place. For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.

(g) Special damage. When items of special damage are claimed, they shall be specifically stated.

(h) Statute of limitations. In pleading the statute of limitations it is not necessary to state the facts showing the defense but it may be alleged generally that the cause of action is barred by the provisions of the statute relied on, referring to or describing such statute specifically and definitely by section number, subsection designation, if any, or otherwise designating the provision relied upon sufficiently clearly to identify it. If such allegation is controverted, the party pleading the statute must establish, on the trial, the facts showing that the cause of action is so barred.

(i) Private statutes; ordinances. In pleading a private statute of this state, or an ordinance of any political subdivision thereof, or a right derived from such statute or ordinance, it is sufficient to refer to such statute or ordinance by its title and the day of its passage or by its section number or other designation in any official publication of the statutes or ordinances. The court shall thereupon take judicial notice thereof.

(j) Libel and slander.

(1) Pleading defamatory matter. It is not necessary in an action for libel or slander to set forth any intrinsic facts showing the application to the plaintiff of the defamatory matter out of which the action arose; but it is sufficient to state generally that the same was published or spoken concerning the plaintiff. If such allegation is controverted, the party alleging such defamatory matter must establish, on the trial, that it was so published or spoken.

(2) Pleading defense. In his answer to an action for libel or slander, the defendant may allege both the truth of the matter charged as defamatory and any mitigating circumstances to reduce the amount of damages, and, whether he proves the justification or not, he may give in evidence the mitigating circumstances.

Rule 36. Request for admission.

(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. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. Without leave of court or written stipulation, requests for admission may not be served before the time specified in Rule 26(D).

(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 time 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. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or readily obtainable by him is insufficient to enable him to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; he may, subject to the provisions of Rule 37 (c), deny the matter or set forth reasons why he cannot admit or deny it.

(3) The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pretrial conference or at a designated time prior to trial. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(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. Any admission made by a party under this rule is for the purpose of the pending action only and is not an admission by him for any other purpose nor may it be used against him in any other proceeding.

Rule 52. Findings by the court.

(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; in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings 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. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. 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. The trial court need not enter findings of fact and conclusions of law in rulings on motions, except as provided in Rule 41(b). The court shall, however, issue a brief written statement of the ground for its decision on all motions granted under Rules 12(b), 50(a) and (b), 56, and 59 when the motion is based on more than one ground.

(b) Amendment. Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made either a motion to amend them, a motion for judgment, or a motion for a new trial.

(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:

- (1) by default or by failing to appear at the trial;
- (2) by consent in writing, filed in the cause;
- (3) by oral consent in open court, entered in the minutes.

Rule 56. Summary judgment.

(a) For claimant. A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For defending party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and proceedings thereon. The motion, memoranda and affidavits shall be filed and served in accordance with CJA 4-501. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case not fully adjudicated on motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of affidavits; further testimony; defense required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When affidavits are unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a

continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits made in bad faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Rule 4-501. Motions.

(1) Filing and service of motions and memoranda.

(A) Motion and supporting memoranda. All motions, except uncontested or ex-parte matters, shall be accompanied by a memorandum of points and authorities appropriate affidavits, and copies of or citations by page number to relevant portions of depositions, exhibits or other documents relied upon in support of the motion. Memoranda supporting or opposing a motion shall not exceed ten pages in length exclusive of the "statement of material facts" as provided in paragraph (2), except as waived by order of the court on ex-parte application. If an ex-parte application is made to file an over-length memorandum, the application shall state the length of the principal memorandum, and if the memorandum is in excess of ten pages, the application shall include a summary of the memorandum, not to exceed five pages.

(B) Memorandum in opposition to motion. The responding party shall file and serve upon all parties within ten days after service of a motion, a memorandum in opposition to the motion, and all supporting documentation. If the responding party fails to file a memorandum in opposition to the motion within ten days after service of the motion, the moving party may notify the clerk to submit the matter to the court for decision as provided in paragraph (1)(D) of this rule.

(C) Reply memorandum. The moving party may serve and file a reply memorandum within five days after service of the responding party's memorandum.

(D) Notice to submit for decision. Upon the expiration of the five-day period to file a reply memorandum, either party may notify the clerk to submit the matter to the 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.

(2) Motions for summary judgment.

(A) Memorandum in support of a motion. The points and authorities in support of a motion for summary judgment shall begin with a section that contains a concise statement of material facts as to which movant contends no genuine issue exists. The facts shall be stated in separate numbered sentences and shall specifically refer to those portions of the record upon which the movant relies.

(B) Memorandum in opposition to a motion. The points and authorities in

opposition to a motion for summary judgment shall begin with a section that contains a concise statement of material facts as to which the party contends a genuine issue exists. Each disputed fact shall be stated in separate numbered sentences and shall specifically refer to those portions of the record upon which the opposing party relies, and, if applicable, shall state the numbered sentence or sentences of the movant's facts that are disputed. All material facts set forth in the movant's statement and properly supported by an accurate reference to the record shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the opposing party's statement.

(3) Hearings.

(A) A decision on a motion shall be rendered without a hearing unless ordered by the court, or requested by the parties as provided in paragraphs (3)(B) or (4) below.

(B) In cases where the granting of a motion would dispose of the action or any claim in the action on the merits with prejudice, either party at the time of filing the principal memorandum in support of or in opposition to a motion may file a written request for a hearing.

(C) Such request shall be granted unless the court finds that (a) the motion or opposition to the motion is frivolous or (b) that the dispositive issue or set of issues governing the granting or denial of the motion has been authoritatively decided.

(D) When a request for hearing is denied, the court shall notify the requesting party. When a request for hearing is granted, the court shall set the matter for hearing or notify the requesting party that the matter shall be heard and the requesting party shall schedule the matter for hearing and notify all parties of the date and time.

(E) In those cases where a hearing is granted, a courtesy copy of the motion, memorandum of points and authorities and all documents supporting or opposing the motion shall be delivered to the judge hearing the matter at least two working days before the date set for hearing. Copies shall be clearly marked as courtesy copies and indicate the date and time of the hearing. Courtesy copies shall not be filed with the clerk of the court.

(F) If no written request for a hearing is made at the time the parties file their principal memoranda, a hearing on the motion shall be deemed waived.

(G) All dispositive motions shall be heard at least thirty (30) days before the scheduled trial date. No dispositive motions shall be heard after that date without leave of the court.

(H) If a hearing has been requested and the non-moving party fails to file a memorandum in opposition, the moving party may withdraw the request or the court on its own motion may strike the request and decide the motion without oral argument.

