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Richard Ross v. Carol Ross et al : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

RICHARD ROSS,

Plaintiff and Appellant,

vs.

CAROL ROSS,

Defendant, Counterclaimant, Respondent, and Appellant,

and

UTAH STATE DEPARTMENT OF SOCIAL SERVICES,

Intervenor and Appellee.

BRIEF OF RESPONDENT

Appeal from the Judgment of the Third Judicial District Court of Salt Lake County, Honorable

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IN THE SUPREME COURT OF THE STATE OF UTAH

RICHARD ROSS, Plaintiff and Appellant, vs. CAROL ROSS, Defendant, Counter-claimant, Respondent, and Appellant, and UTAH STATE DEPARTMENT OF SOCIAL SERVICES, Intervenor and Appellee.	Supreme Court No. 15800

BRIEF OF RESPONDENT/APPELLEE STATE OF UTAH

Appeal from the Judgment of the Third Judicial District Court of Salt Lake County, the Honorable David Dee, Judge

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BRIEF OF RESPONDENT/APPELLEE, STATE OF UTAH

Appeal from the Judgment of the Third Judicial District Court of Salt Lake County, the Honorable David Dee, Judge

STATEMENT OF THE NATURE OF THE CASE

This is an action by plaintiff Richard Ross to modify a California divorce decree, with a counterclaim by defendant Carol Ross for judgment as to arrearages in child support and alimony. The State of Utah, Department of Social Services, joined the action with a claim against plaintiff for reimbursement of welfare paid to the defendant.

DISPOSITION IN THE LOWER COURT

This case was tried by the lower court without a jury.

The lower court modified the divorce decree in favor of the plaintiff and granted judgment for the defendant on the counterclaim in the amount of $24,475.00, representing arrearages in alimony and child support. Judgment was also granted for the State of Utah, Department of Social Services, in the amount of $1,544.00, representing reimbursement of welfare paid to the defendant, Carol Ross. Plaintiff appeals that part of the lower courts judgment granting the defendant $24,475.00 in arrearages and the State $1,544.00 in reimbursement. Defendant appeals that part modifying the California divorce decree.

RELIEF SOUGHT ON APPEAL

Appellee, Utah State Department of Social Services, seeks an affirmance of the judgment of the lower court against plaintiff appellant Richard Ross for $1,544.00, representing reimbursement welfare the State paid to defendant Carol Ross.

STATEMENT OF FACTS

The plaintiff and defendant were divorced in California in February 1971. The defendant was awarded alimony of $150.00 per month and child support of $100.00 per month per child for each of three children.

After the divorce decree the plaintiff left California for Texas, where he began living under an assumed name (Henderson), to avoid making the payments under the divorce decree. (T. 10,15

In October 1972, defendant Carol Ross went on welfare in Salt Lake City, Utah. (T.68) She executed an assignment to the Utah State Department of Social Services. (Ex.4) By virtue of the assignment the Department of Social Services, through a special investigator, Mr. Theodore Zambos, began unsuccessfully

trying to find Mr. Ross to seek reimbursement for the money the State was paying to the defendant. (T.106)

In July 1973, Mr. Ross initiated contact with Utah State Recovery Services through a Dallas attorney. (Ex.17) Mr. Ross subsequently called Mr. Zambos at Recovery Services, and a discussion between them took place. Mr. Zambos submitted a letter to Mr. Ross (Ex.16) in response to the phone conversation. (T.30, 161-4)

Later, in October 1973, Carol Ross went off welfare since she began receiving some support from Mr. Ross. (Ex. 15) When Mr. Ross began the present action to reduce the amount of support and alimony under the California divorce decree, the Utah State Department of Social Services intervened with a claim to recover $1,854.00 for welfare payments it made to Carol Ross from October 1972 to October 1973.

Other facts are important with respect to the claims between the plaintiff and defendant. They are not critical, nor do they affect the State's position and are therefore omitted, allowing the plaintiff and defendant to cite the matters pertinent between them.

ARGUMENT

The State of Utah will respond to and argue those matters relevant to the appeal issues raised by the appellant/plaintiff regarding the State's position only. Some matters regarding the defendant and State of Utah are common points; thus, those matters will likewise be addressed.

