2005

Sweet v. Sweet : Unknown

Utah Court of Appeals

Steven C. Tycksen, Chad C. Shattuck; Zoll and Tyckson, LC; Attorneys for Appellee.
David Paul White; Attorney for Appellant.

IN THE UTAH COURT OF APPEALS

JAMES SWEET, Petitioner and Appellee, vs. MELANIE SWEET, Respondent and Appellant.	**BRIEF OF THE APPELLEE** Case No. 20050034

Appeal from a Final Judgment
of the Third District Court in and for Salt Lake County, Utah
The Honorable Anthony B. Quinn

Attorney for Appellant:

David Paul White
5278 South Pinehill Business Park
Suite A200
Murray, UT 84123
Telephone: (801) 266-4114

Attorneys for Appellee:

ZOLL & TYCKSEN
Steven C. Tycksen (3300)
Chad C Shattuck (9345)
5300 South 360 West, Ste 360
Murray, Utah 84123
Telephone: (801) 685-7800

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Telephone: (801) 266-4114

Attorneys for Appellee:

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Steven C. Tycksen (3300)
Chad C Shattuck (9345)
5300 South 360 West, Ste 360
Murray, Utah 84123
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STATEMENT OF JURISDICTION

The Utah Court of Appeals has original jurisdiction in this matter pursuant to Utah Code §78-2a-3(2)(h) because this is an appeal from the district court in a domestic relations matter.

DETERMINATIVE RULES AND LAW

This Court is to review the lower court's application of Rule 60 of the Utah Rules of Civil Procedure. A copy of Rule 60 is attached to the Appellant's brief.

The elements of fraud in Utah are: 1) a representation; 2) concerning a presently existing material fact; 3) which was false; 4) which the representor either (a) knew to be false, or (b) made recklessly, knowing that he or she had insufficient knowledge on which to base such representation; 5) for the purpose of inducing the other party to act upon it; 6) that the other party, acting reasonably and in ignorance

of its falsity; 7) did in fact rely upon it; 8) and was thereby induced to act; 9) to his or her injury and damage. See Robinson v. Tripco Investment, Inc., 21 P.3d 219, 223 (Utah Ct. App., 2000).

Regarding Duress: Restatement (Second) of Contracts §175 and §176, as adopted by the Utah Supreme Court in Andreni v. Hurtgren, 860 P.2d 916 (Utah 1993) ("We . . . explicitly adopt the legal standards of duress set forth in sections 175 and 176 of the Restatement (Second) of Contracts" – p. 921).

ISSUES AND STANDARD OF REVIEW

Did the lower court error in requiring the Appellant to carry the burden to present evidence to support her claims: 1) that she lacked capacity to enter into a contract when she signed the Stipulation Agreement; 2) that she was under duress when she signed the Stipulation Agreement; and 3) that the Appellee and counsel for the Appellee made misrepresentations of material fact on which she relied when she entered into the Settlement Agreement?

The lower court's application of the law will be reviewed for correctness. Generally, the appellate court reviews a trial court's legal conclusions for correctness, according the trial court no particular deference. Orton v. Carter, 970 P.2d 1254 (Utah 1998).

Did the trial court properly exercise its discretion in finding that the Appellant had failed to meet her burden to prove: 1) that she lacked capacity to enter into a contract when she signed the Stipulation Agreement; 2) that she was under duress when she signed the Stipulation Agreement; and 3) that the Appellee and counsel for the Appellee made misrepresentations of material fact on which she relied when she entered into the Settlement Agreement?

Absent an abuse of discretion in its ruling on the Appellant's Rule 60(b) motion, the lower court's determination will not be disturbed. Katz v. Pierce, 732 P.2d 92 (Utah 1986). The lower court's factual determination is entitled to deference on appeal and not reversible absent clear error. Lysenko v. Sawaya, 7 P.3d 783, 787 (Utah, 2000).

"In this case we accept the universal and salutary rule that judgments must be sustained; that they cannot for anything but the most compelling reasons be set aside, and that extrinsic fraud must be the basis for such an attack." Rice v. Rice, 212 P.2d 685, 688 (Utah 1949); see also Haner v. Haner, 373 P.2d 577 (Utah 1962).