(4) Expedited dispositions. Upon motion and notice and for good cause shown, the court may grant a request for an expedited disposition in any case where time is of the essence and compliance with the provisions of this rule would be impracticable or where the motion does not raise significant legal issues and could be resolved summarily.

(5) Telephone conference. The court on its own motion or at a party's request may direct arguments of any motion by telephone conference without court appearance. A verbatim record shall be made of all telephone arguments and the rulings thereon if requested by

counsel.

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 for 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 Findings of Fact and Conclusions of Law and a Decree of Divorce on May 21, 1997 (R. 46-76).

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), which was later amended (R. 163-70).

Trial was conducted on both petitions to modify on January 14, 1999. The court entered an "Order Modifying Decree of Divorce" on November 22, 1999 (R. 485-8). The trial court entered an order on February 28, 2000, enlarging the time for plaintiff to file his appeal (R. 508-9).

III. DISPOSITION IN THE COURT BELOW

The trial court, in its "Order Modifying Decree of Divorce" allowed the plaintiff to withdraw requests for admissions which had previously been admitted, awarded additional alimony to the plaintiff, awarded her $\frac{1}{2}$ of defendant's retirement program which had been awarded to him in the decree, modified defendant's rights of visitation

due to his relocation, and awarded plaintiff her attorneys fees and costs. (R. 485-8). The court made no findings of fact and conclusions of law.

IV. STATEMENT OF FACTS

Plaintiff and defendant were married on November 10, 1973 (R. 294). They had five children, two of whom were adults when this action was commenced (R. 47).

The parties entered into a Chapter 13 bankruptcy plan approximately two years prior to their separation (R. 637). The monthly obligation under the bankruptcy decree was \$3,500 per month (R. 637).

The plaintiff left the parties' home in Idaho with the three minor children in early 1997, and relocated to Cedar City, Utah (R. 639). The defendant was unaware of the whereabouts of his wife and children (R. 621). Due to this fact, the defendant became depressed and was unable to work (R. 621). This was diagnosed with depression and forced to terminate his employment, where he had been making about \$250,000 per year (R. 621). Once the defendant located his wife and children, he relocated to Southern Utah for the sole purpose of being closer and having contact with the children (R. 621-2).

Defendant applied for licensure as a physician in Utah, but his application was delayed and later denied (R. 622).

The parties stipulated to the terms of a decree of divorce, which was entered on May 21, 1997 (R. 62-76). At the time the stipulation was entered into, the defendant was unrepresentative by counsel (R. 62). Plaintiff's counsel drafted the decree (R. 62).

The parties were awarded joint legal custody of the children, with plaintiff being designated the primary custodian and defendant being awarded statutory visitation (R.

63). Despite the fact that he was unemployed, the defendant was ordered to pay plaintiff \$900 in child support per month (R. 65). In the event defendant gained employment as a physician and/or surgeon, child support was to be increased to \$1,500 and, in addition, plaintiff was to be awarded alimony of \$1,500 per month (R. 66). The decree provided that both this award and the original child support award were "subject to judicial review at the appropriate request of either party, without either or both being required to establish any substantial change of material circumstances . . ." (R. 65-6). Both parties were enjoined from claiming that there was not any substantial change of circumstances with respect to any proposed increase or decrease of child support and or alimony. (R. 73).

The defendant was required to pay all of the debts of the parties, including their Chapter 13 bankruptcy payments (R. 68).

The decree provided that defendant was awarded the parties' interest in "whatever retirement programs may exist", and was allowed to use those funds to make the parties Chapter 13 Bankruptcy payments, pay their other obligations, or pay the plaintiff support. (R. 68).

In the parties negotiations leading up to their settlement, the defendant represented that his claims for disability had been denied but that he was reapplying (R. 525). He also stated that he believed there was \$12,000 to \$14,000 in his retirement account (R. 526).

In June of 1997, defendant's application for disability was approved and additional sums were deposited into his retirement account (R. 525, 527). Both of these events took

place after the decree was entered.

The plaintiff filed a petition to modify the decree to obtain one-half of additional funds in the retirement account and the disability payments (R. 79-89), as well as other relief. The petition does not plead fraud or mistake with particularity, and defendant raised that defense in his answer (R. 94).

Defendant served a discovery request upon plaintiff on October 23, 1997, including requests for admissions (R. 99). On December 2, 1997, defendant served a motion to compel discovery, seeking the interrogatories and requests for production of documents (R. 188-20). The motion to compel was not opposed, and was submitted for decision on May 4, 1998 (R. 154-5). The court entered an order compelling the plaintiff to respond to the interrogatories and request for production of documents on May 19, 1998 (R. 156-7).

While it is evident from the record that the plaintiff's counsel sought an extension of the time to respond to discovery, it is as evident that no extension was granted, and that defendant's counsel vigorously sought a response to the pending discovery (R. 424-64).

Defendant finally served answers to the discover request on July 13, 1998, more than 18 months after they were due (R. 242).

Defendant filed a petition to obtain custody of the parties' oldest minor child in January of 1998 (R. 124-9). The court granted defendant temporary custody of the child (R. 140-1). The child turned 18 prior to a final order being entered.

Defendant maintains that his denial of licensure in Utah was due in large part to

the false reports of the plaintiff to the Division of Professional Licensing (R. 168). The defendant was forced to relocate to Idaho, and made substantially less money than he had contemplated making in Southern Utah or elsewhere. While the defendant was able to find a job in Idaho, after the bankruptcy payment of \$3,500 per month, child support of \$1,500 per month, taxes, and alimony of \$1,500 per month (for a total of \$6,000), he did not have enough remaining to live on (R. 168).

Consequently, the defendant amended his petition to modify the decree to include a claim seeking to reduce his alimony obligation and alter his visitation with the two children still in plaintiff's care due to the relocation (R. 163-70). The court held an evidentiary hearing on temporary orders, where it heard evidence regarding these issues. The court's order clarified some of the visitation issues but denied the requested reduction in alimony (R. 140-1).

The defendant filed a motion for partial summary judgment on the issues of the retirement account and the disability income, supported by the admissions and the plaintiff's pleadings (R. 253-68). The plaintiff's response did not reply to each disputed fact in a separate numbered sentence and did not specifically refer the record, and did not state the numbered sentence or sentences of the movant's facts which were disputed (R. 273-6). Although the relevant facts had been admitted by plaintiff, the court denied the motion. No written order was entered.

The defendant subpoenaed a representative of the State of Utah to appear at trial, and testify regarding plaintiff's efforts to have the defendant's application for licensure denied (R. 380-3). The Department of Professional Licensure filed a motion for a

protective order, which the court granted without giving the defendant an opportunity to respond (R. 315-352, 375-7). The order was signed only four business days after it was filed.

