

2004

Lynn G. Foster v. Evelyn L. Saunders; Saunders and Saunders, Gary Couillard; and Cathie I. Foster : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

LYNN G. FOSTER,

Plaintiff/Appellant,

EVELYN L. SAUNDERS; SAUNDERS
& SAUNDERS, GARY COUILLARD;
and CATHIE I. FOSTER,

Defendants/Appellees.

APPEAL NO.: 20040527-CA

ORAL ARGUMENT REQUESTED

BRIEF OF APPELLEES
EVELYN L. SAUNDERS AND SAUNDERS & SAUNDERS

ON APPEAL FROM THE
THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH
THE HONORABLE WILLIAM B. BOHLING, DISTRICT JUDGE

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JURISDICTION

The Court has jurisdiction over this appeal pursuant to Utah Code Annotated § 78-2a-3(2)(j).

STATEMENT OF THE ISSUES AND STANDARD OF REVIEW

Did the district court properly dismiss plaintiff-appellant Lynn Foster's ("Lynn") claims for wrongful initiation of civil proceedings and slander of title against his ex-wife's lawyer, defendants-appellants Evelyn Saunders and the law firm of Saunders & Saunders (collectively herein, "Saunders") for failure to state a claim upon which relief may be granted?

When determining whether the trial court correctly granted a motion to dismiss, the Court accepts the factual allegations in the complaint as true and considers them, and all reasonable inferences to be drawn from them, in the light most favorable to the nonmoving party. MFS Series Trust III v. Grainger, 2004 UT 61, ¶ 6.

DETERMINATIVE LAW

Every defense, in law or fact, to claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted.

Utah R. Civ. P. 12(b)(6).

STATEMENT OF THE CASE

In 2001, Lynn, an attorney, was the respondent in a divorce proceeding initiated by his then-wife, Cathie Foster ("Cathie"). As in many divorces, Lynn and Cathie contested the distribution of property of the marital estate. In particular, Cathie filed an

affidavit expressing her belief that “one or both of the parties have an interest in the following properties” (R. 31.) The affidavit then listed a handful of properties, the ownership of which was litigated. (Id.) At trial, the court found that Cathie was entitled to an interest in the majority of the properties listed in her affidavit, but that she was not entitled to an interest in certain other of the properties determined to be owned by two Foster family limited liability companies. Lynn was manager of one of the two entities, Foster Rentals, L.L.C. (“Foster Rentals”) and Lynn’s sons owned the other, Foster Family, L.L.C. (“Foster Family”). (R. 106, 109.)

For reasons apparently motivated by spite rather than any economic loss, the Foster entities each filed separate lawsuits against Cathie to quiet title to certain of the properties identified by Cathie in her affidavit filed in the divorce action. That, of course, proved unnecessary given the court’s ruling in the divorce proceeding that Cathie was not entitled to certain of those properties. Nonetheless, the quiet title action resulted in the entry of two final judgments. (Am. Compl. ¶¶ 17, 30, 34; R. 21, 23, 24, 116-118.)

Not satisfied with winning the dispute over the properties held in the name of the Foster family entities, Lynn then obtained an assignment of claims from those entities and subsequently filed the action from which this appeal is taken. In his complaint, Lynn asserts that Cathie’s affidavit in the divorce proceeding — in which she expressed the belief that either she or Lynn owned an interest in properties, some of which were determined to be owned by the Foster LLCs — was actionable under the torts of wrongful initiation of legal proceedings and slander of title. (See Am. Compl. ¶¶ 12-16, 21-28, 30, 34; R. 20, 22-23, 24.) Lynn named not only his ex-wife in the lawsuit, but also his ex-wife’s divorce lawyer, Evelyn Saunders and her Park City law office, as well as an expert witness who testified for Cathie in the divorce proceeding. Lynn’s theory, in other words, is that arguing entitlement to property in a divorce proceeding, as Cathie

did, comes with the risk that losing the argument constitutes tortious conduct not only for the loser, but for her attorney and expert witnesses as well.

In light of these allegations and circumstances, Saunders filed a motion to dismiss Lynn's complaint. She argued, and the trial court correctly found, that the judicial proceedings privilege bars the complaint because its claims arise out of Cathie's allegedly slanderous statements in her affidavit, filed in the course of the divorce proceeding. Moreover, although Lynn failed to identify any other "meritless theories" below, the trial court also correctly concluded that "meritless theories," however articulated, if made in the course of a properly initiated lawsuit cannot form the basis for a claim for the wrongful initiation of civil proceedings as a matter of law. Finally, the trial court also correctly determined that the slander of title claims are barred by the doctrine of claim preclusion and by the applicable statute of limitations, and dismissed each of Lynn's claims against Saunders. (R. 453.)

Still discontented, Lynn filed a motion to alter or amend the judgment, arguing that a California decision (which predated oral argument on Saunders' motion to dismiss by nearly a decade) constituted intervening and controlling authority sufficient to set aside the trial court's decision. (R. 641.) The trial court correctly rejected this further argument, denying Lynn's motion. (R. 1219.)

Lynn now appeals.

STATEMENT OF FACTS

1. On December 24, 2001, Judge Hilder entered his ruling in Lynn and Cathie's divorce action. Saunders represented Cathie in the divorce. Like any party to a divorce, Cathie also sought judicial valuation and division of the marital estate. (R. 103-115.)

2. In the course of the divorce, Cathie submitted an affidavit asserting that she believed that she “and/or” Lynn owned interests in a list of eleven real properties. (Am. Compl. ¶¶ 12, 13, 17; R. 20-21.) In the Ruling, Judge Hilder considered the ownership issues raised by the parties therein and found that Cathie indeed owned one-half of 92% of Foster Rentals, an entity that held title to the majority of the properties listed in Cathie’s affidavit. (R. 107-109.) Judge Hilder further found that another of the properties listed in the affidavit — the couple’s former residence — was a “joint asset” of the marriage. (R. 104.) Finally, Judge Hilder ordered Lynn (as manager of Foster Rentals), to remain “accountable to [Cathie] as a significant owner, along with the other members of the LLC, until her interest [in Foster Rentals] is satisfied.” (R. 109.)

3. Based on Cathie’s statement that she “and/or” Lynn had an ownership interest in the listed properties, the Foster Rentals and Foster Family L.L.C.s filed two additional lawsuits against Cathie to quiet title in the L.L.C.s. Lynn alleges that Foster Rentals obtained a judgment and decree against Cathie quieting title on July 30, 2001. (Am. Compl. ¶ 17; R. 21.) Foster Family likewise obtained a “Judgment Quieting Title and for Dismissal of Remaining Claims with Prejudice” on May 3, 2001. (R. 116-118.)

4. On January 31, 2003, Lynn filed the third lawsuit arising out of the divorce, this time naming Cathie’s former lawyer, Evelyn Saunders, and Cathie’s expert witness in the divorce case, Gary Couillard, as defendants, in addition to Cathie. (Compl.; R. 2-3, 5-11.) Lynn amended the complaint on February 6, 2003. (Am. Compl.; R. 17.)

5. Lynn’s amended complaint alleges three claims against Saunders, for “wrongful initiation, use and/or continuation of civil proceedings,” as well as two slander of title claims, “assigned” to Lynn by the Foster entities, Foster Rentals and Foster Family. (Am. Compl. ¶¶ 21-36; R. 22-25.)

6. Lynn alleges that Saunders committed the tort of wrongful initiation of civil proceedings by raising “meritless theories, bereft of any legitimate basis in either law, fact, or both” on behalf of Cathie in the divorce. (Am. Compl. ¶¶ 9, 12, 22, 26; R. 19, 20, 22.) The only “meritless” theory that Lynn identified in his complaint, however, was that Cathie stated in her affidavit that she “and/or Lynn held some ownership interest in certain real estate owned by [Foster Rentals], and in other real estate owned by [Foster Family], which Cathie had quit-claimed to the contrary.” (See Am. Compl. ¶¶ 12-16; R. 20.)

7. The slander of title claims Lynn received from Foster Rentals and Foster Family are likewise “based entirely” on the “meritless allegation” in Cathie’s affidavit “slandering [Foster Rentals] and [Foster Family’s] good and marketable title.” (Am. Compl. ¶¶ 30, 32, 34, 36; R. 23-24, 132.)

8. On March 25, 2003, Saunders moved to dismiss, arguing that the claims were barred by the judicial proceedings privilege. (R. 88, 91-95.) Saunders also moved to dismiss the wrongful initiation claim on the ground that Lynn could not make out the elements of the tort because the “civil proceeding” at issue, the divorce, was not wrongful, and his claim instead was based on the assertion of “meritless theories” therein. (R. 94.) Saunders also argued that Lynn’s assigned slander of title claims were barred both by the doctrine of claim preclusion and by the applicable statute of limitations. (R. 95-98.)