POINT I

THE ASSIGNMENT GIVEN THE STATE BY MRS. ROSS WAS NOT OF UNLIMITED SCOPE, BUT WAS ONE RESTRICTIVE IN NATURE. IT DID NOT AUTHORIZE THE COMPROMISE OF "ALL" CLAIMS.

On October 25, 1972, Carol Ross, the defendant in this action, executed an "Assignment of Collection of Support Payment: in favor of the State of Utah. (Ex.4) Pursuant to said assignment, the State of Utah began efforts in attempting to locate Mr. Richard Ross as evidenced by Exhibit 25. Sometime in June or July 1973, Mr. Ross, through attorney B. Patrick Shaw, made contact with the Bureau of Recovery Services as evidenced in his attorney's letter to Mr. Ross dated July 24, 1973. (Ex.17)

Plaintiff would have this court believe that the assignmer (Ex.4) grants broad powers to the State of Utah far beyond the actual money figure that the State had invested in Mrs. Ross. State rejects this contention of plaintiff. Such a position is without support or evidence. The assignment reads in part:

> For public assistance received or to be received, I Carol D. Ross hereby and assign, transfer and set over to the Utah State Division of Family Services, all monies payable to me and/or my child from Richard M. Ross during the time I am or we are receiving public assistance and also past support and alimony due me, not in excess of amount due while receiving public assistance. . . (Emphasis added) (Ex.4)

Plaintiff claims this language, "Carte Blanche," authorize the State to compromise, dismiss, exonerate, forgive, etc. amou "in excess" of what the State has expended in welfare payments. The language simply does not support plaintiff's position. It easy to see how plaintiff is confused since plaintiff failed to quote the critical language in his brief. Plaintiff failed to include the following:

". . . during the time I am or we are receiving public assistance . . . not in excess of amount due while receiving public assistance . . ." (Emphasis Added)

How the plaintiff can contend that the assignment goes beyond the restrictions contained above is beyond the understanding of the State. Not only did the State not try to exceed the authority above, it didn't exceed the authority of the assignment.

In the present action, Carol Ross was receiving approximately $232.00 per month. Mr. Ross' obligation was $450 ($300 child support and $150 alimony). Thus, when the State sued for the $1,854.00 covering a several month period, the State of Utah in no way exceeded the amount due in total payments or in monthly payments. For an equivalent 8 or 9 month period, the amount due under the California decree would be approximately $3,600 to $4,050, which is arrived at by multiplying his monthly obligation of $450 by eight and nine months respectively.

If, for example, the figures were reversed and Mrs. Ross was receiving $450 per month from the State and Mr. Ross' obligation was $232, the assignment could be interpreted to mean that the State of Utah is entitled to sue for alimony and/or child support payments extending beyond the period when Mrs. Ross was on welfare until the State gets judgment or funds equivalent to the total amount the State expended in her behalf. Such is not the case here, and therefore plaintiff's argument is self-defeating.

It has not been shown (1) that the State of Utah had the authority in this case to seek beyond what it did at trial, (2) that any attempt was ever made to seek more, (3) that the assignment itself authorizes what plaintiff contends, and (4) that any

thing happened showing any attempt to exercise more authority than what the assignment allows.

Since the assignment involves the use and recovery of "child support," such an assignment must be read in a restricte nature. For the State of Utah to attempt to disregard the righ of the custodial parent and children for support over and above what the State has given them, when in fact they are entitled t it, is unconscionable. Further, in this matter where the State interest ($232) is not even equivalent to the amount the plaint was to pay for support of the children ($300), the matter of th alimony being assigned for use of the State is not consistent. is child support that was sought. The defendant Carol Ross was entitled to her right to the alimony that was not affected by the assignment, as well as excess child support owing.

What plaintiff is contending is that the assignment would allow the State to compromise a claim of an extremely large amo in this case $25,000, to which the custodial parent is entitle to receive a comparably small amount, in this case $1,500. Suc a position is not supported, and certainly is not equitable. The assignment does not so provide.

Plaintiff cites the closing paragraph of the assignment t "prove" the State has authority to compromise her claim. This paragraph must be read as a whole with the entire document. The divorce decree is between plaintiff and defendant. Mrs. Ro is legally entitled to all support. By virtue of the assignmen she allows the State to act for its share in return for the sup given her and her children. The State's rights are derived fro her and are not independent except as assigned. Thus, if the

State had to obtain permission from the custodial parent every time it wanted to take an action, a burden "too great" would be placed on the State. In many instances, when women terminate welfare, the State no longer knows where they are. Thus, by assignment the State is authorized to act, sue, settle its entitlement under the assignment without requiring notice to the woman, in this case Mrs. Ross.