Trial was held on January 14, 1999. At trial, the defendant objected to the trial court receiving evidence contrary to the requests for admissions (R. 530-3). The trial court elected to hear the evidence and decide later whether the evidence was admissible. The discovery request was admitted into evidence (R. 624).

At trial, the plaintiff could produce no evidence that defendant, at the time the decree was entered, had knowledge that the disability would be granted or that the retirement disbursement would be forthcoming (R. 571-3).

After paying the bankruptcy payment, paying child support, and meeting his basic living expenses, defendant did not have the ability to pay alimony (R. 542).

The trial court, in its "Order Modifying Decree of Divorce", allowed the plaintiff to withdraw her admissions, awarded plaintiff \$6,000 in alimony for the disability income received by defendant, awarded plaintiff one-half of the retirement disbursement, and granted her other relief.

The court had allowed the plaintiff to file memorandum regarding whether the admissions should be withdrawn. The plaintiff introduced affidavits claiming there had been extension of time to respond (R. 411-6). The defendant denied the same, and produced documentation that, although plaintiff's counsel had requested an extension on several occasions, the same had never been granted, and that the defendant had requested in numerous correspondence that the discovery be completed and sought a motion to

compel discovery (R. 420-3). The court made no findings on this issue in its final order, other than to allow the plaintiff to withdraw her admissions.

The court denied defendant's motion to modify the alimony award, but allowed the defendant some additional visitation.

The court, in addition, awarded plaintiff \$6,800 in attorneys fees.

The court made no findings of fact or conclusions of law in making its order.

This final order was not entered until November, 1999, 10 months after trial.

SUMMARY OF ARGUMENT

This court can not properly review this matter as the trial court did not issue any findings of fact and conclusions of law. These are required in divorce modifications under Montoya v. Montoya, 696 P.2d 1193 (Utah 1985) and Rule 52(b), Utah R. Civ. P. (2000).

The trial court improperly allowed the plaintiff to withdraw requests for admissions made prior to trial. Although the court made no findings regarding this issue, given the evidence presented the plaintiff is not entitled to relief under Langeland v. Monarch Motors, Inc., 952 P.2d 1058 (Utah 1998).

The court found that defendant had misrepresented the amount of his disability payments and retirement account. However, because this was a stipulated decree, to succeed on these issues the plaintiff must show fraud on the part of defendant. Land v. Land, 605 P.2d 1248 (Utah 1980) and Kinsman v. Kinsman, 748 P.2d 210 (Utah App. 1988). Plaintiff did not plead fraud, and admitted at trial that she had no evidence that defendant knew the statements to be untrue. There was therefore no misrepresentation.

The trial court denied defendant's petition to reduce alimony and awarded plaintiff attorneys fees. Findings as to the financial abilities of the parties is required for such a determination. The court failed make such findings, and the case must be remanded on these issues. Gramme v. Gramme, 587 P.2d 144, 147 (Utah 1978); Willey v. Willey, 866 P.2d 547, 555 (Utah App. 1993); Chandler v. West, 610 P.2d 1299 (Utah 1980).

Finally, defendant filed a motion summary judgment. Because plaintiff had failed to respond to discovery, no facts were in dispute. In any case, defendant did not properly respond to the motion under Rule 56, Utah R. Civ. P. (2000), or Rule 4-501, Utah Code of Jud. Admin. (2000).

ARGUMENT

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. TRIAL COURT REQUIRED TO MAKE FINDINGS AND CONCLUSIONS

Rule 52(b) of the Utah Rules of Civil Procedure provides that "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". No oral findings were made by the court and no findings appear in any opinion or memorandum of decision filed by the court. There was no waiver of the entry of findings was made pursuant to Rule 52(c), which in any case may not have been possible because this was a divorce action.

B. CASE LAW REQUIRES FINDINGS AND CONCLUSIONS

In Montoya v. Montoya, 696 P.2d 1193 (Utah 1985), the wife was seeking to

modify the original stipulated decree. The parties had been married for almost 30 years. Although the trial court ruled that the change in circumstances in this case required modification, no supporting findings of fact were entered. The court in Montoya held that:

This Court has held that adequate written findings and conclusions of law "aid the appellate court in the exercise of the discretion it enjoys to review and, if necessary, to adjust the financial and property interests of the parties." *Stoddard v. Stoddard, Utah*, 642 P.2d 743, 744 (1982) (citing U.C.A., 1953, § 30-3-5). As we noted in that case, the trial court's decision "in actions of this sort" may significantly affect the economic welfare and standard of living of the parties . . . for many years." *Id.* at 745. It is essential that such determinations be based on proper findings of fact and conclusions of law. Furthermore, the trial court's failure to enter proper findings does not fulfill Utah R. Civ. P. 52(a), which requires that the trial court specifically find the facts and separately state its conclusions of law in every action tried upon the facts without a jury. *Stoddard* held that actions to modify a divorce decree are not exempt from this requirement. 642 P.2d at 744.

696 P.2d at 1194-5.

In Stoddard v. Stoddard, 642 P.2d 743 (Utah 1982), the wife sought to modify the decree by increasing the husband's child support obligation. The trial court made certain cursory factual findings supporting the modification, but did not enter any written findings. The court held that "However, we have concluded that court action on a request to modify a divorce decree should not be included among those 'decisions of motions' referred to in [in Rule 52(a)] so as to exempt the trial court from the general requirement" to make findings.

A contested petition for modification of a divorce decree is an action tried upon the facts and requires findings of fact and conclusions of law. Parish v. Parish, 35 P.2d 999 (Utah 1934); Cody v. Cody, 154 P. 952 (Utah 1916). More recently, in Chandler v.

West, 610 P.2d 1299 (Utah 1980), the Utah Supreme Court reversed a district court which refused to modify a stipulated property settlement incorporated in the divorce decree but gave no explanation for its refusal and made no findings of fact. Instructing the trial court to enter proper findings of fact and conclusions of law on remand, the court stated:

When a party, as in the instant case, presents a prima facie case of changed circumstances which basically raises a serious question as to [the] fairness and equity of continuing the financial obligations of one party, the court's determination that modification of a decree is nevertheless inappropriate should be based on written findings and conclusions. Written findings and conclusions are just as necessary for the modification of child support as for the alteration or nonalteration of property settlement arrangements.

Id. at 1301.