9. On October 6, 2003, the Honorable William B. Bohling entered an order dismissing Lynn’s claims against Saunders with prejudice for failure to state a claim upon which relief could be granted, holding that Lynn’s wrongful initiation of civil proceedings claim was “barred by the judicial proceedings privilege and because the tort applies to the wrongful institution of civil proceedings, not arguments, as a matter of

law[.]” (R. 453.) The trial court further held that Lynn’s slander of title claims were “barred by the judicial proceedings privilege, by the doctrine of claim preclusion, and by the one year statute of limitation for libel and slander, set forth at Utah Code Ann. § 78-12-29(4)[.]” (R. 453.)

10. Lynn moved to alter or amend Judge Bohling’s order on April 8, 2004, arguing that a California decision issued almost ten years before oral argument on Saunders’ motion, Crowley v. Katleman, 881 P.2d 1083 (Cal. 1994), constituted intervening and controlling authority justifying reversal. Judge Bohling denied Lynn’s motion on May 24, 2004. (R. 1219-1220.)

11. Lynn filed the notice of appeal herein on June 21, 2004, seeking reinstitution of his claims. (R. 1221.)

SUMMARY OF ARGUMENT

As the trial court correctly found below, even a superficial view of Lynn’s complaint exposes a danger that no court reasonably could tolerate. If Lynn has viable causes of action against Saunders here, then any spouse and any lawyer who unsuccessfully claim interests in real property in a contested divorce proceeding automatically would face a wrongful initiation or slander of title claim. Every divorce action would contain built-in tort actions against the spouse who loses the property battle, and against that spouse’s lawyer. In fact, under Lynn’s construction of the law, every party to every lawsuit would face multiple follow-on lawsuits for every factual or legal assertion the finder of fact ultimately rejects, regardless of the outcome of the underlying suit. For obvious reasons, this is not the law.

Lynn’s claims fail for a host of independent additional reasons as well. His claim against Saunders and the other defendants for the wrongful initiation of civil proceedings fails as a matter of law because the tort requires for its premise the bringing of “civil

proceedings” — a lawsuit — without probable cause to do so, and simply does not apply to the advancement of “meritless theories” and arguments made within what is otherwise a properly initiated suit. Moreover, because Lynn’s complaint is clear that all of his claims against Saunders depend on Cathie’s statements in her affidavit filed in the divorce, the “absolute” judicial proceedings privilege bars those claims as well. Even if the foregoing were not true, the trial court also correctly found that Lynn’s slander of title claims (for which Lynn’s assignors previously obtained final judgments) are barred under the doctrine of claim preclusion, and further are barred by the applicable statute of limitations.

Judge Bohling, upon reviewing Lynn’s complaint, his papers in opposition to the motion to dismiss, and the arguments of his lawyer at hearing, and after consideration of Lynn’s additional arguments raised in his post-judgment motion to alter or amend, correctly determined that Lynn cannot state claims for wrongful initiation of civil proceedings and for slander of title, and properly dismissed this most recent attempt to relitigate what was clearly a bitter divorce as a matter of law.

ARGUMENT

I. THE TRIAL COURT CORRECTLY DISMISSED LYNN’S CLAIM FOR WRONGFUL INITIATION OF CIVIL PROCEEDINGS BECAUSE THE TORT DOES NOT APPLY TO ARGUMENTS MADE IN THE COURSE OF A PROPERLY INITIATED LITIGATION.

Lynn’s complaint is clear that he believes that Saunders (and the other defendants) should be liable to him for committing the tort of wrongful initiation of civil proceedings because they “initiated, used and/or asserted meritless theories” in the Fosters’ divorce. (Am. Compl. ¶ 9; R. 19.) (emphasis added). Specifically, Lynn alleges that “Saunders and Couillard entered into an agreement with each other with respect to the advancement of these misplaced theories” and then sets forth snippets from Judge Hilder’s ruling after

the former couple's divorce trial, wherein he observed that defendants advanced what he described as "novel" theories. (Am. Compl. ¶¶ 10-11; R. 19-20.) The only allegedly "meritless theory" that Lynn identifies in his complaint, however, was that Saunders "caused" Cathie to file an affidavit in which Cathie asserted that she "and/or Lynn held some ownership interest in certain real estate owned by [Foster Rentals], and in other real estate owned by [Foster Family], which Cathie had quitclaimed to the contrary." (Am. Compl. ¶¶ 12-16; R. 20.)

Of course, as Judge Bohling correctly found, the tort of wrongful initiation of civil proceedings does not apply to "meritless" theories or arguments made in a lawsuit, as Lynn claims, nor should it. First, Lynn fails to identify even one Utah decision applying the tort to create liability merely for arguments made in a lawsuit. To the contrary, as Saunders argued below, every wrongful initiation of civil proceedings (sometimes referred to in the caselaw as "malicious prosecution" or "abuse of process") decision we have identified in Utah has been founded upon the wrongful bringing of a lawsuit, never the proffer of allegedly "meritless" arguments or positions. Indeed, the Utah Supreme Court has expressly stated that an action for "wrongful bringing of civil proceedings . . . is recognized only when the civil suit is shown to have been brought without probable cause, for the purpose of harassment or annoyance; and it is usually said to require

malice.” Baird v. Intermountain School Fed. Credit Union, 555 P.2d 877, 878 (Utah 1976) (emphasis added).¹

The decisions of this Court are equally clear. In Brown’s Shoe Fit Co. v. Olch, 955 P.2d 357, 367 (Utah Ct. App. 1998), this Court observed that “[a]n action challenging the initiation of a lawsuit is an action for malicious prosecution or for wrongful bringing of civil proceedings . . . ”. Most recently, in Hatch v. Davis, this Court stated that the appellant’s so-called “abuse of process” claim arising out of a civil lawsuit for assault and battery was properly termed a claim for “wrongful use of civil proceedings” which tort “occurs when a defendant initiates civil proceedings without justifiable basis.” 2004 UT App. 378, ¶ 22 n.8, 511 Utah Adv. Rep. 16 (Oct. 28, 2004) (emphasis added); see also Mann v. Wadsworth, 776 P.2d 926, 928 (Utah Ct. App. 1989) (upholding dismissal of claim against Watkiss & Campbell “for malicious prosecution in bringing the [civil] conspiracy suit”) (emphasis added).

In fact, in Winters v. Schulman, 977 P.2d 1218 (Utah Ct. App. 1999), a case relied upon by Lynn here and below, this Court upheld the dismissal of an ex-husband’s wrongful initiation of civil proceedings claim as a matter of law. In so doing, the Court observed that “[t]he Utah Supreme Court has recognized a civil cause of action for wrongful initiation of civil proceedings where it is shown that a suit was ‘brought

¹ Accord Smith v. Vuicich, 699 P.2d 763, 764 (Utah 1985) (per curiam) (“abuse of process” claim based on wrongful initiation of trespass lawsuit); Nelson v. Jacobsen, 669 P.2d 1207, 1216 (Utah 1983) (stating that “a plaintiff who institutes a groundless or collusive suit is subject to a suit or counterclaim for abuse of process or malicious prosecution”); Leigh Furniture & Carpet Co. v. Isom, 657 P.2d 293, 308-09 (Utah 1982) (forcing a party “to defend two groundless lawsuits . . . may give rise to independent causes of action in tort for abuse of process and malicious prosecution”); Johnson v. Mt. Ogden Enters., Inc., 460 P.2d 333, 335 (Utah 1969) (“malicious prosecution” award upheld where “defendant instituted the suit for an injunction without probable cause” and “[i]n a majority of the jurisdictions in this country it has been held that an action of malicious prosecution will lie for the institution of the civil action maliciously and without probable cause.”).

without probable cause, for the purpose of harassment or annoyance; and it is usually said to require malice.” Id. at 1225 (quoting Baird, 555 P.2d 877, 878 (Utah 1976) (emphasis added)). Winters based his wrongful initiation claim on the actions of his ex-wife and her attorney in filing a lis pendens on certain of his real property (purchased after the parties’ divorce) in Utah. Id. at 1220. In a post-divorce enforcement action filed by the ex-wife, a California court subsequently ordered the “immediate release” of the lis pendens “after hearing Winters’s and [his ex-wife’s] arguments.” Id. Ultimately, Winters and his ex-wife settled the enforcement action with the assistance of the California court. Id. Despite the ex-husband’s success in having the lis pendens released by the California court in the post-divorce enforcement action, and despite finding that the lis pendens indeed constituted a wrongful lien under the applicable Utah statute, this Court nevertheless upheld the dismissal of Winters’ wrongful initiation claim because “Winters was not a successful defendant in a prior proceeding.” Id. at 1225 (emphasis added). Instead, the Court found that Winters was merely “a respondent in a California enforcement action that ultimately ended in a settlement between the parties.” Id. If Lynn’s construction of the tort of wrongful initiation of civil proceedings — that failed arguments (or, to use Judge Hilder’s actual description, “novel theories” and “creative lawyering” which he did “not wish to discourage”) are sufficient to ground the tort — is correct, then the filing, recording, and then court-ordered release of a “baseless lien” should have been sufficient to ground and salvage Winters’s wrongful initiation claim. Id. at 1220, 1225.² (R. 114.)

