

2004

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

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca2](https://digitalcommons.law.byu.edu/byu_ca2)

 Part of the [Law Commons](#)

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

David W. Scofield.

Matthew L. Lalli; Amy F. Sorenson; Nathan E. Wheatley.

AMY SORENSEN MATTHEW LALLI NATHAN E. WHEATLEY 15 West South Temple, #1200  
Salt Lake City, Utah 84101 Attorneys for Evelyn L. Saunders DAVID W. SCOFIELD, 340 Broadway  
Centre 111 East Broadway Salt Lake City, Utah 84111 Attorneys for Lynn G. Foster GARY R.  
COUILLARD 184 "S" Street Salt Lake City, Utah 84103 ProSe  
C. RICHARD HENRIKSEN, JR., #1466 JAMES E. SEAMAN, #8750 HENRIKSEN &  
HENRIKSEN, P.C. 320 South 500 East Salt Lake City, Utah 84102 Telephone (801) 521-4145  
Facsimile: (801) 355-0246 Attorneys for Cathie I. Foster

---

## Recommended Citation

Brief of Appellee, *Lynn G. Foster v. Evelyn L. Saunders*, No. 20040527 (Utah Court of Appeals, 2004).  
[https://digitalcommons.law.byu.edu/byu\\_ca2/5082](https://digitalcommons.law.byu.edu/byu_ca2/5082)

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

---

IN THE UTAH COURT OF APPEALS

---

LYNN G. FOSTER

\*

Plaintiff and Appellant

\*

Appeal No. 20040527-CA

vs.

\*

EVELYN L. SAUNDERS; SAUNDERS &  
SAUNDERS; GARY COUILLARD; AND  
CATHIE I. FOSTER

\*

\*

\*

Defendants and Appellees

---

OPENING BRIEF OF APPELLEE CATHIE I. FOSTER

---

APPEAL FROM THE JUDGMENTS AND ORDERS OF THE HONORABLE WILLIAM  
B. BOHLING, THIRD JUDICIAL COURT JUDGE

AMY SORENSEN  
MATTHEW LALLI  
NATHAN E. WHEATLEY  
15 West South Temple, #1200  
Salt Lake City, Utah 84101  
Attorneys for **Evelyn L. Saunders**

DAVID W. SCOFIELD,  
340 Broadway Centre  
111 East Broadway  
Salt Lake City, Utah 84111  
Attorneys for **Lynn G. Foster**

GARY R. COUILLARD  
184 "S" Street  
Salt Lake City, Utah 84103  
**Pro Se**

UTAH COURT OF APPEALS  
BRIEF

UTAH  
DOCUMENT  
K F U

50

A10

DOCKET NO. 20040527-CA

C. RICHARD HENRIKSEN, JR., #1466  
JAMES E. SEAMAN, #8750  
HENRIKSEN & HENRIKSEN, P.C.  
320 South 500 East  
Salt Lake City, Utah 84102  
Telephone (801) 521-4145  
Facsimile: (801) 355-0246  
Attorneys for **Cathie I. Foster**

FILED  
UTAH APPELLATE COURTS

DEC 15 2004

---

IN THE UTAH COURT OF APPEALS

---

LYNN G. FOSTER

\*

Plaintiff and Appellant

\*

vs.

\*

Appeal No. 20040527-CA

EVELYN L. SAUNDERS; SAUNDERS &  
SAUNDERS; GARY COUILLARD; AND  
CATHIE I. FOSTER

\*

\*

\*

Defendants and Appellees

---

**OPENING BRIEF OF APPELLEE CATHIE I. FOSTER**

---

APPEAL FROM THE JUDGMENTS AND ORDERS OF THE HONORABLE WILLIAM  
B. BOHLING, THIRD JUDICIAL COURT JUDGE

AMY SORENSEN  
MATTHEW LALLI  
NATHAN E. WHEATLEY  
15 West South Temple, #1200  
Salt Lake City, Utah 84101  
Attorneys for **Evelyn L. Saunders**

DAVID W. SCOFIELD,  
340 Broadway Centre  
111 East Broadway  
Salt Lake City, Utah 84111  
Attorneys for **Lynn G. Foster**

GARY R. COUILLARD  
184 "S" Street  
Salt Lake City, Utah 84103  
**Pro Se**

C. RICHARD HENRIKSEN, JR., #1466  
JAMES E. SEAMAN, #8750  
HENRIKSEN & HENRIKSEN, P.C.  
320 South 500 East  
Salt Lake City, Utah 84102  
Telephone (801) 521-4145  
Facsimile: (801) 355-0246  
Attorneys for **Cathie I. Foster**

# TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	iv-vi
STATEMENT OF CASE .....	2-3
A.    NATURE OF THE CASE.	
B.    COURSE OF PROCEEDINGS.	
STATEMENT OF FACTS .....	3-7
SUMMARY OF ARGUMENTS .....	7-9
ARGUMENT .....	9-41
I.    THE TRIAL COURT CORRECTLY DISMISSED APPELLANT’S FIRST CAUSE OF ACTION FOR WRONGFUL INITIATION, USE OR CONTINUATION OF CIVIL PROCEEDINGS. ....	9
A.    The Court Was Correct in Dismissing Appellant’s First Cause of Action Because the Tort Does Not Apply to Arguments Made in the Course of a Properly Initiated Litigation. ....	9-10
B.    The Trial Court Was Proper to Dismiss Appellant’s Claim for Wrongful Bringing of a Civil Proceedings Because He Failed to Allege That Cathie’s Conduct Was Without Probable Cause and for a Purpose Other than Securing Proper Adjudication. ....	10-11
C.    The Trial Court Properly Dismissed Appellants Causes of Action for Wrongful Bringing of Civil Proceedings Because Previous Proceedings Were Not Terminated in Appellant’s Favor. ....	11-12
D.    The Trial Court Was Proper to Dismiss Appellants Cause of Action for Wrongful Bringing of Civil Proceedings Because the Appellant Failed to Allege a Lack of Good Faith on the Part of Cathie, Who Has the Right to Rely on the Advice of Counsel. ....	12-13
E.    The Trial Court Appropriately Dismissed Appellant’s Cause of Action for Wrongful Bringing of Civil Proceedings Because the Judicial Proceedings Privilege Bars Appellant’s Wrongful Initiation of Civil Proceedings Claim as Plead. ....	14
II.   THE TRIAL COURT CORRECTLY DISMISSED CAUSE OF ACTION WO, THE SLANDER OF TITLE CLAIMS OF FRLC. ....	13

A.	Appellant Has Failed to State a Claim for Slander of Title to Property Owned by FRLC Based upon Statements Made by Cathie in Her January 22, 2002 Affidavit. ....	13-16
B.	The Trial Court Properly Dismissed the FRLC’s Slander of Title Cause of Action Because the Appellant Failed to Allege or Establish the Four Elements of the Cause of Action as Set Forth in <u>Bass</u> . ....	16-19
C.	The Trial Court Properly Dismissed the Slander Title Claim of FRLC Because it Was Barred by the Applicable Statute of Limitations. .	19-22
D.	The Trial Court Also Correctly Dismissed the Slander Claim of FRLC Because They Are Barred by the Doctrine of Claim Preclusion and Res Judicata. ....	22
III.	THE TRIAL COURT APPROPRIATELY DISMISSED CAUSE OF ACTION III, SLANDER OF TITLE BY FFP. ....	22
IV.	THIS COURT SHOULD UPHOLD THE TRIAL COURT BECAUSE THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT AGAINST APPELLANT, LYNN G. FOSTER, ON COUNTS IV AND V.	23
A.	The Fourth Cause of Action Alleging a Breach of Duty Was Properly Dismissed on Summary Judgment Because There Were No Genuine Issues of Material Fact and Cathie Was Entitled to Summary Judgment as a Matter of Law. ....	23-29
i.	<u>Summary Judgment Was Proper in this Case Because There Was No Foreseeability of Harm.</u>	
ii.	<u>Summary Judgment Was Proper Because There Was No Duty or Breach.</u>	
iii.	<u>Summary Judgment Is Proper Because There Were No Material Issues of Fact.</u>	
B.	The Summary Judgment Dismissing the Intentional Interference with Prospective Economic Advantage Cause of Action Was Proper Because There Was No Genuine Issues of Material Fact and Cathie Was Entitled to Judgment as a Matter of Law. ....	29-36

- i. Summary Judgment Was Proper Because the Allegations Do Not Deal with Business or Contractual Affairs.
- ii. Summary Judgment Was Proper Because There Was No Improper Purpose or Means.
- iii. Summary Judgment Was Proper Because There Was No Proof That Cathie's Conduct Caused Harm.

V. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED LYNN'S REQUEST FOR DISCOVERY BEFORE RULING ON THE MOTION FOR SUMMARY JUDGMENT ..... 36-40

VI. THE COURT OF APPEALS SHOULD AWARD ATTORNEYS FEES AND DOUBLE COSTS UNDER RULE 33(A) OF THE UTAH RULES OF APPELLATE PROCEDURE. .... 40-41

CONCLUSION ..... 41

## TABLE OF AUTHORITIES

CASE NAME AND CITATION	PAGE CITED
AMS Salt Industries v. Magnesium Corp., ..... 942 P.2d 315, 321 (Utah 1997)	24
Baird v. Intermountain School Federal Credit Union, ..... 555 P.2d 877 (Utah 1976).	11
Bass v. Planned Parent Management Services, ..... 761 P.2d 566-568 (Utah 1988)	13, 14, 17, 19, 21
Beasley v. Hansen, ..... 286 P.2d 1057, 1058 (Utah 1955)	13
Crossland Savings v. Hatch, ..... 877 P.2 1241, 1243 (Utah 1994)	36
DeBry v. Gode, ..... 992 P.2d 979 (Utah 1999)	14, 15, 16
Doe v. Doe, ..... 878 P.2d 1161, 1163 (Utah App.1994)	31
Dowse v. Doris Trust, Co., ..... 208 P.2d 956, 958 (Utah 1949)	18
Downtown Athletic Club v. Horman, ..... 740 P.2d 275, 278-279 (Utah App. 1987)	36
Fenn v. Redmond Venture, Inc., ..... 2004 WL 2314546, 510 Utah Adv. Rep. 24, 2004 UT App. 355.	36
First Security Bank of Utah, N.A. v. Banberry Crossing, ..... 780 P.2d 1253, 1257 (Utah 1989)	18
Gilbert v. Ince, ..... 981 P.2d 841, 845 (Utah 1999)	10, 11, 12
Howard v. Hudson, ..... 259 F.2d 29 (9th Cir. 1958)	20, 21
Leigh Furniture, Leigh Furniture & Carpet Co. v. Isom, .....	30, 31, 32, 33, 34

657 P.2d 293, 304 (Utah 1982)	
Madson v. Borthick, ..... 769 P.2d 245, 247 (Utah 1988).	22
Matheson v. Pearson, ..... 619 P.2d 321, 322 (Utah 1980)	31
Mecham v. Consol. Oil & Transp., Inc., ..... 53 P.3d 479, 483 (Utah App. 2002)	38, 39
Mumford v. ITT Commercial Fin. Corp., ..... 858 P.2d 1041, 1043 (Utah App. 1993)	31
Norton v. Kanouff, ..... 86 N.W. 2d 72, (Neb. 1957)	20
Pipkin, v. Haugen, ..... 2003 WL 21470399 at *2, (2002 Ut. App 216 at 218.)	33
Prat v. Prodata, Inc., ..... 885 P.2d 786, 788 (Utah 1994)	33
Price v. Armour, ..... 949 P.2d 1251, 1254 (Utah 1997).	14
Prosser & Keeton ..... § 114, at 818	15
Reeves v. Geigy Pharm., Inc., ..... 764 P.2d 636, 639 (Utah App. 1988)	36
Restatement (Second) of Torts, ..... §575, §575(b), §674-681(b)	10, 12
Rev'd in part on other grounds, ..... 827 P.2d 212 (Utah 1992)	4
Sandy City v. Salt Lake County, ..... 749 P.2d 482, 488 (Utah App. 1990)	36
Scott Paper Co. v. Fort Howard Paper Co., ..... 343 F. Supp 299, 235 (E.D. Wis 1972)	20
Smith v. Four Corners Mental Health Center, .....	26

70 P.3d 904, 917 (Utah 2003)	
St. Benedict’s Dev. Co. v. St. Benedict’s Hosp., . . . . .	34
811 P.2d 194, 201 (Utah 1991)	
Taghipour v. Jerez, . . . . .	21
26 P.3d 885, 888 (Utah App. 2001)	
Top Service Body Shop, Inc. v. Allstate Insurance Co., . . . . .	32, 34
582 P.2d 1365 (Or. 1978)	
Wardley Corp. v. Welsh, . . . . .	38, 39
962 P.2d 86,89 (Utah App. 1998)	
Wright v. Lawson, . . . . .	14, 15
530 P.2d 823 (Utah 1975)	

## STATUTES

IRC §152(e) . . . . .	28
-----------------------	----

## RULES

Utah Code Ann. §78-12-29(4) . . . . .	7, 21, 23
Utah Code Ann. §78-12-26(1) . . . . .	21

## **STATEMENT OF CASE**

### **A. NATURE OF THE CASE.**

This case involves a disgruntled attorney who was unhappy with the decision of the divorce court in his divorce proceedings. In an effort to keep the divorce battle going, he has filed unsupportable and legally insufficient claims with the court. The court properly dismissed the claims of wrongful initiation, continuation or use of civil proceedings, slander of title, tortious breach of duty and intentional interference with prospective economic advantage. It is obvious that the Appellant, who is an attorney himself, is so upset with the history of the case and what happened in the divorce action, that he is blinded to the rules of setting forth a proper cause of action with supportable facts and simply wants to lash out against his former wife, her divorce counsel and the expert hired by her divorce counsel. The Appellant has taken opposite positions in the divorce action stating that he was somehow prejudiced and seeks damages and conversely that he does not have any dissatisfaction with Judge Hilder's ruling as he states "it is difficult to square Judge Hilder's rulings in favor of Lynn with any dissatisfaction on Lynn's part and indeed nothing could be further from the truth as Lynn prevailed on every major issue he litigated." (Appellants Brief, Statement of the Case page 4). In fact the Court's decision in the divorce court was apparently pretty close to straight down the middle dividing up the assets halfway between the Appellant's expert's testimony and Appellee's expert's testimony with regards to valuation. The court in fact awarded to

Cathie, one half of the marital interest in approximately 92% of Foster Rentals, in the divorce action, clearly indicating that there was a marital interest to be divided. Each of the causes of action alleged by the appellant was properly dismissed by the trial court and this court should sustain this dismissal.

**B. COURSE OF PROCEEDINGS.**

The Appellant is accurate that all Defendants moved to dismiss all counts of the Amended Complaint shortly after they were served with process because the facts were so clear and the causes of action were unfounded in law and in fact. The trial court dismissed counts 1, 2, and 3 on the Defendants Motion to Dismiss and instructed Appellees Foster and Couillard to reassert their motions to dismiss on counts 4 and 5 under a Rule 56 Motion for Summary Judgment. After Appellee, Cathie I. Foster, filed such Motion for Summary Judgment and Memorandum in Support thereof the court properly granted such motion for summary judgment. The court properly denied Appellant's Rule 56 objection because there were no facts under the circumstances that could be uncovered or discovered that would create a dispute in facts or create a legally recognizable cause of action where none existed. The Appellant is correct that the trial court disposed of cause of actions 1, 2, and 3 on a Motion to Dismiss and granted summary judgment on the 4th and 5th causes of action.

**STATEMENT OF FACTS**

1. The Appellee, Cathie I. Foster, was formerly the spouse of the Appellant,

Lynn G. Foster, an attorney, whose Decree of Divorce was entered on April 25, 2002. (Decree of Divorce at R. 504.)

2. As part of the divorce action Cathie I. Foster filed an affidavit asserting that she believed that she “and/or Lynn owned interest in a list of eleven real properties” In the ruling judge Hilder considered the ownership interest raised by the parties therein and found that Cathie indeed owned one half of 92% of Foster Rentals, an entity that held title to seven of the eleven properties listed in Cathie’s affidavit. (Affidavit of Cathie I. Foster; R. 107-109). Judge Hilder further found that another of the eleven properties listed in the affidavit, the couples former residence, was a joint asset of the marriage. (Affidavit of Cathie I. Foster; R. 104). Finally Judge Hilder ordered that Lynn, as manager of Foster Rentals, was 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 in Foster Rentals and in Foster Family LLC’s filed two additional lawsuits against Cathie to Quiet Title the LLC’s. Lynn alleges that Foster Rentals obtained a judgment and decree against Cathie quieting title on July 30, 2001. (Amended Complaint ¶17; R. 21). The court in the Foster Rentals vs. Cathie Foster in its Minute Entry Ruling dated July 30, 2001 held that neither Lynn Foster nor Cathie Foster have an interest in the real property but then held that “that any claims that may have arisen out

of previous ownership or interest in the property are reserved in the divorce proceeding.” (Minute Entry Ruling page 1; R. 217). However Foster Family Properties LLC’s lawsuit against Cathie was dismissed with prejudice and the Appellant has indicated that they are not pursuing Cathie under cause of action three set forth in the Complaint.