C. APPELLATE COURT SHOULD NOT SUBSTITUTE ITS OPINION FOR TRIAL COURT

Although the appellate court has power in an equity case such as this to weigh the evidence and substitute its judgment for that of the trial court, Wilson v. Wilson, 296 P.2d 977, 981 (Utah 1956), the court should decline to do so where it has no means of knowing upon which facts the trial judge relied in entering his judgment. This is especially true where the record is deficient. For example, in Montoya v. Montoya, 696 P.2d 1193, 1195 (Utah 1985), no mention

is made in the record of the specific needs of Mrs. Montoya, of her income from other sources (such as welfare or unemployment compensation benefits), of any income Mr. Montoya might have aside from his pension (such as from his property in New Mexico), or of his current living expenses. This Court 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*, Utah, 587 P.2d 144, 147 (1978); *English v. English*, Utah, 565 P.2d 409, 411-12 (1977). Only the second of these three

factors appears to be adequately developed in the record, and we are at a loss, without his findings, to know how the trial judge arrived at the figure he reached.

Montoya v. Montoya, 696 P.2d 1193, 1195 (Utah 1985).

In certain instances, the appellate court may exercise equitable powers and take upon itself the responsibility of weighing the evidence and making its own findings of fact. Willey v. Willey 951 P.2d 226 (Utah 1997). However, this exception must not become merely a guise under which an appellate court substitutes its own judgment for that of the trial court. Alta Pacific Assocs. v. State Tax Comm'n., 931 P.2d 103, 117 (Utah 1997). The appellate court must have a valid reason to take this extraordinary step and then only when the appellate court is in an equal position with the trial court with respect to the facts and evidence at issue.

The trial court is much better suited to make those decisions. Willey v. Willey, 951 P.2d 226 (Utah 1997), 233-4. Indeed, the Supreme Court has uniformly required a manifest injustice before an appellate court may take it upon itself to make its own determinations. Although the court in Willey was aware of the unfortunate length and expense of this litigation, it found would be a greater injustice to the judicial system as a whole if we were to allow an appellate court to substitute its own judgment for that of the trial court, which is better positioned for such a task. The court in Willey further held that:

We reaffirm what this court stated in Owen and in many cases since--the trial court is in the best position to evaluate evidence and make findings of fact. This case is not one of such unusual or extraordinary circumstances as to require the court of appeals to usurp the prerogative of the trial court and make its own independent determinations of alimony and attorney fees. However, even if this had been such a case, the court of appeals erred in failing to make findings of fact

to support its conclusions.

Id. at 235. *See also* Reese v. Reese, 984 P.2d 987 (Utah 1999).

II. WITHDRAWAL OF ADMISSIONS

A. RULE 36

In this matter, defendant served a discovery request, the response to which was filed more than a year and a half late. Rule 36(a), Utah Rules of Civil Procedure, provides that:

Each matter of which an admission is requested . . . is admitted unless, within thirty days after service of the request, or within such shorter or longer time 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

Rule 36(b) provides in pertinent part:

Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. . . . 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.

B. THE REQUESTS FOR ADMISSIONS

On appeal, the relevant requests for admissions are numbers one through three.

They request the plaintiff to admit that:

1. Admit that, as part of the settlement negotiations which led to the parties stipulation in this case, the defendant notified the plaintiff that he had a policy or policies for disability insurance in early May of 1997.

2. Admit that, as part of the settlement negotiations which led to the parties stipulation in this case, the defendant notified the plaintiff that he was currently not receiving disability income but that he might receive such income in the future.

3. Admit that, as part of the settlement negotiations which led to the parties stipulation in this case, the defendant notified the plaintiff that there was approximately \$14,000 in his retirement account, but that other funds could be

deposited in that account in the future.

(R. 105). Because the plaintiff's claim is that the defendant did not disclose the possibility that he might receive disability income or additional retirement funds, the requests for admissions would show that defendant did disclose that possibility and there was therefore no misrepresentation. As this is the basis of plaintiff's claims, the admissions would prevent her from pursuing those causes of action.

C. CASE LAW

The trial court has the discretion to permit withdrawal or amendment of admissions when the presentation of the merits of the action would be served and the party obtaining the admissions fails to satisfy the court that he will be prejudiced in maintaining his action. The trial court does not have discretion to unilaterally disregard the admissions. Jensen v. Pioneer Dodge Ctr., Inc., 702 P.2d 98, 100 (Utah 1985); see also Whitaker v. Nikols, 699 P.2d 685, 686-87 (Utah 1985); Brunetti v. Mascaro, 854 P.2d 555, 558 (Utah App. 1993).

In Langeland v. Monarch Motors, Inc., 952 P.2d 1058 (Utah 1998), Monarch did not respond to requests for admission in a timely manner, and Langeland motioned for summary judgment. The trial court granted Monarch's motion to withdraw the admissions. The supreme court held that:

Because the trial court's decision to grant a rule 36(b) motion is not entirely discretionary, our review of such a decision is not a typical review for "abuse of discretion." Instead, we review these decisions in two steps, using what might be called a "conditional" discretionary standard. In the first step, we review the trial court's determinations as to whether amendment or withdrawal would serve the presentation of the merits and whether amendment or withdrawal would result in prejudice to the nonmoving party. In the second step, we review the trial court's

discretion to grant or deny the motion. The trial court has discretion to deny a motion to amend, but its discretion to grant such a motion comes into play only after the preliminary requirements are satisfied. Decisions placed within the discretion of the trial court can be reversed only upon a finding of abuse of discretion, i.e., if there is no reasonable basis for the decision. *Crookston v. Fire Ins. Exch.*, 860 P.2d 937, 938 (Utah 1993). But because the rule does not give the trial court discretion to disregard the preliminary conditions of rule 36(b), its judgment as to whether those conditions have been satisfied is subject to a somewhat more exacting standard of review.

952 P.2d at 1060-1. The court went on to hold that the party who is seeking to have the admissions withdrawn bears the burden of proof on the matter. 952 P.2d at 1062.

In regards to the first issue, the court in Langeland held that:

To show that a presentation of the merits of an action would be served by amendment or withdrawal of an admission, the party seeking amendment or withdrawal must (1) show that the matters deemed admitted against it are relevant to the merits of the underlying cause of action, and (2) introduce some evidence by affidavit or otherwise of specific facts indicating that the matters deemed admitted against it are in fact untrue.

952 P.2d at 1062. In that case, Monarch disputed the admissions, it lacked "any sort of detailed articulation of such arguments and is entirely devoid of evidence of specific facts contradicting the admissions" and the "record is devoid of any sworn statement that admission No. 2 is untrue." The court held that the admission could not be withdrawn.

D. APPLICATION OF THE LAW TO THIS CASE

1. No Evidence That Admissions Untrue

It is undoubtedly true that the admissions in the instant matter go to the merits of the underlying action. However, the plaintiff has introduced no evidence that the admissions are untrue. The affidavits supporting the request to withdraw the admissions are all from plaintiff's counsel, and do not go to the underlying truthfulness of the

admissions (R. 411-6).