² The Winters case describes plaintiff’s cause of action therein as one for “abuse of process,” but the decision relies on (and quotes from) Baird in reaching its decision upholding the claim’s dismissal. In Baird, the Utah Supreme Court likewise upheld the dismissal of plaintiff’s claim for “wrongful bringing of civil proceedings” for failure to state a claim. 555 P.2d at 878. Accordingly, the reference in Winters to “abuse of process” for a wrongful institution of civil proceedings claim appears to demonstrate the

It was not — and for good reason. The tort of wrongful initiation of civil proceedings protects against the wrongful initiation of “civil proceedings” — lawsuits — not arguments. If Lynn were permitted to state a viable cause of action for the advancement of allegedly “meritless theories,” as he contends, then any spouse and any lawyer who made an unsuccessful argument in a divorce proceeding automatically would face a wrongful initiation of civil proceedings claim. Every divorce action filed in this state would have a built-in tort action against the spouse who loses even one argument in the battle for the disposition of the couple’s property and against that spouse’s lawyer. Even more broadly, under Lynn’s construction of Utah law, every party to every lawsuit would face an entirely new lawsuit for each factual assertions or legal arguments the finder of fact ultimately rejects.³

For these very reasons, the Utah Supreme Court eloquently rejected the first attempt by a Utah litigant to proffer such an argument, nearly eighty years ago:

Can [the plaintiff] recover damages merely because he was
sued in a court of justice for more than he actually owed?
Does it constitute a legal and actionable wrong to sue for

fact that the wrongful institution tort in Utah historically has been known variously as either “abuse of process” or “malicious prosecution.” See Gilbert v. Ince, 981 P.2d 841, 844 (Utah 1999) (“More commonly, we have addressed [the tort] . . . under the rubric of ‘abuse of process’ or ‘malicious prosecution.’”).

³ Presumably each side will win (and lose) some of the many arguments it will advance in any given lawsuit, yielding not just one derivative lawsuit, but multiple lawsuits filed by both parties to the underlying action, each claiming that the other (as well as its attorneys, experts, paralegals, jury consultants and fact witnesses) conspired to commit the tort of “wrongful initiation of civil proceedings” against the other for every argument successfully rebutted. Here, for example, although Lynn declines to quote from this portion of the Ruling in his complaint, Judge Hilder also “reject[ed] Lynn’s argument that a marketability discount of 15% (or any percentage) should be applied to [Foster Rentals], because the assets of [Foster Rentals] are readily marketable parcels of incoming producing real property.” (R. 108.) Under Lynn’s construction of the tort, Cathie should countersue for the initiation of a wrongful civil proceeding as the result of Lynn’s assertion of what the divorce court determined was a “meritless” theory, and for every other argument he lost in the divorce.

more than ultimately is found to be due or that is in fact due?
If that should be held to be a cause of action, suits would
multiply beyond power of the courts to handle them.

Karenius v. Merchants' Protective Ass'n, 235 P. 880, 883 (Utah 1925).⁴ Losing arguments and meritless theories raised in one lawsuit do not, and should not, engender new lawsuits for the wrongful initiation of civil proceedings. Instead, in the tort of wrongful initiation of civil proceedings, "[t]he references are to a 'proceeding' and in no way indicate that any of the theories underlying a particular proceeding could render the entire action one without probable cause. [Such an] interpretation . . . would invite a multitude of unwarranted litigation arising from situations where a proceeding is instituted on the basis of inconsistent theories, or where theories are abandoned during the proceeding, and where the proceeding is terminated adversely to the plaintiff." Zahorsky v. Griffin, Dysart, Taylor, Penner and Lay, P.C., 690 S.W.2d 144, 150-51 (Mo. Ct. App. 1985) (emphasis added). Judge Bohling agreed, dismissing Lynn's claim for wrongful initiation of civil proceedings with prejudice in part because "the tort applies to the wrongful institution of civil proceedings, not arguments, as a matter of law." (R. 453.) As Lynn concedes in his brief, sanctions pursuant to Rule 11 and other authority exist which provide both an adequate remedy and an immediate deterrent for the advancement

⁴ In Karenius, the Merchants' Protective Association ("Merchants") initiated a collection action against Karenius for money he conceded that he owed. Merchants expressly sought and was successful in entering a default judgment against Karenius for more money than was owed. Karenius sued Merchants, claiming that Merchants was liable to him for "the wrongful suing out and service of a writ of garnishment" despite the fact that the underlying action on which the garnishment was based was proper. 235 P. 882, 883. Apparently in recognition of this fact, Karenius disavowed claims for abuse of process or malicious prosecution, instead seeking damages arising out of the excess judgment and "wrongful" garnishment. Faced with these facts, the Utah Supreme Court unequivocally concluded that a claim for more money than is due made in the course of a properly initiated lawsuit is not something "for which an action for damages lies": "To go into court and collect a past-due claim is a right guaranteed by the Constitution; nor is it made a wrong to sue as party for more than is due" Id. at 884.

of arguments made in bad faith, and without engendering additional derivative lawsuits (which, under Lynn's construction of the tort, could themselves engender still more lawsuits, and so on). (Appellant's Br. at 21.)

In response to this logic, Lynn argues that this Court should hew to the California decision of his choosing, Crowley v. Katleman, 881 P.2d 1083 (Cal. 1994). Lynn's portrayal of California law and his interpretation of Crowley, however, are both incomplete and incorrect. A subsequent California decision, Merlet v. Rizzo, 64 Cal. App. 4th 53 (Cal. Ct. App. 1998), explained Crowley and California law on the tort of "malicious prosecution." The Merlet court clarified that, as evidenced by the Crowley decision, the California courts "have concluded that subsidiary procedural actions or purely defensive actions cannot be the basis for malicious prosecution claims," that "ancillary or independent rather than subsidiary proceedings" instead may ground the tort, and that a will contest action (such as was at issue in Crowley) in fact constitutes such an "ancillary or independent proceeding." 64 Cal. App. 4th at 59, 60-61. The reason that a malicious prosecution action cannot be grounded upon actions taken within pending litigation, according to the court in Merlet, is "that permitting such a cause of action would disrupt the ongoing lawsuit by injecting tort claims against the parties' lawyers and because the appropriate remedy for actions taken within a lawsuit lies in the invocation of the court's broad powers to control judicial proceedings." Id. (emphasis added).

Finally, the Merlet court determined (directly contrary to Lynn's assertions here) that Crowley "did not hold that merely injecting new facts and legal issues into a proceeding and imposing on the party the burden of mounting a defense would be sufficient to establish that a proceeding satisfies the requirement of being independent or ancillary." 64 Cal. App. 4th at 61 (emphasis added). Thus, according to the Merlet court,

California allows malicious prosecution claims to be grounded on independent civil proceedings, not on the mere assertion of legal issues and factual matters in any single proceeding, even where they impose on the opposing party the burden of mounting a defense, such as Lynn objects to here. See id.

Of course, so long as Lynn would have this Court look to California law in creating a claim for wrongful initiation of civil proceedings in this situation, the Court should be aware that, based on important policy reasons that are equally evident here, the California courts do not allow the tort at all in family law cases. In Green v. Uccelli, for example, in explaining its holding that the proper relief for wrongful arguments in divorce case was sanctions against the attorney in the divorce, not a separate malicious prosecution claim, the court observed that in light of “the deeply personal nature of the issues . . . and despite best efforts of the Legislature, the bench and the bar, it is not surprising there is still considerable bitterness between spouses whose marriage is being dissolved. . . . In this atmosphere, the judge hearing the domestic relations calendar must regularly issue orders which do not and most often cannot satisfy either party.” 207 Cal. App. 3d 1112 (Cal. Ct. App. 1989). In Bidna v. Rosen, the court imposed a bright-line rule that malicious prosecution claims do not lie in family law matters because “family law cases have a unique propensity for bitterness” and because “allowing separate malicious prosecution actions in the wake of unsuccessful attempts to obtain certain remedies may have a chilling effect on the ability to obtain those remedies by, in effect, increasing the risk of asking for them,” among many other reasons. 19 Cal. App. 4th 27, 35 (Cal. Ct. App. 1993). Most recently, in Begier v. Strom, 46 Cal. App. 4th 877, 886 (Cal. Ct. App. 1996), the California court noted this “abiding judicial reluctance” to extend malicious prosecution actions to family law proceedings and held that an ex-

husband could not sue his ex-wife for malicious prosecution for child sexual molestation allegations made in the couple's divorce proceeding for this reason.⁵

Cathie's positions in the divorce, however Lynn may chose to articulate them — whether as to which or how much of any given asset should be attributed to her or to Lynn, how much an asset is worth, or the length, means, or amount of financial support to which she is entitled — cannot, and should not, constitute wrongful “proceedings” for which Lynn may sue her and her service providers in what is now the third lawsuit arising out of the couple's divorce. For all the foregoing reasons, the trial court correctly found that Lynn cannot state a claim for wrongful initiation of civil proceedings as a matter of law based on the assertion of allegedly “meritless theories” against Cathie, much less her lawyer and expert witness, however articulated.

