IN THE UTAH COURT OF APPEALS

	BRIEF OF APPELLANT Appeal No.: 20170415 ORAL ARGUMENT REQUESTED
MARY ELLEN ROBERTSON Petitioner/Appellee, v. MICHAEL STEVENS Respondent/Appellant.	On appeal from: The Honorable Ernie W. Jones Second Judicial District Court District Court No. 154901439

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JURISDICTIONAL STATEMENT

This matter went before the Honorable Judge Ernie W. Jones in the Second Judicial District Court in Ogden, Utah on April 5, 2017 with the Second District Court entering its final Judgment on April 28, 2018. On May 23, 2017, Appellant, by and through counsel, timely filed a Notice of Appeal to the Utah Court of Appeals, where appellate jurisdiction was proper pursuant to Utah Code Ann. § 78A-4-103(2)(h).

ISSUES PRESENTED

1. **WHETHER THE TRIAL COURT ERRED IN DISMISSING THE APPELLANT'S PETITION TO MODIFY DECREE OF DIVORCE DISPARAGEMENT PROVISION.**

    a. Controlling Authority:
        i. Utah Rule of Civil Procedure, 12(b)(6).
        ii. *Bayles v. Bayles*, 1999 UT App 128.
    b. Standard of Review:
        i. "A trial court's decision granting a rule 12(b)(6) motion to dismiss a complaint for lack of a remedy is a question of law that we review for correctness, giving no deference to the trial court's ruling." *Oakwood Village LLC v. Albertsons, Inc*., 2004 UT 101, ¶ 9.
        ii. "The determination of the trial court that there [has or has not] been a substantial change in circumstances ... is presumed valid, and we review the ruling under an abuse of discretion standard." *Bolliger v. Bolliger,* 2000 UT App 47, ¶ 11. (alteration and omission in original).

2. **WHETHER THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S REQUEST FOR A PRELIMINARY INJUNCTION ENJOINING THE APPELLEE FROM DISPARAGING THE APPELLANT.**

    a. Controlling Authority: Utah Rules of Civil Procedure, 65A(a)(e)-(f).
    b. Standard of Review:

i. An appellate court "will not disturb a district court's denial of a preliminary injunction 'unless the court abused its discretion or rendered a decision clearly against the weight of the evidence.'" *Zagg, Inc. v. Harmer*, 2015 UT App 52, ¶1.

3. WHETHER THE TRIAL COURT ERRED BY DENYING THE APPELLANT LEAVE OF COURT TO AMEND THE VERIFIED PETITION TO MODIFY DECREE OF DIVORCE.

a. Controlling Authority: Utah Rules of Civil Procedure, Rule 15(a).
b. Standard of Review:
   i. "We review a district court's denial of leave to amend for an abuse of discretion. Under the Utah Rules of Civil Procedure, this leave should be granted liberally. But we have held that this liberality is limited, such as, for example, when it would result in prejudice to the opposing party, when leave to amend is sought during or after trial instead of before trial, or if the amendments would be futile." *Hudgens v. Prosper, Inc.* 2010 UT 68, ¶¶10-11.

DETERMINATIVE PROVISIONS

The following rules of the Utah Rules of Civil Procedure are of central importance to the appeal.

Utah Rule of Civil Procedure 65A(e) and (f):

(e) Grounds. A restraining order or preliminary injunction may issue only upon a showing by the applicant that:

(e)(1) The applicant will suffer irreparable harm unless the order or injunction issues;

(e)(2) The threatened injury to the applicant outweighs whatever damage the proposed order or injunction may cause the party restrained or enjoined;

(e)(3) The order or injunction, if issued, would not be adverse to the public interest; and

(e)(4) There is a substantial likelihood that the applicant will prevail on the merits of the underlying claim, or the case presents serious issues on the merits which should be the subject of further litigation.

(f) Domestic relations cases. Nothing in this rule shall be construed to limit the equitable powers of the courts in domestic relations cases.

Utah Rule of Civil Procedure 12(b)(6):

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

Utah Rule of Civil Procedure 15(a):

(a) Amendments before trial.

(a)(1) A party may amend its pleading once as a matter of course within:

(a)(1)(A) 21 days after serving it; or

(a)(1)(B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

(a)(2) In all other cases, a party may amend its pleading only with the court's permission or the opposing party's written consent. The party must attach its proposed amended pleading to the motion to permit an amended pleading. The court should freely give permission when justice requires.

(a)(3) Any required response to an amended pleading must be filed within the time remaining to respond to the original pleading or within 14 days after service of the amended pleading, whichever is later.

STATEMENT OF THE CASE

Nature of the Case: The present case arises out of a marriage and subsequent and recent divorce of the parties. The Appellant is asking this Court to draw a line for divorced parties with non-disparagement clauses in their decrees to assist them in knowing the boundaries between natural venting about an ex-spouse and highly offensive disparagement of an ex-spouse. In this case, the Appellant asserts the trial court erred in finding that Appellee's extensive campaign to disparage her ex-husband was the natural frustration of divorce. The Appellant petitioned the court to modify the parties' *Decree of Divorce* due to more than 300 printed pages disparaging the Appellant that were published by Appellee after the entry of the *Decree of Divorce*. The publications spanned three media outlets (a book chapter, an on-line essay for a prominent website, and extensive social media posts), and are believed to represent

only a small fraction of the total disparagement waged by the Appellee. The Appellant petitioned to modify Paragraph 22 of the parties' *Decree of Divorce* seeking to expand an already-existing non-disparagement order that enjoins only the Appellee. Paragraph 22 states in full: "Non-disparagement. Mary Ellen shall not tell third parties that (1) Michael kicked her out of the house, or (2) Michael has stolen marital assets." The Appellant also sought to restrain the Appellee pursuant to Rule 58A of the Utah Rules of Civil Procedure during the proceedings related to his *Verified Petition to Modify Decree of Divorce*. (R. Vol. 1, 279-280; Resp't's Dec, ¶2).

