2010

Fred Danneman v. Holly Danneman : Brief of Appellant

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

FRED DANNEMAN, Petitioner / Appellee, v. HOLLY DANNEMAN, Respondent / Appellant.	)))))))))	Case No. 20100824-CA

BRIEF OF APPELLANT

Appeal from the Ruling and Order (Re: Ruling August 23, 2010) of the Third District Court, the Honorable Lynn W. Davis, presiding, which were entered on August 23, 2010, and September 14, 2010, respectively.

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STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction over the instant appeal pursuant to Utah Code Ann. § 78A-4-103(2)(h).

STATEMENT OF ISSUES / STANDARDS OF REVIEW

1. Whether the trial court erred by dismissing Wife's Motion for order to show cause based on res judicata. Generally, "[t]he decision to hold a party in contempt of court rests within the sound discretion of the trial court and will not be disturbed on appeal unless the trial court's action 'is so unreasonable as to be classified as capricious and arbitrary, or a clear abuse of discretion.'" *Marsh v. Marsh*, 1999 UT App 14, ¶8, 973 P.2d 988 (quoting *Bartholomew v. Bartholomew*, 548 P.2d 238, 240 (Utah 1976)), *cert. denied*, 982 P.2d 89 (Utah); *accord Anderson v. Thompson*, 2008 UT App 3, ¶11, 176 P.3d 464.

"A trial court abuses its discretion 'if there is no reasonable basis for the decision.'" *Riley v. Riley*, 2006 UT App 214, ¶ 15, 138 P.3d 84 (quoting *Langeland v. Monarch Motors, Inc.*, 952 P.2d 1058, 1061 (Utah 1998)). "An abuse of discretion may be demonstrated by showing that the district court relied on 'an erroneous conclusion of law' or that there was "no evidentiary basis for the trial court's ruling.'" *Kilpatrick v. Bullough Abatement, Inc.*, 2008 UT 82, ¶ 23, 199 P.3d 957 (quoting *Morton v.*

Continental Baking Co., 938 P.2d 271, 274 (Utah 1997)). However, the trial court's interpretation of law, such as that in the instant case involving res judicata, is reviewed for correctness, with no special deference being given on appeal. *Keiter v. Keiter*, 2010 UT App 169, ¶ 16, 235 P.3d 782; *Fisher v. Fisher*, 2009 UT App 305, ¶ 7, 221 P.3d 845, *cert. denied*, 230 P.3d 127 (2010).

Preservation of Issue Citation or Statement of Grounds for Review: Wife preserved this issue by way of her filings and arguments in the course of the subject proceedings as set forth at R. 1903, R. 1904-38, R. 2294:7-11, R. 2294:23-28 et al., R. 2206-18, R. 2295:13-19, R. 2295:43-44 et al.

2. Whether the district court plainly erred by failing to enter explicit, detailed findings of fact concerning the substantive elements of contempt as well as res judicata and by placing the burden of proof on Wife in the contempt proceedings. This issue is raised pursuant to plain error. In *State v. Dunn*, 850 P.2d 1201 (Utah 1993), the Utah Supreme Court outlined the following principles involved in determining whether "plain error" exists:

> In general, to establish the existence of plain error and to obtain appellate relief from an alleged error that was not properly objected to, the appellant must show the following: (i) An error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful, i.e., absent the error, there is a

> reasonable likelihood of a more favorable outcome for the appellant, or phrased differently, our confidence in the verdict is undermined.

Id. at 1208-09; *accord State v. Larsen*, 2005 UT App 201, ¶¶5-6, 113 P.3d 998. Appellate courts review the legal adequacy of findings of fact in divorce cases for correctness as a question of law. *See Kimball v. Kimball*, 2009 UT App 223, ¶ 13, 217 P.3d 733; *Jensen v. Jensen*, 2009 UT App 1, ¶ 6, 203 P.3d 1020. In addition, the appellate court reviews questions involving a trial court's interpretation of law or the failure to comply with rules and procedures for correctness. *See In re S.Y.*, 2003 UT App 66, ¶10, 66 P.3d 601; *In re S.D.C.*, 2001 UT App 253, ¶8, 36 P.3d 540; *Trujillo v. Jenkins*, 840 P.2d 777, 778-79 (Utah 1992); *State v. Richardson*, 843 P.2d 517, 518 (Utah Ct. App. 1992).

Preservation of Issue Citation or Statement of Grounds for Review: Issues involving plain error constitute an exception to the preservation rule and as such may be raised for the first time on appeal.

3. The trial court erred by dismissing Wife's Motion for order to show cause and failing to consider all the claims and supporting evidence set forth in the Motion. The trial court's findings of fact are presumed correct and unless they are shown to be "clearly erroneous" under Utah R. Civ. P. 52(a), they will not be set aside on appeal. *See Kishpaugh v. Kishpaugh*, 745 P.2d 1248,

1253 (Utah 1987). "However, a trial court's conclusions of law are examined for correctness and are accorded no special deference on review." *See Smith v. Smith*, 793 P.2d 407, 409 (Utah Ct. App. 1990) (Citations omitted.).

The inadequacy of findings portion of this issue is raised pursuant to plain error. In *State v. Dunn*, 850 P.2d 1201 (Utah 1993), the Utah Supreme Court outlined the following principles involved in determining whether "plain error" exists:

> In general, to establish the existence of plain error and to obtain appellate relief from an alleged error that was not properly objected to, the appellant must show the following: (i) An error exists; (ii) the error should have been obvious to the trial court; and (iii) the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable outcome for the appellant, or phrased differently, our confidence in the verdict is undermined.

Id. at 1208-09; *accord State v. Larsen*, 2005 UT App 201, ¶¶5-6, 113 P.3d 998. Appellate courts review the legal adequacy of findings of fact in divorce cases for correctness as a question of law. *See Kimball v. Kimball*, 2009 UT App 223, ¶ 13, 217 P.3d 733; *Jensen v. Jensen*, 2009 UT App 1, ¶ 6, 203 P.3d 1020.

Preservation of Issue Citation or Statement of Grounds for Review: Wife preserved this issue by way of her filings and arguments in the course of the subject proceedings as set forth at R. 1903, R. 1904-38, R. 2294:7-11, R. 2294:23-28 et al., R. 2206-18, R.

2295:13-19, R. 2295:43-44 et al. In contrast, issues involving plain error constitute an exception to the preservation rule and as such may be raised for the first time on appeal.

4. Whether the trial court abused its discretion in awarding attorney fees to Husband by relying on an erroneous conclusion of law and by failing to make adequate findings supporting its award. Generally, "'[b]oth the decision to award attorney fees and the amount of such fees are within the trial court's sound discretion.'" *Oliekan v. Oliekan*, 2006 UT App 405, ¶ 30, 147 P.3d 464 (quoting *Wilde v. Wilde*, 969 P.2d 438, 444 (Utah Ct. App. 1998)). However, a trial court exceeds its permitted discretion when it fails to make findings establishing an adequate and reviewable basis for the fee award. *See id.* "An abuse of discretion may be demonstrated by showing that the district court relied on 'an erroneous conclusion of law' or that there was "no evidentiary basis for the trial court's ruling.'" *Kilpatrick v. Bullough Abatement, Inc.*, 2008 UT 82, ¶ 23, 199 P.3d 957 (quoting *Morton v. Continental Baking Co.*, 938 P.2d 271, 274 (Utah 1997)). The Court reviews the legal adequacy of findings of fact in divorce cases for correctness as a question of law. *See Kimball v. Kimball*, 2009 UT App 233, ¶ 13, 217 P.3d 733.

Preservation of Issue Citation or Statement of Grounds for Review: Wife preserved this issue by way of her filings and arguments in

the course of the subject proceedings as set forth at R. 1903, R. 1904-38, R. 2294:7-11, R. 2294:23-28 et al., R. 2206-18, R. 2295:13-19, R. 2295:37:23-25; R. 2295:45:23-25; R. 2295:43-44 et al.

DETERMINATIVE AUTHORITY

The constitutional provisions, statutes, ordinances, rules, and regulations, whose interpretation is determinative, are set out verbatim, with the appropriate citation, in the body and arguments of the instant Brief of Appellant.

STATEMENT OF THE CASE

This case involves, among other things, the trial court's dismissal of Wife's Motion for order to show cause based on res judicata, which precluded Wife's claims and evidence in her Motion from being duly considered and adjudicated by the court.

Prior to the parties' divorce, Husband formed Harvest Films, LC, which was created for the production of the film, "The Best Two Years" -- in which the Dannemans had heavily invested. After a lengthy marriage, Husband filed a Petition for Divorce in October 2004, in which he sought, among other things, an equitable division of the parties' business income.

In November 2005, the district court granted the parties a bifurcated divorce. The district court subsequently issued an

Amended Decree of Divorce, ordering, among other things, that "[t]he parties shall share equally in the parties' right to future disbursements and revenues from the film The Best Two Years." On June 30, 2008, the district court issued an Order, pursuant to a mediation between the parties, requiring Husband to provide an accounting of the disbursements related to the film, "The Best Two Years".

On September 11, 2009, Holly Danneman (Wife) filed a Motion for Order to Show Cause and supporting Affidavit, requesting that Husband be held in contempt for violating the court's orders. Husband responded in opposition, requesting that Wife be held in contempt for failing to comply with the court's restraining order.

At a hearing on December 8, 2009, Wife's counsel requested a continuance, which Husband opposed. The commissioner, however, continued the hearing and reserved a ruling on the parties' requested attorney fees.

Wife, through counsel, subsequently issued various subpoenas and sought discovery. Husband, through counsel, responded with a Motion to quash and for a protective order.

On March 23, 2010, the commissioner heard oral arguments about the disbursement and accounting of revenues from the film, "The Best Two Years". The commissioner dismissed the Motion, refused to allow any discovery, and denied both requests for attorney fees.

Both parties objected to the commissioner's recommendation. On June 30, 2010, the district court heard oral argument on the objections, after which it took the matter under advisement.

On August 23, 2010, the district court issued its ruling, overruling Wife's objection, sustaining Husband's objection, and ordering Wife to pay Husband attorney fees in the amount of $500.00. Wife filed a timely Notice of Appeal.

STATEMENT OF FACTS

1. On March 18, 2003, Fred Danneman (Husband), filed Articles of Organization, forming Harvest Films, LC, as a Utah limited liability company (R. 1585-86).

2. Harvest Films was created for the production of the film, "The Best Two Years" -- in which the Dannemans had heavily invested (R. 1197, ¶ 5).

3. The film, "The Best Two Years", is the "sole and only asset of value of Harvest Films . . . ." (R. 1197, ¶ 5).

4. The Dannemans were the "chief investors" of the film and, as such, "are entitled to 90 percent of the revenues of the investors' side." (R. 2295:22:15-18).