II. THE TRIAL COURT ALSO CORRECTLY DISMISSED LYNN'S CLAIMS AGAINST SAUNDERS BECAUSE THEY ARE BARRED BY THE JUDICIAL PROCEEDINGS PRIVILEGE.

A. The Judicial Proceedings Privilege Bars Lynn's Slander of Title Claims As a Matter of Law.

Utah law is clear that three elements must be satisfied in order to invoke the “absolute immunity” provided by the judicial proceedings privilege:

First, the statement must have been made during or in the course of a judicial proceeding. Second, the statement must have some reference to the subject matter of the proceeding. Finally, the one claiming the privilege must have been acting in the capacity of a judge, juror, witness, litigant, or counsel in the proceeding

⁵ Notably, these courts also support the decision not to allow the maintenance of malicious prosecution claims in the family law context with the numerous California cases holding that meritless positions in lawsuits “do not constitute a separate proceeding upon which an action for malicious prosecution can be premised.” Begier, 46 Cal. App. 4th at 886 n.8 (collecting cases).

Ortez, 802 P.2d at 1312 n.8. Under the privilege, “statements of attorneys, parties, judges, witnesses, and other participants in the judicial process enjoy an absolute privilege against liability for torts if the statements are made during or preliminary to a judicial proceeding.” Bower v. Stein Eriksen Lodge Owners Ass’n, 201 F. Supp. 2d 1134, 1138 (D. Utah 2002) (emphasis added). The historic privilege is “absolute” because it serves the important public policy of “securing to attorneys as officers of the court the utmost freedom in their efforts to secure justice for their clients.” Beezley v. Hansen, 286 P.2d 1057, 1058 (Utah 1955) (quoting Restatement of Torts § 586). All but two states recognize the privilege and its provision of “absolute immunity for lawyers involved in litigation[,] with very little variation from state to state.” T. Leigh Anenson, Absolute Immunity from Civil Liability: Lessons for Litigation Lawyers, 31 Pepp. L. Rev. 915, 918 (2004) (internal quotation marks omitted).

Lynn concedes, as he must, that Saunders and the other defendants have “clearly established” the first and third elements of the three-pronged test, and that, were the privilege to apply, his slander of title claims against Saunders are properly dismissed. (Appellant’s Br. at 26-27; R. 132, 152.) Lynn’s sole argument as to why the judicial proceedings privilege does not bar his slander of title claims outright is that Cathie’s affidavit — filed in the couple’s divorce and stating that she “and/or Lynn” held ownership interests in a variety of properties, which interests the divorce court then adjudicated and apportioned — somehow does not have “some reference” to the subject matter of the couple’s divorce. (R. 132.) Simply on its face, this argument lacks any credibility. As the trial court correctly determined below, and as this Court is well aware, marshalling and dividing a couple’s property is necessarily the subject matter of divorce, and Lynn’s assigned slander of title claims against Saunders are correctly dismissed as barred by the privilege.

In addition to Lynn's claim that Cathie's affidavit does not bear even "some reference" to the Foster's divorce, Lynn also argues that this Court can look no further than the "four corners of the amended complaint" in assessing the privilege, and that the Court must blind itself to the portions of the Ruling he declines to quote in his complaint, on which his claims unquestionably are based. (See Appellant's Br. at 28). As set forth in detail below, Judge Bohling considered and correctly rejected both arguments.

Lynn bases his argument that Cathie's statement does not have "some reference" to the subject matter of the divorce solely on his interpretation of Wright v. Lawson, 530 P.2d 823, 825 (Utah 1975). Lynn argues that because the Wright court observes that "[t]he majority of American courts have adopted the rule that there is no immunity unless particular statements are in some way 'relevant' or 'pertinent' to some issue in the case," Cathie's statement that she "and/or" Lynn held ownership interests in various properties cannot qualify as having "some reference to the subject matter of the proceeding." (Appellant's Br. at 27). First, and as discussed above, Cathie's affidavit clearly passes the mere "relevant or pertinent to some issue in the case" standard set forth in Wright, which Lynn contends is applicable. At issue in the Foster's divorce, as in every divorce, was the adjudication and equitable division of the couple's interests in property, in whatever form such interests may exist. If this principle requires support, this Court need look no further than the numerous decisions on appeal considering the decisions of Utah's district courts doing exactly that. See Burke v. Burke, 733 P.2d 133, 134-35 (Utah 1987) (noting that the supreme court has "consistently concluded that [the divorce statute] confer[s] broad discretion on trial courts in the division of property, regardless of its source or time of acquisition."); Glynn v. Dubin, 369 P.2d 930, 931 (Utah 1962) (holding that property quit-claimed by husband to his attorney was "within the jurisdiction of the court [in the divorce action,] having been thus committed to it for the

purpose of adjudication” in the divorce). Cathie’s affidavit was necessarily part of her effort to have the court adjudicate the marital estate, and it is for this very reason that Lynn sues her and her lawyer here. Indeed, the divorce court’s ruling expressly found that Cathie held a one-half interest in 92% of Foster Rentals, which entity held title to numerous of the eleven properties listed in Cathie’s affidavit, that another of the eleven properties was a “joint asset” of the marriage and the couple’s former residence, and concluded that Lynn (in his capacity as manager of Foster Rentals) must remain “accountable to [Cathie] as a significant owner, along with the other members of the LLC, until her interest [in the LLC] is satisfied.” (R. 104, 107, 109.) Therefore, the statements upon which Lynn would base his claim for slander of title easily meet the standard of mere “pertinence” or “relevance” set forth in Wright.⁶

Second, in a case decided fifteen years after Wright (but which Lynn declines to cite in his brief), the Utah Supreme Court explained that

The Restatement provides that the testimony need not be material or even relevant so long as it has “some reference to the subject of the litigation.” Most courts hold that the defamatory material need not be relevant as an evidentiary matter, but need only have “some relation” to the proceeding.

Allen v. Ortez, 802 P.2d 1307, 1312 n.8 (Utah 1990) (internal citations omitted) (emphasis added). Significantly, the Utah Supreme Court then concluded that “[w]e read this court’s language in Wright v. Lawson . . . as implying, if not expressing, the same meaning.” Id. (emphasis added).

Subsequent decisions of the Utah Supreme Court interpreting the “some reference” requirement of the judicial proceeding privilege are in accord with Ortez. In fact, in Debry v. Godbe, the supreme court cited Wright for the proposition that “[a]

⁶ Indeed, the relevance standard is met by the fact of the statements’ admission into evidence in the divorce. (R. 107-110.)

statement need not be relevant or pertinent to the judicial proceeding from an evidentiary point of view for the privilege to apply. The requirement is that a statement have ‘some relationship to the cause or subject matter involved.’” 992 P.2d 979, 984 (Utah 1999) (emphasis added). Furthermore, “because of the important purpose the privilege serves,” the Debry court advised that “[d]oubts should be resolved in favor of the statement having reference to the subject matter of the proceeding.” Id. (emphasis added); see also Krouse v. Bower, 20 P.3d 895, 899 (Utah 2001) (“The rule enunciated in Wright is thus congruent with the second element of the test set forth in Ortez, that the allegedly defamatory statements ‘have some reference to the subject matter of the proceeding.’”).

Lynn’s arguments that this Court is required to ignore what the remainder of the Ruling (on which he bases his claims and from which he quotes, albeit selectively, in his complaint) makes clear, and that the Court is obligated to “infer” that facts exist that show that Cathie’s statement, despite being actually adjudicated in the divorce, nevertheless had no reference to the divorce, are equally incorrect. (Appellant’s Br. at 28.)

First, these assertions directly contradict well-established law that documents “referred to” in a plaintiff’s complaint and which are central to a plaintiff’s claim “may be considered on a motion to dismiss.” GFF Corp. v. Assoc. Wholesale Grocers, Inc., 130 F.3d 1381, 1384 (10th Cir. 1997); Nester v. Bank One Corp., 224 F. Supp. 2d 1344, 1345-46 (D. Utah 2002) (same); see also 5 Wright & Miller, Federal Practice and Procedure: Civil 2d § 1327, at 762-63 (“[W]hen a plaintiff fails to introduce a pertinent document as part of his pleading, defendant may introduce the exhibit as part of his motion attacking the pleading.”). According to the Utah Supreme Court, the reason for this is that otherwise, “a plaintiff with a deficient claim could survive a motion to dismiss simply by not attaching a dispositive document upon which the plaintiff relied.”