STATEMENT OF THE CASE

The matter before the Court concerns an issue of "buyer's remorse" in regard to a Settlement Agreement that was the basis for a stipulated decree of divorce, entered by the district court on June 7, 2004. The Appellant entered into a

Stipulation with the Appellant on May 3, 2004. She now wishes to set aside the lower court's ruling that the Settlement Agreement is a binding contract, and that the Appellant failed to meet her burden to prove that she was "deceived", "stressed out", "depressed" and "under duress" when she entered into the Stipulation. As set forth hereafter, the facts in the record before the court below establish that the Appellant was, in fact, the driving force in preparing the terms set forth in the Stipulation, was a willing participant, and was not deceived, stressed out, depressed, or under duress at anytime throughout the divorce process. As such, her appeal should be denied because the lower court's decision correctly applied Utah law, and was not an abuse of discretion.

STATEMENT OF FACTS BEFORE THE LOWER COURT

1. The Appellee and Appellant, Melanie Sweet ("Melanie") were married on May 7, 1993. See Affidavit of James Sweet at 7 (Record at 119).

2. In April 2004, Melanie informed the Appellee that she was still having a relationship with a prison inmate. See Affidavit of James Sweet at 7 (Rec. at 120).

3. The parties discussed getting a divorce. Melanie informed the Appellee that she wanted to discover who she really was, "check out her options", and get on with her life. See id. at 9 (Record at 120).

4. The Appellee hired Steven Tycksen to represent him in a divorce action. See id. at 8 (Record at 120).

5. At that time, the Appellee asked Melanie if she wanted to stay in their house or move out. During that conversation, Melanie informed the Appellee that she did not want to take care of the house and wished to move out. She told the Appellee that she wanted him to stay there to raise the children in the house like they had always planned. See id. at 3 (Record at 121).

6. Melanie went to the Appellee's place of work with apartmt/condo brochures and asked for his help in looking for a new place. See id. at 14(Rec. at 121).

7. The Appellee went with Melanie and together they looked at places for her to stay. They visited several apartments and condos, then sat down together and went over Melanie's finances to determine whether it would be better to rent a place or purchase a condo. See id. at 15 (Record at 121-22).

8. During their search, they found a place that Melanie wanted to live in, and she later moved into that apartment. See id. at 16 (Record at 122).

9. Melanie moved from the marital home to her apartment on April 28, 2004. See Affidavit of Bryce Ivan Bills, at 4 (Record at 131).

10. During the move, Melanie was very happy and spoke openly with her nephew Bryce Bill, telling him that "this was best for both of them" and that "they would both be better off and a lot happier". See id. at 5 (Record at 131).

11. Melanie gave no indication that she was depressed, despondent, or feeling like she was being forced to move. To the contrary, she seemed genuinely happy, to be doing what she wanted, and openly stated that she was happy about the move. See id. at 6 (Record at 131).

12. On the other hand, the Appellee was visibly upset and told Bryce Bill that he was upset that his wife was moving out. See id. at 7 (Record at 131).

13. The Appellee has never visited Melanie's residence unless she first invited him over. For example, on their wedding anniversary, he went over and they ended up spending the night together. See Affidavit of James Sweet, at 17 (Rec. at 122).

14. Although Melanie has offered the Appellee a key to her residence on several occasions, he has never accepted one. See id. at 19 (Record at 122).

15. The Appellee has never taken any of Melanie's mail, but does have a safety deposit box, which contains the letters that Melanie gave him in 2003, regarding her relationship with her boyfriend, who was in prison at that time. See id. at 21 (Rec. at 122).

16. The Appellee wanted the divorce to be fair for both of the parties, and they discussed whether they would need to litigate the divorce or if they could sit down and work the divorce terms out on their own. Melanie informed the Appellee that she did not want to hire an attorney. See id. at 22 (Record at 122-23).

17. The parties discussed finalizing the divorce before Melanie's boyfriend was released from prison on May 11, 2004, so both of them could go on with their personal lives. See id. at 23 (Record at 123).

