1994

Dautel v. Dautel : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

DIANE R. DAUTEL, Plaintiff/Appellant, vs. DAVID F. DAUTEL, Defendant/Appellee.	*	Case No. 940130-CA Priority No. 15

BRIEF OF APPELLEE

APPEAL FROM THE JUDGMENT OF THE
SECOND JUDICIAL DISTRICT COURT OF
DAVIS COUNTY, STATE OF UTAH
THE HONORABLE ROBERT L. NEWEY
DISTRICT COURT JUDGE

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BRIEF OF APPELLEE

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to Utah Code Annotated, Section 78-2a-3(2)(i), Amended 1992, pertaining to Appeals from District Courts involving domestic relations cases.

NATURE OF PROCEEDINGS

The matter below is a divorce action and this Appeal is from the Order Denying Plaintiff's Motion to Set Aside the Stipulation or the Decree of Divorce entered on the Stipulation September 17, 1993. The basis of Plaintiff's Motion to set aside the Stipulation presented in open Court, on the record, by her

attorney, agreed to by each party and approved by the Court, is her claim that her thinking was impaired due to medication (Xanax) she had taken. The medication was prescribed by her doctor, Dr. Wilson, which she had been taking since October, 1991. (T. Vol. II 60) The Court, the Honorable Robert L. Newey, denied Plaintiff's Motion to Set Aside the Stipulation or Decree of Divorce entered on the Stipulation after a thorough review of the transcript of the proceedings held April 28, 1993 (Stipulation) and the evidentiary hearing on Plaintiff's Motion, December 20, 1993 and concluded December 28, 1993, finding, "that Diane Dautel, (Plaintiff) was alert, appeared to understand the terms of the agreement and her testimony was clear and concise on April 28, 1993," at the time the stipulation was presented, agreed to and she gave testimony. (T. Vol. IV 728)

ISSUE PRESENTED FOR REVIEW

Did the trial Court abuse its discretion in denying Plaintiff's Rule 60(b)(1) Motion to Set Aside the Stipulation or the Decree of Divorce entered on the parties Stipulation? Birch v. Birch, 777 P.2d 1114 (Ut. C. App. 1989). See also Goodmansen v. Liberty Vending Systems, 227 Ut. Adv. Rep. 64 (Ut. C. App. 1993); Warren v. Dickson Ranch Company, 123 Ut. 416, 260 P.2d 741 (1953).

STANDARD OF REVIEW

The standard of review on this Appeal is an abuse of discretion standard. The trial Court has broad discretion in ruling on a Motion for Relief from a Judgment or Order under Rule 60(b), Utah Rules of Civil Procedure.

The Appellate Court should review the factual findings of the trial Judge under the "clearly erroneous standard." The trial Court's Findings of Facts should not be disturbed unless such findings are clearly erroneous. Findings of Fact will be regarded as clearly erroneous only if they are "so lacking in support as to be against the clear weight of the evidence." Hagan v. Hagan, 810 P.2d 478 (Ut. C. App. 1991); Jense v. Jense, 784 P.2d 1249, 1251 (Ut. C. App. 1989); In re the Estate of Bartell, 776 P.2d 885, 886 (Ut. 1989). Appellant must first marshall the evidence which supports the finding and then demonstrate that, despite this evidence, it is clearly erroneous. Christensen v. Munns, 812 P.2d 69, 73 (Ut. App. 1991)

STATEMENT OF CASE

This is an Appeal from the trial Court's denial of Plaintiff's Motion to Set Aside the Stipulation, or the Decree of Divorce

entered on the Stipulation of the parties, presented in open Court, on the record, agreed to by each party separately and approved by the Court.

PROCEEDINGS

The Plaintiff, (wife) filed this divorce action on or about January 8, 1992, (R. 1) after the parties had participated in marriage counseling prior to August, 1991 with Kurt B. Thorn, a clinical psychologist. (T. Vol. II 325) Mr. Thorn at that time had only been licensed approximately eight (8) months. (T. Vol. II 324; 351) Defendant was not represented by counsel at the time the action was commenced. He voluntarily entered his appearance by signing an Acceptance of Service, Consent and Appearance (R. 10). The parties negotiated from January to April, 1992, when Plaintiff's attorney filed a Default Certificate, without notice to Defendant, after he declined to sign a Stipulation prepared by Plaintiff and her attorney. (R. 12; 20-25; 29) Defendant was required to seek the aid of an attorney to have the Default Certificate set aside, after Plaintiff first agreed to, and then subsequently refused Defendant's request to voluntarily vacate the Default Certificate. (R. 20-24) At the hearing on Defendant's Motion, Plaintiff agreed to set aside the Default Certificate at the suggestion and urging of the Domestic Relations Commissioner. (R. 47) From this point throughout the proceedings, Plaintiff

displayed a vindictive and uncooperative attitude toward Defendant. (R. 160-162) (T. Vol. III 664; 674, L-21)

From April, 1992, to January, 1993, Defendant made several attempts personally and through his attorney, to engage in settlement negotiations which were rejected by Plaintiff, (T. Vol. II 247) although she had claimed Defendant was stalling the divorce process. (R. 39, par. 5). The divorce action being dormant, a Certificate of Readiness was filed August 14, 1992 (R. 49) and a Pre-trial Settlement Conference scheduled for September 22, 1992. (R. 38) Defendant filed his Financial Declaration form September 18, 1992, with personal property lists attached, a copy having been served on Plaintiff. (R. 60-70) The case was not settled at the Pre-trial Settlement Conference (R. 71-73) The date of December 23, 1992 was available for trial and agreeable to both attorneys. However, Plaintiff refused to have the case tried on that date, with the excuse that it was her son's 16th birthday. (T. Vol. II 290) This necessitated the case being certified to Judge Memmot for a trial setting in 1993. (R. 72)