In any case, the admission does not conflict with plaintiff's testimony at trial. She testified that defendant had told her that his application for disability had been denied, but that he would reapply but that the chances of getting any money were minimal (R. 549). It is also clear from the record that the disability claim was not approved until several months after the settlement negotiations (R. 571). The testimony introduced at trial does not contradict the admission, in fact it reinforces it.

The same is true for the retirement account. The defendant testified at trial that she was told there was \$12,000 to \$14,000 in the account (R. 551-2). She did not testify that the defendant did not tell her of possibility that "other funds could be deposited in the account." There is no direct contradiction of the admission, and therefore, as in *Monarch*, no actual evidence that the admission is untrue.

2. Prejudice to Defendant

The defendant is greatly prejudiced by allowing the admissions to be withdrawn. He appeared at trial, expecting these issues to be settled. The court allowed the plaintiff to introduce evidence contrary to the admissions. The plaintiff was unprepared to put on a case regarding these issues.

III. RETIREMENT ACCOUNT

A. PLAINTIFF MUST SHOW MISREPRESENTATION

The parties in this matter reached a settlement agreement regarding the issues of their divorce, which is an enforceable contract.

On a petition for modification of a divorce decree, the threshold requirement for relief is a showing of substantial change in the circumstances of the parties occurring since the entry of the decree and not contemplated in the decree itself. See Haslam v. Haslam, 657 P.2d 757 (Utah 1982); Adams v. Adams, 593 P.2d 147 (Utah 1979). The burden with respect to modifications of divorce decrees based on stipulated settlement agreements, as is the case here, is particularly high. Land v. Land, 605 P.2d 1248 (1980).

Courts are reluctant to disturb property settlement agreements. In the recent case of Land v. Land, 605 P.2d 1248 (Utah 1980), this Utah Supreme Court stated:

True it is that, in making a division of property by a decree of divorce a trial court is governed by general principles of equity. It is likewise true that the court retains continuing jurisdiction over the parties and may modify the decree due to a change in circumstances, equitable considerations again to govern. It must, however, be added that, when a decree is based upon a property settlement agreement, forged by the parties and sanctioned by the court, equity must take such agreement into consideration. Equity is not available to reinstate rights and privileges voluntarily contracted away simply because one has come to regret the bargain made. Accordingly, the law limits the continuing jurisdiction of the court where a property settlement agreement has been incorporated into the decree, and the outright abrogation of the provisions of such an agreement is only to be resorted to with great reluctance and for compelling reasons.

Similarly, in Lea v. Bowers, 658 P.2d 1213 (Utah 1983), the trial court had modified a stipulated decree without any findings of fraud. The case was reversed.

Likewise, in Christensen v. Christensen, 619 P.2d 1372 (Utah 1980), the wife relied upon the husband's statement of the value of some property in settling the matter. As here, she made no effort to verify those amounts. The court held that nonfraudulent misrepresentation by the husband did allow her to avoid the stipulation. The court stated that:

While we are not generally unsympathetic to the position of the plaintiff, we cannot now upset a stipulated property settlement because of her having relied upon values furnished by her husband in an adversary proceeding nor because she was without funds to hire an appraiser of her own. Accordingly, we hold that the District Court committed no error in not disturbing the stipulated property settlement of the parties under these circumstances.

619 P.2d at 1373-4.

C. REQUIREMENTS TO PROVE FRAUD

The elements of an action in deceit based on fraudulent misrepresentation are: (1) a representation; (2) concerning a presently existing material fact; (3) which was false; (4) which the representor either (a) knew to be false, or (b) made recklessly, knowing that he had insufficient knowledge upon which to base such representation; (5) for the purpose of inducing the other party to act upon it; (6) that the other party, acting reasonably and in ignorance of its falsity; (7) did in fact rely upon it; (8) and was thereby induced to act; (9) to his injury and damage. Pace v. Parrish, 247 P.2d 273 (Utah 1952).

In order to prevail on a claim of fraud, all the elements of fraud must be established by clear and convincing evidence. Cheever v. Schramm, 577 P.2d 951, 954 (Utah 1978).

D. FRAUD NOT PLEAD

Rule 9 of the Utah Rules of Civil Procedure requires that fraud be plead. Mere conclusory allegations in a pleading, unsupported by a recitation of relevant surrounding facts, are insufficient to preclude dismissal or summary judgment. Norton v. Blackham, 669 P.2d 857, 859 (Utah 1983); Ellefsen v. Roberts, 526 P.2d 912, 915 (Utah 1974). Here the defendant raised that objection at trial and in the pleadings (R. 94, 649). The

plaintiff in her pleadings only says that there was misrepresentation regarding the retirement account. She does not say that the statement was intentional or that defendant had any knowledge that the statements were false.

E. STIPULATION IS CLEAR AND NO EXTRINSIC EVIDENCE NECESSARY

The stipulation in this case provides that defendant is to receive the retirement account. Where possible, the underlying intent of a contract is to be gleaned from the language of the instrument itself; only where the language is uncertain or ambiguous need extrinsic evidence be resorted to. Oberhansly v. Earle, 572 P.2d 1384 (Utah 1977); Bennett v. Robinson's Medical Mart, 417 P.2d 761 (Utah 1966). No such ambiguity is present in this case, nor was it asserted. Also, the mere fact that the parties urge diverse definitions of contract terminology does not, per se, render it ambiguous. Camp v. Deseret Mutual Benefit Ass'n., 589 P.2d 780 (Utah 1979). Defendant is asking the court to modify the stipulation to provide that there is a cap on the amount that could be in the account. If that were what the parties had intended, they should have included such a provision in the stipulation.

F. FACTS OF THIS CASE

With regards to the retirement fund, plaintiff testified as follows:

- A I was told by Jim Marriott that - the manager of the clinic - that there was about \$12,000, if I closed out my account there was about \$12,000, as of, you know, January or right around there, because, you know, when she left and everything kind of fell apart and I couldn't work and so on and so forth. I was thinking of using that as income He told me that the proportion I would get would be about \$12,000 to \$14,000 depending on how much they held out in taxes.

Q Now when you made that representation to Mr. Bishop and your ex-wife -

A Yes.

Q - did you believe that to be true?

A I did.

Q Okay. Now, its true that sometime later you found out there was more money in there?

A That's true.

Q When did you find that out?

A Boy, I don't know. I can't remember off the top of my head. But it would be I go - I don't know. I think the first time I got it was right around in June.