18. The Appellee informed Melanie that he had hired Mr. Tycksen as his attorney, who could write up their divorce terms once the parties mutually agreed to them. See id. at 24 (Record at 123).

19. The Appellee asked Melanie to write up the terms of their divorce as she wanted them so they could later meet and discuss them. See id. at 26 (Rec at 123).

20. Melanie prepared the terms of their divorce on her own, and the parties met and discussed them. During that meeting, their discussion was very easy going and cordial. Melanie's thorough preparation helped to identify their respective interests in the terms of the divorce. See id. at 27 (Record at 123).

21. The terms of divorce that Melanie prepared included the visitation schedule with their children. At the time, the Appellee was concerned that she might get tired of the schedule that she wanted (having visitation during the day with the

children until he got home at night), but she insisted that she wanted it that way. See id. at 28 (Record at 123).

22. During their discussion, the Appellee went through the terms and changed some of the wording, including;

a. Adding wording that the children would not be in the presence of convicted felons,
b. Adding wording that would give Melanie more than ½ of their vacation credits at the parties' time share, and
c. The Appellee also added language that Melanie would donate the lingerie she had purchased in anticipation of meeting her boyfriend to charity. They both laughed and crossed it out. See id. at 30 (Record at 124).

23. When they finished the meeting, Melanie told the Appellee that she felt good about the terms they had agreed to and wanted those terms. See id. at 32 (Rec. at 124).

24. On April 22, 2004, Melanie drafted and faxed to Mr. Tycksen's office the terms she and the Appellee had previously agreed to. See Transcript of Hearing, dated November10, 2004 ("Tr.") at 20:6-21:2 (Record at 238); see also Affidavit of Steven C. Tycksen, at 6 (Record at 135); Fax, dated April 22, 2004, attached thereto (Record at 140-42).

25. Up until that time, Mr. Tycksen had not met with Melanie nor prepared any documents for the parties to review for their divorce. See Tr. at 20 (Record at 238); see also Affidavit of Steven Tycksen at 7 (Record at 135).

26. Based upon the written terms supplied by Melanie via fax from her work, Mr. Tycksen's office prepared a Stipulation, Decree of Divorce, and Findings of Fact and Conclusions of Law. See Affidavit of Steven Tycksen, at 8 (Rec. at 135).

27. The parties later met at the office of Mr. Tycksen on April 26, 2004. See Tr. at 20 (Record at 238); see also Affidavit of James Sweet, at 33 (Record at 124); Affidavit of Steven Tycksen, at 9 (Record at 135).

28. Melanie went to that meeting on her own accord, and everyone was friendly and cordial throughout the meeting. See Tr. at 18-20 (Record at 238); see also Affidavit of James Sweet, at 34 (Record at 124); Affidavit of Steven Tycksen, at 10 (Record at 136).

29. During that meeting, Mr. Tycksen twice explained to Melanie that he was acting only as the Appellee's attorney and explained her rights, including her right to have an attorney. See Tr. at 19:17-20:4, 24:2-4 (Record at 238); see also Affidavit of James Sweet, at 36 (Record at 125); Affidavit of Steven Tycksen, at 11 (Record at 136).

30. Melanie exhibited no signs of stress or duress during that meeting. See Affidavit of James Sweet, at 35 (Record at 125); Affidavit of Steven Tycksen, at 12 – 14 (Record at 136).

31. Melanie admitted that she knew what she was doing when she and the Appellant met with the Appellant's attorney. See Tr. at 19:13-15 (Record at 238).

32. During that meeting, the parties reviewed the Stipulation, Decree of Divorce, and Findings of Fact and Conclusions of Law, and negotiated changes and made edits that they wanted to have included in the documents Mr. Tycksen had drafted. See Affidavit of James Sweet, at 37 (Record at 125); Affidavit of Steven Tycksen, at 12 – 14 (Record at 136).

33. Melanie appeared quite happy and friendly. She expressed her interest in quickly terminating the marriage, and took an active part in discussing the terms of the Stipulation. See Affidavit of James Sweet, at 38 (Record at 125).