4. Prior to the Decree of Divorce being entered, it came to Cathie’s attention that Lynn had filed an individual tax return and therefore Cathie went ahead and filed what she thought was a married filing separately return for the year 2000. (R. 330)

5. Cathie had never prepared a tax return or a tax extension form on her own. Cathie was not able to prepare and submit her 2000 return by the April 15, 2001 deadline. (R. 330).

6. Couillard was not hired to prepare and advise Cathie with respect to filing her federal or state taxes. (R. 330). Couillard assisted Cathie during his lunch break and did not bill Cathie for this assistance. The tax return as filed, reports Cathie’s income only. The major portion of Cathie’s income for the year 2000 was alimony paid by Lynn. Cathie’s earnings reported on her tax form was \$5,510.00 and this tax return indicates that Cathie was a homemaker and that Lynn is an attorney. (R. 331). Cathie was entitled to claim Greg and Brad as dependents on her taxes because she had full custody of them pursuant to court order. (R. 331).

7. On March 20, 2003 Cathie Foster moved to dismiss the Complaint filed in his matter arguing that the claim for wrongful bringing or continuation of a civil action

should be dismissed because of the failure of Lynn to allege probable cause and for purposes other to securing proper adjudication as the previous proceedings were not terminated in Plaintiff's favor, that the Plaintiff failed to allege a lack of good faith on the part of Cathie, who had the right to rely on the advice of counsel. Cathie moved to dismiss the second cause of action for slander of FRLC's title because the Plaintiff's affidavit was privileged under the judicial proceedings privilege. The Plaintiff failed to allege that Cathie's affidavit slandered titled and his claim was barred by the applicable statute of limitations.

8. On October 3, 2003 the Honorable William B. Bohling dismissed Lynn's claims against Cathie with prejudice on causes of action 1, 2, and 3 and held that the wrongful initiation of civil proceedings claim was "barred by judicial proceedings privilege and because the tort applies to the wrongful institution of civil proceedings, not arguments, as a matter of law." (Order October 3, 2003 at ¶ 1(2); R. 450). The trial court held that Lynn's slander of title claims were "barred by the judicial proceedings privilege, by the doctrine of claims preclusion, and by the one year statute of limitations for libel and slander as set forth in Utah Code Ann. §78-12-29(4). (Order October 3, 2003 at ¶ 2; R. 450).

9. Cathie filed a Motion for Summary Judgment on September 8, 2003 for causes of action four, breach of duty and five, intentional interference with prospective economic advantage. On December 30, 2003 the Honorable William B. Bohling granted

Summary Judgment in favor of Cathie on the fourth and fifth causes of action on the following grounds:

- a. That there were no genuine issues of material fact upon which a reasonable jury could find in favor of the Plaintiff on either the fourth or fifth causes of action.
- b. That the Plaintiff's Rule 56(f) Objection was not well taken and no further discovery needed to be done.
- c. That there was no duty or breach of duty applicable to these causes of action.
- d. That there was no foreseeability of harm from damages that might arise from a mistake on a tax return.
- e. That Plaintiff did not have any proof that Cathie's conduct was the cause of any harm or injury. (See Order Granting Summary Judgment; R. 618-621)

### **SUMMARY OF ARGUMENTS**

The trial court's decision dismissing Lynn's First three causes of action on a Motion to Dismiss and dismissing the fourth and fifth causes of actions on a Motion for Summary Judgment were properly granted and can be supported by a number of independent bases. In his opening brief, Lynn fails to address each of the independent rationales that support the trial courts decisions and fails to demonstrate that the trial

court made an error of law or abused its discretion. Lynn's first cause of action alleging wrongful initiation or continuation of civil proceedings was properly dismissed because that cause of action can not be applied to arguments made in pursuance of a properly initiated litigation. Cathie had probable cause to make claims against property in the divorce litigation, the divorce proceedings did not terminate in favor of either party. Cathie's actions were done in a good faith reliance on the advice of counsel, and finally the judicial proceedings privilege applies to bar this cause of action.

Additionally Lynn's second cause of action for slander of title to FRLC's real property was properly dismissed by the trial court for multiple reasons. These include Lynn's failed to allege or establish the four elements of the cause of action, the cause of action was barred by the one year statute of limitations for libel and slander and the cause of action was barred because it had previously been litigated and can not be brought due to the doctrines of claim preclusion and res judicata.

Lynn did not assert his third cause of action for slander of title of property held by FFP against Cathie and therefore Cathie does not address these arguments in her brief.

Lynn's fourth and fifth causes of action for breach of duty and intentional interference with prospective economic advantage are both predicated on the fact that Cathie filed a tax return that was mistakenly designated a joint return even though it only had income information for Cathie. The trial courts granting of summary judgment on these causes of action was proper and there were multiple reasons and justifications for

the granting of summary judgment on those causes of action.

The breach of duty cause of action was properly dismissed on summary judgment because it was not foreseeable that Cathie's minor mistakes on her tax return would cause harm to Lynn, in preparing her tax return Cathie owed no duty to Lynn, Lynn raised no genuine issue of material fact with regards to Cathie's filing of the tax return that would give rise to this cause of action and Lynn could not offer or proffer any evidence that demonstrated that Cathie's conduct was the cause of any harm or injury to Lynn.

Lynn's fifth cause of action for intentional interference with prospective economic advantage was properly dismissed on summary judgment because the allegations did not relate to Lynn's business or contractual affairs, Cathie did not use any improper purpose or means in filing her tax returns, and there was no evidence that Cathie's filing of the tax return caused any harm to Lynn.

Therefore for all of the foregoing reasons this court should uphold the trial courts dismissal of causes of action one, two and three and its grant of summary judgment on causes of action four and five against Cathie.

### **ARGUMENT**

#### **I. THE TRIAL COURT CORRECTLY DISMISSED APPELLANT'S FIRST CAUSE OF ACTION FOR WRONGFUL INITIATION, USE OR CONTINUATION OF CIVIL PROCEEDINGS.**

##### **A. The Court Was Correct in Dismissing Appellant's First Cause of Action Because the Tort Does Not Apply to Arguments Made in the Course of a Properly Initiated Litigation.**

It would be stifling to the judicial process in our adversary system, where each party is represented by counsel, that any argument that counsel made or advanced in a case could later be a subject of a malicious prosecution or a wrongful bringing or continuation of a civil proceeding. Therefore courts have been reluctant to apply this tort to arguments of counsel and not to actual abuses that were brought to annoy, harass and prolong litigation wrongfully that the court would want to discourage. This is particularly true in family law situations where oft times the acrimonious relationship exhibits itself in the courtroom. Cathie refers the court to the arguments set forth by Appellee, Evelyn Saunders, in section I of their brief as though incorporated and fully set forth herein below.

**B. The Trial Court Was Proper to Dismiss Appellant's Claim for Wrongful Bringing of a Civil Proceedings Because He Failed to Allege That Cathie's Conduct Was Without Probable Cause and for a Purpose Other than Securing Proper Adjudication.**

In the case of Gilbert v. Ince, 981 P.2d 841, 845 (Utah 1999) the Court adopted the Restatement (Second) of Torts definition of wrongful use of civil proceedings. The claims for wrongful use of civil proceedings was defined under the restatement as instituting or maintaining civil proceedings for an improper purpose without a justifiable basis. Id. Restatement (Second) of Torts § 674-681(b). The elements of wrongful use of civil proceedings include initiating civil proceedings: 1) without probable cause and primarily for a purpose other than that of securing the property adjudication of the claim in which the proceedings are based, and 2) the proceedings terminated in favor of the

person against whom the proceedings were brought. Gilbert v. Ince, 981 P.2d 841, 845 (Utah 1999).

Appellant has failed to allege that Cathie has brought claims without probable cause. Probable cause is defined as a reasonable belief in the existence of the facts upon which the claim is based, and correctly or reasonably believing that under those facts the claim may be valid under the applicable law. Id. at 846. Probable cause must be accompanied by a showing of purposeful harassment or annoyance and, in most cases, malice. Id.; Baird v. Intermountain School Federal Credit Union, 555 P.2d 877 (Utah 1976).