(R. 626-7). Defendant further testified that the board of the clinic did not determine how much was to be paid to the physicians for their retirement program until March or April, after the end of their fiscal year on February 28th. Funds would not actually be paid until June or July (R. 627-8).

Q So the amount of money that is actually in that account as of February 28th is not really known until June or July?

A Exactly.

Q So you couldn't have known, how much, if there was more that \$14,000 in that policy until June or July?

A No. I had to take Mr. Marriott's word for it.

Q And, again, when you said there was 12 to \$14,000, do you have any information to the contrary.

A Absolutely not.

(R. 628-9).

Plaintiff's former counsel at trial testified that, during the settlement negotiations that there was \$12,000 available or \$14,000 available to him in his retirement program (R. 538-9). This is identical to defendant's testimony.

At trial, defendant's testimony regarding this issues was that "Dale had said that he had \$12,000, maybe \$14,000, but not more than that, and that he needed it to pay off some bills" and that "there was only between \$12,000 and \$14,000, and that there wasn't

any other funds anyplace else.” (R. 551-2). The plaintiff testified that she made no effort to verify these numbers (R. 567).

At trial, the plaintiff admitted that she had no evidence that Dr. Mosdell knew the balance of the retirement account had more than \$14,000 in it until after the decree was entered (R. 572-3).

This case falls squarely within the principle set forth in Land v. Land, 605 P.2d 1248 (Utah 1980). There was a stipulated decree. The defendant told the plaintiff that there was 12 to \$14,000 in his retirement account. This turned out not to be true, or that additional funds would be deposited in the account. However, the plaintiff has made no showing that the defendant knew this to be untrue. The defendant was merely reciting what he had been told in January, the last time he checked. Where the issue was not properly plead and the plaintiff produced no evidence of fraudulent intent, certainly not by clear and convincing evidence, the conclusions of the trial court should be reversed.

IV. DISABILITY INCOME

A. LEGAL REQUIREMENTS TO INCREASE ALIMONY

The requirements to modify the alimony obligation is similar to property distributions. Kinsman, v. Kinsman, 748 P.2d 210 (Utah 1988). In Kinsman, the parties had stipulated that neither would receive alimony. The wife later petitioned the court to modify the decree and award her alimony. The Court of Appeals reversed the granting of the award. After reciting that the wife must show a substantial change of circumstances and held that: “to base the award of alimony on changed circumstances ignores the

finality of the terms of the stipulation which should only be overturned "with great reluctance and for compelling reasons", citing Land v. Land, 605 P.2d 1248 (Utah 1980). The court declined "to hold that a change of circumstances can overcome a knowing and specific waiver in a stipulation." 748 P.2d at 212. In a footnote, the court went on to state that:

To hold that a change of circumstances can overcome a stipulation in all cases . . . opens the door to abuse. Nothing would prevent a party from negotiating a favorable settlement in exchange for a waiver of alimony and sometime later, having enjoyed the benefit of the agreement and having dissipated the assets awarded, coming back to court to obtain alimony on a change of circumstances. Such a rule would encourage fraud and deception and would eliminate the efficacy of stipulated settlements. All divorces would be contested in the hope of establishing finality and preventing future litigation over those matters established in court.

748 P.2d at 212. These principles apply to this case. The defendant notified the plaintiff that he had a disability policy, and that his application had been denied. He also made it clear that he was going to reapply. In the decree, he received that income stream, and bore the risk that it would not produce. Now that it has produced, the plaintiff wishes to go back on the agreement and get part of that income that she bargained away.

B. FACTS OF THIS CASE

The settlement discussions took place in May and the settlement agreements were executed on May 2 and May 12, 1997.

Defendant's testimony at trial regarding the disability income is as follows:

A I told them that I had been denied the disability and that I was reapplying for it. But I didn't know whether I would receive any of it . . .

Q Now, so when you were talking to them [plaintiff and her counsel] in May, you at that time, you were not receiving or planned to receive or couldn't rely on that you were going to receive any disability?

A Could not rely on it. I didn't know that I would receive it or not. And I actually had taken, made steps with my brother to try and borrow some money from him in order to pay the \$900 that she demanded.

Q So that letter dated June 4th that your wife looked at, your ex-wife, that's the first time that you were notified that your claim had been approved?

A Approved, exactly.

(R. 625). He further testified as follows:

Q No, when you - when you represented to Mr. Bishop and your ex-wife that you weren't receiving any disability income, but that you would reapply for it and you might get it, did you believe that to be true?

A Absolutely.

Q Did you know of any facts that would indicate that wasn't true?

A No . . .

(R. 628-9).

Plaintiff's former counsel testified that defendant had represented that he had a disability policy, that he had made an application, and that the application had been denied (R. 530, 534-5). This is identical to defendant's testimony.

Plaintiff at trial testified that defendant had represented that "he had been turned down and that he was going to reapply, but the possibility of getting disability was small" and that "He didn't think that he would get any." (R. 549). The plaintiff made no effort to verify the status of the disability claim (R. 567). She admitted at trial that the disability claim was not approved until June 4, 1997, several months after the entry of the decree herein - although it was approved effective April 30, 1997 (R. 571). She had no evidence whatsoever that defendant had been approved for disability prior to his receipt of the June 4, 1997 letter (R. 571-2).

Both parties were aware of the facts in this case. There was simply no misrepresentation on the part of defendant. Misrepresentation was not plead, and

certainly not proved by clear and convincing evidence at trial. Plaintiff would have had to have shown at trial that defendant knew at the time the negotiations were taking place that he would receive the disability. Her own evidence shows that the disability was not approved for several months after the decree was entered.

V. ALIMONY ADJUSTMENT

The defendant sought to reduce his alimony obligation, due to the fact that he was not making as much money as he had previously or as much as he had planned on when stipulating to the alimony award. Because of his obligation to pay the Chapter 13 Bankruptcy, child support, alimony, taxes, and support a household in Idaho, he was actually losing money on a monthly basis (R. 168). He did not have the ability to pay alimony at the level set by the decree.

Defendant did not make as much money as he had planned because he did not obtain his license in Utah, and was forced to take a lower paying position in Idaho. Defendant maintains that he failed to get his license, in part, because of the efforts of the plaintiff to sabotage his efforts with the Department of Professional Licensure.