34. At the end of the meeting, Melanie expressed that she found the agreed to terms of the Stipulation to be fair and what she wanted them to be. See Affidavit of James Sweet, at 38 (Record at 125); see also Affidavit of Steven Tycksen, at 13 (Record at 136).

35. After the meeting on April 26, 2004, Mr. Tycksen made edits to the Stipulation, pursuant to the parties' requests, and asked Melanie to review the Stipulation, Decree of Divorce, and Findings of Fact and Conclusion of Law prior to their next meeting. See Affidavit of Steven Tycksen, at 15 (Record at 136).

36. A second meeting was held at Mr. Tycksen's office on May 3, 2004, to review the final documents before signing. See Affidavit of James Sweet, at 39 (Record at 125); Affidavit of Steven Tycksen, at 16 (Record at 136-37).

37. Melanie went to that meeting on her own accord. See Tr. at 19-20 (Record at 238); see also Affidavit of James Sweet, at 40 (Record at 125); Affidavit of Steven Tycksen, at 17 (Record at 137).

38. Melanie read through the documents, appeared quite happy that the Stipulation was complete, and again expressed that it was what she wanted it to be. See Affidavit of Steven Tycksen, at 18 (Record at 137).

39. Before the parties signed the Stipulation, Mr. Tycksen set the documents aside and again explained to Melanie that he only represented the Appellee as his attorney. He was very direct, and explained that she had the right to have her own attorney, and have her attorney review the documents. See Affidavit of James Sweet, at 41 (Record at 125); Affidavit of Steven Tycksen, at 19 (Record at 137).

40. The Appellee told Melanie not to sign the Stipulation if she did not think it was fair. He wanted the divorce to be fair to both of them, and he did not want to later end up in Court if there was something she did not like in the Stipulation. See Affidavit of James Sweet, at 43 (Record at 126).

41. Melanie responded that she did not wish to hire an attorney, and that she considered the terms of their Stipulation to be fair and reflected what she wanted. See Affidavit of James Sweet, at 42, 44 (Record at 125, 126).

42. The parties then signed the Stipulation before a notary public. See Affidavit of James Sweet, at 45 (Record at 126); Affidavit of Steven Tycksen, at 20 (Record at 137); see also Affidavit of Rachael A. Stocking, at 4 (Record at 145).

43. Melanie was neither pressured nor under any duress to sign the Stipulation and signed it of her own free will and choice. See Affidavit of James Sweet, at 46 (Record at 126); Affidavit of Steven Tycksen, at 20 – 21 (Record at 137); Affidavit of Rachael A. Stocking, at 5 – 7 (Record at 145).

44. The Appellee asked Melanie if she would agree to pay half of Mr. Tycksen' fees. She said that she would. See Affidavit of James Sweet, at 47 (Record at 126).

45. The parties left Mr. Tycksen's office together joking and holding hands. See Affidavit of James Sweet, at 48 (Record at 126); Affidavit of Steven Tycksen, at 21 (Record at 137); Affidavit of Rachael A. Stocking, at 7 (Record at 145).

46. There was no pressure placed on Melanie throughout the divorce process, and it was through Melanie's own initiative in drafting and editing the terms of our divorce, and providing them to Mr. Tycksen, that the divorce moved forward. See Affidavit of James Sweet, at 49 (Record at 126).

47. The Appellee never acted to deceive nor did he deceive Melanie during the process of their divorce. See id. at 50 (Record at 126).

48. The Appellee has never threatened to take the children away from Melanie, and he has always encouraged the children to have a close relationship with their mother. See id. at 51 (Record at 126).

49. Melanie returned later to Mr. Tycksen's office to sign title transfer documents. At that time, Melanie again appeared happy and pleased with the terms of the divorce. See Affidavit of Steven Tycksen, at 22 (Record at 137); see also Affidavit of Rachael A. Stocking, at 8 (Record at 145).

50. In May or June, while the parties were in the process of getting a divorce, friends of both the Appellee and Melanie visited with them in the marital home. Although the parties were separated and in the process of getting divorced, Melanie appeared very friendly and casual, and exhibited no signs of stress. See Affidavit of James Todd Lambert, at 7 – 8 (Record at 148).