5. Halestorm - which is the distributor of the film, "The Best Two Years" - receives all of the sales revenues for the film (R. 2295:21:9-12). After deducting nominal expenses and a 20%

distribution fee, Halestorm forwards the remaining revenues to Harvest Films (R. 2295:21:12-21).

6. In October 2004, Husband filed a Petition for Divorce, seeking, among other things, an equitable division of the parties' business income (R. 1-7).

7. At the time Husband filed the Petition, the parties had been married for over 26 years (R. 7, ¶ 2).

8. In November 2005, the district court granted the parties a bifurcated divorce (R. 743).

9. On January 20, 2006, the district court issued an Amended Decree of Divorce, ordering, among other things, that Husband "is entitled to all right, title, and interest that the parties may have in Harvest Films (R. 797, ¶ 9). The Decree also ordered that "[t]he parties shall share equally in the parties' right to future disbursements and revenues from the film The Best Two Years." (R. 797, ¶ 10). *See* Amended Decree of Divorce, R. 793-99, a true and correct copy of which is attached to this Brief as Addendum A.

10. On October 2, 2007, Husband filed a Motion for Order to Show Cause and supporting Affidavit (R. 1429 and R. 1447).

11. On October 30, 2007, Holly Danneman (Wife) filed a Verified Response to Order to Show Cause and Counter Motion for Relief (R. 1480). In her Counter Motion, Wife argued that Husband

had failed to disburse her share of the profits from the film, "The Best Two Years", in the amount of $82,641.00 (R. 1468-70).

12. On November 5, 2007, the commissioner, after a hearing on the competing Motions for order to show cause filed by the parties, ruled that Wife had failed to meet her burden of proof (R. 2289:24:5-7).[1] However, in conjunction with that ruling, the commissioner found, "that's an issue that's still open, it still seems to be ongoing, and she's entitled to do ongoing discovery." (R. 2289:24:7-11).

13. Wife objected to the commissioner's recommendation (R. 1490).

14. On April 29, 2008, the district court entertained the arguments of counsel on the objection, taking under advisement the claim for judgment against Husband for the failure, under the decree, to disburse funds for the film, "The Best Two Years" (R. 2292; R. 1877).

15. Later that same day, the court received notice from the parties that the matter had been settled (R. 1877).

16. On June 30, 2008, the district court issued an Order pursuant to a mediated agreement of the parties, which ordered the following:

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[1]The commissioner commented, "But I'm not, what I'm, there's a difference between saying it's not owed and saying she's failed to meet her burden of proof." (R. 2289:24:7-9).

> [Husband] will give [Wife] an accounting and/or disbursement checks (if there are disbursement checks) within 60 days of receiving funds from Halestorm, including a copy of the check from Halestorm received and an accounting of the expenses and disbursements as attached to this agreement. [Husband] will request that Halestorm simultaneously send [Wife] copies of all checks when they are sent to Harvest Films. Both parties will provide the other with K-1s as required by the Internal Revenue Service each year as soon as reasonably prepared. [Husband] has no objection to her calling Halestorm directly. [Husband] does not object to [Wife] calling other parties to verify his accounting or to make reasonable inquiries regarding Harvest Films and the disbursements related to The Best Two Years.

(R. 1881-82, ¶ 13). *See* Order, R. 1880-84, a true and correct copy of which is attached to this Brief as Addendum B.

17. On September 11, 2009, Wife filed a Motion for Order to Show Cause and supporting Affidavit, requesting that Husband be held in contempt for, among other things, the following: violating the court's restraining order for posting negative content on the internet concerning Wife's book, "The Triumphs of the Twelve Apostles of Jesus"; for failing to provide a full accounting and disbursement of funds received for the film, "The Best Two Years" pursuant to the court's Order of June 30, 2008 and the divorce decree; and for failing to provide a full financial disclosure pursuant to the Order of June 30, 2008 (R. 1903 and R. 1938). The Motion included a request for attorney fees (*Id.*).

18. Husband responded in opposition, requesting that Wife be held in contempt for failing to comply with the court's restraining order and requesting attorney fees (R. 2079).

19. At a hearing on December 8, 2009, Wife's counsel requested a continuance, to which Husband objected (R. 2293:3-7; R. 2293:14:2-3). The commissioner continued the hearing and reserved a ruling on the requests for attorney fees (R. 2080; R. 2087; R. 2155).

20. Counsel for Wife subsequently issued subpoenas to Halestorm Distribution, the entity responsible for distributing the film, "The Best Two Years", and to managers of Harvest Films, which owns the rights to the film, requesting information concerning the disbursement of revenues from the film (R. 2115-26).

21. Husband, through counsel, filed a Motion to quash the subpoenas (R. 2141). In addition, counsel filed a Motion seeking a protective order from discovery propounded by Wife concerning the accounting to be provided for disbursements of revenue for the film, "The Best Two Years" (R. 2197).

22. On March 23, 2010, the commissioner heard oral arguments about the disbursement of revenues and the accounting that is to be provided by Husband for the film, "The Best Two Years" (R. 2294:9-28). Without addressing any other issues, the commissioner dismissed the Motion on the basis of res judicata as to what is to

be provided as an accounting of disbursements, and that no discovery should be allowed (R. 2294:31-32).[2] The commissioner, relying on *Anderson v. Thompson*, 2008 UT App 3, 176 P.3d 464, denied both requests for attorney fees because neither side had proven that the other had a greater ability to pay (R. 2294:32-33).

23. Both parties objected to the commissioner's recommendation (R. 2218; R. 2229).

24. On June 30, 2010, the district court heard oral argument on the objections to the commissioner's recommendation -- taking the matter under advisement (R. 2295).

25. On August 23, 2010, the district court issued its ruling in which it overruled Wife's objection and affirming the commissioner's recommendation, interpreting the June 2008 Order as not requiring Husband "to account for every penny of revenue and disbursements that are in some way related to the film, "The Best Two Years" (R. 2260; R. 2262-63). The court sustained Husband's objection, ordering Wife to pay Husband attorney fees in the amount of $500.00 (R. 2260-62). *See* Ruling, R. 2258-69, and Order - Re: Ruling August 23, 2010, a true and correct copy of which are attached to this Brief as Addendum E.

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[2]A true and correct copy of the commissioner's ruling is attached to this Brief as Addendum C (R. 2294:31-33).

26. On September 22, 2010, Wife filed a timely Notice of Appeal (R. 2279). *See* Notice of Appeal, R. 2276-79, a true and correct copy of which is attached this Brief as Addendum F.

SUMMARY OF ARGUMENTS

1. The trial court erred by dismissing Wife's Motion for order to show cause based on res judicata. Although it is unclear from the record on appeal which branch of res judicata the court relied upon in dismissing Wife's Motion, neither branch supports the outright dismissal imposed in the instant case.

The claim raised by Wife in her Motion for order to show cause, filed September 11, 2009, is a different claim than that raised in any prior proceeding. Although Husband's disbursements of revenues for the film, "The Best Two Years", had been the topic of prior disputes between the parties -- none of the prior disputes had been brought in relation to the recently imposed accounting requirements set forth in the Order of June 30, 2008, which the trial court had imposed pursuant to the parties mediation in April that same year.

Prior to that Order, there existed no specific definition of the accounting documentation to be provided by Husband in the course of making the requisite disbursements. Consequently, the nature of the proceedings involving Wife's Motion for order to show

cause, which is the subject of this appeal, is completely different from that of any prior proceeding. In light of this difference, it is difficult to see how the claim raised in Wife's Motion could and should have been asserted in an earlier proceeding.

The difference in proceedings is further demonstrated by the fact that each and every disbursement made by Husband, which allegedly failed to include Wife's equal portion of the revenues of the film, constituted a new act of alleged impropriety. As a result, a different kind or character of evidence, not to mention the facts, is necessary to prove them.

The analysis under the branch of claim preclusion is likewise applicable to issue preclusion. Because the claim raised by Wife in her Motion, filed September 11, 2009, is different than that raised in any prior proceeding, the second and third requirements of the *Collins* test are not satisfied.

2. The district court plainly erred by failing to enter explicit, detailed findings of fact concerning the substantive elements of contempt as well as res judicata and by placing the burden of proof on Wife in the contempt proceedings. The district court's findings are not "sufficiently detailed and do not include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached. The court's findings appear to state little more than the ultimate legal conclusions.

Further, the court's findings are devoid of any subsidiary findings concerning the substantive elements of contempt that Husband knew what was required or that he had the ability to comply with the Order. Moreover, the court's findings fail to reference the specific allegations raised in Wife's Motion concerning Husband's failure to provide the requisite accounting of disbursements due to the preclusive determination, without more, that res judicata applied to Wife's claim.

The trial court also erred by placing the burden of proof on Wife in the course of the contempt proceedings. In its ruling and recommendation, the commissioner erroneously placed the burden on Wife, which the district court affirmed. While it is true that an order to show cause will not issue except upon an affidavit that a party has violated or disobeyed the court's orders, once issued, the burden is on the defendant to present evidence with respect to the three elements of contempt.

These errors should have been obvious in light of the aforementioned case law explicitly requiring courts to enter explicit, detailed findings in contempt proceedings and that the burden of proof is on the party against whom the order to show cause is issued. The errors were harmful because the court ultimately utilized these inadequate findings and the erroneously placed burden of proof as the basis for dismissing Wife's Motion

for order to show cause. Had the court properly entered the requisite explicit, detailed findings and properly addressed the substantive elements of contempt -- not to mention placing the burden of proof on the appropriate party, there is a reasonable likelihood, if not a firm conviction, that Wife's Motion would not have been dismissed.

3. The trial court erred by dismissing Wife's Motion for order to show cause and failing to consider all the claims and supporting evidence set forth in the Motion. Wife filed a Motion for Order to Show Cause and supporting Affidavit, On September 11, 2009, requesting that Husband be held in contempt for the following: violating the court's restraining order for posting negative content on the internet concerning Wife's book, "The Triumphs of the Twelve Apostles of Jesus"; for failing to provide a full accounting and disbursement of funds received for the film, "The Best Two Years", pursuant to the court's Order of June 30, 2008, and the divorce decree; and for failing to provide a full financial disclosure pursuant to the Order of June 30, 2008. After erroneously placing the burden of proof on Wife, the commissioner apparently dismissed the entire Motion for order to show cause on the basis of res judicata, which the district court affirmed.

The commissioner in the course of the recommendation relied heavily on the documents Husband filed in response. The

commissioner subsequently issued an order of its recommendation. The findings contained in that order, however, are not sufficiently detailed and do not include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached. In fact, the findings appear to state little more than the ultimate legal conclusions that res judicata served as a basis to dismiss all claims in Wife's Motion for order to show cause. Further, the court's findings are devoid of any subsidiary findings concerning the substantive elements of contempt that Husband, with respect to all the claims raised in Wife's Motion, knew what was required or that he had the ability to comply with the Order.