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); English v. English, 565 P.2d 409, 411-12 (Utah 1977). It is well grounded in Utah law that the trial court must consider: "(1) the financial conditions and needs of the receiving spouse; (2) the ability of the receiving spouse to produce a sufficient income; and (3) the ability of the supporting spouse to provide support." Godfrey v. Godfrey, 854 P.2d 585, 589 (Utah

App. 1993). A trial court abuses its discretion when it fails to consider the enumerated factors. Willey v. Willey, 866 P.2d 547, 550 (Utah App. 1993). "Thus, 'the trial court must make sufficiently detailed findings on each factor to enable a reviewing court to ensure that the trial court's discretionary determination was rationally based upon'" the required factors. Id. Accordingly, "if sufficient findings are not made, we must reverse unless the record is clear and uncontroverted such as to allow us to apply the . . . factors as a matter of law on appeal." Id.

A contested petition for modification of a divorce decree is an action tried upon the facts and requires findings of fact and conclusions of law. Parish v. Parish, 35 P.2d 999 (Utah 1934); Cody v. Cody, 154 P. 952 (Utah 1916). In Chandler v. West, 610 P.2d 1299 (Utah 1980), the Utah Supreme Court reversed a district court which refused to modify a stipulated property settlement incorporated in the divorce decree but gave no explanation for its refusal and made no findings of fact. Instructing the trial court to enter proper findings of fact and conclusions of law on remand, the court stated:

When a party, as in the instant case, presents a prima facie case of changed circumstances which basically raises a serious question as to [the] fairness and equity of continuing the financial obligations of one party, the court's determination that modification of a decree is nevertheless inappropriate should be based on written findings and conclusions. Written findings and conclusions are just as necessary for the modification of child support as for the alteration or nonalteration of property settlement arrangements.

Id. at 1301.

The trial court in this matter should have made findings of fact and conclusions of law regarding the denial of defendant's claim to reduce alimony.

VI. MOTION FOR PROTECTIVE ORDER

Defendant maintains that plaintiff contributed to his failure to gain licensure in Utah and forced his relocation to Idaho. Defendant thereby lost a lucrative position in Kanab and earned less money, which was relevant to his claim to seek a reduction in alimony. Defendant subpoenaed a representative from the Department of Professional Licensure (DOPL) to appear at trial and testify regarding these issues. On October 22, 1998, the DOPL filed a motion for protective order. On October 28, 1998, the court executed the protective order (R. 375-7). DOPL did not seek an order shortening time, and no notice to submit was ever filed.

Rule 4-501(1)(B), Utah Code of Judicial Administration, provides that a party has ten days from the date of service of a motion to file a response. After that time, the matter may be submitted for decision, but the court may not rule on a motion without said notice being filed. 4-501(1)(D). The court may grant summary disposition of a motion, but only where "Upon motion and notice and for good cause shown, the court may grant a request for an expedited disposition in any case where time is of the essence and compliance with the provisions of this rule would be impracticable or where the motion does not raise significant legal issues and could be resolved summarily." No such claim was made by DOPL, and no notice was provided of an expedited disposition. Rule 4-501 was clearly not complied with. The motion was ruled on before the plaintiff was given his opportunity to respond. This is reversible error. Gillmor v. Cummings, 806 P.2d 1205 (Utah App. 1991)

VII. SUMMARY JUDGMENT

Before trial, the defendant filed a motion for summary judgment based upon the

request for admissions. As discussed above, the admissions refute the notion that there was fraud when defendant made the representations regarding the disability payments and retirement account. As there was then "no genuine issue as to any material fact" and defendant was "entitled to a judgment as a matter of law." Rule 56(c), Utah Rules of Civil Procedure. Plaintiff did not even file an affidavit of any other evidence in opposition to the motion for summary judgment. Under Rule 56(e) provides that:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Further, Rule 4-501(2)(B), Utah Code of Judicial Administration provides that:

The points and authorities in opposition to a motion for summary judgment shall begin with a section that contains a concise statement of material facts as to which the party contends a genuine issue exists. Each disputed fact shall be stated in separate numbered sentences and shall specifically refer to those portions of the record upon which the opposing party relies, and, if applicable, shall state the numbered sentence or sentences of the movant's facts that are disputed. All material facts set forth in the movant's statement and properly supported by an accurate reference to the record shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the opposing party's statement.

Plaintiff failed to follow this procedure. There is no statement as to what facts are disputed, only a general allegation that defendant "misrepresented" his disability and retirement. The specific fact that defendant stated that he said he was reapplying for disability and that he might receive other retirement moneys were not addressed (R. 353-4). No mention is made of the record, only vague references to discovery not yet filed with the court. No reference is made to the numbered sentences of movants facts.

Because the plaintiff failed to follow these procedures, the facts are deemed admitted. They were, of course, they were already admitted because plaintiff failed to comply with discovery.

Because these facts were admitted, there can simply be no cause of action for the disability or retirement. The plaintiff must show by clear and convincing evidence that she has proven each and every element of fraud, and specifically that defendant knew the representations were untrue. She acknowledged at trial that she can provide no such evidence on that issue. She certainly had no such evidence when opposing the motion for summary judgment. Summary judgment was therefore proper.

VIII. ATTORNEYS FEES

The court awarded plaintiff her attorneys fees and costs incurred in pursuing her petition. The decision to make such an award "must be based on evidence of the financial need of the receiving spouse, the ability of the other spouse to pay, and the reasonableness of the requested fees." Willey v. Willey, 866 P.2d 547, 555 (Utah App. 1993) (quoting Bell v. Bell, 810 P.2d 489, 493 (Utah App. 1991)). The failure to consider any of the enumerated factors is ground for reversal on the fee issue. Willey, 866 P.2d at 556; Rudman v. Rudman, 812 P.2d 73, 77 (Utah App. 1991). See Willey, 866 P.2d at 555 ("We have consistently encouraged trial courts to make findings to explain the factors which they considered relevant in arriving at an attorney fee award.")

The trial court here made no findings as to this issue. As discussed above, the defendant testified that he did not have the money to meet his living expenses - how then can he have the ability to pay plaintiff's fees? Further, he testified that he did not have

the funds to pay his own counsel (R. 642-3). This issue should be returned to the trial court so that adequate findings may be made.

CONCLUSION

This court can not properly review this matter as the trial court did not issue and findings of fact and conclusions of law. These are required in divorce modifications under Montoya v. Montoya, 696 P.2d 1193 (Utah 1985) and Rule 52(b), Utah R. Civ. P. (2000). The case must be remanded for additional findings. This issue should be remanded to the trial court. This issue is so clear, and the opposition to the appeal so unwarranted, that defendant should be awarded his costs incurred herein.

The trial court improperly allowed the plaintiff to withdraw requests for admissions made prior to trial. Although the court made no findings regarding this issue, given the evidence presented the plaintiff is not entitled to relief under Langeland v. Monarch Motors, Inc., 952 P.2d 1058 (Utah 1998). The court should reverse the trial court on this issue.