The State of Utah is therefore limited and not given unbounded authority in what it can and cannot do. The lower court rejected plaintiff's contention because it is an unsubstantiated position. As expressed above, this court should do the same.

POINT II

NOTWITHSTANDING THE INTERPRETATION OF THE STATE'S AUTHORITY UNDER THE ASSIGNMENT, THERE WAS NO AGREEMENT EXPRESSED OR IMPLIED WHEREBY THE STATE WAIVED ITS OWN OR MRS. ROSS' ARREARAGES.

Plaintiff somehow contends that "all " arrearages, both for the State of Utah and the defendant, were waived by the State. The record is clear that NO EXPRESSED, DEFINITE, PRECISE, ACKNOWLEDGED waiver has been produced in the record. The burden is plaintiff's and he has not met that burden.

The evidence presented by and relied on by plaintiff is two-fold: First, Mr. Ross' testimony of a telephone conversation which took place between him and Mr. Zambos in early October 1973, and second, a letter written to Mr. Ross by Mr. Zambos, dated October 4, 1973, which referred to the prior phone conversation. (T.30-1, 161-4, Ex.16)

In reviewing the first position, Mr. Ross claims that it was in the phone conversation he had with Mr. Zambos that th actual compromise took place. (T.30-1, 161-4) Mr. Ross claims that Mr. Zambos told him that if he just paid $225 per month, t "everything would be fine." Mr. Zambos disputes that this conv sation compromised the arrearages. (T.115-117) Mr. Zambos testified that in the several years he had been with the Bureau of Recovery Services he had never (1) made an agreement to acce less than the court-ordered amount in a divorce action if that amount would come to the State, and (2) compromised all arrearages for nothing, and he didn't believe he had the au to do so. (T.119-21) Therefore, the testimony regarding the ph conversation is in dispute and up to the trier of fact to deter

The State of Utah believes other testimony exists which w help interpret both the letter and phone conversation even if t court were to accept plaintiff's arguments at face value.

The evidence and testimony show that Mrs. Ross was recei $232 in the summer of 1973. Plaintiff's own attorney, via a le to the plaintiff (Ex. 17), stated:

> As per our telephone conversation, your ex-wife, Carol, is receiving $232.00 per month from the Utah Bureau of Family & Children's Services. The Bureau . . . suggest that you send this amount to them each month and that they will in turn see that Carol is given this amount. . . (Emphasis Added).

Then in Exhibits 18 and 19, Mr. B. Patrick Shaw sent letters to Mrs. Ross saying that Mr. Ross would be sending $23 per month to the Office of Recovery Services. It is not incon sistent with the State's postion for Mr. Zambos, for purposes o

simplification and uniformity, to say (hypothetically): "three children at $75 per child is $225 which is close to $232, so we'll accept that amount for current support as long as she is on." Thus, as long as she is on and Mr. Ross pays $225 per month (3 x $75) everything would be fine. Is this compromising and dropping all past amounts? The State says no! Nowhere in the record is there evidence to substantiate plaintiff's contention.

The State of Utah, as expressed in Point I, only had the right to collect what it had paid out in this case. Therefore, at most it could collect $232 per month, and after the phone conversation, for simplicity sake, Mr. Ross was allowed to fulfill his obligation to the State at the rate of $75 per child for the future. The State did not have any right and made no attempt to discuss or handle Mrs. Ross' claim, which was the difference between the $450 and the $232 assigned to the State. The telephone conversation does not show otherwise.

Now, turning our attention to the letter referred to as Exhibit 16, is this letter inconsistent with the position that the State is entitled to $232 or approximately $75 per child? No, it is not. Sure, the State could have said that he is to pay $77.33 1/3 per child or the equivalent of $232. This is to allow that if one child would turn 18 or die or for some reason the welfare grant be reduced with one of the children out of the home, then the amount would be $154.66 2/3. It is a cumbersome and unnecessary burden on both the State and the plaintiff to get involved in the game of figures. Thus, if all three children are on welfare, the payment is $225, if two are on welfare the payment is $150 and

if only one, the obligation to the State is $75. This is not inconsistent with what Exhibit 16 says, or with the understandi of Mr. Ross that all would be fine (for continuing support) or understanding of plaintiff's attorney as evidenced by Exhibits 17-19.