Appellant has the obligation of alleging that Cathie acted without probable cause and for the purpose of harassment, annoyance, and with malice. See Gilbert, 981 P.2d at 846. However, Plaintiff has failed to allege in his Complaint that Cathie's prior actions were for the purpose of harassment, annoyance, and brought with malice. Thus Plaintiff has failed to state a claim for wrongful initiation, use and/or continuance of civil procedure against Cathie.

**C. The Trial Court Properly Dismissed Appellants Causes of Action for Wrongful Bringing of Civil Proceedings Because Previous Proceedings Were Not Terminated in Appellant's Favor.**

In addition, Appellant is unable to allege that the divorce proceedings terminated in his favor as required under Gilbert. 981 P.2d at 845. Because the prior proceedings concerned the divorce of Lynn and Cathie, the proceedings did not terminate in favor of

either Lynn or Cathie. There is no “winner” after a divorce adjudication. The court’s final ruling in dividing the assets in the divorce proceeding struck a balance between the evaluations given at trial by Cathie’s expert and Lynn’s expert. Lynn therefore cannot allege that the divorce proceedings terminated in his favor. Because the proceedings cannot be alleged to have terminated in Lynn’s favor, he has failed to state a claim against Cathie for wrongful initiation, use and/or continuation of civil proceedings.

**D. The Trial Court Was Proper to Dismiss Appellants Cause of Action for Wrongful Bringing of Civil Proceedings Because the Appellant Failed to Allege a Lack of Good Faith on the Part of Cathie, Who Has the Right to Rely on the Advice of Counsel.**

In the event that Appellant succeed in stating a valid claim against Saunders for wrongful initiation, use and/or continuation of civil proceedings, Cathie is not liable. Restatement (Second) of Torts § 575 addresses client liability when an attorney engages in wrongful use of civil proceedings. Section 575(b) states that a client has probable cause and consequently is not liable for wrongful use of civil proceedings if the client “believes to this effect in reliance upon the advice of counsel, sought in good faith and given after full disclosure of all relevant facts within his knowledge and information.” Gilbert, 981 P.2d at 846 n.9; Restatement (Second) of Torts § 575(b). Cathie is therefore protected from liability because she relied in good faith on Saunders’ advise. Cathie was an unsophisticated client who placed her good faith reliance in Saunders’ expertise and experience in selecting the strategies and theories employed during trial. Cathie therefore cannot be liable for any claim against Saunders for wrongful initiation, use and/or

continuation of civil proceedings.

In sum, Appellant has failed to state a claim against Cathie for wrongful initiation, use and/or continuance of civil proceedings because Cathie did not bring claims lacking probable cause with purpose of harassment, annoyance, or with malice. Also, the proceedings could not have terminated in favor of Lynn, as there was no winner in the divorce proceeding. Alternatively, Cathie cannot be held liable for Saunders' wrongful initiation use/or continuance of civil proceedings because Cathie relied in good faith on Saunders' representation.

**E. The Trial Court Appropriately Dismissed Appellant's Cause of Action for Wrongful Bringing of Civil Proceedings Because the Judicial Proceedings Privilege Bars Appellant's Wrongful Initiation of Civil Proceedings Claim as Plead.**

The Appellant's claim for wrongful initiation of civil proceedings is also barred by the judicial proceedings privilege. (See Beasley v. Hansen, 286 P.2d 1057, 1058 (Utah 1955)). Appellee, Cathie I. Foster, incorporates Evelyn Saunders brief section 2 (b) as though set forth hereinafter.

**II. THE TRIAL COURT CORRECTLY DISMISSED CAUSE OF ACTION TWO, THE SLANDER OF TITLE CLAIMS OF FRLC.**

**A. Appellant Has Failed to State a Claim for Slander of Title to Property Owned by FRLC Based upon Statements Made by Cathie in Her January 22, 2002 Affidavit.**

In Bass v. Planned Parent Management Services, 761 P.2d 566-568 (Utah 1988).

The court held that a claim for slander of title is determined by satisfying four factors.

Appellant must show that there has been (1) a publication, either oral or written, of a slanderous statement, (2) that is false, (3) made with malice, (4) that resulted in actual or special damages to the claimant. Id. Appellant has failed to plead the slander of title cause of action according to the four factor test. Also, Appellant cannot state a claim for slander of title because the statements made in the affidavit are privileged and otherwise do not constitute slander of title.

The trial court properly dismissed the Slander claim as statements made in Cathie's January 22, 2001 affidavit fall under the judicial privilege. The three pronged test for judicial privilege requires a showing that (1) the statement was made during or in the course of judicial proceedings; (2) the statement has some reference to the subject matter of the proceeding; (3) the statement was made by a judge, juror, litigant or counsel. DeBry v. Gode, 992 P.2d 979 (Utah 1999) (quoting Price v. Armour, 949 P.2d 1251, 1254 (Utah 1997)). Lynn has never contested that the first and last prongs of the test are met. However, Lynn disputes that the affidavit has some reference to the subject matter of the divorce proceeding.

Lynn argues that the test for determining whether a statement has some reference to the subject matter is narrow. Lynn asserted that the affidavit does not fall within the scope of the "American rule" that was adopted by the Utah Supreme Court in Wright v. Lawson, 530 P.2d 823 (Utah 1975). While the "American rule" is indeed more narrow than its English counterpart, the rule as adopted by the Court is still quite broad. The

American rule, on the other hand, grants immunity for statements that are “relevant” or “pertinent” to some issue in the case, being further defined as having **“some relationship to the cause or subject matter involved.”** Id. (emphasis added); see also DeBry, 992 P.2d at 984. The phrase “some relationship to the cause or subject matter involved” is considerably broad. The DeBry Court asserted that “[a] statement need not be relevant or pertinent to the judicial proceedings from an evidentiary point of view for the privilege to apply.” Id. at 984. The Court further explained that “[d]oubts should be resolved in favor of the statement having reference to the subject matter of the proceeding.” Id., citing Prosser & Keeton § 114, at 818.

The Court in DeBry demonstrated the breadth of what constitutes something that makes “reference to the subject matter of a proceeding.” At issue in DeBry was whether statements made in a letter written to a judge by an attorney involved in a trial before the judge were protected by the judicial privilege. Id. at 981-82. The attorney wrote the letter to inform the judge of vandalism that had occurred to her home. Id. The attorney had a “gut” feeling that the vandalism was somehow related to the case, but was not certain. Id. In affirming the trial court’s determination that the statements in the letter related to the proceedings and covered by the judicial privilege, the Court held that the letter has reference to the subject matter of the proceeding because it touched on the integrity of the divorce proceeding. Id. at 984. Thus the Court determined that the statements in the letter were covered by the judicial privilege though the attorney had

little more than a suspicious feeling that the vandalism was somehow related to the case and though the statements did not relate to evidence or arguments proffered in the case.

Cathie's affidavit describing her possible interest in Foster Rentals, L.C.'s ("FRLC") property clearly had reference to the subject matter of the divorce proceeding. Cathie's affidavit was created on January 22, 2001. In the affidavit, she stated that she believed that she or Plaintiff had an interest in property held by FRLC. It was not until several months later that the court issued its ruling quieting title in FRLC. In fact, the court declared that "any claims [Cathie and Lynn] may have arising out of previous ownership or interest in the property are reserved for the divorce proceedings." Later, at the culmination of the divorce, the court stated that "[p]etitioner [Cathie] is awarded half of the marital interest" in FRLC. Therefore, Cathie's interest with respect to FRLC undoubtedly had "some reference to the subject matter of the proceeding", especially considering the broadness of what constitutes a statement that has some reference to the subject matter of the proceeding. Any doubt that the affidavit had reference to the subject matter of the proceeding should be resolved in favor of Cathie. DeBry, 922 P.2d at 984.

Cathie's statements in her affidavit regarding her interest in property plainly had some reference to the subject matter of the divorce, as required under the second prong of the judicial privilege test. Because Cathie's affidavit fits squarely within the judicial privilege, Lynn's claim for slander of title was properly dismissed.

**B. The Trial Court Properly Dismissed the FRLC's Slander of Title Cause of Action Because the Appellant Failed to Allege or**

**Establish the Four Elements of the Cause of Action as Set Forth  
in Bass.**

The Appellant in his original Complaint, also failed to allege that Cathie's statements in her affidavit constituted slander of title as defined in case law. Plaintiff must allege that Cathie published a "slandorous statement", that was "false", made with "malice", and that resulted in "damages" to Plaintiff. Bass, 761 P.2d at 568.