Pursuant to Notice dated March 24, 1993, the case was set for trial on April 28, 1993. (R. 100) As the trial date approached, Plaintiff's attorney requested that the parties meet on April 27, 1993, the eve of the trial, and negotiate. Although the parties had exchanged settlement proposals in January, 1993, this was the first meeting between the parties and their attorneys. (T. Vol. II 247). The parties met for approximately 3 1/2 hours and all of

the issues of the divorce were discussed, utilizing the January settlement proposals. Plaintiff understood and was aware of all the issues discussed, negotiated and those agreed upon. (T. Vol. II 247-248)

The parties appeared for trial April 28, 1993. Negotiations continued with leave of the Court which resulted in an agreement and stipulation on all issues. The stipulation and agreement of the parties was presented to the Court, on the record, by Plaintiff's attorney, Mr. Lawrence. (T. 106-134 Trial transcript; R. 102-105; 206) The Court, Judge Newey, approved and accepted the stipulation and settlement agreement, after each of the parties had stated their approval and acceptance. (T. 129-130; 131-134, Trial transcript)

Plaintiff's attorney, Mr. Lawrence, prepared proposed Findings of Fact and a Decree of Divorce, which were submitted to Defendant's attorney, Mr. Fankhauser, for approval. After exchange of letters between counsel, the differences in wording of the proposed Findings and Decree of Divorced were resolved. Only one issue remained to be resolved regarding the 401-K account. (See letter July 27, 1993 Addendum) On July 30, 1993, Plaintiff filed her Motion to set aside the Stipulation three (3) months and two (2) days after the Stipulation had been agreed to, accepted and approved by the Court. Plaintiff's Motion, as filed, did not indicate it was brought pursuant to Rule 60(b)(1) U.R.C.P. (R. 140-142) However, Plaintiff's attorney, at the time of

closing argument, represented to the Court that Plaintiff's Motion was brought pursuant to Rule 60(b)(1), (mistake, inadvertence, excusable neglect) (T. Vol. III 681; 708-709)

Plaintiff filed contemporaneous with the Motion to Set Aside, an Order to Show Cause for Contempt and Other Relief which was heard August 20, 1993. (R. 144-146). Domestic Relations Commissioner Allphin, ruled Defendant was not in arrears in his payment of alimony and support and that Plaintiff's Order to Show Cause was not appropriately brought to the Court, recommending Defendant be awarded attorney's fees. (R. 158-159; 173-175)

At the Order to Show Cause hearing, August 20, 1993, Plaintiff's attorneys had not yet submitted Findings of Facts, Conclusions of Law and Decree of Divorce to the Court, although a transcript of the proceedings of April 28, 1993 had been prepared and filed with the Court. (R. 106-135). Defendant's attorney prepared Findings of Facts, Conclusions of Law and Decree of Divorce pursuant to the transcript of the parties Stipulation, which were signed and entered by the Court September 17, 1993. (R. 215-235)

DISPOSITION IN THE LOWER COURT

The Court, the Honorable Judge Newey, after the evidentiary hearing on Plaintiff's Motion, which concluded December 28, 1993, denied the Plaintiff's Motion based on specific findings set forth in the record (T. Vol. IV 728-738). The Court found Plaintiff,

Diane Dautel, to be alert and appeared to understand the agreement when she appeared before the Court on April 28, 1993 at the time the Stipulation was entered into and when she specifically testified to jurisdiction and other matters necessary to award a Decree of Divorce based upon the Stipulation. The denial of Plaintiff's Motion was also based upon the Court's finding from the evidence presented that Plaintiff had failed to prove mistake, inadvertence or excusable neglect under Rule 60(b), Utah Rules of Civil Procedure. Further, it was the Court's opinion and finding the Stipulation of the parties was fair and equitable to both parties to the extent the Court's Findings and Decree would not substantially vary from the Stipulation the parties entered into. (T. Vol. IV 728; 733-734; 735-736).

STATEMENT OF FACTS

1. Plaintiff's problems of depression and anxiety pre-existed for more than five (5) months before she filed her Complaint for divorce. Plaintiff was represented by her attorney, Mr. Lawrence, throughout the entire proceedings. Prior to filing the divorce Complaint, the parties had engaged in marriage counseling with Kurt B. Thorn, a licensed clinical psychologist, who testified Plaintiff's anxiety increased after separation. (T. Vol. II, 325; 328-329).

2. Dr. Wilson, Plaintiff's physician, on or about October 29, 1991, pursuant to telephone calls from Mr. Thorn and the Plaintiff,

without actually seeing or examining her, prescribed Xanax for her anxiety problem. The prescribed dosage was .5 milligrams every 8 hours as needed, a total of 1.5 milligrams per day. (T. Vol. II 305-306) Prozac was not prescribed until November 12, 1991. Dr. Wilson, on or about February 19, 1992, increased the prescribed dosage of Prozac from one 20 milligram tablet per day to two 20 milligram tablets per day. At the same time, he increased Plaintiff's prescribed dosage of Xanax to 8 pills .5 milligrams each, for a total of 4 milligrams daily. (T. Vol. II 294-295)