51. Regarding Melanie's ability to enter into a contract, the Lower court found that "the information that has been submitted in this case falls far short of showing that Ms. Sweet lacked contractual capacity. See Tr. at 4:17-19 (Record at 238).

52. Regarding the duress, Judge Quinn found: "The affidavits that have been submitted, in my opinion, fall way short of showing that her will was overcome by contractual duress." See Tr. at 5:14-16 (Record at 238).

53. The lower court appropriately concluded: "I remain of the view that there hasn't been anything presented in this case that would justify my setting aside the judgment under Rule 60(b), so I'm denying the motion." See Tr. At 30:17-20 (Record at 238).

ARGUMENT

I. Issues Raised for the First Time on Appeal are Improper and Should be Thrown Out.

The Appellant sought to have the district court set aside the parties' Decree of Divorce pursuant to Rule 60(b)(1) [mistake] and (3) [fraud] of the Utah Rules of Civil Procedure. See Verified Memorandum in Support of Respondent's Motion to Set Aside the Decree of Divorce, dated July 12, 2004, at pp. 1, 6-7 (Record at 72, 77-78). That motion was denied, and is the subject of this appeal. The Appellant now seeks relief on appeal for the first time from this Court by arguing Rule 60(b)(6) as well. See Brief of the Appellant at pp. 11-16, 19-20.

Rule 60(b) states in relevant part:

> (b) Mistakes; indadvertence; excusable neglect; newly discovered evidence; fraud, etc. On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the

following reasons: ... (6) Any other reason justifying relief from the operation of judgment.

The Appellant has also argued for the first time on appeal that the standards used to invalidate a marriage contract as opposed to a common, or arm's-length contract are different. These arguments were never asserted in the court below. The Appellant's new arguments all find their basis in equity, and although they are separately argued in the Appellant's brief, the arguments regarding 1) contract invalidation (see Brief of the Appellant at pp. 14-16), 2) equity (see Brief of the Appellant at p. 14), and 3) public policy are all different approaches to the same argument for relief under Rule 60(b)(6) (see Brief of the Appellant at pp. 19-20), which is a new argument raised for the first time on appeal. Since these three arguments were not argued in the court below and have been raised for the first time on appeal, they should be summarily dismissed. It is improper for the Appellant to raise an argument under Rule 60(b)(6) for the first time on appeal. "[I]ssues not raised at trial cannot be argued for the first time on appeal." Monson v. Carver, 928 P.2d 1017, 1022 (Utah 1996). Since the Appellant did not pursue an argument under Rule 60(b)(6) before the district court, she cannot do so now for the simple reason that the Court of Appeals cannot review a decision that has not been

made. Accordingly, the arguments made for relief pursuant to Rule60(b)(6), should fail.

Notwithstanding that the Appellee believes this argument to be procedurally dispositive of the Rule 60(b)(6) issue, the Appellee will deal with the arguments on their merits hereafter.

Contracts Between Spouses

The Appellant knowingly entered into a valid stipulation with the Appellee. Parties are bound by their stipulations. In United Factors v. T.C., 445 P.2d 766 (Utah 1968), the Utah Supreme Court observed:

> [T]hat **where parties . . . stipulate that a decree may be entered** in conformity thereto, **such contract, if lawful, has a binding effect on the decree which may be entered. It has all the binding effect of findings of fact and conclusions of law made by the court upon the evidence.**

United Factors, 768 (citations omitted)(emphasis added); see also State v. Seventy-Three Thousand One Hundred Thirty Dollars United States Currency, 31 P.3d 514 (Utah, 2001); Davis v. Davis, 29 P.3d 676 (Utah Ct. App., 2001). Parties are bound by their stipulations unless relieved therefrom by the court, which has the power to set aside a stipulation entered into inadvertently or for justifiable cause. See First of Denver Mortgage Investors v. Zundel, 600 P.2d 521, 527 (Utah 1979).