Plaintiff has not alleged in his Complaint that Cathie published a "slandorous statement" in her affidavit. Cathie did not make a statement in her affidavit that could be considered slanderous. A slanderous statement is defined as a statement that is derogatory or injurious to the legal validity of an owner's title or to his or her right to sell or hypothecate the property. Id. at 568. In paragraph three of the affidavit, Cathie stated that there are "numerous commercial properties in which the Affiant [Cathie] and/or the Respondent [Plaintiff] have an ownership interest." In paragraph five of the affidavit, Cathie stated that "affiant [Cathie] believes that one or both parties have an interest in the following properties. . . ." This statement in paragraph five was followed by a list of property. These statements do not constitute statements that are derogatory or injurious to the validity of Plaintiff's property or his right to sell the property. Cathie merely stated that either she or Plaintiff or Plaintiff only may have an interest in certain properties that might be at issue in the divorce proceedings. Plaintiff has not alleged and cannot allege that Cathie published a slanderous statement in her affidavit, therefore Plaintiff's claim for slander of title should be dismissed.

Cathie did not make a “false” statement about her interest in property. Plaintiff claims that the statements made in paragraphs three and five (quoted above) of the affidavit constituted a claim to an “ownership interest” or “legal title” in the property. However, neither of the statements made in paragraph three or paragraph five of the affidavit asserted that Cathie held an “ownership interest” or that she owned “legal title” in any property. Cathie states only that either she or Plaintiff or Plaintiff only might have an interest in the properties. Cathie’s statement was a truthful assessment of the possible interest she may or may not have had in the property in conjunction to the divorce proceeding. If fact, in the Ruling dated December 24, 2001, the court determined that Cathie had a “marital interest” in half of FRLC’s property. Considering Cathie did have a marital interest in FRLC’s property, the statement in her affidavit regarding such interest was not false.

Plaintiff has not alleged that Cathie’s affidavit was procured with “malice.” Cathie did not have malice in drafting the affidavit or any statement therein. Courts have held that malice may be affirmative – made with an intent to injure, vex or annoy. First Sec. Bank of Utah, N.A., v. Banberry Crossing, 780 P.2d 1253, 1257 (Utah 1989). Malice may also be implied – knowingly or wrongfully publishing something untrue which gives a false or misleading impression adverse to one’s title under the circumstances that it should reasonably foresee might result in damage to the owner of the property. See Dowse v. Doris Trust Co., 208 P.2d 956, 958 (Utah 1949). Cathie did

not publish the affidavit with the intent to “injure, vex, or annoy” Plaintiff. The affidavit was prepared for the purpose of showing that a property appraisal was necessary in conjunction to the divorce proceeding. Also, Cathie did not “knowingly or wrongfully” make a false or misleading statement that could cause foreseeable damages to FRLC. As discussed above, Cathie’s statements were true and made without the foresight of possible damages to the property. Because Plaintiff has not alleged and cannot allege that Cathie made a statement with malice, Plaintiff’s claim for slander of title should be dismissed.

FRLC has not been “damaged” by Cathie’s affidavit. Plaintiff stated in his Complaint that he was injured in the form of attorney fees, costs involved in clearing title to the property, and lost time. In Bass, the trial court, by its own initiative, rewarded the plaintiff special damages for attorney fees incurred in clearing title to property. 761 P.2d at 569. However, the Supreme Court reversed and held that it was necessary to show a loss of sale or economic advantage in order to recover attorney fees and costs of clearing title. Id. No allegation suggests that Plaintiff’s property was harmed by a loss of sale or other loss of economic advantage. Plaintiff has failed to allege that his property has sustained any legally recognizable harm as a result of Cathie’s affidavit. Thus Plaintiff has failed to state a claim for slander of title.

**C. The Trial Court Properly Dismissed the Slander Title Claim of FRLC Because it Was Barred by the Applicable Statute of Limitations.**

The trial court properly dismissed the Appellant's cause of action for slander of title of FRLC's because as a matter of law this cause of action was barred by the applicable one year statute of limitations for libel and slander.

Causes of action based on slander are limited by a one year statute of limitations under Utah Code Ann. § 78-12-29(4). Nothing in the statute creates an exception for causes of action involving slander of title. Lynn argues that a claim for slander of title should fall under the three year statute of limitations for damage to real property as provided under Utah Code Ann. § 78-12-26(1).

The majority of courts that have addressed this issue have held that the statute of limitations for a slander of title claim is governed by the one year limitation for slander and libel. Scott Paper Co. v. Fort Howard Paper Co., 343 F. Supp 299, 235 (E.D. Wis 1972). The case of Norton v. Kanouff, 86 N.W. 2d 72, (Neb. 1957) is an example of a case which follows the majority rule. However, after considering several cases in which courts held that the one year statute of limitations applied, the court went on to hold that "[w]e can see no substantial reason why the Legislature would make any distinction between an action involving defamation of title to property and one based upon defamation of the person." Id. at 76.

Lynn quotes language from the federal circuit court case of Howard v. Hudson, 259 F.2d 29 (9th Cir. 1958) which opined that California courts would likely apply the statute of limitations for property injuries to slander of title actions in consideration of

California case law. The California Appellate Court had stated that a slander of title cause of action is for “redress of an invasion of a **particular property right**, that of **immediate salability of the property involved.**” Id. at 32. Based in part on this language, the Ninth Circuit held that California considers slander of title to relate to an injury to property rights and that the statute of limitations for property injury was therefore appropriate. Plaintiff argues that the Supreme Court of Utah in Bass v. Planned Management Services, Inc., 761 P.2d 566, 568 (Utah 1999) adopted a similar comparison of a slander of title action to property rights. However, the Court in Bass stated that slander of title actions are different than slander of a person because slander of title relates to the economic injury to an individual caused by defamation rather than a person’s reputation. Id. Because slander of title in Utah focuses on the injury the slander causes an individual rather than the harm to a property right as in California, the analytical leap should not be made that the tort of slander of title action be controlled by a statute of limitations designed for injury to property. Therefore, the Court has no reason under Utah case law to deviate from the majority rule that the one year statute of limitations for slander applies to claims for slander of title.

In addition, Lynn cites to Taghipour v. Jerez, 26 P.3d 885, 888 (Utah App. 2001) for authority that the “general” statute of limitations for slander should be controlled by the “specific” statute for injury to property. However, the opposite is true. With respect to the cause of action for slander of title, the statute of limitations that governs “slander”

is more specific to the cause of action of slander of title than the statute of limitations which governs general injuries to real property.

In sum, the court properly dismissed Lynn's claim for slander of title because a cause of action based on slander of title is more properly related to defamation than injury to real property. Utah Code Ann. § 78-12-29(4) limits the time frame for bringing a cause of action based on slander to one year.

**D. The Trial Court Also Correctly Dismissed the Slander Claim of FRLC Because They Are Barred by the Doctrine of Claim Preclusion and Res Judicata.**

Alternatively if the slander claim is not barred by the arguments set forth above, Appellant's claims are barred by the doctrine of claim preclusion. All three requirements are met under claim preclusion. First both cases must involve both parties or their privies. Second, the claimant is alleged to be barred must have been presented in the first suit or must have been one that could have and should have been raised in the first action and third, the first suit must have resulted in a final judgment on the merits. Madson v. Borthick, 769 P.2d 245, 247 (Utah 1988).

Appellee, Cathie, incorporates the full argument set forth by Appellee, Evelyn Saunders in III of their brief.

**III. THE TRIAL COURT APPROPRIATELY DISMISSED CAUSE OF ACTION III, SLANDER OF TITLE BY FFP.**

Since the Appellant has not asserted a claim against Appellee, Cathie Foster, for the slander of FFP's title she will not respond to this portion of the Appellant's brief.

However Appellee, Cathie Foster, believes that it is absolutely clear that under the doctrine of claim preclusion the judicial privilege statute of limitations and failure to set forth the elements of slander of title that the court properly dismissed such cause of action against the other Appellees.

**IV. THIS COURT SHOULD UPHOLD THE TRIAL COURT BECAUSE THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT AGAINST APPELLANT, LYNN G. FOSTER, ON COUNTS IV AND V.**

**A. The Fourth Cause of Action Alleging a Breach of Duty Was Properly Dismissed on Summary Judgment Because There Were No Genuine Issues of Material Fact and Cathie Was Entitled to Summary Judgment as a Matter of Law.**

After extensive briefing, affidavits, and argument by both parties in the underlying case, the trial court made a carefully considered decision to grant Cathie I. Foster (“Cathie”) and Gary Couillard (“Couillard”) summary judgment on Lynn’s claims of Tortious Breach of Duty and Intentional Interference with Prospective Economic Advantage. In its Order Granting Summary Judgment the court outlined multiple independent bases for its grant of summary judgment. These include: 1) a finding that there were no issues of material fact upon which a jury could find in favor of the Plaintiff; 2) there was no duty or breach of duty in this case applicable to the fourth and fifth causes of action; 3) that there was no liability because there was no foreseeability of harm; and 4) the Plaintiff failed to establish any proof of causation or that Cathie’s conduct caused any harm or injury to the Plaintiff. (See Order Granting Summary Judgment; R. 618-

621). Any one of these rationales standing alone would be sufficient to grant summary judgment in favor of Cathie. Lynn however challenges only one of these bases in his brief. Without citing any case law to support his contentions he argues that it was foreseeable that Cathie's mistakes on a tax return would damage Lynn. Lynn's contentions are contrary to Utah law and contrary to the facts of this case.