In this case, without the knowledge or consent of the Appellant, the Appellee has published private, intimate facts about the Appellant and further cast him in a false light in an extensive and pervasive manner that is highly offensive. The Appellee's actions were not known by the Appellant, nor could have been known by the Appellant, at the time the Decree of Divorce was entered. Thus, the Appellant sought to modify the *Decree of Divorce* based on a substantial and material change in circumstances that were not contemplated at the time the parties' *Decree of Divorce* was entered by the Second District Court.

Course of the Proceedings: The Second Judicial Court entered a final judgment on April 28, 2017 after oral argument arising from two objections to the Commissioner's recommendations of December 6, 2016 and March 7, 2017. The December 6, 2016 hearing related to Appellant's *Ex Parte Motion for Temporary Restraining Order* and the March 7, 2017 hearing related to Appellee's *Motion to Dismiss Verified Petition to Modify*. The Second District Court ordered the dismissal of Appellant's petition to modify and upheld the Commissioner's ruling to vacate the temporary restraining order. The Notice of Appeal was timely filed on May 23, 2017.

The District Court granted the Appellee's motion to dismiss the petition to modify even though the Commissioner granted the Appellant's request to amend his petition. The District Court held that the Appellant was seeking to litigate a tort claim; however, the instant case is not a tort action.

The District Court found that the Appellee's statements were no more than traditional, post-marital bickering. However, the Appellee's public statements about the Respondent arise out of the marriage and divorce and could not emerge out of any other set of circumstances other than the marriage due to the private nature of the facts.

STATEMENT OF THE FACTS

1. The *Decree of Divorce* was entered on November 10, 2015. (R. Vol. 1, 47)

2. The parties were married for approximately eight years. (R. Vol. 1, 48)

3. The parties have no children at issue from the marriage. (R. Vol. 1, 48)

4. The parties negotiated a settlement agreement and signed it on July 8, 2015. (R. Vol. 1, 6)

5. Paragraph 22 of the Decree of Divorce states: "Non-disparagement. Mary Ellen shall not tell third parties that (1) Michael kicked her out of the house, or (2) Michael has stolen marital assets." (R. Vol. 1, 53)

6. The Appellant filed a *Verified Petition to Modify Decree of Divorce* on or about November 15, 2016 seeking to modify Paragraph 22 of the *Decree of Divorce*. (R. Vol. 1, 67)

7. The Appellant did not learn of almost 300 pages of disparaging comments about him by the Appellee until after he had filed the petition to modify. (R. Vol. 1, 93, 117, 623; p. 14 of Transcript)

8. The Appellant filed an *Ex Parte Motion for Temporary Restraining Order* on November 15, 2017. (R. Vol. 1, 71)

9. The Commissioner heard arguments on December 6, 2016 on the *Ex Parte Motion for Temporary Restraining Order* and vacated the temporary restraining order with orders entered on December 15, 2016. (R. Vol. 1, 468)

10. On December 20, 2016, the Appellant filed an *Objection to the Commissioner's Order* issued on December 6, 2016. (R. Vol. 1, 515)

11. The Appellee filed a *Motion to Dismiss* Appellant's *Verified Petition to Modify Decree of Divorce* on or about November 29, 2016 and oral arguments were heard on or about March 7, 2017. (R. Vol. 1, 451)

12. Subsequent to the *Decree of Divorce* being entered, the Appellant learned of a chapter the Appellee published and a public reading of her book chapter at King's English bookstore where the Appellee discloses private and confidential facts about the Appellee. (R. Vol. 1, 90)

13. Subsequent to the *Decree of Divorce* being entered, the Appellant learned that the Appellee had published more some 300 pages of disparaging or defaming comments about the Appellant in a closed, but public on-line forum. (R. Vol. 1, 117; Exhibit E)

14. The book with Appellee's chapter is entitled *Baring Witness: 36 Mormon Women Talk Candidly about Love, Sex and Marriage* (edited by Holly Welker and published in July 2016 by the University of Illinois Press). The Appellee contributed a chapter entitled "Mormon Marriage Surprise." (R. Vol. 1, 106) In her chapter, the Appellee publically communicates the following private and confidential facts that could only be known from the context of the privacy of a marriage:

a. Private medical issues related to our fertility as a couple (R. Vol. 1, 106-110);

b. Personal and intimate conversations that took place during our private and confidential couples' therapy sessions (R. Vol. 1, 106-110)

15. At a September 21, 2016 public reading event at the King's English book store (located at 1511 S. 1500 E, Salt Lake City, Utah; public social media announcement of this event (R. Vol. 1, 112)) for the *Baring Witness* book referenced above, the Appellee publically communicates the following private and confidential facts:

a. Private medical issues related to fertility as a couple (R. Vol. 1, 112);

b. Personal and intimate conversations that took place during private and confidential couples' therapy sessions. (R. Vol. 1, 112)

16. Regarding the above-mentioned public reading at the King's English bookstore, the *Salt Lake Tribune*'s acclaimed and seasoned journalist, Peggy Fletcher Stack, covered this event where the Appellee participated (along with six other contributing authors) by reading excerpts from her chapter. (R. Vol. 1, 113-115)

17. Ms. Stack posted a link to her subsequent *Salt Lake Tribune* newspaper article on her social media Facebook page that questioned the probity of disclosures from the book's authors with the following statement:

a. "[The book is] a collection of fascinating stories.... I do wonder how ex-spouses will feel when reading about their intimate lives and the dissolution of their marriages" (R. Vol. 1, 116)

18. In an extensive compilation of postings at the online "What Women Know Google Group" spanning nearly 300 printed page, the Appellee publically communicates the following private and confidential facts. (R. Vol. 1, 117-387)

a. Appellee discloses matters related to personal medical facts concerning services the Appellant procured at the Planned Parenthood clinic (R. Vol. 1, 294) (Exhibit E, p. 178);

b. Appellee discloses matters related to personal medical facts concerning the Appellant's attempted vasectomy reversal (R. Vol. 1, 304) (Exhibit E, p. 188);

c. Appellee discloses matters related to Appellant's intimate sexual attitudes and practices (R. Vol. 1, 288) (Exhibit E, p. 172);

d. Appellee discloses matters regarding intimate conversations that took place in the parties' confidential couple's therapy sessions (R. Vol. 1, 132, 133, 134, 202 & 237) (Exhibit E, pp. 16, 17, 18, 86 & 121);

e. Many additional statements were made in Exhibit E by Appellee that has invaded the Appellant's privacy by publically communicating facts or information of a confidential, personal and private nature (R. Vol. 1, 203, 204, 211, 220, 280, 289, 313, 318, 339, 341, 377 & 386) (Exhibit E, pp. 87, 88, 95, 104, 164, 173, 197, 202, 223, 226, 262 & 271).