Oakwood Vill. L.L.C. v. Albertsons, Inc., 2004 UT 101, ¶ 13 (Utah 2004) (citations and internal quotation marks omitted). Judge Hilder’s Ruling, no less than the affidavit submitted by Cathie, is not only “central” to Lynn’s claims, it forms the basis for his entire complaint, and not least because Lynn directly quoted portions of it therein. (Am. Compl. ¶ 11; R. 19-20.) Indeed, Lynn again quotes portions of the Ruling to make his case on appeal, even as he claims that examination of the remainder of the Ruling is impermissible. (Appellant’s Br. at 4, 9.)

Second, in Utah, as elsewhere, “[t]he determination of whether the communication has sufficient reference to the subject matter of the litigation is a question of law.” Ortez, 802 P.2d at 1312 n.8; Krouse, 20 P.3d at 897 (upholding dismissal pursuant to the judicial proceedings privilege on Rule 12(b)(6) motion). Because Cathie’s statements in her affidavit easily bear “some relation” to the divorce proceedings as evidenced by documents quoted in and central to Lynn’s claims, the trial court appropriately dismissed the slander of title claims. Of course, even if this were a close case, which it is not, “[d]oubts should be resolved in favor of the statement having reference to the subject matter of the proceeding.” Debry, 992 P.2d at 984.

B. The Judicial Proceedings Privilege Also Bars Lynn’s Wrongful Initiation of Civil Proceedings Claim As Pled.

Lynn’s claim for wrongful initiation of civil proceedings also is barred by the judicial proceedings privilege. As discussed in detail above, the doctrine provides that “an attorney at law is absolutely privileged to publish false and defamatory matter of another in communications preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as a part of a judicial proceeding in which he participates as counsel, if it has some relation thereto.” Beezley v. Hansen, 286 P.2d 1057, 1058 (Utah 1955) (quoting Restatement of Torts, Vol. 3, § 586). Contrary to

Lynn's arguments on appeal, Saunders never argued, and the trial court did not conclude, that the privilege bars all claims for wrongful initiation of civil proceedings, only that the privilege bars Lynn's construction of the claim here. (R. 194-97.) Significantly, despite his status as the only other litigant to the Fosters' divorce, the sole "meritless theory" alleged by Lynn in his complaint is the filing of Cathie's allegedly slanderous affidavit. (Am. Compl. ¶¶ 12-16, 21-28; R. 20, 22-23.) Under the privilege, as set forth above, attorneys are "absolutely" privileged to publish false material in the course of judicial proceedings, so long as the statement bears "some relation" to the subject matter of the proceedings. See, e.g., Ortez, 802 P.2d at 1312 n.8; Beezley, 286 P.2d at 1058. Lynn's wrongful initiation claim is barred by the privilege just as his slander of title claims are barred by the privilege.

Because the privilege bars his claims as a matter of law, Lynn now suggests that the Court must assume that all manner of other "meritless" (but non-defamatory) theories also were advanced in the divorce sufficient to breathe life into his wrongful initiation claim. For the reasons set forth in Part I, however, any meritless theory Lynn might articulate will not constitute the wrongful initiation of civil proceedings as a matter of law.⁷ Lynn's wrongful initiation claim, as pled, clearly derives from an alleged slander, and is therefore barred. As set forth above, any other "meritless theory" he might attempt to articulate instead will not constitute the wrongful initiation of civil proceedings as a matter of law, rendering the privilege unnecessary.

⁷ Indeed, Silver v. Mendel, cited by Lynn for the proposition that the judicial proceedings privilege should not bar a proper cause of action for the wrongful initiation of civil proceedings, makes that point with particular clarity. There, the Third Circuit Court of Appeals, like every Utah court to have considered the cause of action, concluded that "imposition of liability for the wrongful use of civil proceedings occurs only when litigation is instituted both without probable cause and primarily for a purpose other than that of securing the proper adjudication of the claim in which the proceedings are based." 894 F.2d 598, 603-04 (3d Cir. 1990) (last emphasis in original).

III. THE TRIAL COURT ALSO CORRECTLY DISMISSED THE SLANDER OF TITLE CLAIMS BECAUSE THEY ARE BARRED BY THE DOCTRINE OF CLAIM PRECLUSION.

Even if Lynn's claims were not barred by the judicial proceedings privilege, the trial court also correctly dismissed them because they are barred by the doctrine of claim preclusion. Lynn makes only two arguments against this result on appeal, both incorrect. First, he repeats his argument that application of the doctrine requires "assess[ment] [of] facts outside of those pleaded in the Amended Complaint," Appellant's Brief at 32, which fails for the reasons set forth in the previous section. Second, Lynn misstates the doctrine of claim preclusion entirely, arguing that it should not apply because the judgments obtained by Lynn's assignors, Foster Rentals and Foster Family, in the first two lawsuits on these facts do not expressly "release" Saunders who was "not [a] part[y] to the quiet title actions." (Appellant's Br. at 33.) Lynn's unsupported assertion that claim preclusion requires a contractual "release" of the precise defendant who must later assert the doctrine directly contradicts Utah law and stands claim preclusion — and its policy of discouraging seriatim litigation and of promoting judicial repose — on its head. Office of Recovery Servs. v. V.G.P., 845 P.2d 944, 946 (Utah Ct. App. 1992) (claim preclusion protects "vital public interests including (1) fostering reliance on prior adjudications; (2) preventing inconsistent decisions; (3) relieving parties of the cost and vexation of multiple lawsuits; and (4) conserving judicial resources.").

As the Court is aware, claim preclusion will bar a cause of action if "three requirements" are met:

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).⁸ For claim preclusion to apply, the two cases need not involve identical parties, as Lynn contends. (Appellant’s Br. at 33.) Instead, the two cases must involve the same parties “or their privies.” Madsen, 769 P.2d at 247. Utah law is clear that claim preclusion not only bars a second lawsuit by the same plaintiff against the same defendant, as Lynn urges, but also bars “subsequent litigation concerning the same subject matter against . . . agents, alter egos or other parties with similar legal interests.” Press Publ’g, Ltd. v. Matol Botanical Internat’l, Ltd., 37 P.3d 1121, 1128 (Utah 2001) (emphasis added). Moreover, “[g]enerally, an employer-employee or agent-principal relationship,” such as existed between Saunders and Cathie in the divorce, “will provide the necessary privity for claim preclusion with respect to matters within the scope of the relationship, no matter which party is first sued.” 18 MOORE’S FEDERAL PRACTICE, § 131.40[3][f] (Matthew Bender 3d ed.) The trial court correctly held that claim preclusion is established here.

Lynn claims to have received his slander of title against Saunders by assignment from the Foster L.L.C.s. (Am. Compl. ¶¶ 1, 32, 34; R. 17, 24.)⁹ Those entities obtained final judgments in the two actions against Cathie, which suits also were based on the statements made in her affidavit in the divorce action. (Am. Compl. ¶¶ 17, 30, 34; R. 21, 23, 24.) Lynn’s complaint alleges that Foster Rentals obtained a “judgment and decree quieting title” against Cathie on July 30, 2001, and seeks to recover both Foster Rentals’

⁸ By his failure to offer any argument on the point, Lynn concedes that Saunders has established these elements. American Towers Owners Ass’n v. CCI Mech., 930 P.2d 1182, 1185 n.5 (Utah 1996) (“Issues not briefed by an appellant are deemed waived and abandoned.”).

⁹ Under Utah law, which Lynn again declines to refute, an “assignee is subject to any defenses that would have been good against the [assignor]; the assignee cannot recover more than the assignor could recover; and the assignee never stands in a better position than the assignor.” SME Indus., Inc. v. Thompson, Ventulett, Stainback and Assocs., Inc., 28 P.3d 669, 676 (Utah 2001).

and Foster Family's "attorneys' fees, costs and expenses incurred in clearing title" in those actions. (*Id.*) Lynn's complaint also alleges that Saunders' liability in this action arises out of her actions as Cathie's attorney and "agent" during the divorce. (Am. Compl. at ¶¶ 7, 20; R. 18, 21.).

Accordingly, because Lynn's assignors obtained final judgments against Cathie, Saunders' principal, in two previous lawsuits, because those lawsuits also arose out of the statement in Cathie's affidavit, and because those lawsuits involved the same parties, their privies or their assignors, Lynn's slander of title claims also were correctly dismissed for the independent reason that they are barred by the doctrine of claim preclusion.

IV. THE TRIAL COURT ALSO CORRECTLY DETERMINED THAT THE SLANDER OF TITLE CLAIMS ARE BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS.

The trial court also properly dismissed Lynn's slander of title claims because they were untimely as a matter of law under the one year statute of limitations applicable to claims for libel and slander. Utah Code Ann. § 78-12-29(4). For this reason, Lynn attempts to convince the Court that the three year limitation period for injury to real property set forth at Utah Code Annotated Section 78-12-26(1) should govern instead. (Appellant's Br. at 31.) The issue of which statute of limitations applies to slander of title claims is one of first impression in Utah. However, in the absence of a specific statute setting out a limitations period specifically for claims for slander of title, the overwhelming majority of American courts hold that the limitations period for slander and libel applies.