The Appellant relies on Reese v. Reese, 984 p.2d 987 (Utah 1987) to support her contention that the lower court should not have treated the stipulated Settlement Agreement in the same fashion as an arm's –length contract. Contrary to the Appellant's argument, Reese did not identify a different standard for reviewing the validity of marital contracts. Reese dealt with a stipulation that formed the basis for the lower court's distribution of marital assets in a divorce. In Reese, the Supreme Court said: "we have explicitly acknowledged the general authority of spouses or prospective spouses to arrange property rights by a contract that is recognized and enforced by a court in the event of a divorce." See Reese at 994. The Reese decision also points out that additional scrutiny should be used only to insure that the stipulation was in fact a true stipulation. The Supreme Court appropriately concluded that like prenuptial agreements, in a divorce, "agreements 'concerning the disposition of property owned by the parties at the time of their marriage are valid so long as there is no fraud, coercion, or material nondisclosure.'" Reese, at 994, quoting in part In re Beesley, 883 P.2d 1343, 1347 (Utah 1994) (quoting Huck v. Huck, 734 P.2d 417, 419 (Utah 1986)).

Equity

To support her new argument for relief based on principles of equity, the Appellant argues that this Court should "use [its] discretion to set aside this

blatantly one sided and unfair decree." It is axiomatic that the Court of Appeals is a reviewing court, and not a court of equity. Furthermore, although a lower court has the ability to invalidate an unconscionable stipulation where justice requires (Mathie v. Mathie, 363 P.2d 779 (Utah 1961)), the lower court in this matter, (although not even asked to weigh the equities) specifically found that there wasn't "anything presented in this case that would justify [the court] setting aside the judgment under Rule 60(b)." See Tr. at p. 30:18-19.

The Utah Supreme Court has addressed this very argument before, and concluded:

> [Melanie's] contention that the court must look behind [her] stipulation in order to do equity is without merit. . . . **[W]hen a decree is based upon a property settlement agreement, forged by the parties and sanctioned by the court, equity must take such agreement into consideration. Equity is not available to reinstate rights and privileges voluntarily contracted away simply because one has come to regret the bargain made.** Accordingly, the law limits the continuing jurisdiction of the court **where a property settlement agreement has been incorporated into the decree, and the outright abrogation of the provisions of such an agreement is only to be resorted to with great reluctance and for compelling reasons.**

Land v. Land, 605 P.2d 1248, 1250-51 (Utah 1980) (emphasis added and parties' names inserted).

The evidence presented before the district court was insufficient to persuade the court that Melanie should be relieved from the terms of the stipulation that she authored.

Public Policy

The Appellant argues that public policy would favor not enforcing a stipulation that was obtained by fraud or duress. The real meat of this argument is the alleged fraud, misrepresentation, or duress, all of which were specifically found by the lower court not to have occurred.

Public policy favors courts respecting and deferring to the agreement between parties. Regarding divorce stipulations, specifically those that settle property distribution, this Court has held: "Under Utah law there is a 'compelling policy interest favoring the finality of property settlements.'" Childs v. Callahan, 993 P.2d 244, 247 (Utah Ct. App., 1999); see also Toone v. Toone, 952 P.2d 112, 114 (Utah Ct.App.1998); see also Bailey v. Bailey, 745 P.2d 830, 832 (Utah Ct.App.1987). Public policy supports affirming the lower court's decision absent clear and convincing evidence of fraud, which burden the appellant failed to sustain in the court below.

II. The Appellant Failed to Martial any Evidence that the Trial Court Erred in its Application of the Law.

As part of the new argument comparing the treatment of marriage contracts and common contracts, the Appellant presupposes that the lower court failed to apply a correct legal standard. The only evidence offered in support of this is Appellant's quote of a portion of a minute entry wherein Judge Quinn ruled that evidence that would constitute a defense to a common contract must be presented in order to satisfy her burden. See Brief of the Appellant, at p. 11. The Appellant also ignores the contrary evidence that tends to support the lower court's ruling by simply claiming that the court did not identify a correct standard for invalidating stipulated agreements between married couples. When cited in its entirety, Judge Quinn's conclusion of law was not intended to identify a standard per se, but clearly pointed out that the Appellant had failed to meet her burden to show evidence of fraud or misrepresentation.