19. In an essay published at www.the-exponent.com dated 11 May 2016 and titled "Single Again," Appellee makes the following defamatory statement, which is false or otherwise serves to cast the Appellant in a false and misleading light. (R. Vol. 1, 388)

a. Appellee falsely insinuates that the Appellant was abusive by claiming she was in a "marriage" that was "abusive" (R. Vol. 1, 388-390).

b. Appellee directly refutes this assertion of abuse in her own words in her publications to the online chat group where she states: "I was not physically

harmed," but then goes on to falsely claim "but every indicator of financial abuse was present in the marriage to some degree" (R. Vol. 1, 313) (Exhibit E, p. 173).

20. In the extensive compilation of postings at the online "What Women Know Google Group" referenced above, Appellee seeks to cause harm to the Appellant's professional standing and makes the following defamatory statements, which are false or otherwise serve to cast the Appellant in a false and misleading light:

a. Appellee encourages people to seek for the Appellant's "resignation from the Sunstone board of Trustees" (R. Vol. 1, 335) (Exhibit E, p. 219);

b. Appellee insinuates that the Appellant falsified court documents (i.e., that the Appellant committed perjury) and that she would need to investigate further by using a forensic accountant (R. Vol. 1, 293) (Exhibit E, p. 177);

c. Appellee states that she "uncovered some major shenanigans and financial dealings" allegedly committed by the Appellant (R. Vol. 1, 211) (Exhibit E, p. 95);

d. Appellee states that she wants to "hold him accountable for the financial shenanigans he's pulled.... Mike [the Appellant] took money" (R. Vol. 1, 222) (Exhibit E, p. 106);

e. Appellee falsely insinuates that Appellant was engaging in "financial abuse" by attempting to "sabotage [her] career" (R. Vol. 1, 334) (Exhibit E, p. 218);

f. Appellee falsely states she was the victim of "persistent undermining emotional and verbal abuse" perpetrated by Appellant (R. Vol. 1, 336) (Exhibit E, p. 220);

g. Appellee writes obliquely about her being a victim of abuse (R. Vol. 1, 371) (Exhibit E, p. 256); whereas she earlier directly refutes this assertion by her own

words in this same online chat group where she states: "I was not physically harmed," but then goes on to falsely claim "but every indicator of financial abuse was present in the marriage to some degree" (R. Vol. 1, 289) (Exhibit E, p. 173);

h. Appellee falsely claims that "the abuse continues for me!" and encourages others to share the information widely (R. Vol. 1, 373) (Exhibit E, p. 258);

i. Appellee disparages the Appellant when she states: "Enough with the financial abuse, already" (R. Vol. 1, 378) (Exhibit E, p. 263).

j. Many additional statements are made in Exhibit E by Appellee that disparage Appellant or otherwise serve to cast him in a false or misleading light (R. Vol. 1, 213-380) (Exhibit E, pp. 97, 102, 103, 104, 105, 107, 108, 112, 113, 114, 121, 122, 123, 124, 125, 145, 146, 148, 150, 153, 154, 163, 164, 165, 170, 171, 173, 178, 179, 181, 188, 189, 203, 204, 208, 226, 234, 235, 237, 238, 245, 247, 250, 253, 254, 255, 260, 264 & 265).

21. Third parties—most of whom actively participate in academic areas essential to Appellant's professional and career success—have made the following statements, demonstrating clearly that they have been negatively influenced by Appellee's disparaging public comments about Appellant, and confirming that she has been quite successful in her campaign to disparage the Appellant and impugn his character, reputation, and good standing in a community essential to his professional and career success:

a. Redacted third party asks about Appellant: "Is there any way to get him off the board [at Sunstone]?" (R. Vol. 1, 335) (Exhibit E, p. 219);

b. Redacted third party states about Appellant: "Voldemike [aka, Ms. Robertson's pseudonym for the Appellant] is one of the most devious, duplicitous, selfish,

arrogant pigs I've ever been acquainted with" (R. Vol. 1, 309) (Exhibit E, p. 193);

c. Redacted third party states about Appellant: "How power-abusive is that?" (R. Vol. 1, 203) (Exhibit E, p. 87);
d. Redacted third party states about Appellant: "Promise us you'll get a lawyer to deal with the shenanigans Mike has pulled" (R. Vol. 1, 212) (Exhibit E, p. 96);
e. Redacted third party states about Appellant: "What a hostile douche canoe he's being.... What a child." (R. Vol. 1, 224) (Exhibit E, p. 108);
f. Redacted third party states about Appellant: "[Mike is] arrogant and self-absorbed" (R. Vol. 1, 230) (Exhibit E, p. 114);
g. Redacted third party states about Appellant: "He's obfuscating to distract from his financial shenanigans. What a shithead." (R. Vol. 1, 239) (Exhibit E, p. 123);
h. Redacted third party states about Appellant: "Sorry he's a jerkwad" (R. Vol. 1, 267) (Exhibit E, p. 151);
i. Redacted third party states about Appellant: "[I'm] disgusted with Mike" (R. Vol. 1, 268) (Exhibit E, p. 152);
j. Redacted third party states about Appellant: "This level of betrayal is so hurtful. Sounds like a master. Makes me so sad – his mother is a lovely woman." (R. Vol. 1, 272) (Exhibit E, p. 156);
k. Redacted third party states about Appellant: "...this screams financial idiocy, ...he is purposefully cruel to you, ...he's mismanaging money, ...it was stupid" (R. Vol. 1, 280) (Exhibit E, p. 164);