"[I]n the absence of a statute expressly referring to actions for slander of title, the statute of limitations applicable to actions for libel and slander applies to actions for

slander of title.” Bonner v. Chicago Title Ins. Co., 487 N.W.2d 807, 811 (Mich. Ct. App. 1992); see also 50 AM. JUR. 2D *Limitation of Actions* § 564 (1995) (same). Moreover, “[t]he majority of the courts that have considered the issue have held that the statute of limitations for libel governs actions for slander of title”; there is “no reason to vary the statute of limitations because property rather than a person is defamed.” Gee v. Pima County, 612 P.2d 1079, 1080 (Ariz. Ct. App. 1980); Hosey v. Central Bank of Birmingham, Inc., 528 So.2d 843, 844 (Ala. 1988) (adopting the “great weight of authority in this Country . . . that the Statute of Limitations applicable to libel and slander is equally applicable to actions for slander of title”); Norton v. Kanouff, 86 N.W.2d 72, 74-77 (Neb. 1957) (relying on a survey of case law nationwide to conclude that an action for slander of title is governed by the one year statute of limitations applicable to libel and slander).¹⁰ Because Utah has not enacted a statute of limitation for slander of title

¹⁰ Macia v. Microsoft Corp., 152 F. Supp. 2d 535, 541 (D. Vt. 2001) (holding that slander and libel limitations period applies to actions for slander of title); Scott Paper Co. v. Fort Howard Paper Co., 343 F. Supp. 229, 235 (E.D. Wis. 1972) (holding that libel and slander limitation period expressly covers actions for disparagement of property or trade libel); Lehigh Chemical Co. v. Celanese Corp. of America, 278 F. Supp. 894, 897-98 (D. Md. 1968) (limitation period for actions for libel and slander applicable to slander of title claims); Carroll v. Warner Bros. Pictures, 20 F. Supp. 405, 407 (S.D.N.Y. 1937) (same); LaBarge v. City of Concordia, 927 P.2d 487, 493 (Kan Ct. App. 1996) (adopting “the majority view” and barring plaintiff’s slander of title action under the statute of limitations relative to actions for libel and slander); Montgomery v. Milam, 910 S.W.2d 237, 240 (Ky. 1995) (same); Hanbidge v. Hunt, 183 A.D.2d 700, 701 (N.Y. App. Div. 1992) (holding that slander of title actions are governed by the one-year statute of limitation applicable to general slander actions); Hosey v. Central Bank of Birmingham, Inc., 528 So.2d 843, 844 (Ala. 1988) (adopting the “great weight of authority in this Country . . . that the Statute of Limitations applicable to libel and slander is equally applicable to actions for slander of title”); Gee v. Pima County, 612 P.2d 1079, 1080 (Ariz. Ct. App. 1980) (finding that “the majority of the courts that have considered the issue have held that the statute of limitations for libel governs actions for slander of title” and seeing “no reason to vary the statute of limitations because property rather than a person is defamed”); Gentry v. State, 118 N.W.2d 643, 647 (Neb. 1962) (same); Norton v. Kanouff, 86 N.W.2d 72, 74-76 (Neb. 1957) (same); Old Plantation Corp. v. Maule

actions specifically, the trial court correctly applied the one year limitation period set forth at Utah Code Ann. § 78-12-29(4), and held that both of Lynn’s claims for slander of title here are time barred.¹¹

Rather than distinguishing what is overwhelmingly the majority rule, Lynn urges this Court to follow one case, Howard v. Hudson, a federal decision concluding that, under California law, the statute of limitations for injury to real property should apply to slander of title actions. 259 F.2d 29, 32 (9th Cir. 1958). Lynn argues, as he did below, that because the Utah Supreme Court in dicta distinguished aspects of the tort of slander from that of slander of title in Bass v. Planned Management Servs., Inc., 761 P.2d 566 (Utah 1988), Utah courts are therefore obligated to apply the statute of limitation for injury to real property. The trial court correctly rejected this claim for two reasons.

First, Lynn’s argument utterly fails to acknowledge the fact that, nearly a decade after Bass, the Utah Supreme Court expressly declared that “[t]his court has never addressed the requirements to trigger the running of the statute of limitations in a slander of title action.” Valley Colour, Inc. v. Beuchert Builders, Inc., 944 P.2d 361, 364 (Utah 1997). More than merely leaving the issue open, however, the Utah Supreme Court in Valley Colour expressly declined to decide “whether . . . a slander of title claim involves

Industries, Inc., 68 So. 2d 180, 182 (Fla. 1953) (same); Buehrer v. Provident Mut. Life Ins. Co., 175 N.E. 25, 27 (Ohio 1931) (same); Bush v. McMann, 55 P. 956, 957 (Colo. Ct. App. 1899) (same); see also 50 AM. JUR. 2D *Limitation of Actions* § 564 (1995) (“In the absence of a statute expressly referring to actions for slander of title, the statute of limitations applicable to actions for libel and slander applies to actions for slander of title.”).

¹¹ Lynn filed his complaint on January 31, 2003, and conceded below that the slander of title claims accrued on May 3 and July 30, 2001, respectively. (R. 30-43, 136-37.) Accordingly, the only issue here is one of law — which statute of limitations properly applies to the slander of title claims. As such, the trial court correctly followed the clear majority rule, applied the one-year statute, and determined that the slander of title claims were required to have been filed on or before May 3 and July 30, 2002, and were therefore untimely.

injury to person or property for another day,” 944 P.2d at 364, the very proposition which Lynn urges is “clear” from Bass, and which (he claims) argues in favor of application of the statute of limitation for injury to property. Id. at 364. (Appellant’s Br. at 31.) Accordingly, no Utah law exists providing that Utah would (or should) apply the limitation period for property claims.

Second, as set forth above, courts from coast to coast consistently reject just the approach urged by Lynn. In Buehrer v. Provident Mutual Life Insurance Co., for example, the Ohio Supreme Court rejected plaintiff’s argument that the limitations period for actions for injury or trespass to real property controlled its slander of title claim. The court reasoned that

[the libel and slander] section comprehends all actions for slander or for libel, and is not limited, in terms, to slander or libel against the person only; nor is it confined to any particular kind of slander — slander of the person rather than of property; nor can we see any legislative purpose in making such a distinction.

175 N.E. 25, 27 (Ohio 1931). Likewise, in Lehigh Chemical Co. v. Celanese Corp. of America, the court rejected an argument that the injury to property limitations period should apply, concluding that “the one-year period of limitations for all actions on the case for libel and slander is applicable not only to actions for personal defamation but also for actions charging disparagement of property.” 278 F. Supp. 894, 896 (D. Md. 1968); see also Bonner, 487 N.W.2d at 812 (finding “no reason to make a distinction between an action alleging defamation of title to property and an action alleging defamation of the person”).

In light of the great weight of authority applying the slander and libel limitations period to slander of title claims even when presented with a limitation period for injury to real property, this Court should reject Lynn’s appeal for the latter. As courts nationwide

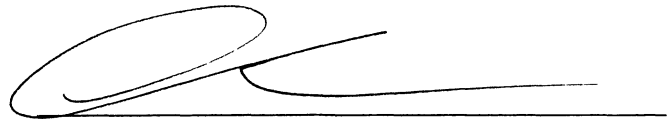
have done, unless and until the Utah Legislature enacts a specific statute of limitations governing slander of title, this Court should apply the one year period applicable to slander claims set forth at Utah Code Ann. § 78-12-29(4), and affirm their dismissal on this additional ground.

CONCLUSION

For the foregoing reasons, the Court should affirm the district court's dismissal with prejudice of Plaintiff-Appellant Lynn G. Foster's amended complaint.

DATED this 15th day of December, 2004.

Snell & Wilmer L.L.P.

A handwritten signature in black ink, appearing to read 'Matthew L. Lalli', is written over a horizontal line.

Matthew L. Lalli
Amy F. Sorenson
Nathan E. Wheatley
Attorneys for Defendants/Appellees

CERTIFICATE OF SERVICE

This will certify that on the 15th day of December, 2004, I caused to be mailed two (2) true and correct copies of the foregoing BRIEF OF APPELLEES EVELYN L. SAUNDERS AND SAUNDERS & SAUNDERS to the following:

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A handwritten signature in black ink, appearing to be "David W. Scofield", written over a horizontal line.

ADDENDUM

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

FILED

DEC 2 6 2001

By Third District Court
Deputy Clerk, Summit County *ef*

CATHIE FOSTER,

Petitioner,

RULING

vs.

LYNN G. FOSTER,

Respondent.