> Unlike Default Judgments, Judgments reached pursuant to the Stipulation of the parties are given significant deference. In order to set aside a stipulated Decree of Divorce, a party must, at a minimum, produce evidence that would constitute a defense to a common contract. **In order to show that the Stipulation was procured by fraud, respondent must show that she reasonably relied on a misrepresentation of a presently existing material fact. The Respondent failed to produce evidence which meets this standard**.

See Minute Entry, dated December 6, 2004, conclusion ¶1 (Record at 241-42) (emphasis added). Further, the Court indicated in the subsequent paragraphs that

the Appellant's evidence fell far short of satisfying the burden to prove duress or mental incapacity. See Minute Entry, dated December 6, 2004, conclusion ¶¶2, 3 (Record at 241-42).

> **This Court has repeatedly held that: It is the appellant's burden to marshall the evidence, citing the appellate court to all the evidence in the record that would support the determination reached by the trial court and then demonstrate why, even when viewed in the light most favorable to the court below, it is insufficient to support the finding under attack.**

Interiors Contracting, Inc. v. Smith, Halander & Smith Associates, 881 P.2d 929, 933 (Utah Ct. App., 1994) (emphasis added); citing to Reid v. Mutual of Omaha Ins. Co., 776 P.2d 896, 899-90 (Utah 1989). The Appellant bears the burden to prove that the court erred by marshalling all of the evidence and persuading this Court that the lower court abused its discretion. The Appellant has failed to do this. Instead, the Appellant simply points to the lower court's conclusion of law, that when taken in context was clearly a statement that the Appellant had failed to meet her evidentiary burden to prove the settlement agreement was based on misrepresentation or duress. Absent this evidence, the Court applied the correct standard.

III. The Trial Court Properly Exercised it Discretion Based on the Evidence Before it, and Denied the Appellant's Rule 60(b) Motion, Specifically Finding no Evidence of Fraud, Misrepresentation, or Duress.

Although a contract between spouses stipulating to the terms of a divorce may reviewed for coercion, fraud, misrepresentation, or duress, (Reese v. Reese, 984 P.2d 987 (Utah 1987)), the Appellant ignores the fact that the lower court carefully weighed the evidence in this regard, and specifically found that:

> Respondent was advised by Mr. Tycksen that he represented only Petitioner, and that Respondent was free to consult her own lawyer if she thought that was necessary. . . . The Court found that Respondent's testimony with respect to misrepresentations to be not credible. . . . Accepting all of Respondent's evidence as true, it nevertheless falls short of suggesting a lack of contractual capacity. . . . Accepting all of Respondent's evidence as true, the evidence falls short of establishing legal duress, or that Petitioner had inappropriately overcome her will.

See Minute Entry, dated December 6, 2004, Findings of Fact ¶¶4, 9, 11, 13 (Record at 240-41).

The lower court found inadequate evidence to support the allegations of fraud, misrepresentation or duress. The Appellant is asking this Court now to reconsider the factual basis for the district court's decision without marshalling the evidence. This approach is procedurally inappropriate. The Utah Supreme Court has held that "a factual determination [is] entitled to deference on appeal and not reversible absent clear error." Lysenko v. Sawaya, 7 P.3d 783, 787 (Utah, 2000). Without marshalling the evidence Appellant cannot demonstrate clear error in the lower court's findings, as explained more fully below.

The parties entered into a valid Stipulation that was accepted by the lower court. The Appellant subsequently alleged, in a shotgun approach, numerous unsupported accusations against the Appellee, including that he "deceived" her, that she was "stressed out", "depressed" and "under duress" to enter into the Stipulation. However, the Appellant failed in the court below to present any valid and/or justifiable factual basis or legal cause to nullify the parties' Stipulation and set aside the Decree of Divorce. Quite to the contrary, the facts before the district court fully refuted her allegations. As previously presented to the district court:

a. The Appellee did not kick the Appellant out of the marital home, but the Appellant chose to move out and the Appellee helped her find a new residence (See Affidavit of James Sweet at 13 – 19) (Record at 121-22);

b. The Appellee has never "stalked" the Appellant (See id. at 22 – 26) (Record at 122-23);