This error concerning the inadequate findings should have been obvious in light of the case law explicitly requiring courts to enter explicit, detailed findings in contempt proceedings and that the burden of proof is on the party against whom the order to show cause is issued. The error was harmful because the court ultimately utilized these inadequate findings and the erroneously placed burden of proof as the basis for dismissing Wife's Motion for order to show cause. If the court had properly entered the requisite explicit, detailed findings and placed the burden of proof on the appropriate party, there is a reasonable likelihood that Wife's Motion would not have been dismissed in such a manner.

The trial court did not consider all the claims and evidence set forth in Wife's Motion for order to show cause because of its erroneous ruling based on res judicata. Because of this error, this Court should reverse and remand for consideration of all the claims and evidence in the Motion for order to show cause.

4. The trial court abused its discretion in awarding attorney fees to Husband by relying on an erroneous conclusion of law and by failing to make adequate findings supporting its award. In its ruling, the trial court determined that because Wife had previously lost on this very issue, and had continued to litigate in spite of prior rulings and in spite of the parties' intention to end litigation in 2008, a $500 fee award was necessary as a sanction for Wife's conduct.

Res judicata does not apply to the instant case. Moreover, the trial court's findings are inadequate because they fail to provide an adequate and reviewable basis for the fee award. The trial court, in the course of its determination that Husband had substantially prevailed, failed to take into consideration that Wife had prevailed to a certain degree by Husband's admitted removal of his internet tags concerning Wife's book as soon as he received Wife's Motion for order to show cause. Consequently, the trial court's fee award was not only based on an erroneous

conclusion of law but the court's findings are inadequate as to the determination that Husband was the prevailing party.

ARGUMENTS

I. THE TRIAL COURT ERRED BY DISMISSING WIFE'S MOTION FOR ORDER TO SHOW CAUSE BASED ON RES JUDICATA.

A. Principles Governing Res Judicata

The preclusive doctrine of res judicata "is based on the premise that the proper administration of justice is best served by limiting parties to one fair trial of an issue or cause." *Trimble Real Estate v. Monte Vista Ranch, Inc.*, 758 P.2d 451, 453 (Utah Ct. App. 1988) (citation omitted), *cert. denied*, 769 P.2d 819 (Utah); *see also Snyder v. Murray City Corp.*, 2003 UT 13, ¶ 33, 73 P.3d 325. As a result, res judicata evolved from common law jurisprudence "to relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication." *Allen v. McCurry*, 449 U.S. 90, 94, 101 S.Ct. 411, 414 (1980).

Res judicata contains two related but distinct branches -- which are both intended to promote judicial economy and the convenience furnished by finality in legal controversies. *Copper State Thift and Loan v. Bruno*, 735 P.2d 387, 389 (Utah Ct. App. 1987); *Salt Lake City v. Silver Fork Pipeline Corp.*, 913 P.2d 731, 733 (Utah 1995). Claim preclusion or pure res judicata, bars,

among other things, the relitigation of claims that have been previously litigated between the same parties. *Id.*; *see also Miller v. USAA Cas. Ins. Co.*, 2002 UT 6, ¶ 57, 44 P.3d 663. To legitimately invoke this branch of res judicata, the following three requirements must be satisfied:

> First, both cases must involve the same parties or their privies. Second, the claim that is alleged to be barred must have been presented in the first suit or must be one that could and should have been raised in the first action. Third, the first suit must have resulted in a final judgment on the merits.

Madsen v. Borthick, 769 P.2d 245, 247 (Utah 1988).

The other branch, issue preclusion - known also as collateral estoppel - prevents relitigation of issues that have been decided, though the causes of action or claims for relief are not the same. *Penrod v. Nu Creation Creme, Inc.*, 669 P.2d 873, 875 (Utah 1983); *see also Copper State*, 735 P.2d at 389. Issue preclusion applies when the party seeking preclusion establishes the following four elements:

> (i) [T]he party against whom issue preclusion is asserted must have been a party to or in privity with a party to the prior adjudication; (ii) the issue decided in the prior adjudication must be identical to the one presented in the instant action; (iii) the issue in the first action must have been completely, fully, and fairly litigated; and (vi) the first suit must have resulted in a final judgment on the merits.

Collins v. Sandy City Bd. of Adjustment, 2002 UT 77, ¶ 12, 52 P.3d 1267 (quoting *In re Rights to Use of All Water*, 1999 UT 39, ¶ 18, 982 P.2d 65).

Res judicata applies in divorce actions and subsequent modification proceedings. *Hogge v. Hogge*, 649 P.2d 51, 53 (Utah 1982). The application of res judicata in divorce actions is different, however, due to the equitable doctrine that allows courts to reopen determinations if a moving party demonstrates a substantial change in circumstances. *See Thompson v. Thompson*, 709 P.2d 360, 361 (Utah 1985) (per curiam); *Hogge*, 649 P.2d at 53; and *Throckmorton v. Throckmorton*, 767 P.2d 121, 123 (Utah Ct. App. 1988). Moreover, the courts have continuing jurisdiction imparted by statute to enter subsequent orders regarding the parties, their children, or their property "as is reasonable and necessary." *See* Utah Code Ann. § 30-3-5(3).

B. Neither Branch of Res Judicata Supports the Dismissal of Wife's Motion for Order to Show Cause

Although it is unclear from the record on appeal which branch of res judicata the court relied upon in dismissing Wife's Motion,[3] neither branch supports the outright dismissal imposed in the instant case. According to the district court's ruling, which

[3]*See* Argument II set forth below for the detailed argument of the trial court's failure to disclose the steps by which the ultimate conclusion regarding res judicata was reached.

overruled Wife's objection to the commissioner's recommendation and, in turn, affirmed the res judicata reasoning underlying that recommendation, res judicata would bar essentially any challenge - even future claims - Wife might have to the accounting of disbursements related to the film, "The Best Two Years".[4]

The function of res judicata is "to protect litigants from the burden of relitigating an *identical* issue with the same party or his privy and to promote judicial economy by preventing needless litigation." *Smith v. Smith*, 793 P.2d 407, 409 (Utah Ct. App. 1990) (emphasis added). With respect to the application of the claim preclusion branch of res judicata to this case, there can be no real dispute that the first and third requirements of the *Madsen* test appear to be satisfied. *See Madsen*, 769 P.2d at 247. The parties are the same, and the dismissal of Wife's Motion for order to show cause resulted in a judgment on the merits. Hence, the question remains whether the second requirement of the *Madsen* test was met -- that is, whether the claim presented in Wife's Motion for order to show cause, filed September 11, 2009, and adjudicated in the ensuing proceedings, was the same claim presented in prior

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[4]The commissioner, in its recommendation, stated, "I do believe res judicata means res judicata and it doesn't mean just res judicata as to everything before. I think it means it [is] res judicata as to exactly what documentation has to be provided." (R. 2294:31-32). Thereafter, the district court simply overruled and thereby affirmed the commissioner's recommendation.

proceedings and, even if it was not, whether it could and should have been asserted in an earlier proceeding.

Claim preclusion is inapplicable if the later proceeding is based on a different claim, demand, or cause of action than was at issue in the prior proceeding. *Schaer v. Department of Transp.*, 647 P.2d 1337, 1340 (Utah 1983). When the two claims or causes of action rest on different facts, and evidence of a different kind or character is necessary to prove them, the claims are not the same for purposes of res judicata. *Id.*; *accord Round Hill Gen. Improvement Dist. v. B-Neva, Inc.*, 96 Nev. 181, 606 P.2d 176, 178 (1980) (holding that claims are not identical unless "the same evidence supports both the present and former cause of action").

In the case at bar, the claim raised by Wife in her Motion for order to show cause, filed September 11, 2009, is a different claim than that raised in any prior proceeding. Although Husband's disbursements of revenues for the film, "The Best Two Years", had been the topic of prior disputes between the parties -- none of the prior disputes had been brought in relation to the recently imposed accounting requirements set forth in the Order of June 30, 2008, which the trial court had imposed pursuant to the parties mediation in April that same year.

The Order, issued June 30, 2008, contained the following accounting mandate:

> [Husband] will give [Wife] an accounting and/or disbursement checks (if there are disbursement checks) within 60 days of receiving funds from Halestorm, including a copy of the check from Halestorm received and an accounting of the expenses and disbursements as attached to this agreement. [Husband] will request that Halestorm simultaneously send [Wife] copies of all checks when they are sent to Harvest Films. Both parties will provide the other with K-1s as required by the Internal Revenue Service each year as soon as reasonably prepared. [Husband] has no objection to her calling Halestorm directly. [Husband] does not object to [Wife] calling other parties to verify his accounting or to make reasonable inquiries regarding Harvest Films and the disbursements related to The Best Two Years.

(R. 1881-82, ¶ 13). *See* Order, dated June 30, 2008, attached to this Brief as Addendum B. Prior to that date, there existed no specific definition of the accounting documentation to be provided by Husband in the course of making the requisite disbursements.[5] Wife's Motion and supporting Affidavit requested that Husband be held in contempt for, among other things, failing to provide a full accounting and disbursement of funds received for the film, "The Best Two Years", pursuant to the court's Order of June 30, 2008 and the divorce decree (R. 1931-35). Consequently, the nature of the proceedings involving Wife's Motion for order to show cause, which

[5]The Amended Decree of Divorce, issued January 20, 2006, ordered that Husband "is entitled to all right, title, and interest that the parties may have in Harvest Films (R. 797, ¶ 9). In addition, the Order required that "[t]he parties shall share equally in the parties' right to future disbursements and revenues from the film The Best Two Years." (R. 797, ¶ 10). *See* Amended Decree of Divorce attached to this Brief as Addendum A.

is the subject of this appeal, is completely different from that of any prior proceeding. In light of this difference in proceedings, it is difficult to see how the claim raised in Wife's Motion could and should have been asserted in an earlier proceeding.

The difference in proceedings is further demonstrated by the fact that each and every disbursement made by Husband, which allegedly failed to include Wife's equal portion of the revenues of the film, constituted a new act of alleged impropriety. As a result, a different kind or character of evidence, not to mention the facts, is necessary to prove each of them. *See Schaer*, 647 P.2d at 1340 (claims are not the same for res judicata purposes when the two claims or causes of action rest on different facts, and evidence of a different kind or character is necessary to prove them).

The above-utilized analysis under the branch of claim preclusion is likewise applicable to issue preclusion -- the other branch of res judicata. Because the claim raised by Wife in her Motion, filed September 11, 2009, is different than that raised in any prior proceeding, as previously discussed, the second and third requirements of the *Collins* test are not satisfied. In other words, the issue decided in any prior adjudication is not identical to the one presented in the instant action and, as a result, the issue in the first action -- based on the differences specifically

referenced above -- were not completely, fully, and fairly litigated. *See Collins*, 2002 UT 77 at ¶ 12, 52 P.3d 1267.