3. Mr. Thorn, Plaintiff's psychologist, testified his focus was on Plaintiff's depression. He vaguely remembered calling Dr. Wilson to recommend some anti-depressant medication for Plaintiff. He did not recommend anything for anxiety. This testimony is in conflict with Dr. Wilson's testimony. (T. Vol. II 326) Although Mr. Thorn continued counselling Plaintiff, seeing her "fairly regularly," he was unaware of Plaintiff's prescribed use of Xanax for anxiety until late April, 1993, somewhere around April 19th. (T. Vol. II 326-328) During this period of continuing counselling, up to April 19, 1993, he did not observe that Plaintiff experienced any side effects from taking Xanax or any change in her behavior. (T. Vol. II 332-333)

4. During the period Plaintiff was taking Xanax and Prozac, Dr. Wilson examined and tested Plaintiff to determine if she was experiencing side effects from the medication, the first March 26, 1992 and again March 17, 1993, approximately one month before the

trial of April 28, 1993. The tests were normal, with no evidence of side effects and her condition with regard to depression and anxiety had actually improved from the time he had increased her prescribed dosage of Xanax to 4 milligrams a day (T. Vol. II 306-308). Dr. Wilson also testified, because of Plaintiff's age, she would be less susceptible to side effects of impairment from Xanax; (T. Vol. II 300-301) that she was responding to the medication (Xanax) the way he wanted her to. He felt she was able to function at the same time her depression and anxiety was controlled with her gastrointestinal problems. (T. Vol. II 301-303)

5. Dr. Wilson testified that the effects of Xanax was different and varies with each individual person, and in cases of severe anxiety, they may perform better. (T. Vol. II 297). The first complaint he received from Plaintiff that she was not able to carry out her work at home from taking Xanax was on or about August 19, 1993, approximately four (4) months after the Court proceedings of April 28, 1993 and five (5) months after the examination of March 17, 1993. (T. Vol. II 316-317).

6. The testimony of Mr. Thorn, quoted in Plaintiff's Brief at the top of page 7 concerning his belief as to Plaintiff's trouble with being assertive, relates to her condition at the time of the parties separation, August, 1991, not the time of trial, April, 1993, and before Xanax was prescribed. Mr. Thorn testified that Plaintiff's periods of confusion and being indecisive were symptoms of the depression and anxiety she was experiencing at that time,

August, 1991. (T. Vol. II 328-330) Plaintiff's difficulty in making correct decisions was due to her indecisive personality disorder, not the medications. The drug, Xanax, was first prescribed September 27, 1991, and Prozac November 12, 1991. (T. Vol. II 293) Dr. Wilson testified, with Xanax, Plaintiff's anxiety condition was under control, had actually improved and she was able to function. (T. Vol. II 302; 308) He also testified that confusion and impaired thinking is not necessarily related to the quantity of Xanax taken. (T. Vol II 303).

7. Plaintiff was not seen or observed by Dr. Wilson or Mr. Thorn the day before trial and the morning of April 28, 1993. The Court, Judge Newey, listened to and observed the Plaintiff throughout the entire proceedings of that morning and again the entire proceedings held December 20, 1993 and December 28, 1993. Plaintiff's parents drove Plaintiff to Court the morning of April 28, 1993 and were present in Court during the entire proceedings, but did not testify concerning Plaintiff's condition at the hearing on her Motion to Set Aside the Stipulation. (T. Vol. II 260-261) Other relatives of Plaintiff were present in the Court room on April 28, 1993 and they likewise did not testify concerning Plaintiff's condition and at the hearing on her Motion to Set Aside the Stipulation.

8. Defendant refuted and denied Plaintiff's claims that he harassed her constantly for two (2) weeks prior to the trial, April 28, 1993. Defendant, during the pendency of the divorce action

suffered from anxiety, stress and depression due to Plaintiff's hateful attitude toward him and her complete lack of cooperation. During the pendency of the action Defendant was taking prescribed medications for his depression and anxiety, taking 40 milligrams of Prozac and 50 milligrams of Trazodone daily. At the hearing April 28, 1993, Defendant conversed with Plaintiff, observed her demeanor and heard her responses to inquiries of Judge Newey and her attorney. Based on his personal knowledge of Plaintiff gained during the marriage, he stated, she was completely coherent, responsive and not impaired physically, mentally or emotionally. She did not act abnormal in any way. (R. 160-162)

9. The Plaintiff's testimony regarding her taking Xanax was in conflict with her Affidavit and the Affidavit of Dr. Wilson filed with her Motion to Set Aside the Stipulation, in the following particulars:

(a) Dr. Wilson at paragraph 4 of his Affidavit states that Plaintiff increased the dosage beyond that which had been prescribed. He stated, based on her (Diane's) representations, he learned she was taking 3 milligrams per day of Xanax. At paragraph 5 of his Affidavit, he gives an opinion that 3 milligrams of Xanax per day would seriously impede a persons's thinking and cognitive processes. (R. 148) In contrast, Dr. Wilson testified from his medical records at the hearing December 20, 1993, that he increased her prescribed dosage of Xanax on February 19, 1992 and told

her that she should take up to 8 pills of .5 milligrams each a day. This would be 4 milligrams per day, 1 milligram more than the 3 milligrams per day stated in his Affidavit. On March 17, 1993 he found her to be improved and free of side effects.