The court found that defendant had misrepresented the amount of his disability payments and retirement account. However, because this was a stipulated decree, to succeed on these issues the plaintiff must show fraud on the part of defendant. Land v. Land, 605 P.2d 1248 (Utah 1980) and Kinsman v. Kinsman, 748 P.2d 210 (Utah App. 1988). Plaintiff did not plead fraud, and admitted at trial that she had no evidence that defendant knew the statements to be untrue. There was therefore no misrepresentation. These issues should likewise be reversed, and these cause of actions dismissed.

The trial court denied defendant's petition to reduce alimony and awarded plaintiff

attorneys fees. Finding as to the financial abilities of the parties is required for such a determination. The court failed make such findings, and the case must be remanded on these issues. Gramme v. Gramme, 587 P.2d 144, 147 (Utah 1978); Willey v. Willey, 860 P.2d 547, 555 (Utah App. 1993); Chandler v. West, 610 P.2d 1299 (Utah 1980). These issues should be remanded to the trial court.

Finally, defendant filed a motion summary judgment. Because plaintiff had failed to respond to discovery, no facts were in dispute. In any case, defendant did not properly respond to the motion under Rule 56, Utah R. Civ. P. (2000), or Rule 4-501, Utah Code of Jud. Admin. (2000). Summary judgment should have entered, and the court should reverse the trial court on that issue. The trial court should be reversed, and summary judgment granted on the issues of the disability and retirement account.

Dated this 18th day of July, 2000.



Samuel G. Draper

CERTIFICATE OF SERVICE

I, Samuel G. Draper, certify that on July 18th, 2000 I served two copies of the attached Brief of Appellant upon Michael W. Park, the counsel for the appellee in this matter, by mailing it to him by first class mail with sufficient postage prepaid to the following address:

Michael W. Park
Park, Park & Barnes, P.C.
P.O. Box 2438
St. George, UT 84771



Samuel G. Draper

DEC - 2 1999

ADDENDUM
ORDER MODIFYING DECREE OF DIVORCE
IN THE FIFTH DISTRICT COURT, IRON COUNTY
STATE OF UTAH

KATHLEEN WILLIAMS MOSDELL,

Plaintiff,

v.

DALE McBRIDE MOSDELL,

Defendant.

**ORDER MODIFYING
DECREE OF DIVORCE**

**Case No. 974500109
Judge Robert T. Braithwaite**

This case came before the Court on November 9, 1999 on a renewed hearing regarding three matters presently pending before the Court: (1) Plaintiff's Verified Petition to Modify Decree of Divorce; (2) Defendant's First Amended Petition to Modify Decree of Divorce; and (3) Plaintiff's Request that the Answers to Defendant's First Discovery Request be Accepted by the Court. Plaintiff was present at the hearing with her attorney of record, Michael W. Park. Defendant was not present, however, but was represented by his attorney of record, Jeffery D. Bursell.

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 upon misrepresentations made by Defendant regarding his finances. As a result, the Court now enters the following:

ORDER

1. The Answers to Defendant's first discovery requests, which were signed on the 13th day of July 1998 in trial, with copies submitted to the Defendant at that time, are hereby admitted.

2. Plaintiff is awarded an additional sum of \$6,000 above the original alimony award because of the previously undisclosed disability income received by Defendant. Other than this modification, alimony is to continue as previously ordered by the Court.

3. As an equitable distribution of marital property, Plaintiff is awarded a sum of \$ 24,353.80, which is half of \$48,707.59 previously unreported by Defendant from his retirement program.

4. As compensation for Defendant's obligation to pay 90% of all uncovered medical bills as required by paragraph 16 of the Decree of Divorce, Plaintiff is awarded a sum of \$787 for medical and therapeutic expenses incurred by Plaintiff for the benefit of the parties' minor children.

5. As compensation for Defendant's failure to comply with the personal property distribution award contained in paragraph 14 of the Decree of Divorce, Plaintiff is awarded a sum of \$750 for the purchase of an upright freezer.

6. Defendant is hereby ordered, in accordance with paragraph 14 of the Decree of Divorce, to deliver all family photographs to Plaintiff, or to pay immediately the costs of reproducing the same using the original negatives, and to deliver the reproductions to Plaintiff.

7. Because the evidence presented at trial regarding the parties remaining personal property was inconclusive, the Court makes no further orders enforcing or modifying the paragraph 14 of the original Decree of Divorce.

8. Because the parties' third child, Mandi (born May 4, 1981), recently reached the age of majority, Child Support is hereby reduced from the \$1500 amount contained within the decree to \$1,000 per month.

9. Defendant's rights of reasonable visitation shall be those set forth in the provisions of Utah Code Ann. § 30-3-35 (1997), a copy of which is attached and incorporated by this reference. Further, Defendant's rights of visitation shall include the following:

(A) Defendant, should he choose to do so, may have the children visit with him for a period of six weeks during the summer.

(B) Defendant is to travel to Cedar City to pick up and return the children during all assigned visitation periods, except that during Thanksgiving, Christmas, and Summer visitation periods Defendant and Plaintiff are to meet and exchange the children at their daughter Marci's home in Provo/Orem.

10. In compliance with paragraph 22 of the Decree of Divorce, Defendant is to designate the parties adult and minor children as beneficiaries of the \$300,000 life insurance policy.

11. In compliance with paragraph 16 of the Decree of Divorce, Defendant is directed to immediately provide Plaintiff with a medical insurance card listing the name of his insurer and his medical insurance policy number.

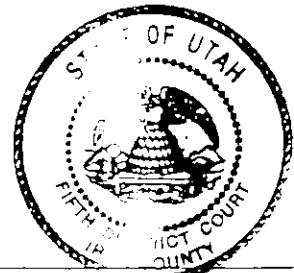
12. Plaintiff is awarded a sum of \$670, which is one half of \$1340 in attorney fees paid by her in conjunction with the parties Idaho divorce proceedings.

13. Plaintiff is awarded \$6,800 for the attorney's fees and costs associated with bringing her Verified Petition to Modify Decree of Divorce.

Dated this 22 day of November, 1999.



ROBERT T. BRAITHWAITE
DISTRICT COURT JUDGE



CERTIFICATE OF MAILING OR HAND DELIVERY

I certify that on this 22nd day of ^{November}~~October~~, 1999 I provided true and correct copies of the foregoing ORDER MODIFYING DECREE OF DIVORCE to each of the attorneys named below by placing a copy in the United States Mail first-class postage prepaid, and addressed as follows:

Samuel G. Draper
187 N 100 W
St. George UT 84770

Michael W. Park
P.O. Box 2430
St. George Ut 84771

Samuel G. Draper
DEPUTY COURT CLERK