II. THE DISTRICT COURT PLAINLY ERRED BY FAILING TO ENTER EXPLICIT, DETAILED FINDINGS OF FACT CONCERNING THE SUBSTANTIVE ELEMENTS OF CONTEMPT AS WELL AS RES JUDICATA AND BY PLACING THE BURDEN OF PROOF ON WIFE IN THE CONTEMPT PROCEEDINGS.

"As a general rule, in order to prove contempt for failure to comply with a court order it must be shown that the person cited for contempt knew what was required, had the ability to comply, and intentionally failed or refused to do so." *Von Hake v. Thomas*, 759 P.2d 1162, 1172 (Utah 1988) (citing *Coleman v. Coleman*, 664 P.2d 1155, 1156 (Utah 1983) and *Thomas v. Thomas*, 569 P.2d 1119, 1121 (Utah 1977)). A finding of contempt must be supported by clear and convincing evidence. *Thomas*, 569 P.2d at 1121. The burden of proof is upon the party against whom the order to show cause is issued. *De Yonge v. De Yonge*, 103 Utah 410, 412, 135 P.2d 905, 906 (1943).

The trial court must make explicit findings with respect to each of the three substantive elements that are sufficiently detailed to "'disclose the steps by which the ultimate conclusion on each factual issue was reached.'" *Butler, Crockett & Walsh Dev. Corp. v. Pinecrest Pipeline Operating Co.*, 909 P.2d 225, 231 (Utah 1995) (quoting *Acton v. J.B. Deliran*, 737 P.2d 996, 999 (Utah

1987)); *see also Rucker v. Dalton*, 598 P.2d 1336, 1339 (Utah 1979); *Hall v. Hall*, 858 P.2d 1018, 1021 (Utah Ct. App. 1993); *see also Sukin v. Sukin*, 842 P.2d 922, 924 (Utah Ct. App. 1992); Utah R. Civ. P. 52(a)). The facts and reasons for the trial court's decision must be set forth fully in appropriate findings and conclusions to ensure that the trial court acted within its broad discretion. *See Connell v. Connell*, 2010 UT App 139, ¶¶ 5, 13, 133 P.3d 836; *Kunzler v. Kunzler*, 2008 UT App 263, ¶ 15, 190 P.3d 497 (considering property division findings), *cert. denied*, 199 P.3d 970. When the trial court's findings are insufficient to permit meaningful review, the appellate court ordinarily does not make its own factual findings, but remands the case for the entry of additional findings. *State v. Ramirez*, 817 P.2d 774, 788 (Utah 1991); *Acton*, 737 P.2d at 999; *Rucker*, 598 P.2d at 1339.

The district court's failure to enter explicit, detailed findings of fact, including the failure to place the burden of proof on Husband, is raised for the first time on appeal pursuant to plain error. In *State v. Dunn*, 850 P.2d 1201 (Utah 1993), the Utah Supreme Court outlined the following principles or elements for establishing "plain error":

> In general, to establish the existence of plain error and to obtain appellate relief from an alleged error that was not properly objected to, the appellant must show the following: (i) An error exists; (ii) the error should have been

> obvious to the trial court; and (iii) the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable outcome for the appellant, or phrased differently, our confidence in the verdict is undermined.

Id. at 1208-09; *State v. Dean*, 2004 UT 63, ¶ 13, 95 P.3d 276; *accord State v. Larsen*, 2005 UT App 201, ¶¶ 5-6, 113 P.3d 998. As articulated in *State v. Verde*, 770 P.2d 116, 121-22 (Utah 1989), "in most circumstances, the term 'manifest injustice' [found in Utah R. Crim. P. 19(c)] is synonymous with the 'plain error' standard expressly provided in Utah Rule of Evidence 103(d) . . . ."

In this case, the district court's findings are not "sufficiently detailed and [do not] include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached." *Rucker*, 598 P.2 at 1338. The court's findings appear to state little more than the ultimate legal conclusions (*See* R. 2245-48). Further, the court's findings are devoid of any subsidiary findings concerning the substantive elements of contempt that Husband knew what was required or that he had the ability to comply with the Order. *See Khan v. Khan*, 921 P.2d 466, 469-70 (Utah Ct. App. 1996). Moreover, the court's findings fail to reference the specific allegations raised in Wife's Motion concerning Husband's failure to provide the requisite accounting of disbursements due to the preclusive determination,

without more, that res judicata applied to Wife's claim. Wife's claim concerning Husband's failure to provide the accounting required by the Order of June 30, 2008, included an expert opinion of an accountant, Steven B. White, CPA, that the accounting provided by Husband in the course of the disbursements lacked support and documentation from third parties to verify the accuracy of such (R. 2214-15, ¶ 6). In addition, Wife provided proof that Husband had failed to provide documentation of disbursements to third parties, which, in turn, reduced Wife's equal portion of the revenues with little or no explanation (R. 1904-38). In fact, Wife, on at least one occasion, received no portion of the revenues on the film (*See* R. 1934, ¶ 15).

The trial court also erred by placing the burden of proof on Wife -- as opposed to Husband -- in the course of the contempt proceedings. In its ruling and recommendation, the commissioner stated, "We are here on an order to show cause for contempt, not to establish new orders. I find that Ms. Danneman has failed to prove contempt by clear an[d] convincing evidence." (R. 2294:31:18-21). The district court affirmed the commissioner's ruling and recommendation by overruling Wife's objection. "While it is true that an order to show cause will not issue except upon an affidavit that a party has violated or disobeyed the court's orders, once issued, the burden is on the defendant to present evidence with

respect to the three elements stated in Thomas, supra." *Coleman*, 664 P.2d at 1156-57. In contempt proceedings, the "'affidavit is sufficient if it states the acts done or omitted in violation of the order of the court.' [Citations omitted.]. Ability to pay is a matter of defense and the burden of proof is upon the defendant in the contempt proceeding." *De Yonge*, 103 Utah at 412, 135 P.2d at 905-06.

These errors should have been obvious in light of the aforementioned case law explicitly requiring courts to enter explicit, detailed findings in contempt proceedings and that the burden of proof is on the party against whom the order to show cause is issued. The errors were harmful because the court ultimately utilized these inadequate findings and the erroneously placed burden of proof as the basis for dismissing Wife's Motion for order to show cause. Had the court properly entered the requisite explicit, detailed findings and properly addressed the substantive elements of contempt -- not to mention placing the burden of proof on the appropriate party, there is a reasonable likelihood, if not a firm conviction, that Wife's Motion would not have been dismissed.

III. THE TRIAL COURT ERRED BY DISMISSING WIFE'S MOTION FOR ORDER TO SHOW CAUSE AND FAILING TO CONSIDER ALL THE CLAIMS AND SUPPORTING EVIDENCE SET FORTH IN THE MOTION.

The trial court's findings of fact are presumed correct and unless they are shown to be "clearly erroneous" under Utah R. Civ. P. 52(a), they will not be set aside on appeal. *See Kishpaugh v. Kishpaugh*, 745 P.2d 1248, 1253 (Utah 1987). "However, a trial court's conclusions of law are examined for correctness and are accorded no special deference on review." *See Smith v. Smith*, 793 P.2d 407, 409 (Utah Ct. App. 1990) (Citations omitted.).

On September 11, 2009, Wife filed a Motion for Order to Show Cause and supporting Affidavit, requesting that Husband be held in contempt for the following: violating the court's restraining order for posting negative content on the internet concerning Wife's book, "The Triumphs of the Twelve Apostles of Jesus"; for failing to provide a full accounting and disbursement of funds received for the film, "The Best Two Years", pursuant to the court's Order of June 30, 2008, and the divorce decree; and for failing to provide a full financial disclosure pursuant to the Order of June 30, 2008 (R. 1903 and R. 1904-38). After erroneously placing the burden of proof on Wife (R. 2294:31:20-21), the commissioner apparently dismissed the entire Motion for order to show cause on the basis of res judicata (R. 2294:31-32). The

district court affirmed the recommendation by overruling Wife's objection (R. 2262-63).

The commissioner in the course of the recommendation, stated, "I'm relying heavily . . . on the documents [Husband] filed in response . . . ." Later - the commissioner issued an Order of its recommendation (R. 2245-48).[6] The findings contained in that order are not "sufficiently detailed and [do not] include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached." *Rucker v. Dalton*, 598 P.2d 1336, 1338 (Utah 1979). In fact, the findings appear to state little more than the ultimate legal conclusions that res judicata served as a basis to dismiss all claims in Wife's Motion for order to show cause (*See* R. 2245-48).[7] Further, the court's findings are devoid of any subsidiary findings concerning the substantive elements of contempt that Husband, with respect to all the claims raised in Wife's Motion, knew what was required or that he had the ability to comply with the Order.[8] *See Khan v. Khan*,

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[6]A true and correct copy of the commissioner's Order on Hearing, entered April 27, 2010, is attached to this Brief as Addendum D.

[7]Husband's documents contain no analysis as to how res judicata precludes Wife's other claims from being duly considered by the trial court (*See* R. 1953-2079).

[8]The portion of this issue that involves the adequacy of the trial court's findings is raised pursuant to plain error as specifically set forth in Argument II, which is incorporated into this Argument III.

921 P.2d 466, 469-70 (Utah Ct. App. 1996). *See* Argument II above, the legal citations and authority for which are incorporated into this Argument III.

This error concerning the inadequate findings should have been obvious in light of the previously discussed case law explicitly requiring courts to enter explicit, detailed findings in contempt proceedings and that the burden of proof is on the party against whom the order to show cause is issued. The error was harmful because the court ultimately utilized these inadequate findings and the erroneously placed burden of proof on Wife as the basis for dismissing her Motion for order to show cause. If the court had properly entered the requisite explicit, detailed findings -- including placing the burden of proof on the appropriate party -- there is a reasonable likelihood that Wife's Motion would not have been dismissed in such a manner.

The trial court did not consider all the claims and evidence set forth in Wife's Motion for order to show cause due to its erroneous ruling based on res judicata. *Cf. Smith*, 793 P.2d at 411. Consequently, the trial court erred -- and, therefore, this Court should reverse and remand for consideration of all the claims and evidence in the Motion for order to show cause.

IV. THE TRIAL COURT ABUSED ITS DISCRETION IN AWARDING ATTORNEY FEES TO HUSBAND BY RELYING ON AN ERRONEOUS CONCLUSION OF LAW AND BY FAILING TO MAKE ADEQUATE FINDINGS SUPPORTING ITS AWARD.

As a general rule, "'[b]oth the decision to award attorney fees and the amount of such fees are within the trial court's sound discretion.'" *Oliekan v. Oliekan*, 2006 UT App 405, ¶ 30, 147 P.3d 464 (quoting *Wilde v. Wilde*, 969 P.2d 438, 444 (Utah Ct. App. 1998)). Nevertheless, a trial court exceeds its permitted discretion when it fails to make findings establishing an adequate and reviewable basis for the fee award. *See id.* "An abuse of discretion may be demonstrated by showing that the district court relied on 'an erroneous conclusion of law' or that there was "no evidentiary basis for the trial court's ruling.'" *Kilpatrick v. Bullough Abatement, Inc.*, 2008 UT 82, ¶ 23, 199 P.3d 957 (quoting *Morton v. Continental Baking Co.*, 938 P.2d 271, 274 (Utah 1997)).