(b) Plaintiff, Diane Dautel, stated at paragraph 2 of her Affidavit that her physician (Dr. Wilson) prescribed .5 milligrams of Xanax per 12 hour period. Dr. Wilson testified that her initial prescribed dosage of Xanax in September, 1991, was one .5 milligram pill every 8 hours, 1.5 milligrams per day. (T. Vol. II 293)

(c) Plaintiff, Diane Dautel, at paragraph 3 of her Affidavit, stated that for a period of two (2) weeks prior to the April 28, 1993 hearing, she increased her dosage of Xanax to 3 milligrams per day. (R. 129-140) This was at a time that her prescribed dosage was up to 4 milligrams per day as stated by Dr. Wilson; (T. Vol. II 295) and she had been taking a prescribed dosage of .5 milligrams to 1.0 milligrams 4 times a day (T. Vol. II 302-303); and could take up to eight .5 milligram pills a day from February, 1992 to the date of hearing, April 28, 1993, with no claim of impairment.

(d) Plaintiff, Diane Dautel, in her Affidavit at paragraph 3, stated that she took 1. milligram of Xanax the night of April 27, 1993 before going to bed and 1. milligram

during the night. In anticipation of the stress and anxiety of the trial, she took 1. milligram of Xanax the morning of April 28, 1993. It should be noted that her Affidavit is dated July 30, 1993. (R. 140) Plaintiff later testified at the hearing on her Motion to Set Aside the Stipulation under questioning of the Court, that she took 1.5 milligrams (3 pills) before going to bed the evening of April 27, 1993, her friend gave her one more pill at approximately 10:30 P.M. (.5 milligrams) and then at 1:30 P.M. the morning of April 28, 1993, she took one pill (.5 milligrams) and then claimed that she took 3 pills the morning of April 28, 1993 before the trial hearing (1.5 milligrams) (T. Vol. I 573; 599-602)

(e) Plaintiff, in her Affidavit of July 30, 1993, did not state that she took Prozac the morning of April 28, 1993. However, she testified on December 20, 1993 that she took 1 regular Prozac. (T. Vol. I 573). This statement was in conflict with and contrary to her testimony that she took Prozac at night when she went to bed. (T. Vol. II 262) Plaintiff testified and Exhibit D-1 verified that the last prescription filled for Xanax before the April 28, 1993 hearing was on March 28, 1993 and consisted of 30 pills .5 milligrams each. Although Plaintiff claimed and testified that she was in the process of stock piling Xanax, she did not know how many pills she

had on March 28 or April 27, 1993. (T. Vol. I 597) Based on Plaintiff's testimony and her Affidavit that she was taking 2 pills a day, 1 every 12 hours, up until approximately 2 weeks before trial, and then increased her dosage to 3 pills a day or more, she would have exceeded her last prescription of 30 pills by 12 to 15 pills. (T. Vol. I 570; 591; 593-595; 597-598). The Court, Judge Newey, found from the evidence, that Plaintiff's taking of Xanax the evening of April 27th and the morning of April 28, 1993, did not exceed the dosage prescribed by Dr. Wilson of 2 tablets of Xanax each 6 hours or 8 tablets per day. (T. Vol. IV 734-735).

10. Plaintiff understood and was cognizant of the issues discussed and agreed to during the meeting of April 27, 1993 of custody, visitation, child support, the income of the parties, debts, division of real property and alimony. (T. Vol. II 247-249) Contrary to the claims of Plaintiff, the Court found this meeting lasted approximately 3.5 hours. (T. Vol. IV 728; R. 166) Plaintiff does not claim that her thinking and decision processes were impaired at any time during this meeting, although she said she had taken 3 pills of Xanax prior to the meeting (1.5 milligrams) (T. Vol. I 603)

11. Plaintiff is and has been self employed, working out of the home, doing nails. She does not report all of her income. At the April 27, 1993 negotiating meeting, she agreed that her actual income was more than minimum wage. That $800.00 per month income

would be imputed to her for support calculations and alimony, even though she had stated her income to be less at the time of the Temporary Order and in her financial declaration. (T. Vol. II 248-249) (R. 51; 74; 166)

12. The Trial Court on the morning of the trial, was advised that there were 2 or 3 issues remaining to be agreed upon and granted additional time to the parties and their attorneys, at their request, to negotiate further to see if they could reach an agreement on these issues, which they did. (T. Vol. IV 728) Plaintiff first admitted and then later denied this fact. (T. Vol. I 575; 578) Plaintiff understood and was cognizant of all of the terms of the Stipulation and Settlement Agreement at the time it was presented to the Court by her attorney, Mr. Lawrence. (T. Vol. II 249-259; 263-265).

13. The Court, Judge Newey, at the time of the hearing on Plaintiff's Motion to Set Aside the Stipulation, had reviewed the transcript of the April 28, 1993 hearing and recalled the questions which he posed directly to the Plaintiff at that time concerning her understanding of the terms of the Stipulation and Agreement. (T. Vol. II 265-258). Judge Newey, before rendering his decision, reviewed the personal property lists (Exhibit P-1), the photographs of Defendant's electrical equipment (Exhibits D-3, D-4), Defendant's Answers to Interrogatories and Admissions (Exhibit P-2), the parties Financial Declarations and payments made by Defendant for the benefit of Plaintiff as a credit against alimony.

(T. Vol. IV 728, 730).