c. The parties were cordial and friendly with one another throughout the process of divorce (See id. at 14 – 19, 20, 22, 23, 27 – 33, 35 – 37, 42 – 44, 46 – 47, 50 – 52) (Record at 121-27);

d. The Appellant, herself, initially drafted the terms of the parties' divorce and later discussed and negotiated those terms with the Appellant on multiple occasions (See id. at 27 – 51) (Record at 123-28);

e. Child support was included in the Stipulation to satisfy the requirements of the law, and the Appellee has never requested nor has Melanie made those payments (See id. at 54) (Record at 127);

f. The Appellant exhibited no visible signs of being "stressed out", "depressed" or "under duress" during the process of the parties' divorce (See id. at 14 – 20, 22, 27, 28, 30 – 35, 37, 38, 41 – 47, 49 – 57) (Record at 121-28), and she has offered no evidence save her self-serving statements to support that allegation, which itself was deemed by the lower court to be insufficient to establish duress (See Minute Entry, dated December 6, 2004) (Record at 141);

g. The Appellee never threatened, pressured or "forced" the Appellant to enter and/or sign the Stipulation, and she entered into it on her own free will and choice (See id. at 13-22, 25-32, 34-51) (Record at 121-27);

h. Mr. Tycksen properly and repeatedly informed the Appellant of her legal rights (See id. at 36, 41, 42) (Record at 126, 127); see also Minute Entry, dated December 6, 2004, ¶4 (Record at 240);

i. The Appellant voluntarily paid for one-half of Mr. Tycksen's attorney fees (See id. at 47) (Record at 126);

This evidence is more than adequate to sustain the Court's ruling. The Appellant has marshaled no other evidence. Considering this evidence before the

lower court, it cannot be said that it was clear error for the court to render a decision to deny the Appellant's Rule 60(b) motion.

Appellant alleges that she was "stressed out", "depressed", and "in distress" throughout the parties' divorce process. However, she also alleges that between the entry of the Decree of Divorce on June 7, 2004 and the time she filed her Motion on July 12, 2004, she has overcome her alleged depression and stress with help from a doctor, and is now a more caring and able parent than the Appellee. These claims contradict each other. It is more plausible and believable, and as previously set forth, that the Appellant has never been depressed, "stressed out" or "in distress" during the process of the parties' divorce. She entered into the Stipulation fully informed of her legal rights and the parties' property. She was neither pressured nor threatened to enter into the Stipulation. Instead, the Appellant having chosen to start a new life with another man, prepared the terms of the Stipulation, discussed them with the Appellee, was pleasant and happy throughout the divorce process, was eager to conclude the divorce, and ultimately was pleased with the terms she drafted and agreed to, so she signed the agreement. Furthermore, the Appellant presented no expert medical evidence to support her claims that she ever suffered any alleged mental illnesses or is now over said illnesses. As such, the district court was not in error when it denied the Appellant's Motion to Set Aside the Decree of

Divorce. The lower court appropriately concluded: "I remain of the view that there hasn't been anything presented in this case that would justify my setting aside the judgment under Rule 60(b), so I'm denying the motion." See Tr. At 30:17-20.

Based upon the foregoing, the Appellant presented no adequate basis for the lower court to nullify the parties' Stipulation and set aside the Decree of Divorce. With the above facts to support its determination, there is no basis for a finding of clear error that would justify this Court in granting Appellant's appeal. Accordingly, the lower court properly denied the Appellant's motion to set aside the decree, and its ruling should be affirmed.

CONCLUSION

The lower court's application of the law was correct considering the facts pled and the testimony received from the parties. There was no clear error in Judge Quinn's factual conclusions finding no evidence of fraud, misrepresentation or duress of any kind. Accordingly, the Court should affirm the lower court's ruling denying the motion to set aside the divorce decree.

DATED this 24 day of October, 2005.

Steven C. Tycksen
Attorney for the Appellee

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing, **Brief of Appellee**, postage pre-paid to the following:

David Paul White
Attorney for Appellant
5278 South Pinehill Business Park
Suite A200
Murray, UT 84123

on this 24th day of October, 2005.

Julie Huntington