l. Redacted third party states about Appellant: “I’m absolutely disgusted by his behavior, ...that sorry excuse for a man” (R. Vol. 1, 286) (Exhibit E, p. 170);

m. Redacted third party states about Appellant: “This financial stuff is totally duplicitous and dishonest. It’s VERY strange” (R. Vol. 1, 290) (Exhibit E, p. 174);

n. Redacted third party states about Appellant: “Voldemike [aka, Ms. Robertson’s pseudonym forthe Appellant] is... incredibly stupid” (R. Vol. 1, 293) (Exhibit E, p. 177);

o. Redacted third party states about Appellant: “I am continually astounded at the depth of Voldemike’s douchebaggery & a$$holedness. What a DICK!!!!!!” (R. Vol. 1, 321) (Exhibit E, p. 205);

p. Redacted third party states about Appellant: “What a fucking, cheating, lying, duplicitous, spineless sack of dog shit” (R. Vol. 1, 325) (Exhibit E, p. 209);

q. Redacted third party states about Appellant: “I’m willing to bet that the source [of a rumor about Ms. Robertson] can be traced back to Voldemike [aka, Ms. Robertson’s pseudonym for the Appellant].” (R. Vol. 1, 334) (Exhibit E, p. 218);

r. Redacted third party states about Appellant: “What a douchebag. He is an incredibly abusive man toward you” (R. Vol. 1, 336) (Exhibit E, p. 220);

s. Redacted third party states about Appellant: “Who is this petty, small-minded, douchebag of an a$$hole person you used to be married to?” (R. Vol. 1, 354) (Exhibit E, p. 238);

t. Many additional statements were made in Exhibit E by third party individuals confirming that Appellee has been quite successful in her campaign to falsely

disparage and impugn the Appellant's character, reputation, and good standing in a community essential to his professional and career success (R. Vol. 1, 169-380) (Exhibit E, pp. 53, 58, 70, 89, 90, 107, 112, 113, 125, 131, 146, 148, 153, 171, 212, 253, 254, 257¸258, 259¸263, 264 & 265).

SUMMARY OF ARGUMENT

The District Court erred in granting the Appellee's *Motion to Dismiss Petition to Modify Decree of Divorce*. Utah case law is very clear that "dismissal is a severe measure and should be granted by the trial court only if it is clear that a party is not entitled to relief under any state of facts which could be proved in support of its claim." *Mackey v. Cannon,* 2000 UT App 36, ¶ 9 (citing *Colman v. Utah State Land Bd.,* 795 P.2d 622, 624 (Utah 1990). In this case, the Appellant is entitled to pursue his petition because he has pled a material and substantial change in the circumstances.

The material and substantial change in circumstances not contemplated at the time of entry of the *Decree of Divorce* are the vast disparaging comments by the Appellee and were enumerate above. At the time the parties negotiated their *Decree of Divorce,* the Appellant was acting in good faith and had no reason to consider the likelihood that the Appellee was actively engaging in a vast campaign to defame his reputation and good standing and to share private and intimate facts related to their marriage. As a result, the understandably narrow scope of Paragraph 22 restraining the Appellee from disparaging the Appellant seemed adequate and proper. Notwithstanding, once the extent of the Appellee's actions came to light, the Appellant, through his petition, sought to amend Paragraph 22, which states: "Non-disparagement. Mary

Ellen shall not tell third parties that (1) Michael kicked her out of the house, or (2) Michael has stolen marital assets."

Utah courts have been clear that "[t]o succeed on a petition to modify a divorce decree, the moving party must first show that a substantial material change of circumstances has occurred since the entry of the decree and not contemplated in the decree itself." *Bolliger v. Bolliger,* 2000 UT App 47, ¶ 11. The Appellant clearly and abundantly meets this standard. Additionally, at the time of filing his petition, the Appellant moved the Trial Court for a preliminary injunction to restrain the Appellee from making additional disparaging comments.

The District Court held that the Appellant was seeking to litigate a tort claim; however, the instant case is not a tort action, but a petition to modify a decree of divorce. Although the Appellant concedes that the present case does have elements to it that may sound in tort, he nonetheless is not seeking to litigate for tortious remedies before this court. Utah appellate courts have made clear that trial courts can consider torts in divorce actions, but that torts cannot be litigated in divorce actions. *Bayles v. Bayles*, 1999 UT App 128.

In summary, the District Court found that the Appellee's statements were no more than traditional, post-marital bickering. The facts of this case show that Appellee's actions are not traditional, post-divorce meanness, but rather highly offensive disparagement that have falsely impugned the character and reputational standing of the Appellant in professional communities central to the success of his livelihood. What's more is that Appellee's book chapter and over 300 pages of scorched-earth disparagement have been published in print and posted on the Internet, and can thus never be retracted.

The Appellee's public statements about the Respondent arise out of the marriage and divorce and could not emerge out of any other set of circumstances other than the marriage due to the private nature of the facts. The Appellee's statements include the following: the private fact that the Appellant underwent a failed vasectomy reversal; private matters relating to the Appellant's intimate sexual attitudes and practices during their courtship and marriage; personal and intimate information about the Appellant that took place during the parties' private and confidential couples' therapy sessions; private medical facts related to the fertility of the parties when married; Appellant's private financial information; the fact that the Appellant procured medical services for intimate health screenings; false and malicious claims that Appellant was abusive or an abuser; disparaging, false and misleading comments about the Appellant's professional abilities and trustworthiness that have succeeded in damaging his reputation with long-standing colleagues; false and malicious accusations that the Appellant lied on his financial declaration to the family court and is thus guilty of the criminal act of perjury; and that the Appellee accused the Appellant of being so dishonest with marital finances that she repeatedly claimed the need to acquire the services of a forensic accountant to ascertain the extent of his deceptions.

ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING APPELLEE'S MOTION TO DISMISS BECAUSE THE APPELLANT HAS A LEGAL BASIS FOR MODIFICATION

In determining whether a trial court correctly granted a motion to dismiss, an appellate court must "accept the factual allegations in the complaint as true and consider them, and all reasonable inferences to be drawn from them, in the light most favorable to the non-moving

party." *MFS Series Trust III v. Grainger,* 2004 UT 61, ¶ 6. The Utah Supreme Court has made clear that under a rule 12(b)(6) dismissal, an appellate court's inquiry is concerned solely with "the sufficiency of the pleadings, [and] not the underlying merits of [the] case." *Oakwood Village LLC v. Albertsons, Inc*., 2004 UT 101, ¶ 8 (citing *Alvarez v. Galetka,* 933 P.2d 987, 989 (Utah 1997). In this case, the Appellant submitted his petition to modify the parties' *Decree of Divorce* with sufficiency. If any concern were over sufficiency, the trial court should have provided leave of court for the Appellant to amend his original petition such as the Appellant did in this case (see argument below).

Additionally, the bar is high for dismissal. This Court has previously noted that "[a] dismissal is a severe measure and should be granted by the trial court only if it is clear that a party is not entitled to relief under any state of facts which could be proved in support of its claim." *Mackey v. Cannon,* 2000 UT App 36, ¶ 9 (citing *Colman v. Utah State Land Bd.,* 795 P.2d 622, 624 (Utah 1990). In the instant case, as shown below, the Appellant has a legal basis for modification, which is a material and substantial change in the circumstances not contemplated at the time of entry of the *Decree of Divorce*. *See Mackey v. Cannon,* 2000 UT App 36, ¶ 13. (Dismissal under rule 12(b)(6) is only warranted in cases when "even if the factual assertions in the complaint were correct, they provide no legal basis for recovery.")

a. THE APPELLANT ALLEGED MATERIAL AND SUBSTANTIAL CHANGES IN THE CIRCUMSTANCES NOT CONTEMPLATED AT THE TIME OF ENTRY OF THE DECREE OF DIVORCE

The parties entered a mediated, settlement agreement on July 8, 2015, which resulted in a *Decree of Divorce* entered by the Second District Court on November 10, 2015. The Appellant sought to modify the *Decree of Divorce*'s Paragraph 22, which states the following:

"Non-disparagement. Mary Ellen shall not tell third parties that (1) Michael kicked her out of the house, or (2) Michael has stolen marital assets." Over the course of a year subsequent to the *Decree of Divorce* being entered, the Appellee published writings in wide-ranging media that contained disparaging comments, if not out-right lies, about the Appellant and published other statements that pervasively disclosed private and confidential facts about the Appellant. The media included a book chapter (in a book published by University of Illinois press), an essay on a widely-read website, and postings at the online "What Women Know Google Group" spanning nearly 300 printed pages.

There are a number of factors an appellate court must consider when reviewing a trial court's decision on a petition to modify a decree of divorce. First, for a party "[t]o succeed on a petition to modify a divorce decree, the moving party must first show that a substantial material change of circumstances has occurred since the entry of the decree and not contemplated in the decree itself." *Bolliger v. Bolliger,* 2000 UT App 47, ¶ 11. In this case, all of the Appellee's publications emerged after the *Decree of Divorce* was entered or, in the case of the Google Group's approximate 300 pages, the Appellant could not have known of the comments (some were made before divorce, but most were made after divorce). Therefore, the Appellant asserts that the new publications about the Appellant constitute a material and substantial change in the circumstances that were not contemplated at the time since entry of the *Decree of Divorce*. Arguably, if there were no Paragraph 22 of the *Decree of Divorce*, there would be nothing to modify; if there were no Paragraph 22, arguably the Appellant would be seeking to litigate a tort in a divorce action. However, all the Appellant seeks to do is expand the parties' disparagement clause in the *Decree of Divorce* based on the substantial new information that has now come to light.

Additionally, an appellate court "can properly find abuse [of discretion] only if no reasonable person would take the view adopted by the trial court." *Goggin v. Goggin,* 2011 UT 76, ¶ 26, 267 P.3d 885 (citation and internal quotation marks omitted). The Appellant takes seriously this extremely high standard and asserts that no reasonable person would consider over 300 pages of disparaging statements, the disclosure of private and intimate facts, and a host of lies, not to constitute a material and substantial change in circumstances not contemplated at the time of entry of the decree of divorce.

The District Court abused its discretion when holding that the Honorable Commissioner Wilson did not err when "she recommended that Petitioner's Motion to Dismiss be granted on the basis of failure to allege a substantial and material change in circumstances." The Trial Court stated the following:

> On the second question, the motion to modify, again, I'm going to deny the objection. Again, I just don't think this is a material change in circumstances. The parties hated each other, disliked each other before. They disliked each other during and they still dislike each other. I just don't see there's a material change in circumstances. (R. Vol. 1, 636; Transcript, 27)

In this case, the Trial Court has confused mean-spirited, post-divorce venting with outright, highly offensive, false, and malicious disparagement (including, defamation and invasions of privacy) published for all the world to see. In the Internet age, none of these publications can be retracted. This Court must draw a line for divorcing parties between meanness and highly offensive, disparaging comments.

The critically important fact in this case is the already-existing Paragraph 22 in the *Decree of Divorce* that restrains the Appellee.

b. APPELLE'S HIGHLY OFFENSIVE DISPARAGING STATEMENTS AND INVASIONS OF PRIVACY CONSTITUE A MATERIAL AND SUBSTANTIAL CHANGE IN CIRCUMSTANCES

The trial court erred in finding that Appellee's extensive campaign to disparage her ex-husband was the natural frustration of divorce. In the Trial Court's view, in every marriage it is contemplated at the time of divorce that parties will say mean things about their ex-spouses. The Trial Court stated the following:

> "THE COURT: ". . . parties say mean things about each other all the time in divorce cases. Sometimes they print it. Sometimes, you know, Facebook, whatever tweet, tweeter, Twitter, whatever. It's not unusual. Unfortunately, it's not unusual for people, the two parties in a divorce to say things that are mean about each other both before, both during and after the divorce. And of course sometimes some of those things are false." (R. Vol. 1, 634; Transcript, 25)

Contrary to the Trial Court's finding, a court should be free to address torts in a divorce actions, especially in light of technological advances such as Facebook, Twitter, and other social media published on the Internet.