14. On July 30, 1993, approximately 3 months after the April 28, 1993 hearing, Plaintiff filed her Motion to Set Aside the Stipulation because she felt her attorney, Mr. Lawrence, had let her down when he advised her to compromise and agree to the issues that remained in dispute concerning the disparity in division of personal property, the 401-K account and compromise of money claims for alimony arrearage against debts paid by the Defendant. (T. Vol. II 255; 265) (T. Vol I 576) (T. Vol. III 666-673; 690-694)

RULING

15. The Court, Judge Newey, having observed the Plaintiff throughout the hearing on her Motion and after careful review of the testimony, exhibits and transcript of the April 28, 1993 hearing, denied Plaintiff's Motion to Set Aside the Stipulation or the Decree of Divorce, based on his finding that the Plaintiff, Diane Dautel, to be alert, that her testimony was clear and concise when she appeared before the Court on April 28, 1993. The finding that Plaintiff, Diane Dautel, on the morning of the trial, appeared to act and respond normally to the Court's questions, was able to articulate and respond accurately to the Court's specific questions relating to the Stipulation and Settlement Agreement and her agreement to the Stipulation. (T. Vol. IV 728-733) The Court

also found, after review of the property lists and evidence presented, the Stipulation of the parties was fair and equitable to both parties and that Plaintiff had failed to prove mistake, inadvertence or excusable neglect under Rule 60(b), Utah Rules of Civil Procedure. (T. Vol. IV 735-736).

ERRORS IN PLAINTIFF'S STATEMENT OF FACTS

16. The testimony of Mr. Thorn, quoted at page 7 of Plaintiff's Brief, pertains to events and circumstances that occurred between the parties separation, August 19, 1991 and the filing of the Divorce Complaint by Plaintiff, January, 1992, as opposed to the two (2) week period before the trial hearing of April 28, 1993, indicated by Plaintiff.

Defendant, David Dautel, did not enter the home or remove personal property after January, 1992. The statements referenced in Plaintiff's Brief that he entered the home and removed personal property again pertains to the period September, 1991 to January, 1992, not the two (2) week period before April 28, 1993. (T. Vol. III 665; 669)

Plaintiff's assertion at the top of page 12 of her Brief, Statement of Facts, that the trial Court should have used a "criminal law" inquiry before accepting the parties Stipulation and Settlement Agreement in a civil proceeding is without legal basis.

NOTICE OF DUPLICATION OF RECORD

In an effort to avoid confusion and assist the Court with regard to the transcript of the proceedings held December 20th and concluded December 28, 1993, there is a duplication of Volume II of the transcript of the proceedings held December 20, 1993 contained in the trial Court file II. The original of Volume II is designated in the trial Court record as pages 245 to 377. A copy of the transcript volume II has been designated in the trial Court record as pages 430 to 562.

Volume I of the transcript of the proceedings held December 20, 1993 has been designated in the trial Court record as pages 564 to 606. Transcript Volume I should have been number ahead of Volume II. Thus, there may be confusion with regard to references to the trial transcript in the Briefs of the respective parties.

Volume III of the transcript of the proceedings held December 28, 1993 begins at page 608 of the trial Court record and concludes with Volume IV of the transcript of the proceedings December 28, 1993, pages 725 to 738.

SUMMARY OF ARGUMENT

POINT I

THE TRIAL COURT'S DENIAL OF PLAINTIFF'S MOTION TO SET ASIDE THE STIPULATION OR DECREE OF DIVORCE ENTERED ON THE STIPULATION AS A RULE 60(b)(1) MOTION WAS NOT ABUSE OF DISCRETION.

Plaintiff's Motion to Set Aside the Stipulation did not designate it was brought pursuant to Rule 60(b)(1) U.R.C.P. and did not comply with provisions of Rule 7(b)(1) U.R.C.P. (R. 140-142; 203-204) However, Plaintiff's attorney, near the conclusion of the hearing on Plaintiff's Motion and at closing argument, represented to the Court that Plaintiff's Motion was brought pursuant to Rule 60(b)(1), mistake, inadvertence, excusable neglect. (T. Vol. III 681; 708-709) Plaintiff filed her Motion to Set Aside the Stipulation on July 30, 1993, more than three (3) months after the hearing of April 28, 1993, and therefore was not timely. Rule 60(b) requires that Motions for reasons (1), (2), (3) or (4) be filed not more than 3 months after the proceedings that the stipulation was presented and approved by the Court. Plaintiff's Motion, under subdivision (b)(1) being filed more than 3 months after the Stipulation was entered into, accepted and approved by the Court, was untimely and should have been denied. Kanzee v. Kanzee, 668 P2d 495 (Ut 1983).

As a general rule, the trial Court is afforded broad discretion in ruling on a Motion for relief under Rule 60(b)(1), mistake, inadvertence or excusable neglect and its determination will not be disturbed absent an abuse of discretion. Birch v. Birch, 771 P.2d 1114 (Ut. C. App. 1989) Plaintiff's attack on the trial Court's ruling is a challenge to the Court's Findings of Fact. To successfully attack Findings of Fact, Plaintiff, as

Appellant, must first marshall all the evidence supporting the Findings and then demonstrate that even if viewed in the light most favorable to the trial Court, the evidence is legally insufficient to support the Findings. Christensen v. Munns, (supra) Doelle v. Bradley, 784 P.2d 1176, 1178 (Ut. 1989) citing Reid v. Mutual of Omaha, Ins. Co. 776 P.2d 896, 899 (Ut. 1989) In Re Estate of Bartell, 776 P.2d 885, 886 (Ut. 1989).