**i. Summary Judgment Was Proper in this Case Because There Was No Foreseeability of Harm.**

The issue of foreseeability has been addressed by Utah courts who have stated that the standard for foreseeability is whether "a reasonable person can foresee that his acts may create a significant likelihood of causing harm to others." AMS Salt Industries v. Magnesium Corp., 942 P.2d 315, 321 (Utah 1997). Whether a particular harm is "foreseeable" is an important factor in determining whether there is a duty. Id. In addition, other factors that may be considered are the likelihood of injury, the magnitude of the burden of imposing a duty on the defendant, reasonable mutual reliance, whether there is intentional conduct which increases the risk of harm, and general policy considerations. Id.

It was not significantly likely that a minor error made on Cathie's tax return by indicating the wrong filing status could result in an audit of Lynn's taxes or a refund delay. Because Cathie and Lynn filed their taxes separately, they both assumed responsibility for only their own taxes. Lynn filed his individual tax return first causing Cathie the need to file her return alone. A reasonable person would not foresee an audit

of another's taxes occurring because of a minor error made on the person's own taxes. In fact, it is much more foreseeable that a person who made an error would be the subject of an audit. Moreover, it is obvious by looking at Cathie's 2000 tax form that the tax return is for Cathie alone. The form indicates Cathie's income only. (Memo in Support of Motion for Summary Judgment at No. 19; R. 332.) The majority of Cathie's income for 2000 was from alimony, which indicates that Cathie was separated. (Id. at No. 20; R. 332.) The tax form included earnings of only \$5,510.00. (Id. at No. 21; R. 332.) It also indicated that Cathie was a homemaker and that Lynn is an attorney. (Id. at No. 22; R. 332.) The tax return is signed by Cathie only. (Id. at No. 23; R. 332.) It would not be reasonable that the IRS could think the tax return was actually intended to be a joint return. Thus, it was not foreseeable that such a minimal error on Cathie's tax return could create a significant likelihood of an audit to Lynn's taxes.

**ii. Summary Judgment Was Proper Because There Was No Duty or Breach.**

In addition, for the reasons just mentioned, no duty should be imposed on Cathie because it was not likely that Cathie's tax return would result in an audit to Lynn's taxes. Imposing a duty on Cathie in this situation would create the heavy burden of not giving her any leeway in making easily correctable errors on her tax return without automatically subjecting her to liability. Also, there was no mutual reliance between Cathie and Lynn as they were filing their taxes separately. Finally, there was no material factual dispute that Cathie engaged in intentional conduct that increased the risk of harm by filing her

tax return under these circumstances.

The presumption that Couillard and Cathie conspired to intentionally generate a “red flag” to the IRS is mere speculation and is contrary to the evidence. The idea that Cathie would make an error on her own taxes, creating the likelihood that her own taxes would be audited, for the slight possibility that the IRS would go after Lynn is not logical. Cathie was simply attempting to satisfy her duty to file her taxes. An error was made on her taxes that was not intentional and that was not calculated to affect Lynn. Lynn has produced no evidence to create a dispute to the contrary. Moreover, “[a]n affidavit that merely reflects the affiant’s unsubstantiated opinions and conclusions is insufficient to create an issue of fact.” Smith v. Four Corners Mental Health Center, 70 P.3d 904, 917 (Utah 2003). Lynn has provided nothing more than speculation and opinion on this matter. Thus Lynn has not raised an issue of material fact sufficient to avoid summary judgment or that requires further discovery on this matter.

The fact that Cathie intended to file her tax return under the status of a married individual filing a separate return is clearly established by the evidence. Lynn admitted the fact that “Plaintiff prepared a separate tax return for the year 2000 so Cathie was required to file a separate return as well.” (See Plaintiff’s Memorandum in Opposition, at Response to Statement No. 4; R. 385.) In the previous divorce litigation, Lynn argued to the court that Cathie should not have filed a separate return which led the court to order to parties to file an amended joint return. Thus for any error, Lynn has his remedy. (See

December 24, 2001 Ruling, at heading “Income Tax Return; R. 488-489.)

Cathie did not assert that there was a court order granting her the exemptions for Brad and Greg. Rather, Cathie asserts that the court granted Cathie full custody of Brad and Greg. The fact that Cathie had full custody of Greg and Brad entitled her to claim them as exemptions on her taxes. IRC § 152(e) provides as follows:

(e) Support test in case of child of divorced parents, etc.

(1) **Custodial parent gets exemption.**—Except as otherwise provided in this subsection, if—

(A) a child (as defined in section 151(c)(3)) receives over half of his support during the calendar year from his parents—

(i) who are divorced or legally separated under a decree of divorce or separate maintenance,

(ii) who are separated under a written separation agreement, or

(iii) who live apart at all times during the last 6 months of the calendar year, and

(B) such child is in the custody of one or both of his parents for more than one-half of the calendar year,

such child shall be treated, for purposes of subsection (a), as receiving over half of his support during the calendar year from the parent having custody for a greater portion of the calendar year...

Thus under the provision of § 152(e)(1), because Cathie and Lynn together provide more than half the support for Greg and Brad, Cathie, as the custodial parent, was entitled to claim them as exemptions on her taxes. Lynn was not entitled to claim Brad and Greg as exemptions on his taxes.

iii. **Summary Judgment Is Proper Because There Were No Material Issues of Fact.**

The fact that only Cathie’s income is reported on her tax return clearly establishes

that she intended to file a separate return. Lynn has admitted that the tax return reports Cathie's income only. (See Plaintiff's Memorandum in Opposition, at Response to Statement No. 19; R. 391.) If Cathie had intended the return to be a joint return she would have included Lynn's income on the return as well. It is much more logical that Cathie intended to file separately and indicated the wrong filing status on the tax form than she intended to file jointly and forgot to include Lynn's income in all the calculations. Whether Cathie reviewed the tax return for correctness and missed the error is immaterial. The point is that Cathie intended to file her tax return as a separate return. No genuine issue of material fact has been raised with respect to this issue.

Furthermore the error regarding the improperly marked filing status on Cathie's tax return and the fact that both parties filed individual returns was discovered and remedied. The Court granted the remedy of requiring the parties to file a joint return. This amended joint return was then filed by both parties and corrected an errors or mistakes that may have been contained in the previous tax filings.

Finally in his opening brief, Lynn claims to be entitled to an inference of bad faith due to Cathie's filing of the tax return because she later filed a copy of Lynn's tax return in this litigation. It is difficult to follow this disjointed reasoning. What Cathie's attorneys chose to use as an exhibit to support her claims in this litigation, certainly had nothing to do with the fact that she filed a separate joint tax return two years before Lynn's tax return was used as an exhibit in litigation. There is no connection and no

presumption or inference of bad faith can or should be granted. Furthermore, Lynn's own actions in filing this lawsuit subsequent to the divorce action put his own financial situation and tax return status at issue. He claims that in the divorce decree, the protective order would prevent Cathie's use of any of his tax returns in this litigation but he should be estopped from arguing that Cathie violated the Protective Order because he is the one that put his tax returns and financial situation at issue in this litigation.

For all of the foregoing reasons this court should hold that the trial court properly granted Summary Judgment on Lynn's cause of action alleging a breach of duty. This Court should hold that as a matter of law the trial court did not err when it found that there were: 1) no issues of material fact upon which a jury could find in favor of the Lynn; 2) no duty or breach of duty in this case applicable to the fourth and fifth causes of action; 3) that there was no liability because there was no foreseeability of harm; and 4) Lynn failed to establish any proof of causation.

**B. The Summary Judgment Dismissing the Intentional Interference with Prospective Economic Advantage Cause of Action Was Proper Because There Was No Genuine Issues of Material Fact and Cathie Was Entitled to Judgment as a Matter of Law.**

Lynn continues to claim that the Court "had already sustained the viability of Lynn's interference cause of action in count V of the Amended Complaint." That argument is in error because the trial court did not make any ruling with regards to the intentional interference with prospective economic relations issue. The court merely

requested that Cathie re-file her Motion to Dismiss as a Motion for Summary Judgment (See Order at No. 4; R.453-454.) and did not rule on the viability of the claim at that time.