Case No. 004600010

Judge Robert K. Hilder

This matter was tried to the court on September 10, 11, 13 and 14, 2001, and closing argument was heard on September 28, 2001, after which the matter was taken under advisement. Respondent (for clarity, the court will hereafter frequently refer to the parties by their first names: petitioner as "Cathie" and respondent as "Lynn") filed a post trial affidavit on November 30, 2001, regarding an alleged change in economic circumstances. Petitioner opposed receipt of the affidavit, and respondent filed a reply. The court has reviewed the affidavit and memoranda, and concludes that the affidavit will not be a factor in the decision. The affidavit suffices to show that Lynn's employment circumstances have changed, but it does not adequately establish his reasonable earning prospects and is, therefore, not a better alternative than the evidence adduced at trial to allow the court to reach a reasonable determination regarding his income from professional employment. In addition, if the affidavit did lay a sufficient evidentiary basis to require the court to reconsider the evidence regarding professional income, then it would be

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necessary to reopen the case to allow rebuttal evidence from petitioner. Under the circumstances, that is neither appropriate nor necessary.

This Ruling is intended to include all essential findings and conclusions, but it does not purport to be formal Findings of Fact and Conclusions of Law. Accordingly, the court requests counsel for respondent, Ms. Maycock, to prepare formal Findings and Conclusions, and a Decree of Divorce, consistent with this Ruling, but also including any necessary findings and conclusions that the court might have inadvertently omitted.

Child custody was settled in a prior hearing, with each parent awarded custody of one of the two minor sons. The parties were married September 20, 1979, and separated January, 2000. At the time of separation and of filing the parties were resident in Summit County, and had been for more than three months. Petitioner alleges irreconcilable differences, and those grounds were clearly established at trial. The court has determined, and the parties appear to agree, that with the possibility of some minor exceptions, property in this case shall be valued and divided as of September 14, 2001.

Provo Rental House

The court finds that net income from the Provo house is a joint asset. Lynn should be ordered to provide an accounting for all rental income derived from that rental from the date of separation. Allowable expenses are taxes, insurance, maintenance and any costs of renting the property, but only expenses related to that specific property. The resulting net amount is awarded equally, and Lynn must pay Cathie's share within sixty days of entry of the final Decree in this matter.

With respect to the Provo house, Lynn asserts that it is a valuable asset and that it is marketable. Nevertheless, he strongly urges that the house should be awarded to Cathie at the

appraised value of \$305,000. Cathie does not want the house. She prefers to relocate to Summit County and she doubts the marketability of the Provo house. The court finds that the house should be sold, with proceeds net of sale costs and the Anna Martin loan principal, divided equally (if there is interest on the Anna Martin loan, Lynn shall be entirely responsible). Lynn shall be responsible to market the home in a commercially reasonable manner. Based on his testimony regarding value and marketability, if the house sells for more than ten percent less than the appraised value, Cathie's proceeds shall nevertheless not be less than half of ninety percent of the appraised value, less her actual half share of sale costs and Anna Martin loan principal. Lynn may wish to assign his share of the net proceeds to Cathie in partial settlement of her interest in Foster Rentals.

Foster Family Properties (law office and related buildings)

It is undisputed that Cathie owns no interest in the law practices, as such, but there is an issue regarding the properties associated with the practice, and possibly the few assets of the LC that was dissolved after Lynn's 1998 illness, including any residual accounts receivable. The court determines that the real property associated with the practices, located at approximately 300 South and 600 East in Salt Lake City, were Lynn's premarital property. They remained his property after marriage, and minimal if any activity occurred after marriage that would convert the property into a marital asset.

Cathie argues that Lynn's excessive work at the practice constituted investment of a marital asset, and in addition, or alternatively, she argues the "partnership of marriage" theory set forth in *Dunn v. Dunn*. Lynn did work hard at the practice and Cathie bore a disproportionate share of the responsibilities in the home, thus giving Lynn the freedom to devote his time to building both the law practice and the rental properties, but even if that contribution sufficed to

grant Cathie a marital interest in the law practice, or more relevantly, the buildings, that interest was voluntarily and consensually transferred over time, for value in cash, services, and the less tangible benefit of time, to Lynn's sons, Brett and Grant

The evidence is unassailable that the decision to invite first Brett, then Grant, to join the practice, was joint. It is also unrefuted that Brett and Grant were well situated professionally and would not have made the moves without promises that they would ultimately receive the assets associated with the practice, and even specifically that they would not have come without assurances that Cathie would not, at some point, claim an interest in the practices or assets. They had that assurance, and Cathie was part of it. The transfer of assets was not designed to take assets from Cathie in contemplation of divorce, and the transfer commenced before either Lynn's illness or any concrete decisions by either party to divorce. It is true that the transfer was accelerated after Lynn's illness, but that was a sound business decision that merely implemented a longer term plan, and did so sooner rather than later in recognition of Lynn's precarious health and his relatively advanced age. The court finds that all properties included in the entity Foster Family Properties belong to Brett Foster and Grant Foster, free of any interest in Cathie Foster.

One final issue regarding the law practice is Cathie's suggestion that the receivables and the personal property associated with the practice were transferred for less than value, thus depriving the marital estate of a valuable asset. The court finds, however, that there is no evidence to support such a finding. The personal property was sold, along with remaining receivables. There was no substantial or detailed evidence regarding the personal property, and the evidence regarding the receivables was that they were not sold until they were substantially aged (in fact, some were undoubtedly aged before the post-illness collection efforts commenced, after which more than another year passed before sale), and after all reasonable collection efforts

were concluded. In addition, the amounts actually collected after transfer were very consistent with the value assigned.

Foster Rentals

Lynn accumulated and managed certain rental properties before the marriage, and continued to do so after the marriage. When the various properties were brought together within the Foster Rentals entity, for both management and estate planning purposes, they comprised the parties' biggest asset. Cathie argues that because of commingling within Foster Rentals, as well as use of the family asset of both Lynn and Cathie's efforts, and Lynn's marital income (derived in part from his long hours and limited contributions in the home). Lynn and Cathie's 92% interest in Foster Rentals, in its entirety, is a marital asset. Cathie appears to agree that the eight percent of Foster Rentals previously conveyed to certain Foster children is neither her asset nor Lynn's.

Lynn agrees that certain of the assets are marital property, but argues that others, which were acquired before the marriage, were self-sustaining during the marriage, with no substantial contribution from Cathie or from marital assets, or that they at least include a premarital portion that should be awarded to him. Both are correct in some respects:

The Duchesne Lots include premarital property which shall not be included in the Foster Rental value to be divided (value \$72,422). Similarly, the Hillview and Lincoln Arms receivables, assets derived from premarital purchase and sale of real property, are Lynn's sole property, which assets were rolled into Foster Rentals and should be carved out as his sole property, in the amounts of \$150,000 and \$22,000 respectively.

The court finds that the Lehi houses include a substantial premarital interest, but that Cathie should be allowed a marital asset credit of \$20,000 (resulting in a credit to her personally

of \$10,000 in the ultimate disposition of marital assets), based on completion of the log home during the marriage and Cathie's assistance with some of the work. This will be accomplished by valuing Lynn's premarital interest at \$141,199, or \$20,000 less than the amount he claims. The court cannot determine from the evidence that the \$60,000 related to 625 Northcrest maintained its separate status nor can it say that Royal Crest (6th Avenue Apartments) maintained its separate identity sufficiently to maintain its premarital character, and exercising its equitable discretion, the court further finds that Cathie's contribution to the partnership of marriage in her maintenance of the home and her actions that facilitated Lynn's dedication to the family's business interests should be accounted for; accordingly, neither claim will be recognized.

The court finds the value of Foster Rentals to be as determined in the initial appraisals. Specifically, the court rejects the revised appraisal for the K Street Apartments, because the reasons therefor were not persuasive and were not supported by concrete evidence. The court accepts the debt figures as respondent's experts proffered, but instructs that any debt reduction since approximately September 10, 2001, be factored in to any final accounting. The court rejects Lynn's argument that a marketability discount of 15% (or any percentage) should be applied to the LLC, because the assets of this LLC are readily marketable parcels of income producing real property. The LLC may not wish to liquidate, but if it must the value is clearly present

The court is assuming a value net of mortgage debt, and prefers to use a value net of both sales commissions and capital gains taxes, but the parties may have some flexibility in the ultimate disposition. That is, Lynn may either transfer funds or property at gross values, leaving Cathie to handle her own real estate commission and capital gains issues, or he may elect to find some way to transfer funds or property to Cathie that will result in her receiving the net amount

to which she is entitled after commissions and taxes. In any event, the court finds that Cathie shall receive half of the marital interest (that is, half of 92% of the net value of Foster Rentals). Because the figures may change, the court will not do the actual calculation, but Cathie shall receive either of the following, potentially adjusted for changes in debt or actual tax calculations: the gross value (deducting mortgage debt only) of \$2,351,322, *less* Lynn's premarital interest in the amount of \$385,621, multiplied by 46% (that is, half of the resulting marital interest); or net value of \$1,694,613, *less* Lynn's premarital interest in the amount of \$385,621, multiplied by 46%, but if the latter option is chosen, the resulting amount must be *net* to Cathie. Both options use a value that requires Lynn to repay his loans from Foster Rentals, and also include a cash balance of \$7,540.