Legal sufficiency of the evidence is determined under Rule 52(a) U.R.C.P., which provides: "Findings of Fact, whether based on oral or documentary evidence, shall not be set aside unless "clearly erroneous" and due regard shall be given to the opportunity of the trial Court to judge the credibility of the witnesses." Richens v. Delbert Chipman & Sons Co, 817 P.2d 382 (Ut. C. App. 1991); Doelle v. Bradley (supra). The findings of the trial Court and its ruling are supported by the transcript of the proceedings of April 28, 1993, the evidence presented at the hearing of Plaintiff's Motion, in particular the events which occurred the day before, at the same time refuting Plaintiff's claim that she was befuddled and unable to make decisions relating to her interest at the time the Stipulation was presented and approved by her. At the time the Stipulation was presented and read into the record by Plaintiff's attorney, Mr. Lawrence, the Court, the Honorable Judge Newey, heard and observed each of the parties, made inquiries and asked specific questions of them, as follows:

(1) Mr. Lawrence, at page 3, lines 2 through 9, set forth the restriction on visitation regarding the children under age 14, requested by Plaintiff and agreed to by Defendant. (R. 108)

(2) The Court, at page 6, lines 22 to 25 and page 7, line 1, reviewed the child support issue presented by Mr. Lawrence and Exhibit D-2 (Support Worksheet) that was submitted to the Court with income verification. (R. 111-112)

(3) The Court, at page 10 of the transcript, lines 1 through 16, reviewed the Stipulation with regard to the equity lien to be awarded Defendant for his share of the home equity and the events which would render the lien due and payable. Also, Mr. Lawrence, at lines 18 and 19 stated that Defendant was waiving any claim to a pre-marital contribution.

(4) The Court, at page 12 of the Stipulation, lines 12 through 15, requested Mr. Lawrence to clarify the parties agreement to division of Defendant's ESOP and PAYSOP stock shares with his employer, E-Systems. At page 11 of the transcript, lines 23 through 25, Mr. Lawrence stated to the Court that Defendant would be awarded all of the ESOP and PAYSOP shares of stock he had acquired before marriage. (R. 116-117).

(5) The Court, at page 13 of the transcript, lines 8 through 9, asked, "and what does the $7,000.00 represent?

His prior marriage interest? Mr. Lawrence responded, "no, no, the $7,000.00 is consideration in some transfers we have done in regard to personal property." (R. 118) With regard to the division of personal property, the Court, at page 14 of the transcript, lines 7 through 8, asked Mr. Lawrence whether he would furnish an itemization of the personal property. Mr. Lawrence responded in the affirmative, "that's correct." The Court, being satisfied with the response, stated at lines 13 through 15, "alright. alright. It won't be necessary then to itemize those for the record right now." (R. 119) It should be noted that both parties had possession of the personal property lists which had been reviewed in detail at the negotiating meeting, April 27th and the morning of trial, April 28, 1993.

(6) The Court, at page 16 of the transcript, lines 2 through 7, expressly stated that it was trying to avoid future misunderstandings with regard to the Stipulation and Settlement Agreement.

(7) Mr. Lawrence, at page 18 of the transcript, lines 15 through 17, conferred with Plaintiff, off the record, about the Stipulation concerning debts and obligations and marital debts that would be paid from liquidation and sale of the stock that he had just articulated to the Court. (R. 123) Back on the record, the Court, at page 18 of the transcript, lines 22 to 25, and page 19, made inquiry

to clarify the parties agreement on the 1992 real property taxes. (R. 123-124)

(8) The Court, at page 19, commencing with lines 19 through 25, continuing to page 20, asked Plaintiff specifically if she understood the Stipulation that had been recited to the Court. The following exchange then ensued:

MRS. DAUTEL: I think so.

THE COURT: And is this your agreement? Is this what you want the - - your Divorce Decree to incorporate by way of property settlement, alimony and support?

MRS. DAUTEL: I guess.

THE COURT: Well - -

MRS. DAUTEL: I am a little iffy on it.

THE COURT: Pardon me?

MRS. DAUTEL: I'm questioning it a little bit, but I guess I'll go along with it.

MR. LAWRENCE: Could I talk to her one second, your Honor?

THE COURT: Yes.

(Off the record discussion between Mr. Lawrence and Mrs. Dautel)

MR. LAWRENCE: I think she's ready, your Honor.

THE COURT: We would - - we would need you to state if that is your agreement, if that is what you are agreeing to at this time; otherwise, why the Court would proceed with the trial of the case.

MRS. DAUTEL: Yes, I will agree with that.

THE COURT: And that's - - that's what you want to do

at this time?

MRS. DAUTEL: Yes.

THE COURT: Alright. Then, let me ask the Defendant, David Dautel, is that your agreement?

MR. DAUTEL: Yes, your Honor, it is. (R. 124-126)

(9) Thereafter, points of clarification and other matters were presented to the Court by counsel for the respective parties, which are set forth on pages 22 through 23 of the transcript. Judge Newey, at page 23, lines 20 and 21 of the transcript, specifically inquired of Plaintiff's attorney regarding his client's understanding of the points of clarification. Judge Newey again, at page 24, lines 14 through 21, inquired of both parties regarding the stipulated agreement, their understanding and approval of the agreement, as follows:

THE COURT: Very well, now, with these clarifications, let me again ask each party if this is your agreement and if this is the agreement you want the Divorce Decree entered on and incorporated in the Decree. You both understand what counsel has said by way of clarification, and this is your agreement. Is that correct, Mrs. Dautel?

MRS. DAUTEL: Yes

THE COURT: Mr. Dautel?

MR. DAUTEL: Yes it is, your Honor.