The Appellant is asking this Court to draw a line for divorced parties with non-disparagement clauses in their decrees of divorce to assist them in knowing the boundaries between natural venting and highly offensive public disparagement. While there certainly exists the natural frustration of divorce and the healthy "venting" process associated with healing from divorce, Appellee has wrongfully sought public outlets to communicate intimate private details, and to communicate messages containing false and misleading content for her venting. The overwhelming result is that the Appellee's actions violate both public policy and decency. Additionally, because the extent of the Appellee's action have all come to light since issuance of the divorce decree, the Appellant thus maintains that they constitute material and

substantial changes in circumstances not contemplated at the time the decree of divorce was entered.

c. THE APPELLANT SEEKS TO MODIFY HIS DECREE OF DIVORCE AND NOT LITIGATE A TORT

The Appellant's petition before the court did not seek to litigate a tort, but rather sought to modify Paragraph 22 of the parties' *Decree of Divorce*. The District Court erred in its grant of dismissal when making its finding that "[t]he Court finds that the allegations set forth in the Petition to Modify amount to an allegation of tort claim and, therefore, the divorce action is not the proper forum to litigate a tort claim." (R. Vol. 1, 636; Transcript, 27, line 20) The trial court also stated "I think your only remedy is to file a tort action so—and I just don't think you can use the divorce case as a basis." (R. Vol. 1, 636; Transcript, 27, line 20)

The trial court conflated joinder of tort and divorce actions with what this Court held in *Bayles v. Bayles* allowing trial courts to consider torts in divorce actions. *Bayles v. Bayles*, 1999 UT App 128, 981 P.2d 403 (Utah Ct. App. 1999). Whereas Utah courts suggest that joinder is impermissible, they also suggest that torts may be addressed—even though the notion of specifically how they may be "addressed" is not defined or expounded. The Appellant asks this Court to provide some guidance on what "free to address" means in this context. The controlling case on the issue is the 1999 case of *Bayles v. Bayles*, 1999 UT App 128, 981 P.2d 403 (Utah Ct. App. 1999).

This Court held in *Bayles* that a trial court can consider a tort in a divorce action although a trial court cannot join a tort action with a divorce action. The Courts specifically states that " . . . divorce courts are free to address [torts], . . ." *Id.* at 406 (citing *Masters v. Worsley*, 777 P.2d 499, 503 (Utah Ct.App.1989)). The clause "[a]lthough divorce courts are

free to address [torts]" is of increasing significance in the Internet age, especially in light of technological advances and the increasing ease to disparage or defame or invade the privacy of a divorcing or divorced spouse; in such cases, divorce courts should be empowered to address such tortious actions. In this case, the parties already have an existing provision in their *Decree of Divorce*, at Paragraph 22, that restrains the Appellee from certain disparaging speech.

The facts of *Bayles* lend some guidance to this case although it deals with the tort of fraud. The facts of *Bayles* arises out of a post-decree dispute where the husband filed a petition for modification claiming wife had converted funds from the family-owned business for her personal use. The district court denied wife's motion to dismiss and she filed an interlocutory appeal. While *Bayles* is limited to the intentional tort of fraud, it opens the door for district courts in Utah to address other torts such as invasion of privacy or the intentional infliction of emotional distress without empaneling a jury.

In *Bayles* the husband argued that the wife fraudulently withdrew funds from the martial business in order to devalue the husband's share of the property settlement stipulated to by the parties. *Id.* at 407. The court held that because husband's "petition to modify sound[s] in tort" and "[a] claim of fraud is considered a tort . . . it is not properly addressed in a petition to modify a divorce decree." *Id.* at 406. The court further reasoned as follows, highlighting that a divorcing party may file an independent tort action to seek redress:

> "However, there can be little question that plaintiff's alleged nefarious activities were 'contemplated' in the context of the divorce proceeding. If defendant's assertions prove true, defendant may be entitled to relief. This notwithstanding, defendant failed to timely file a Rule 60(b)(3) motion. Because a claim of fraud contemplated in the context of the divorce is not generally a proper basis for a petition to modify a divorce decree, defendant's only avenue for relief under the facts of this case is to file an independent action." *Id.* at 407.

In light of the present case at bar, *Bayles* begs the question: in what manner should a court address a tort in a divorce action without allowing parties to litigate a tort? In a case where, such as the instant case, an ex-wife divulges private medical information about her husband after entry of decree of divorce, how should that issue be resolved if the husband does not want to assume the costs of funding a separate cause of action? In this case, the question is easier to resolve because the *Verified Petition to Modify Decree of Divorce* address an already-existing order of the court regarding disparagement.

The instant case provides a context where "free to address" should allow a trial court to address the tortious behavior as it may impact a spouse's ability to earn if their reputation has been damaged by defamatory or disparaging statements or if private information has been disseminated to the public without permission or consent. In the latter scenario, such as in this case, trial courts should consider the tortious invasion of privacy and thereby consider enjoining the tortfeasor spouse from so acting. Such a restraining order would protect the victim spouse. Although objections may be raised about the *a priori* restraint of speech otherwise protected by the First Amendment, it is not at all uncommon for divorce courts to issue decrees that include clear and explicit non-disparagement restrictions on the parties such as the present case at bar.

d. JUDICIAL ECONOMY REQUIRES TRIAL COURTS TO CONSIDER INTENTIONAL TORTS IN DIVORCE ACTIONS SUCH AS INVASIONS OF PRIVACY OR DEFMATION ESPECIALLY IN DIVORCE MODIFATIONS WITH NON-DISPARAGEMENT PROVIONS

One underlying principle of not allowing a trial court to join a divorce and tort action is due to judicial economy. As Utah appellate courts have noted over a series of cases, trial courts hearing a divorce action should not empanel a jury or, conversely, a trial court should not hear issues arising out of a divorce action in a tort action due to principles of *res judicata*. Judicial

economy also dictates, as held in *Bayles v. Bayles*, that although an issue arising in a divorce action may sound in tort, it may not be a tort as can be seen in the instant case brought by Appellant.