The letter in question, though it speaks for itself, is to say the most open for several interpretations. Obviously the trial court, being able to see and hear all the evidence, rejecte plaintiff's claim that the letter was evidence that all arrearac were forgiven -- which the letter does not say. The arrearage even mentioned.

The letter says as follows:

> This will confirm our telephone conversation of October 2, 1973, at which time you agreed to pay $75.00 a month child support for each child totaling $225.00, effective September 1, 1973; furthermore, you agreed to double up on your payments to bring your account current by October 31, 1973. (Exhibit 16)

As indicated, this letter is open to several interpretatic from both sides, and possibly more from those not involved in this matter. I will try to analyze several of them. It must be remembered, that as of October 4, 1973, Mrs. Ross was still receiving welfare and Mr. Ross had made a payment in August of $232.00.

Interpretation #1: This interpretation is consistent wit the previous discussion, above, that instead of $77.33 1/3 per child, Mr. Ross could pay the State of Utah $225 per month to meet his obligation beginning September 1, 1973. Though the reco does not reflect whether Mr. Ross made a payment in September, if he had not, he could double up his payment for October and become current on his ongoing obligation by October 31, 1973.

(T.30) This is the more logical and sound position. Under this interpretation, nothing is mentioned about the past amounts due, and nothing is said about Mrs. Ross' rights, which consist of the difference between what is due the State and what is due under the decree. The letter does not even refer to Mrs. Ross at all.

Interpretation #2: This interpretation is taken by plaintiff -- that the letter "modifies" the divorce decree and that the State of Utah had the power to do so and bind both the State and Mrs. Ross to an ongoing obligation of $225.00 per month with the past amounts waived.

Plaintiff, here, is trying to make an ambiguous letter the "written proof" that the divorce is changed, the arrearages are waived for both parties, and that estoppel (because of some "agreement") should attach. The State does not agree. Even if the State had the authority, there are no specifics contained in the letter which substantiate plaintiff's claim. As minimal evidence of such a modification and waiver, the letter should have included: (1) That the decree was being changed to be what plaintiff says; (2) That alimony was waived (which was not mentioned in the letter); (3) That the arrearages were specifically waived with the naming of those involved; (4) The period of time the waiver was to cover (here only prospective payments to the State were mentioned). None of these matters was covered or mentioned in the letter. It is difficult to see how plaintiff can contend that the letter is so "clear" on these points. The court might possibly find that all the points alluded to are not necessary, or that they all be spelled out in such specificity, but in the letter relied on

by plaintiff (Ex.16) not only are none of them mentioned, they aren't even alluded to.

Interpretation #3: This interpretation is that plaint was to pay $225 per month for September and bring current his payments of $450 per month by the end of October, including arrearages.

This position, as in interpretation two, is inconsistent with the facts, but is still a possible interpretation. Since the State was interested in having Mr. Ross send -- at most -- $232 per month, requiring him to send the $450 by the end of October probably was out of the scope of Mr. Zambos unless Mr. Ross voluntarily did so. It is just as logical to say the letter means to catch all back payments up the end of October as to say all back is waived.

Other interpretations: Any combination of the above and possibly other totally unrelated interpretations are possible. Clear is definitely one thing the letter "is not."

The letter, itself, is at best ambiguous and is the only neutral evidence. It should speak for itself. It does when rea in light of the evidence. The court, as trier of fact, had every opportunity to review it and come to the same conclusion as the State -- that irrespective of whether the State had auth to compromise any and all claims of both parties in an unrestri manner, there is still no direct evidence that any compromise o arrearages or modification of the decree took place. There woul have to be something more specific than "ambiguity." The plaint position therefore fails for lack of evidence and support.

POINT III

THE PLAINTIFF HAS FAILED TO SHOW WHERE ESTOPPEL AGAINST THE STATE IS AN APPROPRIATE DOCTRINE IN THIS MATTER, AND THEREFORE THE JUDGMENT OF THE TRIAL COURT SHOULD BE AFFIRMED.