THE COURT: Alright. The Court believes that through great effort on the part of counsel and the parties - - that's the reason I permitted you extra time, rather than starting this morning - - that you have been able to devise an agreement that appears to the Court to be fair and reasonable under all the circumstances. And I would approve your agreement and permit you to incorporate it into the

Findings of Facts, Conclusions of Law and Decree of Divorce which the Court would sign. And I will permit the Plaintiff to proceed at this time, the testimony. (R. 129-130)

Plaintiff was then called to the stand to testify. She was duly sworn and examined by Mr. Lawrence, her attorney. At page 26 of the transcript, lines 21 through 25, continuing to page 27, lines 1 through 4, affirmed the Stipulation and Settlement Agreement, as follows:

Q: And isn't it true that - - isn't it your desire that you be awarded a divorce pursuant to the terms set forth in the Stipulation that was entered into today?

A. Yes.

Q. And you are not opposed to the Defendant withdrawing his Answer and allowing this to take place pursuant to that Stipulation?

A. No. (R. 131-132)

The Court, at page 28 of the transcript, lines 2 through 7, approved the Stipulation and Agreement and ordered it be incorporated in the Findings of Facts, Conclusions of Law and Decree of Divorce. The Court again, at page 29 of the transcript, beginning with line 1, made inquiry concerning anything the Court should have covered, without any contrary response from the Plaintiff. (R. 133-134)

Plaintiff has not attempted to marshall the evidence in support of the trial Court's findings and demonstrate that the evidence supporting the findings is legally insufficient. Plaintiff's Brief presents conflicting evidence in a light most favorable to her position and largely ignores the contrary

evidence. Plaintiff was not seen or observed by Dr. Wilson or Mr. Thorn, the day before trial and the morning of April 28, 1993. Judge Newey listened to and observed the Plaintiff throughout the entire proceedings of April 28th, the entire proceedings held December 20 and December 28, 1993. Judge Newey was in the advantage position of determining whether the Xanax she had taken affected her thought and decision processes negatively. In contrast, the testimony of Mr. Thorn and Dr. Wilson was based on what the Plaintiff had told them, speculation and not actual observation. Dr. Wilson testified that the affect of Xanax was different and varied with each individual person, and in cases of severe anxiety, they may perform better. (T. Vol. II 297) Plaintiff's first complaint that she was not able to function and carry out her work from taking Xanax came 4 months after the Court proceedings of April 28, 1993 and 5 months after the examination of March 17, 1993 without specifics. (T. Vol. II 316-317).

Plaintiff's Brief presents conflicting evidence in a light most favorable to her position and largely ignores the contrary evidence. A trial Court's factual finding is deemed "clearly erroneous" only if it is against the clear weight of the evidence. Doelle v. Bradley (supra). The challenged findings are not "clearly erroneous" and therefore no abuse of discretion on the part of the trial Court and its ruling denying Plaintiff's Motion should not be disturbed.

POINT II

THE FINDING THAT THE STIPULATION AND AGREEMENT TO BE FAIR AND EQUITABLE BY THE TRIAL COURT IS SUPPORTED BY THE EVIDENCE AND NOT ABUSE OF DISCRETION.

Plaintiff's claim that the trial Court abused its discretion in failing to make or enter specific Findings of Fact, "justifying alimony, child support and property awards," is without merit and not supported by the record or law. The trial Court was under a duty to make a determination on the evidence presented, whether there was sufficient basis or reason to set the Stipulation aside for "mistake, inadvertence or excusable neglect." The Court, on Plaintiff's Motion before it, was not required to make factual findings on the issues of child support, alimony or property awards. As to the issue of child support, at the time the Stipulation was presented, child support was represented to be according to the Guidelines pursuant to the parties incomes and the worksheet presented (Exhibit D-2) in response to the inquiry of the Court. (R. 111-112) The Utah Supreme Court, in the case of Larson v. Collins, 684 P.2d 52 (Ut. 1984) stated as a general rule:

> Usually, it is not appropriate on subdivision (b) Motions to examine the merits of claim decided by the default judgment.

Irrespective of this Rule, Plaintiff was afforded considerable latitude by the trial Court throughout the hearing on her Motion to present evidence with regard to these issues. David M. Nielsen, an attorney, a witness called by Plaintiff, acknowledged that alimony is "always negotiable." (T. Vol. III 635) Mr. Nielsen acknowledged that he had only seen the file of Plaintiff's attorney, delivered to him by Mr. Crist's office, noon the day before. (T. Vol. III 616; 654) He was not privy to the parties negotiations. He had not talked with the parties or their attorneys regarding their negotiations or the underlying basis for the parties agreement. In response to a direct question by Judge Newey, to-wit:

> THE COURT: You're not in a position to give a professional opinion without having been privy to the hours of negotiation in arriving at this settlement, are you?
>
> MR. NIELSEN: No, I'm not, your honor.
>
> THE COURT: Alright.
>
> MR. NIELSEN: Each case is differently - - is different and we weren't there for the discussions between the attorneys and the clients and the attorneys and the attorneys. So all we can do is look at the file now to make our - -
>
> THE COURT: Yes
>
> MR. NIELSEN: - - opinion

In spite of this response of Mr. Nielsen to the Court's question, Judge Newey allowed him to state opinions on the issues which he acknowledged were not based on facts of the case. (T. Vol. III

620-621; 636; 644-645) However, Mr. Nielsen did acknowledge his reading of the April 28, 1993 transcript, the care that Judge Newey took to make sure the parties understood every aspect of the Stipulation. (T. Vol. III 641)

The Court, Judge Newey, made his finding that the Stipulation of the parties was fair and equitable to both parties only after he had made an indepth review of each party's list of properties and values awarded to them, the debts and obligations, the financial statements and the evidence presented concerning the property, alimony and child support, as if a new trial of the case. (T. Vol. IV 736) Under all these circumstances, it cannot be said, as Plaintiff asserts, the Court abused its discretion. Where a Decree of Divorce is based upon a Property Settlement Agreement, negotiated by the parties and sanctioned by the Court, equity should not be used as a lever to realign rights and privileges voluntarily contracted away simply because one party has come to regret the bargain made. Whitehouse v. Whitehouse, 790 P.2d 56, 61 (Ut. C. App. 1990) quoting Land v. Land, 605 P.2d 1248, 1251 (Ut. 1980)

> Equity is not available to reinstate rights and privileges voluntarily contracted away simply because one has come to regret the bargain made.