The trial court abused its discretion by awarding attorney fees to Husband because it relied upon an erroneous conclusion of law in the course of doing so. In its ruling, the trial court stated, "The court simply believes that it would be in the best interest of justice to limit the fee award as the court does not find strong evidence that [Wife] is litigating in bad faith." (R. 2261). The trial court continued, "However, because [Wife] has lost previously on this very issue, and has continued to litigate

in spite of prior rulings and in spite of the parties' intention to end litigation in 2008," the court found that a $500 fee award was necessary as a "sanction" for Wife's conduct (R. 2260-61).

As discussed in detail above, res judicata does not apply to the instant case. Moreover, the trial court's findings are inadequate because they fail to provide an adequate and reviewable basis for the fee award.[9] The trial court, in the course of its determination that Husband had substantially prevailed, failed to take into consideration that Wife had prevailed to a certain degree by Husband's admitted removal of his internet tags concerning Wife's book as soon as he received Wife's Motion for order to show cause (R. 2295:37:23-25). Consequently, the trial court's fee award was not only based on an erroneous conclusion of law but the court's findings are inadequate as to the determination that Husband was the prevailing party.

The trial court's failure to provide adequate findings should have been obvious in light of the previously discussed case law, which requires courts to enter findings supporting its award. The error was harmful because the court ultimately utilized its inadequate findings and the erroneous conclusion of law as the basis for the award to Husband. If the court had properly

[9]This issue is raised pursuant to plain error as specifically set forth in Argument II, the legal authority of which is incorporated into this Argument IV.

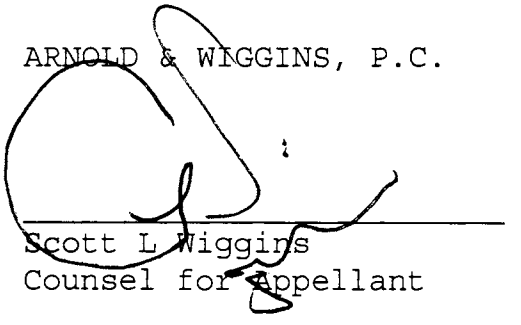
considered the issue, making adequate findings as to the prevailing party on all claims, there is a reasonable likelihood that the award would not have been made to Husband.

CONCLUSION

Based on the foregoing, Wife respectfully asks that this Court reverse the trial court's dismissal of her Motion for order to show cause and the award of attorney fees to Husband and remand for further proceedings consistent with this Court's opinion, and that the Court grant her any other relief the Court deems just or appropriate under the circumstances.

RESPECTFULLY SUBMITTED this 1st day of August, 2011.

ARNOLD & WIGGINS, P.C.

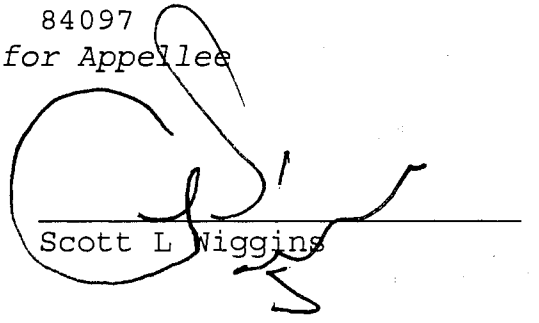


Scott L Wiggins
Counsel for Appellant

CERTIFICATE OF SERVICE

I, SCOTT L WIGGINS, hereby certify that I personally caused to be mailed by First-Class Mail, postage prepaid, two (2) true and correct copies of the foregoing **BRIEF OF APPELLANT** to the following on this 2nd day of August, 2011:

Mr. David J. Hunter
Dexter & Dexter
1360 South 740 East
Orem, UT 84097
Counsel for Appellee



Scott L Wiggins

ADDENDA

Addendum A:	Amended Decree of Divorce
Addendum B:	Order entered June 30, 2008
Addendum C:	Transcript of commissioner's ruling 03/23/2010
Addendum D:	Order on Hearing, entered April 27, 2010
Addendum E:	Ruling and Order - Re: Ruling August 23, 2010
Addendum F:	Notice of Appeal

Tab A

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IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR UTAH COUNTY
STATE OF UTAH

FRED DANNEMAN, Petitioner, vs. **HOLLY DANNEMAN,** Respondent.	**AMENDED DECREE OF DIVORCE** Case No. 044402147 Division No. 8 Judge Anthony W. Schofield

THIS MATTER having come before the court for trial on December 19, 2005, and the parties having stipulated to the final orders herein, the Court having taken all matters herein under advisement, and being fully advised in the premises, having heretofore signed Findings of Facts and Conclusions of Law, and for good cause appearing therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. Divorce: The parties were previously granted a bifurcated decree of divorce entered on November 21, 2005.

2. Marital Home: Respondent is awarded all right, title, and interest in the marital residence in Alpine, Utah and shall be responsible for all expenses therefore. Petitioner waives his one-half interest in the marital home in exchange for Respondent's waiver of alimony.

3. Alimony: Respondent waives alimony now and forever and in favor of the award of the marital home to her.

4. Adjacent Lot: The parties own a lot adjacent to the marital home in Alpine, Utah. Respondent is awarded this lot and all expenses therefore on the condition that she make a good faith effort to refinance the current loan on the property (approximately $165,000) out of Petitioner's name and pay Petitioner his one-half equity position in the lot. If she is unable to remove the loan from Petitioner's name for any reason within 90 days, the lot will be placed on the market for sale and sold. The proceeds of the sale, after payment of the sales costs and the payoff of the loan, shall be divided equally between the parties.

5. Overdraft loan: The parties have a personal/overdraft loan of approximate $50,000 outstanding. Petitioner will be responsible for this loan and has received credit for Respondent's one-half responsibility ($25,000) in the below personal property settlement.

6. Pensions: The parties have various pension plans and/or accounts. Such accounts shall be divided between the parties equally, including to but not limited to the UK Pensions. Qualified domestics relations orders shall issue from this court as necessary to divide such plans or accounts.

7. Timeshares: Petitioner shall be awarded one winter-week time share and be responsible for the expenses therefore. Respondent is awarded two winter weeks and one summer week of the time shares together will all expenses therefore. The unequal distribution on the timeshares was for settlement on and equalization of personal loans during this action by the parties to third parties.

8. RMSA: Petitioner is awarded all right, title, and interest that the parties may have in the business Rock Mountain Sports Academy. Respondent is granted an

equitable interest only to share in one-half of any future direct distributions or dividends received by Petitioner from the business on an ongoing basis or from the sale of the same. Payments to the parties shall be made directly to each directly from the business. Respondent's interest shall be equitable only and shall be non-voting and shall carry no management authority or decision making powers. The decision to sell the business shall rest solely with Petitioner. The Petitioner shall not sell the business for less than one million dollars unless the parties agree in writing to a lower price. Respondent may have the businesses' books audited or examined upon reasonable request. The parties acknowledge that the interest of Petitioner may change after their investment funds have been repaid and that the interest of Petitioner may be reduced to one-third. In any event, after such reduction in ownership interest, Respondent's equitable interest is limited to and shall be one-half of the disbursements to Petitioner in perpetuity.

9. Harvest Films: Petitioner is entitled to all right, title, and interest that the parties may have in Harvest films.

10. Best Two Years: The parties shall share equally in the parties' right to future disbursements and revenues from the film The Best Two Years.

11. Charlie: The parties shall share equally in the parties' right to future disbursements and revenues from the film Charlie. The equalization of the revenue received from Charlie between separation up to and including the payment received for June 26, 2005 was accounted for in the division of the IRA accounts below.

12. Tax Loss Carry Forwards: All tax loss carry-forwards of the parties shall be divided equally.

13. Personal Property Division:

a. Vehicles: Petitioner is awarded the Jeep and Mustang. Respondent is awarded the Durango, the Honda S2000, and the Honda ATV.

b. Petitioner's Separate Property: Petitioner is awarded the following as separate personal property: (1) The dining room table and 6 chairs; (2) "Mark Spitz" by LeRoy Neiman; and (3) "Appelant Ecartele" by Joan Miro.

c. Neiman Art: Petitioner is awarded the following works of art by LeRoy Neiman: "Lady Liberty"; "Abe Lincoln"; "The Big Five"; "Elephant Nocturn"; "Red Square"; "Tiger"; and "Elephant Charge".

d. Auduban Art: Petitioner is awarded the eight works of art by John J. Audubon.

e. Records: Petitioner is awarded his records/framed record collection and the Simbari art book.

f. Cash: Each party is awarded one-half of the cash available.

g. Stock: Each party is awarded one-half of the Clifton stock.

h. Life Insurance Policies: Each party is awarded the life insurance policy in his or her respective name along with the cash value, loans, and obligations and premiums therefore.

i. Petitioner: Petitioner is awarded all other art and personal property in his possession and not otherwise distributed herein.

j. Respondent: Respondent is awarded all other art and personal property in her possession and not otherwise distributed herein.

k. Exchange: The parties shall use good faith to exchange the property herein in the next 30 days and to give each other reasonable notice of his or her intent to do so.

14. IRA: The parties each have separate IRA accounts. In order to equalize the personal property division, each is awarded his or her IRA account with the exception that Petitioner will transfer $41,000 from his account to her account. A qualified domestic relations order shall issue from this court to effectuate this transfer if necessary.

15. Personal effects: Petitioner is awarded is personal effect, clothes, books, and personal items outside of the scope of the personal property appraisal list. Petitioner will give Respondent reasonable notice of his intent to pick up such items, either party may request the assistance of counsel, and Petitioner will attempt to pick up these items within 30 days.

16. Miscellaneous: Tara is awarded her personal property, clothes, and effects and is allowed to remove such items from the marital home. Respondent will return Petitioner's photo card chips to Petitioner.

17. Restraining Orders: Both parties shall be permanently restrained from saying or doing anything, including but not limited to speaking derogatorily about the other parent, speaking to the child about the issues in this case, or from any actions that would tend to diminish the love and affection of the child for the other parent. Both parties are permanently and mutually restrained from harassing, annoying, or otherwise bothering the other party, the other party's family members, or the other party's non-mutual friends, including but not limited to Ashley Mangum. Both parties are restrained from contacting the other party, the other party's family members, or the other party's

non-mutual friends, including but not limited to Ashley Mangum, either directly or indirectly. Contact between the parties for the purpose of discussing the minor child, visitation, and other ongoing concerns regarding the minor child is allowed but shall be limited to contact via email or telephone only. Both parties are restrained from coming to each other's current or future residence, place of business, employment, or other places known to be frequented by the other party. Both parties are mutually restrained from allowing third parties to do what they themselves are prohibited from doing under this paragraph.