For purposes of argument, even if we assume that Lynn is correct that the trial court did determine that the Plaintiff's cause of action as plead was viable, that determination would not preclude a later determination by the court that summary judgment should be granted on that very same cause of action. Once again there are multiple independent bases that each would support the trial court's decision to grant summary judgment on this cause of action.

**i. Summary Judgment Was Proper Because the Allegations Do Not Deal with Business or Contractual Affairs.**

Lynn's claim for intentional interference with prospective economic advantage was properly dismissed on Summary Judgment because this tort is specifically intended to deal with infractions of one's business or contractual affairs. See Leigh Furniture, Leigh Furniture & Carpet Co. v. Isom, 657 P.2d 293, 304 (Utah 1982). In the instant case, where Lynn's prospective business or contractual affairs have not been intentionally interfered with, summary judgment in favor of Cathie was appropriate as a matter of law.

Cathie has not interfered with the Lynn's prospective economic advantage. Under Leigh Furniture & Carpet Co. v. Isom, 657 P.2d 293, 304 (Utah 1982), the Lynn must satisfy three factors to prove Cathie has interfered with a prospective economic advantage. The Lynn must show that (1) Cathie intentionally interfered with the Lynn's existing or potential economic relations, (2) for an improper purpose or by improper

means, (3) causing injury to the Lynn. Id. Under the facts of this case it is clear that Cathie has not intentionally interfered with the Lynn's prospective economic relations for an improper purpose or by improper means. Consequently, the Lynn's claim for the interference with prospective economic advantage was properly dismissed on summary judgment.

In addition, The Plaintiff's claim for interference with prospective economic advantage should be dismissed on summary judgment because Cathie did not intentionally interfere with the Plaintiff's tax return. "The tort of intentional interference with economical relations is an intentional tort." Mumford v. ITT Commercial Fin. Corp., 858 P.2d 1041, 1043 (Utah App. 1993); Leigh Furniture, 657 P.2d at 304. An intentional tort requires an intent to harm or a substantial certainty that harm will result from the act. Matheson v. Pearson, 619 P.2d 321, 322 (Utah 1980); Doe v. Doe, 878 P.2d 1161, 1163 (Utah App.1994). The Plaintiff alleges that due to Cathie's 2000 tax return he was subjected to an audit and a delay in receiving his tax refund. However, the facts of this case are obvious that Cathie did not act with the intent or the substantial certainty that her taxes would cause an audit or delay in Plaintiff's refund. As discussed previously, it was more likely that an error on Cathie's tax return would generate an audit of her own taxes. It does not make sense that Cathie would make an intentional error on her own taxes when such an error was more likely to create problems for herself than for Plaintiff. Because Cathie did not have the intent to harm Plaintiff as required for a claim

for interference with prospective economic advantage, the Plaintiff's claim for interference with prospective economic advantage should be dismissed.

A claim for interference with prospective economic advantage is intended to cure "injury to plaintiff's contractual or business relationships." Leigh Furniture, 657 P.2d at 304 (quoting Top Service Body Shop, Inc. v. Allstate Insurance Co., 582 P.2d 1365 (Or. 1978)). Accordingly, Lynn's claim for interference with economic advantage cannot be based on his alleged tax audit and delay in receiving his tax refund. It is clear that Lynn's tax refund was not contingent on any contractual or business relationship and, consequently, Lynn's claim under the theory of interference with prospective economic advantage was properly dismissed.

**ii. Summary Judgment Was Proper Because There Was No Improper Purpose or Means.**

It is clear from the undisputed facts that Cathie did not intend to harm Lynn's potential business or contractual relations by filing her tax return. Cathie did not file her tax return to intentionally harm Plaintiff—she filed her tax return because she was required to do so by law. It does not make sense that Cathie would intentionally make an error on her tax return in an effort to harm Plaintiff. Thus Cathie clearly did not intend to harm Plaintiff through her tax return. This fact is established by common sense and Cathie's affidavit. (See Affidavit of Cathie I. Foster, at ¶ 17; R. 348.) This fact alone is sufficient to justify dismissing Plaintiff's claim for intentional interference with prospective economic advantage.

Plaintiff has failed to produce any evidence that Cathie had the intent to harm his business relations for an improper purpose or improper means. Plaintiff has only produced speculation to support his claims. It has been held that were a plaintiff failed to produce evidence that a defendant intentionally interfered with his business relations and did so with an improper purpose that summary judgment was appropriate. See Pipkin, v. Haugen, 2003 WL 21470399 at \*2, (2002 Ut. App 216 at 218.). Such should be the result in the case at hand. Further discovery would not allow Plaintiff to gather additional facts that would make his claims successful. Therefore, the court properly dismissed Plaintiff's claim for intentional interference with economic advantage on summary judgment.

The Court in Leigh Furniture stated that “[t]he alternative of improper purpose will be satisfied where it can be shown that the actor’s predominant purpose was to injure the plaintiff.” 657 P.2d at 307-08. This test has been further articulated as requiring a plaintiff to prove “that the defendant’s ill will predominated over all legitimate economic motivations.” Prat v. Prodata, Inc., 885 P.2d 786, 788 (Utah 1994). Cathie’s purpose in filing her 2000 tax return was not to interfere with the Lynn’s taxes, but to satisfy her own obligation to file. The facts do not support that Cathie’s error on her taxes was based on ill will toward Lynn.

To show that Cathie interfered with Lynn’s prospective economic advantage by improper means, the Lynn must show that Cathie used means that were “contrary to law,

such as violation of statutes, regulations, or recognized common-law rules.” Leigh Furniture, 657 P.2d at 308. Improper means include “violence, threats, or other intimidation, deceit or misrepresentation, bribery, unfounded litigation, defamation, or disparaging falsehood.” St. Benedict’s Dev. Co. v. St. Benedict’s Hosp., 811 P.2d 194, 201 (Utah 1991). Means may also be improper or wrong “because they violate ‘an established standard of a trade or a profession.’” Id. (quoting Top Service Body Shop, Inc. v. Allstate Ins. Co., 582 P.2d 1365, 1371 (Or. 1978). Here, Cathie has not interfered with Lynn’s prospective economic advantage by improper means. Cathie’s mistake on her 2000 tax form did not constitute a violation of statutes, regulations, recognized common law. Also, the error did rise to the level of violence, threats, intimidation, deceit and misrepresentation, bribery, unfounded litigation, defamation, or disparaging falsehood. In addition, Cathie’s mistake on her taxes did not violate an established standard of a trade or profession. Preparation of Cathie’s individual tax return was not related to a “trade or profession.” In any case, while the IRS does require that an individual file his or her taxes accurately, it is to be expected that people will make minor errors on their taxes. Such minor and easily correctable errors do not constitute a violation of a standard of a trade or profession.

Lynn alleges that Couillard used improper means in preparing Cathie’s tax return because Lynn’s Social Security number was used on the tax form. Regardless of who prepared Cathie’s tax return, the preparer was required to include Plaintiff’s Social

Security number on the form, no matter whether Cathie filed jointly or married filing individually. Therefore, the Plaintiff's Social Security number was not used by improper means as the IRS tax form required the inclusion of the Plaintiff's Social Security number. Cathie's tax return was clearly not prepared for an improper purpose or by improper means. There were no actions undertaken "intentionally, willfully, and/or with a reckless disregard for the rights of Lynn." Rather, in filing her year 2000 tax return, Cathie was satisfying her obligation to report her income and pay her taxes to the IRS. Therefore, the Court should dismiss Plaintiff's claim for Interference with Prospective Economic Advantage on summary judgment.

**iii. Summary Judgment Was Proper Because There Was No Proof That Cathie's Conduct Caused Harm.**

Furthermore, as discussed above, Lynn's dispute over the tax issue was raised in the divorce proceedings. The issues of the tax returns and any possible harm that could have occurred to Lynn was resolved during the divorce proceedings by the court's order to file a joint return. Under res judicata, Lynn should be barred from returning to court a second time to pursue a second remedy.

Plaintiff's tax audit and delay in his tax return was not caused by Cathie's 2000 tax return. As mentioned above, Plaintiff's audit could not have been caused by Cathie's tax return. Also, any delay in the Plaintiff receiving his tax refund could not have been caused by Cathie as Plaintiff filed his taxes four months before Cathie. In any case, any claim by the Plaintiff that he was damaged because of delay in his tax return was rendered

moot when Judge Hilder ordered Cathie and Plaintiff to file a joint return for the year 2000 and to split the refund. (Statement of Facts at No. 34.)