Some of the strongest evidence that Plaintiff was not impaired at the trial hearing, April 28, 1993, as claimed, comes from testimony of Mr. Thorn, her clinical psychologist. Reading from his

clinical notes made at a counselling session with Plaintiff on or about July 9, 1993, some 3 months after she entered into the Stipulation, he testified:

> Diane was upset with the divorce settlement. Victor seemed to have washed out in Court and totally conceded to Dave's attorney. Two boys have become defiant. Diane is on Xanax and Prozac. During the Court, currently and prior to Court very anxious and depressive. Confused in the Court by Victor's change of attitude and also because of anxiety. Probably agreed to Court Decree with - - oh, excuse me. Due to anxiety and confusion of her attorney. (T. Vol. II 347-348)

The foregoing is a strong indication that Plaintiff had, subsequent to agreeing to the Stipulation in open Court, came to regret the bargain made. She was in fact alert, and understood the agreement she had entered into with the aid and advise of her attorney. Where these circumstances exist, there is an institutional hesitancy to relieve a party from a stipulation negotiated and entered into with the advise of counsel. Richins v. Delbert Chipman & Sons Co. (supra) citing Birch v. Birch (supra).

The burden of proof with respect to setting aside Divorce Decrees based on stipulated settlement agreements is particularly high. For example, the Utah Supreme Court, in the case of Lea v. Bowers, 658 P.2d 1213, 1215 (Ut. 1983) held that factual findings that the husband was not represented by counsel and had been drinking heavily for an extensive period of time, at the time a stipulation was entered into which governed the Findings and Decree in the original divorce, did not constitute "compelling reasons"

for change of circumstances or modification of a Decree of Divorce. Also, illness alone is not a sufficient excuse to make neglect for vacating a default judgment. Warren v. Dixon Ranch Co. 123 Ut. 416, 260 P.2d 741 (1953) Where the findings of the trial Court in its ruling are supported by the transcript of the proceedings of April 28, 1993, the evidence presented at the hearing of Plaintiff's Motion, Plaintiff has failed to meet the required burden of proof to establish abuse of discretion on the part of the trial Court.

CONCLUSION

Plaintiff failed to meet her burden of showing abuse of discretion by a clear preponderance under the clearly erroneous standard in that the findings and ruling of the trial Court are supported by the clear weight of the evidence. The denial of Plaintiff's Motion to Set Aside the Stipulation should be affirmed. Equity is not available to Plaintiff to reinstate rights and privileges voluntarily contracted away because she subsequently became dissatisfied with her attorney and now regrets the bargain made.

Plaintiff's Motion brought pursuant to Rule 60(b)(1), mistake, inadvertence, or excusable neglect, was not filed within 3 months from the time the Stipulation was presented, approved by the parties and accepted and approved by the Court and therefore her Motion should have been denied.

As a matter of law, Plaintiff not being awarded attorney's fees in the lower Court is not entitled to an award of attorney's fees on this Appeal. Plaintiff's Appeal of the lower Court's ruling should be denied in all particulars.

Respectfully submitted this _____ day of September, 1994.

E. H. FANKHAUSER
Attorney for Defendant/Appellee

MAILING CERTIFICATE

I certify a true and correct copy of the foregoing was mailed to Neil B. Crist and Paul W. Mortensen, Attorneys for Plaintiff/Appellant, 380 North 200 West, Suite 214, Bountiful, Utah 84010 on this _____ day of September, 1994.

ADDENDUM

EXHIBIT "A"	Letter from Attorney Victor Lawrence dated July 27, 1993

VICTOR LAWRENCE
ATTORNEY AND COUNSELOR AT LAW
323 South 600 East, Suite 150
SALT LAKE CITY, UTAH 84102

TELEPHONE (801) 359-0600
FAX (801) 521-5731

July 27, 1993

E.H. Fankhauser, Esq.,
243 East 400 South, Suite 200
Salt Lake City, Utah 84111

Re: Dautel v. Dautel

Dear Mr. Fankhauser:

This letter is in regard to the above-referenced matter. As stated in my last letter dated 07/06/93 I had contacted the court reporter, Laurie Shingle, to clarify the issue regarding the 401K.

She had told me that it would take about a week to get a transcript for me. Last week I called, she represented that she had mailed it on Monday. By Thursday I had still not received anything, she sent out another copy. Today, I received both copies, evidently the first one had an incorrect zip code.

I won't get a chance to review it now until probably Thursday afternoon or Friday morning. I will contact you immediately at that time to discuss this matter further. Please note I have enclosed a letter submitted to the Court to let them know that we are still trying to resolve this matter.

Kindest regards.

Very truly yours,

Victor Lawrence

VL/lcv
cc: Ms. Dautel
Enclosure(s)