18. Fees: Each party shall be responsible for and pay for his or her respective attorney fees and costs incurred.

DATED this 20 day of January, 2006

BY THE COURT:

Anthony W. Schofield
District Court Judge

Approval as to form:

Bruce Nelson
Counsel for Respondent

Date

NOTICE OF INTENT TO SUBMIT FOR SIGNATURE

Pursuant to Rule 7(f)(2) of the Utah Rules of Civil Procedure, you are hereby notified that the forgoing will be sent to the Court for signing upon the expiration of five (5) days from the date of this notice, plus three (3) days if service is by mail, unless a written objection is filed with the Court prior to that time.

DATED this 30th day of December, 2005

David J. Hunter

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I personally served a true and correct copy of the foregoing on this 3rd day of December, 2006 to the following

Bruce L. Nelson
1145 South 800 East, Suite 117
Orem UT 84097

Sent via:
___Hand-Delivery
___Facsimile
_✓_Mailed (U.S. Mail, postage prepaid)
__Other _____

Lynette Howcroft
_✓_Secretary __Attorney

Tab B

David J. Hunter (9015)
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Counsel for Petitioner

IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR
UTAH COUNTY, STATE OF UTAH

FRED DANNEMAN, Petitioner, vs. **HOLLY DANNEMAN,** Respondent.	**ORDER** Case No. 044402147 DA Division: 8 Judge Lynn W. Davis

THIS MATTER came before the Court pursuant to mediation attended by the parties and a written agreement of the parties duly signed by each party and their counsel. The Court, now being fully advised in the premises, makes and enters the following:

1. The parties intend to end all litigation between them from this date forward.

2. Both parties are of sound mind and body and enter into this agreement freely, voluntarily, without duress or coercion and with the advice of counsel. Judy Dunston was present as Respondent's therapist during the mediation and confirms that Respondent understands this agreement.

3. The parties understand that there is litigation pending between them in a divorce action case number 044402147 and a civil action under case number 060401926 and that this

settlement will serve to end all litigation, claims, motions, and hearings now pending, in all cases referenced herein including case number 050400471.

4. The parties understand that they have the right not to enter into this agreement and to have the court decide their respective claims, but agree to waive this right in favor of these agreements.

5. The pending ruling on the Objection with Judge Davis is also resolved herein, and counsel for the parties will contact the court and request that the Objection be withdrawn. Counsel for Respondent will file paperwork regarding the same with the court immediately.

6. All civil cases, except the protective order remaining in the alienation of affections case (050400471) will be dismissed with prejudice.

7. All UK Pensions domiciled in the UK, will be awarded to Petitioner. The pension through Deutsche bank will be divided as heretofore ordered.

8. Resopndent will withdraw all filings with the State of Utah regarding trademark, copyright, patent, Harvest Films, and The Best Two Years. She will also withdraw similar filings with the U.S. Patent & Trademark offices. She will provide sufficient documentation to Petitioner by August 1, 2008 that this has been completed. If such filings lapse automatically by August 1, 2008 without Respondent taking further action, such lapsing shall satisfy this requirement, if such verification is provided that in fact the filings have lapsed and are of no effect.

9. Respondent will sign documents to transfer the Utah Harvest Films, LC entity and The Best Two Years, LC entity to Petitioner or assigns.

10. Both parties agree not to violate the current restraining orders as issued in the divorce case.

11. Any web sites as indicated in Petitioner affidavit for order to show cause currently pending have or will be removed and will remain removed by Respondent. Any other web sites that would violate the restraining orders will be removed or cancelled immediately. The parties will not permit or cause to be posted any content pertaining to each other, their business associates, businesses, non-mutual friends, including to but not limited to Ashley Mangum or Michael Flynn, from the internet, websites, blogs, or any other area of the internet.

12. Respondent (or any entity with whom she may become associated) will cease and desist from holding herself out as the producer or creator of the Best Two Years. Respondent (or any other entity with which she may become associated) may hold herself out as "assisting in the financing and helped with the production of the film The Best Two Years."

13. Petitioner will give Respondent an accounting and/or disbursements checks (if there are disbursement checks) within 60 days of receiving funds from Halestorm, including a copy of the check from Halestorm received and an accounting of the expenses and disbursements as attached to this agreement. Petitioner will request that Halestorm simultaneously send Respondent copies of all checks when they are sent to Harvest Films. Both parties will provide the other with K-1s as required by the Internal Revenue Service each year as soon as reasonably prepared. Petitioner has no objection to her calling Halestorm directly. Petitoiner does not object to Respondent calling other parties to verify his accounting or to make

reasonable inquiries regarding Harvest Films and the disbursements related to The Best Two Years.

14. Respondent will pay Petitioner $6,000 upon the signing of this agreement.

15. The parties warrant that they have made a full disclosure of all the assets and bank accounts in this matter.

16. The undersigned warrant that they are not under the influence of alcohol, prescription drugs, or any other medication or influence when they signed this document.

17. All other provisions in the Amended Decree of Divorce and the previous orders of the Court not modified herein, remain in full force and effect.

DATED this 30 day of June, 2008.

ORDERED BY THE COURT:

JUDGE LYNN W. DAVIS

Approval as to form:

J. Bruce Reading
Counsel for Respondent

Date

NOTICE OF INTENT TO SUBMIT FOR SIGNATURE

Pursuant to Rule 7(f)(2) of the Utah Rules of Civil Procedure, you are hereby notified that the forgoing will be sent to the Court for signing upon the expiration of five (5) days from the date of this notice, plus three (3) days if service is by mail, unless a written objection is filed with the Court prior to that time.

DATED this 30th day of April, 2008

David J. Hunter

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served on the following, this 30th day of April, 2008:

J. Bruce Reading
SCALLEY & READING, P.C.
50 South Main, Ste. 950
P.O. Box 11429
Salt Lake City UT 84147-0429

Sent via:
___Hand-Delivery
___Facsimile
__✓Mailed (U.S. Mail, postage prepaid)
__Other _____

__Secretary __Attorney

Tab C

ORIGINAL

IN THE FOURTH JUDICIAL DISTRICT COURT, PROVO

UTAH COUNTY, STATE OF UTAH

-o0o-

FRED DANNEMAN,	)	
	)	
Plaintiff,	)	Case No. 044402147
	)	
vs.	)	RULE 101 HEARING
	)	
HOLLY DANNEMAN,	)	
	)	
Defendant.	)	

-o0o-

BE IT REMEMBERED that on the 23rd day of March, 2010, commencing at the hour of 2:09 p.m., the above-entitled matter came on for hearing before COMMISSIONER THOMAS PATTON, sitting as Judge in the above-named Court for the purpose of this cause, and that the following proceedings were had.

-o0o-

subpoenas be quashed or--

THE COURT: Thank you. What else do you want? Move past the discovery.

MR. HUNTER: Okay. We would like--we would like the--a special master procedures as outlined in our motion to be established.

THE COURT: No.

MR. HUNTER: Okay. And we would like the issue of re--of attorney's fees to remain on the table.

THE COURT: Thank you.

In this matter, I find that this has come up several times, not once, several times, before the Court. And it's always similar argument, it's always similar. "Well, we think that we're not getting the right amount of money." And the Court has resolved this and resolved it and as far as I can tell from the 2008 order, resolved it again. And said, this is the accounting that is required.

We are here on an order to show cause for contempt. not to establish new orders.

I find that Ms. Danneman has failed to prove contempt by clear an convincing evidence.

I'm relying heavily, Mr. Hunter, on the documents you have filed in response, so, I'm not basing it simply from what I'm stating from the bench, but I do believe res judicata means res judicata and it doesn't mean just res judicata as to

everything before. I think it means it res judicata as to exactly what documentation has to be provided. Both sides were represented by attorneys, both sides could have argued for additional documentation. It says what it says.

I believe, Mr. Hunter, your client has complied with the 2008 order, at least he has substantially complied with the intent of the 2008 order; therefore, I'm dismissing the order to show cause. There not being an underlying action, I don't have to go to the subpoenas, I don't have to go to the discovery issues.

But if I'm wrong, if I am wrong, then I find at least as to discovery on anything prior to 2008, in other words, if I'm wrong about, oh, yes, there was proof on the order to show cause, then I find specifically that you can't do discovery prior to the order from 2008, period. We're just not going there, we're not--we are not going to plow again the same ground.

As to attorneys' fees and costs, it's the Thompson case, I cannot think of the Thompson--of the rest of it, but there's a case that says I've got to have financial declarations, I've got to have set--evidence that the other party's in a better position to pay attorney's fees. It's no longer--you can't just say, we prevailed, you've got to also establish the other side has a greater ability to pay. No one's proven to me that either side has a greater ability to

pay. Neither side is awarded attorney's fees and costs.

Mr. Hunter, I want you to prepare the order. I want you to make it clear I am not relying only on what you argued today, I'm relying heavily on the documents that you filed.

MR. NEMELKA: So, your Honor, just clarification. Are you ruling then that Paragraph 13 of the 2008 order that response--

THE COURT: Counsel, my--my order is what it is.

MR. NEMELKA: I understand--

THE COURT: I've ruled that he has substantially complied.

MR. NEMELKA: I understand that. But it does state that we can make reasonable inquiries regarding Harvest Films and the disbursements related to "The Best Two Years."

THE COURT: I find that when I look at this file what's being requested is not reasonable. It's far in excess of what the 2008 order expected.

Thank you.

MR. HUNTER: Thank you, your Honor.

(Whereupon, this hearing was concluded.)

* * *

Tab D

David J. Hunter (9015)
DEXTER & DEXTER
Attorneys at Law, PC
University Office Park
1360 South 740 East
Orem, Utah 84097
Telephone (801)225-9900
Facsimile (801)224-6500
Counsel for Petitioner

IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR UTAH COUNTY
STATE OF UTAH

FRED DANNEMAN, Petitioner, vs. **HOLLY DANNEMAN,** Respondent.	**ORDER ON HEARING** **Hearing Date: March 23, 2010** Case No. 044402147 DA Judge James R. Taylor Commissioner Thomas R. Patton

THIS MATTER came before the Commissioner Thomas R. Patton on March 23, 2010 for hearing on Respondent's Order to Show Cause, and for oral arguments on three (3) motions and an affidavit of attorney fees filed by Petitioner, to wit: Motion for Special Master & Dispute Resolution Procedures, Motion for Protective Order (Discovery), Affidavit of Fees & Costs, and Verified Motion and Memorandum to Quash Subpoenas. Petitioner was represented by counsel, David J. Hunter. Respondent appeared with her counsel, Joseph Lee Nemelka. The Court, now being fully advised in the premises, makes and enters the following order:

1. The Court finds that the issues before the Court have come up in this matter previously; in fact, such has come up several times with similar arguments.

2. The Court finds that the Court has already resolved these issues, in fact has resolved these issues in the June 2008 order.