For example, in *Noble v Noble*, the court held that tort and divorce actions were barred from being joined as *Bayles* would later uphold (*Noble v. Noble*, 761 P.2d 1369 (Utah 1988)). In *Noble*, the husband filed for divorce and wife counterclaimed for divorce on the ground that her husband had physically abused her when he shot her in the head while she had lain on the bed. In *Noble*, the Supreme Court consolidated two separate appeals. The second case arose because wife had later filed a tort action against her husband based on the same shooting incident; in the second case, wife asserted claims based on negligence, battery, and intentional infliction of emotional distress. The Supreme Court of Utah held that *res judicata* did not bar her from preceding on her separate tort claim against husband following their divorce, which was due to the bar on tort claims tried as part of a divorce action. *Noble v. Noble*, 761 P.2d 1369, 1374-137 (Utah 1988). *Noble* is of critical importance because the Supreme Court stated at footnote seven of the opinion, that the court had only addressed intentional torts as being barred from joinder with divorce actions and that the Court had not ever addressed, including the *Noble* decision, negligence claims in the context of joinder. Footnote seven states as follows:

> "Elaine has also appealed from Judge Ballif's ruling that her negligence claim was barred by the doctrine of interspousal immunity. She argues that the partial summary judgment was in error because the common law doctrine was held to have been abrogated as to negligence actions in *Stoker v. Stoker*, 616 P.2d 590 (Utah 1980). In *Stoker*, this Court held that the doctrine had been abrogated with respect to intentional torts. *Id.* at 590, 592. We have never had occasion to decide whether this abrogation extended to negligence claims, and we do not do so in this case. It is unnecessary for us to reach that question because our disposition of Elaine's intentional

> tort action makes it a certainty that she will have a remedy for her injuries." *Noble v. Noble*, 761 P.2d 1369, fn. 7 (Utah 1988).

Although footnote seven clarifies the status of case law regarding what torts can or cannot be joined to a divorce action, the courts in the 1980s or 1990s could not have considered the impact of technological advances and their ability to spread quickly defamatory or disparaging statements about a spouse or a tortious invasion of the spouse's privacy. Therefore, intentional torts should be considered by courts in divorce actions as suggested by *Bayles*. This does not mean courts should empanel a jury or assess damages in a divorce action, but, among other possible remedies, injunctive relief should be available to restrain a divorcing party from publishing defamatory remarks or private facts to the public. The present case is not as broadly construed because of paragraph 22 of the parties' *Decree of Divorce* that already restrains one of the parties (the Appellee).

The principle of judicial economy in the context of interspousal torts can be found elsewhere in Utah case law. For example, in *Walther*, wife counter-petitioned for a decree of divorce and requested damages for the intentional tort of battery asserting general damages in the amount of $75,000. *Walther v. Walther,* 709 P.2d 387 (Utah 1985). The Supreme Court of Utah held that "wife's claim was clearly framed in tort" and that "[t]he trial court should not have tried the wife's tort claim as part of this divorce action." *Walther v. Walther,* 709 P.2d 387, 387 (Utah 1985). In making this decision, the Supreme Court relied on *Lord v. Shaw*, 665 P.2d 1288 (Utah 1983) where the same court observed the following:

> "[T]he trial court held that the plaintiff was barred by *res judicata* from suing her ex-husband for torts which occurred during the marriage, because his liability for any tort should have been litigated in the divorce action. We do not comment on this ruling other than to observe that actionable torts between married persons should not be litigated in a divorce proceeding. We believe that divorce actions will become unduly complicated in

> their trial and disposition if torts can be or must be litigated in the same action. A divorce action is highly equitable in nature, whereas the trial of a tort claim is at law and may well involve, as in this case, a request for trial by jury. The administration of justice will be better served by keeping the two proceedings separate." *Lord v. Shaw*, 665 P.2d 1288, 1291 (Utah 1983) (emphasis added).

In sum, it thus appears we have competing priorities vis-à-vis the principle of judicial economy in case law. While *Lord v. Shaw* addresses the problem of judicial economy when joining divorce and tort actions, judicial economy nevertheless is arguably not preserved when torts are not considered in divorce actions such as in Appellant's petition to modify his decree of divorce. Certainly juries should not be empaneled, nor damages assessed in a divorce action for alleged tortious actions; however, judicial economy also dictates that separate tort actions should not be the only avenue for relief if a divorcing party defames or invades their ex-spouse's privacy. In this case, the Appellant only seeks to expand an already-existing non-disparagement clause in the *Decree of Divorce.*

II. THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S REQUEST FOR A PRELIMINARY INJUNCTION ENJOINING THE APELLEE FROM DISPARAGING THE APPELLANT.

That the District Court erred as a matter of law by denying the Appellant's request for preliminary injunction. The District Court erred in its understanding of the law when it found that "[u]nless a party can show immediate and irreparable harm, a temporary restraining order or preliminary injunction cannot be maintained." The District Court erred in its finding and conclusion that "It is not enough to allege that the actions of Appellee are damaging Appellant's reputation unless there is some real harm" despite the overwhelming evidence that the actions of the Appellee demonstrates not only real harm but the threat of irreparable harm. The Utah

Supreme Court held that a "[p]reliminary injunction is an anticipatory remedy purposed to prevent the perpetration of a threatened wrong or to compel the cessation of a continuing one, and it further serves to preserve the status quo pending the outcome of the case." *Hunsaker v. Kersh,* 1999 UT 106, ¶ 9. In this case, the trial court found that harm must occur before a preliminary injunction is to be issued; however, the standard is clear that a preliminary injunction is designed to prevent the threatened wrong. Additionally, even if the trial court were not in clear error, its own standard should not have dismissed all the disparaging publications of Appellee. Indeed, the Utah Supreme Court has held that a preliminary injunction should issue to prevent "[w]rongs of a repeated and continuing character, *or* which occasion damages that are estimated only by conjecture, and not by any accurate standard.... *Hunsaker v. Kersh,* 1999 UT 106, ¶ 9 (*citing System Concepts, Inc. v. Dixon,* 669 P.2d 421, 427–28 (Utah 1983).

a. THE TRIAL COURT ERRED IN DEFINING IRREPARALE HARM.