Lynn shall continue his management of Foster Rentals, but he shall be accountable to Cathie as a significant owner, along with the other members of the LLC, until her interest is satisfied.

Finally, with respect to Foster Rentals, the court absolutely rejects petitioner's argument regarding improper use of Foster Rentals assets in the past two years. Lynn's salary was reasonable, the payments on the Pinebrook condominium merely reduced debt on the a Foster Rentals marital asset, and the evidence was unpersuasive that any other expenses were not justified and reasonable. The court notes at this point that Cathie makes a number of allegations regarding misuse or concealment of additional funds, but her testimony is either speculative or lacking credibility on these issues. Cathie claims that information was concealed from her, but the court finds that information was generally available, and sometimes affirmatively provided, but Cathie chose to stay uninformed in most cases. She should not now be allowed to benefit from her own choice to ignore opportunities to be better informed.

Retirement Account (SEP)

The SEP retirement account is a joint asset, which shall be assigned to Cathie and fifty percent of the value shall offset her interest in Foster Rentals. That asset will be assigned at its value net of taxes (\$107,061) if Cathie is compensated in net funds, or full value (\$178,435) if the division is accomplished in gross terms

Child Support

The parties each have custody of one minor son. Based on the income figures found by the court in the alimony section of this Ruling, Lynn would have a support obligation under the tables in the approximate amount of \$300.00. At trial Lynn stipulated that he would pay \$700.00 per month for the younger son, which is about two times the required sum, unless the court finds reason to further substantially depart from the tables. The court can find no basis for such a departure. In view of the overall asset allocation, Cathie's earning ability and reasonable need, the alimony award, and the absence of any compelling argument that the child's needs are extraordinary and unmet when the court considers the totality of the circumstances, the court can find no basis to exceed the tables beyond the amount already offered by respondent. Accordingly, Lynn should be ordered to pay Cathie child support in the amount of \$700.00, which is a continuation of the existing order.

Alimony

Cathie asserts a justified alimony request in this marriage of over twenty years, where Lynn was primary earner, and the parties assumed traditional roles. One problem with Cathie's request, however, is her strongly urged position that Lynn is capable of and morally bound to work well into his seventies at the same level of productivity he displayed during the prime of his

professional working life, and that he should do this despite the substantial impact of his near fatal illness and the predictable, indeed almost inevitable, decline in his practice. This claim ignores physical, professional and economic realities that were all clearly established by Lynn. His energy has declined, his mental acuity somewhat diminished (although he is still clearly a very able man intellectually), and his practice has shrunk. He will never return to his prior productivity, and even before the illness and the imminence of divorce Lynn was contemplating retirement and a reduced income.

The other problems with Cathie's very substantial alimony claim are that she claims expenses that far exceed the whole family's living expenses before separation, and she claims that because she is fifty years old, and has one teenager at home, she should not be required to work a full time job. Both the expense and the earning capacity arguments are untenable. Cathie has spent more than a year preparing to re-enter the nursing profession, an area in which she was apparently quite successful before marriage, and equally successful, albeit on a part time basis, during some periods after marriage. The court finds the evidence persuasive that Cathie should be licensed again within a very short time, and that she should be able to earn at least \$12.00 per hour on a full time basis, resulting in earned income exceeding \$2,000 per month initially, which income will reasonably increase as Cathie gains experience, to at least \$2,800 per month in current dollars.

Regarding expenses, the court makes adjustments in the following areas: mortgage (Cathie will receive substantial assets, from which she will either be able to avoid a mortgage entirely, or conversely invest the amounts received and obtain additional income), medical insurance (the claimed sum is high assuming Cathie obtains full time employment, with even average benefits), automobile, vacations, gifts, tithing and taxes. Total reductions approximate

\$3,200, leaving expenses of about \$5,500 with a child at home, \$4,600 thereafter. Using the first figure, after deducting Cathie's earning ability, and child support in the amount of \$700 per month, her need is about \$2,800, but except for the mortgage adjustment herein, this need ignores the fact that Cathie will receive about \$700,000 in the ultimate disposition of marital assets. In this case, where Lynn must use his share of assets as a primary source of income, equity requires that both parties realize the income potential from his or her share of assets, and that the income to be derived be accounted for in a support award.

The final factor is Lynn's earning ability. The court finds that his recent history of about \$50,000 in taxable income from the law practice is reasonable, Lynn may exceed that yearly sum by a small amount, but there is no evidence to suggest that he can do so consistently, or even for many more years. Since separation Lynn has been taking a salary, in the amount of \$3,000 per month, from Foster Rentals. The sum is reasonable, but it is difficult to say whether he will be able to justify that salary, or otherwise realize comparable income from the rental properties after he satisfies Cathie's interests as awarded herein. Lynn also receives social security income, for a monthly total income of about \$8,500 to \$9,000. His reasonable expenses, before alimony and child support, are in the range of \$4,500, including taxes.

Based on the foregoing, Lynn shall pay alimony effective January 1, 2002, in the amount of \$2,000 per month, for twenty four months, then \$1,750 per month for twenty four months, after which alimony will reduce to \$1,500 per month, Alimony shall continue for the duration of the marriage, or until the remarriage or cohabitation of petitioner, or the death of either party.

Income Tax Return (2000)

Cathie should not have filed a separate year 2000 income tax return. The parties should

be ordered to amend their 2000 returns to file a joint return which shall, among other things, account for the tax prepayment from marital funds that occurred near the time of separation. A refund is contemplated, and shall be shared equally. If there is no refund, Lynn, as manager of family and business finances before separation, shall bear the sole liability.

Miscellaneous

The court finds that the following property is clearly, and in its entirety, Lynn's separate property, and should be awarded to him free of any claim by Cathie:

- Devon Energy Corp shares
- Morgan Stanley Dean Witter Trust
- McCormick Oil, LLC

The court finds that Cathie's jewelry is her sole and separate property, with no value to be assigned in the overall allocation of assets. To the extent the parties cannot agree on the disposition of remaining personal property, Cathie shall prepare two lists of approximately equal value, and Lynn shall choose which list he wishes to claim.

Cathie shall receive her Honda, with an assigned net value of \$5,816, subject to the indebtedness thereon, and that sum is deemed a marital asset in the final balancing of the disposition. The other vehicles are accounted for in the disposition of Foster Rentals, the owner or lessee of said vehicles.

The parties agree, and it should be ordered, that the Summit Watch Marriott Timeshare will be sold, with net proceeds to be divided equally.

The Anna Martin loan (principal only) related to the Provo house is a joint obligation. All other loans from Anna Martin should be Lynn's sole responsibility, for which he shall receive no credit in the final allocation of marital assets.

Attorney's Fees

Both parties have incurred substantial fees for attorney's and expert witnesses. Cathie argues that Lynn should pay all or part of her fees. While neither party in this case will be destitute after the property is allocated, payment of fees will be a significant burden. Lynn has already paid \$11,000 of Cathie's fees, and because of the court's rulings regarding premarital property, he will have a larger estate than Cathie. In addition, although the court has rejected the strongly urged claim that Lynn either can or should work for many more years at his prior level of effort and productivity, he possesses in the short-term a greater earning capacity than Cathie. For these reasons, the court finds that Lynn should provide some further assistance with Cathie's reasonable and necessary fees. Her fees and costs, including expert witnesses, exceed \$100,000.00. They are not all reasonable. Particularly with respect to the accounting expert, the court has seldom seen less credible analysis nor a more blatantly overworked file, with virtually no ultimate advancement of the client's position. When the expert's evidence (which was overwhelmingly passionate advocacy, not expert analysis) was considered in its totality, it did virtually nothing to aid the court's determination of the issues. In addition, both the expert and petitioner's counsel chose to advance novel theories at significant cost in legal and accounting services to the client. The court does not wish to discourage creative lawyering, but neither does the court wish to encourage counsel or experts to risk such significant client resources on a longshot, in the hope that, even if unsuccessful, the other party will pay the bill.

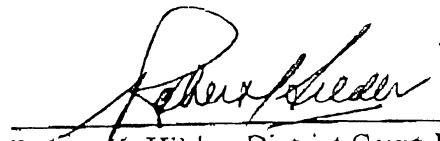
Respondent shall pay \$25,000.00 of petitioner's fees, with a credit for the \$11,000.00 already paid. In addition, if Lynn has paid his own fees or all or part of the \$11,000, from Foster Rentals, and if that amount is not included in the loans from Foster Rentals that Lynn is required to repay, he shall reimburse petitioner for said amounts, if any, in the final settlement of this matter

Balancing Entry

After calculation of all amounts awarded as part of the marital estate, the final balancing shall be accomplished by adjusting the allocation of the parties' interests in Foster Rentals.

DATED 24th day of December, 2001.

By the Court:

A handwritten signature in black ink, appearing to read "Robert K. Hilder", is written over a horizontal line.

Robert K. Hilder, District Court Judge