3. Respondent has filed an order to show cause for contempt. However, this Court finds that Respondent has failed to prove contempt by clear and convincing evidence. Instead, Respondent is relying on suspicions and hearsay evidence.

4. The Court finds that Petitioner has complied or substantially complied with the orders of the Court. In making this finding, the Court is relying heavily on the documents filed by Petitioner in this matter showing his compliance with the orders of the Court.

5. This Court finds that the doctrine of *res judicata* applies to this matter, and at least from June 2008 and backwards, which is the date of the previous order which resolved financial issues prior to that date, and that as such, these matters have been resolved and cannot now be re-litigated.

6. Inasmuch as Respondent has not met her burden on her order to show cause issues, and because the Court finds Petitioner is in compliance, Respondent's order to show cause issues are dismissed.

7. Due to the dismissal of Respondent's order to show cause issues, this Court finds that there is no underling action of Respondent upon which she may base discovery, therefore no discovery is allowed.

8. Additionally, the Court finds that the discovery requests made by Respondent in this matter are not reasonable because such requests go far beyond the June 2008 order.

9. Neither party is awarded his or her fees and costs in this matter. In coming to this decision, the Court is relying on *Thompson v. Thompson*, 176 P.3d 464 (Utah App. 2008), believing that the Court in the award of attorney fees for this enforcement matter should not only determine who is the substantially prevailing party but must also receive evidence of the parties' finances.

DATED this 16th day of April, 20__.

ORDERED BY THE COURT:

DISTRICT COURT JUDGE

DATED this 16 day of April

RECOMMENDED BY:

COMMISSIONER

Approval as to form:

Joseph Lee Nemelka
Counsel for Respondent

Date

NOTICE OF INTENT TO SUBMIT FOR SIGNATURE

Pursuant to Rule 7(f)(2) of the Utah Rules of Civil Procedure, you are hereby notified that the forgoing will be sent to the Court for signing upon the expiration of five (5) days from the date of this notice, plus three (3) days if service is by mail, unless a written objection is filed with the Court prior to that time.

DATED this 23rd day of March, 20 10

David J. Hunter

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I personally served a true and correct copy of the foregoing on this 26 day of March, 20 10, to the following:

Joseph Lee Nemelka, P.C.
6806 South 1300 East
Salt Lake City UT 84121

Sent via:
___Hand-Delivery
___Facsimile
_X_ Mailed (U.S. Mail, postage prepaid)
__Other _____

_X_Secretary __Attorney

Tab E

IN THE FOURTH JUDICIAL DISTRICT COURT, UTAH COUNTY, STATE OF UTAH

FRED DANNEMAN, Petitioner, vs. HOLLY DANNEMAN, Respondent.	**RULING** Date: August 23, 2010 Case No.: 044402147 Judge: Lynn W. Davis

The parties came before the court for a hearing on the Objections to Recommendation of Commissioner Patton on June 30, 2010. David J. Hunter represented Petitioner Fred Danneman, and Joseph L. Nemelka represented Respondent Holly Danneman. The court, having reviewed the memoranda and heard the arguments, hereby rules as follows:

I.

Procedural History

1. Respondent filed her Objection to Recommendations of Domestic Relations Commissioner on April 1, 2010.
2. On April 6, 2010, Petitioner filed his Objection to Recommendation of Commissioner.
3. On April 19, Petitioner filed a Response to Respondent's Objection to Recommendations of Domestic Relations Commissioner.

4. On June 30, 2010, the court held a hearing on the objections, and indicated that it would rule in writing.

II.

The Parties' Arguments

a. Respondent's Arguments Supporting her Objections.

Respondent argues that the Commissioner first erred in ruling that Respondent's Order to Show Cause was dismissed. Respondent argues that the entire Order to Show Cause was not specifically before the Court on hearing and no motion had been made to dismiss. The main issue in the Respondent's Order to Show Cause was a full and fair pay-out and reasonable accounting of the disbursements and revenues from the film, "The Best Two Years."

Respondent argues that the Commissioner further erred in not allowing Respondent to conduct further reasonable inquiry regarding Harvest Films and the disbursements related to "The Best Two Years." The Commissioner ruled that there was a sufficient accounting by Petitioner. It is Respondent's position that the Commissioner erred in not allowing Respondent a reasonable inquiry into Harvest Films and the disbursements. The Respondent argues that the Order from June 30, 2008, specifically allows Respondent "to call other parties to verify Mr. Danneman's accounting or to make reasonable inquiries regarding Harvest Films and the disbursements relating to "The Best Two Years."

Respondent argues that if the Court allows Petitioner to deduct from the disbursements and revenues of the film, then it is clear that Petitioner must provide an accounting of the

disbursements made in his chart. The Petitioner should be ordered to provide third-party support evidence showing those expenses and that they were incurred. For example, Respondent argues, that if Petitioner pays a check to any other partners, or if he pays a check for any expense, then instead of just providing a chart reflecting the same, he needs to provide a check copy and a bank statement showing that the check was cashed. It is these documents that Respondent is specifically seeking from the date of the entry of the Amended Decree.

Further, Respondent argues the Commissioner erred in finding that Petitioner is allowed to take additional disbursements from the revenues and disbursements from the film. Pursuant to the Amended Decree, Respondent was awarded one-half of any and all disbursements and revenues. The Amended Decree did not allow or require Petitioner to take any funds from the disbursements, nor did it authorize him to pay any funds out from those disbursements. Respondent argues that Petitioner is capable of providing additional information. In his Affidavit of Attorney's Fees, counsel for Petitioner has provided substantial accounting as to Petitioner's expenses relating to the information in the Affidavit. It is this information that Respondent simply requests that Petitioner provide.

Respondent contends that it is not unreasonable to expect Petitioner to provide evidence other than his hand-crafted chart that he has paid other expenses. These amounts are taken out of the revenues and disbursements from "The Best Two Years" before Respondent is paid any money. Therefore, because it directly related to the amount received by Respondent from the revenues and disbursements of the film, she should be entitled to see that this money was actually

paid out. Simply relying on the hand-crafted document of Petitioner is insufficient.

b. Petitioner's Arguments Supporting his Objection.

Petitioner asserts that to award attorney fees in an enforcement action a court presumes that the fees will be awarded to the prevailing party and the finances of the parties are not relevant unless a party is impecunious or unless the court enters on the record the reason for not awarding fees. Petitioner cites *Moon v. Moon, Lyngle v. Lyngle, Finlayson v. Finlayson, Beardall v. Beardall* and *Stuber v. Stuber*. Pursuant to Utah Code Annotated Section 30-3-3(2) and to the cases listed, the finances of the parties are not an issue in enforcement actions. Because the Respondent has not claimed impecuniosity or pled any other reason why fees should not be awarded to her, fees and costs should have been awarded to the Petitioner. Petitioner argues that Commissioner Patton mistakenly or in error applied the case of *Anderson v. Thompson,* 2008 UT App 3, 176 P.3d 464.

Finally, Petitioner is requesting attorney fees as a sanction and deterrent for continued litigation and from Respondent bringing frivolous claims. In this matter, Respondent brought Order to Show Cause claims that were dismissed as non-meritorious. Before the dismissal of the claims she launched into inappropriate and overreaching discovery which prompted motions for protective orders and to quash. Although Petitioner timely filed responses to the Order to Show Cause, and after Petitioner traveled from Virginia to attend the scheduled hearing, Respondent asked for a continuance. Petitioner has to respond to and defend against such actions at considerable legal expense, not to mention travel costs and lost wages.

d. Petitioner's Response to Respondent's Objection

Petitioner argues that the Respondent's objection is simply a rehash of the arguments contained in her previous pleadings and motions. Petitioner argues that Respondent cites no error, faulty logic, or incorrect legal conclusion of the Commissioner. Further, Petitioner argues that Respondent cites no precedent, no rule of this case, no statutory law, no case law, or any other authority in support of her positions. Petitioner contends that Respondent has been arguing and rearguing these same arguments for years in multiple court filings.

Petitioner argues that the Commissioner dismissed Respondent's "main issue" because it did not have merit. Now respondent is simply arguing the same thing she did in her motion, but points to no law, facts, or authority in support of her contention.

Petitioner argues that Respondent has no right to request an audit of Harvest Films, a third-party entity, who is not before the court and who has no involvement in this case. Petitioner contends that the intent of the June 2008 Order was to state that Petitioner had no objections to informal requests for information, without requiring that such information be provided. Petitioner did not object to phone call requests to simply verify that the flow of funds was being done properly. A review of the discovery sought will reveal discovery going back before the divorce case was even filed and, in some instances, back to 2003. Respondent is allowed to reasonably inquire, but instead has chosen to delve into unreasonable, untimely, overbearing, and litigious discovery that went far beyond the reasonable inquiry contemplated in the order of the Court limiting the continuous and litigious desires of Respondent in this matter.

Petitioner argues that Petitioner and Harvest Films are not one and the same. Petitioner contends that Respondent is simply arguing that the parties are entitled to 100% of the revenues received by Harvest Films, LLC. Such a position ignores years of litigation on this point, and ignores the other managers, investors, actors, directors, musicians, and everyone else involved in the film. Respondent has never in this matter provided a single affidavit or statement from any person whatsoever, that the distributions and percentages paid to anyone have been incorrect or against a written or verbal understanding. On the other hand, Petitioner has provided written information, deposition testimony of himself and others, affidavits signed by nearly every major person involved which indicate the agreements and understanding and confirming that Petitioner's accounting for the funds is correct. At this point, Respondent's refusal to accept such overwhelming facts is disingenuous, misleading, in bad faith and malicious.

Petitioner agrees that the Amended Decree did not allow or require him to take any funds from the disbursements, nor did it authorize him to pay funds out from those disbursements. Petitioner contends he has never done so. However, Petitioner argues that the Amended Decree is silent as to how Harvest Films calculates those disbursements, or who, other than the Petitioner, Harvest Films makes payments and disbursements to, because it is irrelevant. Harvest Films is an uninvolved third party.

Petitioner argues that just because he might be capable of providing information does not mean that he should have to. Respondent is seeking to modify the June 2008 Order without

filing a petition to modify, but seeks to do so through an order to show cause. Petitioner contends that this is specifically prohibited by Rule 7(b)(2) of the Utah Rules of Civil Procedure.

Petitioner's position is that Respondent's obsessive and continual litigation on these issues should and will be followed up with a request for Rule 11 sanctions for improper purpose, needless costs of increase of litigation, not warranted by existing law, used for harassment, frivolous, lack of evidentiary support, and/or in bad faith. Respondent's objection is without merit and should be overruled. Petitioner should be awarded his fees and costs for having to defend himself yet again in this meritless claim.

III.

Case Analysis

a. Respondent's Objection is Overruled.

The June 2008 Order states that following, in relevant part:

> Petitoiner [sic] does not object to Respondent calling other parties to verify his accounting or to make reasonable inquiries regarding Harvest Films and the disbursements related to The Best Two Years.
>
> Order of June 30, 2008, ¶ 13.