The Trial Court erred in defining irreparable harm in the instant case. The Supreme Court of Utah has provided guidance on the very issue of what constitutes "irreparable harm" when it stated that "'[i]rreparable injury' justifying an injunction is that which cannot be adequately compensated in damages *or* for which damages cannot be compensable in money." *Hunsaker v. Kersh,* 1999 UT 106, ¶ 9 (*citing System Concepts, Inc. v. Dixon,* 669 P.2d 421, 427–28 (Utah 1983). In this case, the trial court found that "[t]here's no evidence here that Mr. Stevens lost his job or that there was a reduction in income or that somehow it's affected him. I just—that's the hurdle I think you need to get over for a TRO is this irreparable harm." (R. Vol. 1, 635; Transcript, 26, line 1) The Trial Court in this case held in stark contrast to Utah

appellate courts. Indeed, the Appellant did not offer evidence of compensable damages because his petition was filed to modify a divorce decree, not litigate a tort.

The Trial Court also stated that "unless there is some real harm it means nothing, at least in terms of a TRO." (R. Vol. 1, 635; Transcript, 26, line 7) The Trial Court failed to apply the applicable standard as it relates to irreparable harm. The trial court conflated the "threat" of immediate and irreparable harm with actual harm. All is needed is the threat of irreparable harm.

Rule 65A(e) of the Utah Rules of Civil Procedure set forth the required grounds for an injunction to be issued. Rule 65A(e)(1) requires a finding "the applicant will suffer irreparable harm unless the order or injunction issues." In this case, the Appellee's public statements and public actions and statements have caused, and continue to cause harm to the Appellant's professional reputation, standing, activities, and obligations. If the Appellee is not immediately restrained, the good standing of the Appellant's professional reputation and employment activities will continue to be irreparably damaged.

b. THE ISSUANCE OF A PRELIMINARY INJUNCTION WOULD NOT BE ADVERSE TO THE PUBLIC INTEREST

The very law cited herein specifically states that the type of statements made by the Petitioner should be restrained. It is in the public interest that intimate details of one's marriage and intimate personal life be protected and preserved in private if the party so decides.

c. SUBSTANTIAL LIKELIHOOD THAT THE RESPONDENT WILL CONTINUE TO BE HARMED BY APPELLEE'S ACTIONS

An abundance of evidence is provided to the Court on Appellant's ex-parte motion with specific details about the Appellee's statements to third parties. The statements are private in nature, or cast the Appellant in a false light, and are unequivocally made by the Appellee. The

Appellee has repeatedly made known her explicit intent to continue on her path to disparage the Appellant and to cause him harm by casting him in a false and misleading light.

d. TRIAL COURT HAS EQUITABLE POWERS IN DOMESTIC RELATIONS CASES TO ENJOIN A SPOUSE FROM DISPARAGING THE OTHER

Rule 65A(F) of the Utah Rules of Civil Procedure states that "[n]othing in this rule shall be construed to limit the equitable powers of the courts in domestic relations cases." In addition to Utah case law on modification of decrees of divorce and invasion of privacy claims, this Court has broad discretion under its equitable powers in domestic cases to issue the injunction permanently or until, if necessary, the petition to modify is resolved.

III. THE TRIAL COURT ERRED BY DENYING THE APPELLANT LEAVE OF COURT TO AMEND THE VERIFIED PETITION TO MODIFY DECREE OF DIVORCE.

That the District Court abused its discretion by holding that "Commissioner Wilson's recommendation is modified to remove the permission for leave to file an amended petition." Rule 15(a)(2) provides that a party may amend its pleading with the court's permission: "(a)(2) In all other cases, a party may amend its pleading only with the court's permission or the opposing party's written consent. The party must attach its proposed amended pleading to the motion to permit an amended pleading. The court should freely give permission when justice requires." *See* Ut. R. Civ. Pro., R. 15(a)(2).

In this case, the Appellant sought to amend his petition to include additional facts supporting the material and substantial changes he pled. The Honorable Commissioner Wilson granted leave of court to amend Appellant's *Verified Petition to Modify Decree of Divorce*. However, the Honorable Judge Ernie W. Jones denied the Appellant's request to amend his

pleadings because "we're going to be right back here on the same issue which is these hurtful statements." (R. Vol. 1, 636; Transcript, 27, line 16) In other words, the trial court held it would be a moot point to amend because, in his words, "I think your only remedy is to file a tort action so—and I just don't think you can use the divorce case as a basis." (R. Vol. 1, 636; Transcript, 27, line 20) This is clear error and trial courts "should freely give permission when justice requires." *See* Ut. R. Civ. Pro., R. 15(a)(2).

CONCLUSION AND RELIEF SOUGHT

The Appellant requests that this Court reverses the Trial Court's decision to grant Appellee's motion to dismiss and to deny the Appellant's motion for a preliminary injunction enjoining the Appellee from disparaging him and remand the case to be heard on the merits.

Respectfully submitted this 5th day of January, 2017.

LAW OFFICE OF DAVID W. READ, LLC

David W. Read
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of January, 2017, I caused to be delivered two true and correct copies of the foregoing BRIEF OF THE APPELLANT pursuant to statute to the following by U.S. Mail, Postage Prepaid.

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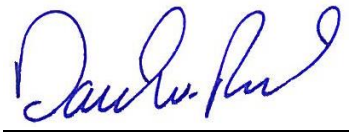

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