**V. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED LYNN'S REQUEST FOR DISCOVERY BEFORE RULING ON THE MOTION FOR SUMMARY JUDGMENT.**

Utah law is clear that courts should not and do not grant Rule 56(f) motions when intended to cause delay or lack in merit. Sandy City v. Salt Lake County, 749 P.2d 482, 488 (Utah App. 1990), rev'd in part on other grounds, 827 P.2d 212 (Utah 1992) (citing Reeves v. Geigy Pharm., Inc., 764 P.2d 636, 639 (Utah App. 1988); Downtown Athletic Club v. Horman, 740 P.2d 275, 278-279 (Utah App. 1987)). This is such a case where Lynn's Rule 56(f) affidavit was intended to delay summary judgment, lacked in merit and where further discovery would not lead to material information that would have enabled Lynn to defeat summary judgment.

Furthermore in the Court of Appeals reviews a trial court's decision to deny a Rule 56(f) motion under the abuse of discretion standard Crossland Savings v. Hatch, 877 P.2 1241, 1243 (Utah 1994). The Appellant Court should decline to reverse the trial courts decision unless the decision "exceeds the limits of reasonability". Id. "A district court is not required to grant Rule 56 motions that are dilatory or lacking in merit." Fenn v. Redmond Venture, Inc., 2004 WL 2314546, 510 Utah Adv. Rep. 24, 2004 UT App. 355. This Court should uphold the trial court's decision to deny the Rule 56(f) motion because it carefully considered all of the discovery that had taken place in the underlying

divorce case and although Lynn filed an affidavit supporting his Rule 56(f) motion the trial court determined that his affidavit lacked merit and was not founded on personal knowledge but instead was based upon speculation and unsubstantiated beliefs. Therefore the trial courts denial of Lynn's 56(f) motion was properly granted and was a proper exercise of the trial court's discretion.

The case that is currently before this court is based on an underlying divorce case in which there was extensive discovery, including depositions of the parties and experts, litigation and eventually a trial. The essential and key facts related to this current case including knowledge about Cathie's tax return were already the subject of discovery and litigation in the underlying lawsuit. The issues in the current case are not complex and the Plaintiff had in his possession all of the material factual information related to these issues. Allowing further discovery in this case would not have revealed any information that would have bolstered the Plaintiff's claims because the Plaintiff's claims were legally deficient and should be dismissed. Allowing further discovery would result in a waste of time and resources of the parties counsel and the court.

In his brief and his Rule 56(f) motion, Lynn makes much ado about his claims of an agency relationship between Cathie and Couillard with regards to the tax return. Lynn claims that he needs the opportunity to do additional discovery to flush out this relationship. What Lynn ignores however is that whether or not there is an agency relationship between Cathie and Couillard was irrelevant and was not a factor in the

Courts decision to grant summary judgment. The Court did not dismiss Lynn's causes of action because he failed to prove agency, the trial court dismissed his causes of action because he had insufficient legal and factual proof for his claims of Breach of Duty and Interference with Prospective Economic Advantage. The issue of or not whether there was an agency relationship ultimately can not and does not save the Plaintiff's claims.

Nevertheless, there was no agency created. Cathie and Couillard did not create an agency relationship with respect to preparing Cathie's tax return. An agency relationship based on "the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." Mecham v. Consol. Oil & Transp., Inc., 53 P.3d 479, 483 (Utah App. 2002); Wardley Corp. v. Welsh, 962 P.2d 86,89 (Utah App. 1998). This manifestation simply did not occur between Cathie and Couillard.

Agency is "the fiduciary relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." Mecham v. Consol. Oil & Transp., Inc., 53 P.3d 479, 483 (Utah App. 2002); Wardley Corp. v. Welsh, 962 P.2d 86, 89 (Utah App. 1998). In order for Plaintiff to show that there was an agency relationship between Cathie and Couillard, Plaintiff must prove (1) Cathie manifested that Couillard could act for her, (2) Couillard accepted the proposed undertaking, (3) both Cathie and Couillard understood that Cathie was to be in charge of the undertaking. Mecham, 53 P.3d at

483. Moreover, “[a]n agency is created and authority is actually conferred very much as a contract is made’: a meeting of the minds must exist between the parties.” Id. (quoting Wardley Corp., 962 P.2d at 89.) “[A]n agency relationship can arise only at the will and by the act of the principal.” Id.

Under the above test, it is clear that no agency relationship existed between Cathie and Couillard. Cathie had never prepared her taxes before and was not able to prepare her 2000 tax on her own. (Memorandum in Support of Motion for Summary Judgment at No. 5; R. 330.) Couillard assisted Cathie in preparing her tax return as a friend and he did not bill her for his assistance. (Id. at Nos. 8-10; R. 331.) Couillard did not prepare the tax return for Cathie; rather, they prepared the tax return together. (Id. at No. 11; R. 331.) The informal relationship between Cathie and Couillard did not create an agency. There was no manifestation on the part of Cathie that Couillard could act for her and Couillard did not accept such a proposal. (Id. at 14; R. 331.) Furthermore, there was no mutual understanding between them that Cathie was in charge. (Id.) One person helping another is not based on the sort of formalities similar to those required to enter into a contract. Therefore no agency relationship existed between Cathie and Couillard. The facts and circumstances in the case at hand indicate that no agency relationship was created between Cathie and Couillard with respect to filing the tax return. Therefore the Court Properly dismissed Lynn’s claim for breach of duty and properly denied Lynn’s 56(f) motion because Cathie was not liable for Couillard’s actions under an agency

theory.

Lynn also argues that he needed further discovery to determine whether it was foreseeable that a mistake on a tax return by one spouse would trigger an audit of the other spouse's tax return. The trial Court did find that as a matter of law there was no foreseeability of harm with regards to potential damages that might arise from a mistake on a tax return thereby creating no liability on the fourth and fifth causes of action. Furthermore there were multiple other rationales for granting the summary judgment including Lynn's failure to establish that he could prove any of Cathie's conduct were the cause of harm or injury to him, that there was no duty or breach of duty and that there were no genuine issues of material fact upon which a jury could find in favor of the Plaintiff. (See Order Granting Summary Judgment; R. 618-621.) Therefore because of the multiple factual and legal deficiencies, granting additional discovery would be an inefficient waste of resources that could not in the end save Lynn's deficient claims. In making its decision, the trial court carefully considered the amount of discovery that had taken place in the underlying divorce case as well as the substantial amount of information already possessed by the parties as well as the legal deficiency of Lynn's claims. Therefore the trial court did not abuse its discretion in denying further discovery on these causes of action and the motion for summary judgment was properly granted.


**VI. THE COURT OF APPEALS SHOULD AWARD ATTORNEYS FEES AND DOUBLE COSTS UNDER RULE 33(A) OF THE UTAH RULES OF APPELLATE PROCEDURE.**

Appellee, Cathie Foster, pursuant to Rule 33(a) of the Utah Rules of Appellate Procedure requests that the court of appeals award reasonable attorneys fees and double costs to her for having to respond to such appeal. The appeal taken is frivolous and for delay in the resolution of this marital action is not grounded in fact nor warranted by existing law or based on a good faith argument to extend, modify or reverse existing law. The purpose of such appeal is to continue to harass and cause needless increase of attorneys fees to the Appellant's former spouse, Cathie Foster, and the court should award such double costs and attorneys fees.

#### **CONCLUSION**

The Court of Appeals should affirm the trial courts dismissal of counts one, two and three of the Appellants Complaint and affirm the courts dismissal by summary judgment of counts four and five of the Appellants Complaint.

DATED this 15 day of December, 2004.

  
C. Richard Henriksen, Jr.  
Attorney for Cathie I. Foster

#### **CERTIFICATE OF MAILING**

I hereby certify that on this 15 day of December, 2004, a true and correct copy of the foregoing **OPENING BRIEF OF APPELLEE CATHIE I. FOSTER** was

Amy Sorensen  
Matthew Lalli  
Nathan E. Wheatley  
15 West South Temple  
#1200  
Salt Lake City, Utah 84101

David W. Scofield,  
340 Broadway Centre  
111 East Broadway  
Salt Lake City, Utah 84111

Gary R. Couillard, *pro se*  
372 "I" Street  
Salt Lake City, Utah 84103

A handwritten signature in black ink, reading "Brian Hensley". The signature is written in a cursive style with a horizontal line underneath the name.