The court interprets this provision to mean that either that Respondent may call other parties to make reasonable inquiries regarding Harvest Films and the disbursements related to "The Best Two Years" or that Respondent may make reasonable inquiries to Petitioner regarding Harvest Films and the disbursements related to "The Best Two Years." Either way, Respondent has made multiple inquiries, and Petitioner has sufficiently responded. The Order does not

require Petitioner to account for every penny of revenue and disbursements that are in some way related to the film "The Best Two Years." This seems to be what Respondent is demanding in making her frequent inquiries.

The court finds that Commissioner Patton did not err in finding Respondent's arguments to be without merit. Based on the pleadings before the Commissioner, Respondent's claims and demands simply are not reasonable and serve only to increase the expenses incurred in this case.

Respondent is invited to understand that Petitioner and Harvest Films, LLC, are not the same entity. If Respondent has claims specifically against Harvest Films, LLC, they are not properly the subject of this lawsuit between the two individuals Petitioner and Respondent.

b. Petitioner's Objection is Sustained.

In ruling that neither party was entitled to attorney fees, the Commissioner relied on the 2008 Utah Court of Appeals case *Anderson v. Thompson*, stating that the court must not only find a prevailing party but must receive evidence as to the parties' finances.

In *Connell v. Connell*, 2010 UT App 139, 233 P.3d 836, the Utah Court of Appeals distinguished between attorney fee awards for establishing court orders in Utah Code Ann. Section 30-3-3(1) and attorney fee awards for enforcing court orders in Section 30-3-3(2). *Id.* ¶ 28. Fees awarded in establishing court orders must be based on need, ability to pay, and reasonableness. *Id.*; *see also Stonehocker v. Stonehocker*, 2008 UT App 11, ¶ 49, 176 P.3d 476. However, the financial need of a party seeking to enforce an order may be disregarded. *Connell,* 2010 UT App 139 at ¶ 28; *see also Finlayson v. Finlayson*, 874 P.2d 843, 850 (Utah Ct. App.

1994). The guiding factor in fee awards for enforcing orders is whether the moving party substantially prevailed on the claim. *Connell*, 2010 UT App 139 at ¶ 28; *see also* U.C.A. § 30-3-3(2). Attorney fee awards for enforcing orders "allow the moving party to collect fees unnecessarily incurred due to the other party's recalcitrance." *Connell*, 2010 UT App 139 at ¶ 30; *see also Finlayson*, 874 P.2d at 850-51.

In this case, Petitioner sought for an attorney fee award for having to enforce the court's Order of June 30, 2008. Thus, the analysis for an attorney fee award is found in Section 30-3-3(2). It was not necessary for the Commissioner to take into account either party's finances or impecuniosity. The relevant consideration is whether Petitioner substantially prevailed upon his claim or defense.

At the hearing before Commissioner Patton on March 23, 2010, the Court found that Respondent failed to meet her burden of proof, and that the claims had been brought up multiple times. The Court emphasized that no discovery can be completed prior to the 2008 Order. Thus, Petitioner substantially prevailed on his defenses to Respondent's claims pursuant to Utah Code Ann. Section 30-3-3(2).

The statute further states that "[t]he court, in its discretion may award . . . limited fees against a party if the court . . . enters in the record the reason for not awarding fees." *Id.* Here, the court exercises its discretion to award limited attorney fees in the amount of $500. The court simply believes that it would be in the best interest of justice to limit the fee award as the court does not find strong evidence that Respondent is litigating in bad faith. However, because

Respondent has lost previously on this very issue, and has continued to litigate in spite of prior rulings and in spite of the parties' stated intention to end litigation in 2008, the court finds that a $500 fee award is necessary as a sanction for Respondent's conduct.

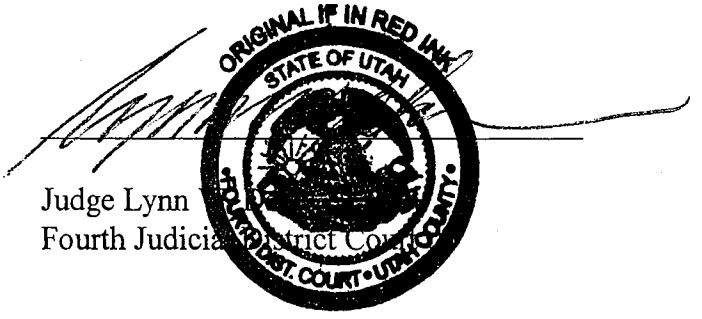
IV.

Ruling

Based on the foregoing, Respondent's Objection is overruled, Petitioner's Objection is sustained and Respondent is ordered to pay Petitioner an attorney fees award of $500.

Finally, the court intends to assist the parties in following their agreement to "end all litigation between them" in this case. Order of June 30, 2008, ¶ 1. Further, the court observes that the parties agreed "that this settlement will serve to end all litigation, claims, motions, and hearings now pending, in all cases referenced herein. . ." *Id.* ¶ 3. The court now seeks to help the parties honor their commitment to end litigation. In recognizing that the 2008 mediation between these parties was successful and resulted in the June Order, the court invites and encourages the parties to attend mediation in good faith to resolve any further disputes or differences. Either party may reference this paragraph as well as the first paragraph of the June 2008 Order if the other party tries to re-initiate litigation in this case. Any violations of the parties' self-imposed moratorium on litigation will likely result in full attorney fees and other sanctions. Counsel for Petitioner is instructed to prepare an Order and Judgment consistent with this Ruling.

Dated this 23rd day of August, 2010.



Judge Lynn
Fourth Judicial District Court

A certificate of mailing is on the following page.

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 044402147 by the method and on the date specified.

MAIL: DAVID J HUNTER UNIVERSITY OFFICE PARK 1360 S 740 E OREM, UT 84097

MAIL: JOSEPH L NEMELKA 6806 S 1300 E SALT LAKE CITY UT 84121

Date: 8/25/16

Deputy Court Clerk

ORIGINAL IF IN RED INK
STATE OF UTAH
FOURTH DIST. COURT • UTAH COUNTY •

David J. Hunter (9015)
DEXTER & DEXTER
Attorneys at Law, PC
University Office Park
1360 South 740 East
Orem, Utah 84097
Telephone (801)225-9900
Facsimile (801)224-6500
Counsel for Petitioner

IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR UTAH COUNTY
STATE OF UTAH

FRED DANNEMAN, Petitioner, **vs.** **HOLLY DANNEMAN,** Respondent.	**ORDER** **Re: Ruling August 23, 2010** Case No. 044402147 DA Judge James R. Taylor Commissioner Thomas R. Patton

THIS MATTER came before the Judge Lynn W. Davis on June 30, 2010 on cross Objections to the Recommendations of the Commissioner, and upon a Ruling issued by the Court on August 23, 2010. Based upon the findings of fact and conclusions of law in the Ruling, the Court, now being fully advised in the premises, makes and enters the following order:

1. Respondent's Objection is overruled, and Petitioner's objection is sustained.

2. Respondent is ordered to pay Petitioner an attorney fees award of $500.

DATED this 14TH day of Sept, 2010.

ORDERED BY THE COURT:

ORIGINAL IF IN RED INK
STATE OF UT

DISTRICT COURT JUDGE

Approval as to form:

9-3-10

Joseph Lee Nemelka
Counsel for Respondent

Date

NOTICE OF INTENT TO SUBMIT FOR SIGNATURE

Pursuant to Rule 7(f)(2) of the Utah Rules of Civil Procedure, you are hereby notified that the forgoing will be sent to the Court for signing upon the expiration of five (5) days from the date of this notice, plus three (3) days if service is by mail, unless a written objection is filed with the Court prior to that time.

DATED this 27th day of August, 2010

David J. Hunter

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I personally served a true and correct copy of the foregoing on this 27 day of August, 2010, to the following:

Joseph Lee Nemelka, P.C.
6806 South 1300 East
Salt Lake City UT 84121

Sent via:
___Hand-Delivery
___Facsimile
_X_ Mailed (U.S. Mail, postage prepaid)
__Other _____

X Secretary __Attorney

Tab F

ORIGINAL

Scott L Wiggins (5820)
ARNOLD & WIGGINS, P.C.
American Plaza II, Suite 105
57 West 200 South
Salt Lake City, UT 84101
Telephone: (801) 328-4333
Facsimile: (801) 328-2405

Counsel for Appellant

IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR UTAH COUNTY
STATE OF UTAH

FRED DANNEMAN, Petitioner / Appellee, v. HOLLY DANNEMAN, Respondent / Appellant.	**NOTICE OF APPEAL** Case No. 044402147 DA Judge Lynn W. Davis

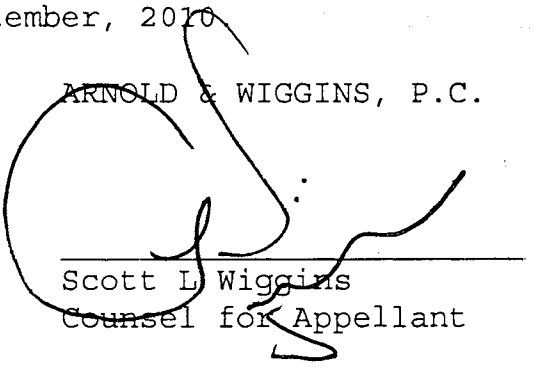
NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Holly Danneman, by and through appellate counsel, Scott L Wiggins, of and for Arnold & Wiggins, P.C., hereby appeals to the Utah Court of Appeals from the Ruling and Order of the Fourth Judicial District Court of Utah, Utah County, the Honorable Lynn W. Davis, presiding, which Ruling and

Order were entered on August 23, 2010, and September 14, 2010, respectively.

DATED this 22nd day of September, 2010.

ARNOLD & WIGGINS, P.C.



Scott L. Wiggins
Counsel for Appellant

AFFIDAVIT OF SERVICE

I, SCOTT L WIGGINS, being duly sworn, state that I, as appellate counsel for Appellant, Holly Danneman, served a true and correct copy of the foregoing NOTICE OF APPEAL upon the party(ies) listed below by placing the same in an envelope addressed to:

Mr. David J. Hunter
Dexter & Dexter
1360 South 740 East
Orem, UT 84097
Counsel for Fred Danneman

and causing the same to be mailed First Class, postage prepaid, on the 22 of September, 2010.

Scott L Wiggins

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

Personally appeared before me SCOTT L WIGGINS and signed the foregoing AFFIDAVIT OF SERVICE on this 22 day of September, 2010.

Notary Public

Notary Public
CYONIE SAMORA
Commission #580634
My Commission Expires
October 26, 2013
State of Utah

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 044402147 by the method and on the date specified.

CERTIFIED MAIL: ATT: LISA COLLINS COURT OF APPEALS

Date: 10-7-10

Kay Rice

Deputy Court Clerk