Appellant relies heavily upon the equitable theories of estoppel and laches. He asserts the doctrines against Carol Ross saying certain acts of hers should bar her recovering certain past due child support and alimony payments. It is unclear to what extent the appellant is making these claims against the State. If appellant is contending that laches and estoppel apply to both parties, it is important to point out that except for the letter already discussed, the URESA action, and a few other minor points, the acts used to point out the effectiveness of the doctrine were basically after Mrs. Ross was off of welfare and done by her, not the State. This should be kept in mind as this matter is discussed.

The equitable doctrine of estoppel carries with it a high burden of evidence. In this particular case the plaintiff is trying to displace a legal right with a substitute doctrine that prohibits one from exercising this right. Courts must be cautious in so ruling. Such an imposition must not be allowed unless convincing evidence is produced to show that somehow the party holding the legal right has acted in such a way as to essentially "waive" its effect. The evidence needed to substantiate plaintiff's claim does not exist in this case to sustain a ruling against the State of Utah.

What legal right does the State of Utah have that plaintiff is trying to suppress? At the time of the accrual of the State's inter-

est (1972-1973), Utah Code Annotated 78-45-9 read as follows, in part:

> Whenever the state department of public welfare furnishes support to an obligee, it has the same right as the obligee to whom the support was furnished, for the purpose of securing reimbursement and of obtaining continuing support. (Emphasis added)

With the assignment, as previously discussed, there is no contention that the State is not entitled to funds, but it is this legal right that the plaintiff must displace.

The following test of estoppel has been adopted by this court in the case of J.P. Koch, Inc. v. J.C. Penney Company, Inc. 534 P.2d 903 (Utah, 1975):

> It is a doctrine of equity to prevent one party from deluding or inducing another into a position where he will unjustly suffer loss. As applicable here, the test is whether there is conduct, by act or omission, by which one party knowingly leads another party, reasonably acting thereon, to take some course of action, which will result in his detriment or damage if the first party is permitted to repudiate or deny his conduct or representation.

Regarding the State's position, there is no evidence that Mr. Ross was induced to a position of injury where he would "unjustly suffer loss." At the time Mr. Ross claims he made the "agreement" with Mr. Zambos regarding the past arrearages owing the State, the full $1,854 claimed by the State was already owed. How can he now claim that the State should now be estopped from claiming what was already the case. He has not lost anything, but in fact has gained, because he has not paid the State and could use the funds owing the State for other purposes. The State cannot see where, as the above case states, where there is any "conduct, by act or omission, by which one party knowingly leads another party, reasonably acting thereon, to take some

course of action, which will result in his detriment or damage. . ."

As noted in plaintiff's brief, plaintiff moved to Utah, sold a boat, paid a couple hundred dollars for the move, but found a job where he earned approximately the same. Since plaintiff already owed the money, all the State can see that he can complain of is that he is now finally having to pay what he already owed. This is no more a detriment than what already existed at the time plaintiff contacted Mr. Zambos.

However, the State realizes the complexity of the issues and that plaintiff contends the State's and Mrs. Ross' actions go together to prove the applicability of the doctrine of estoppel and laches and therefore discusses these matters in more detail.

Inducement must be shown. Mr. Ross is claiming that Mr. Zambos induced him to pay $225 per month and, apparently, that Mrs. Ross acquiesced and induced him as well to continue those payments, believing the arrearages and differential were "forgiven". The evidence (plaintiff's attorney's letters, phone conversation as testified to by Mr. Zambos and Mr. Ross, and a letter) shows no direct inducement. Could it have been negligent inducement where Mr. Zambos' comments were taken out of context and relied on by Mr. Ross? If this is the case, the matter fails, because this court requires that the inducing party do so "knowingly."

Further, did Mr. Ross "reasonably rely" on the "inducement"? Is it reasonable for Mr. Ross to have relied on the letter and phone conversation?

In speaking on what constitutes "reasonable reliance" this court in Corporation Nine v. Taylor, 513 P.2d 420 (Utah, 1973) said:

> "The determination of such an issue is not dependent on the asserted subjective content of

> the mind of the person claiming he was misled. The test to be applied is an objective one as to what a reasonable and prudent person in the circumstances might conclude; and the burden of proof and of persuasion as to the issue of estoppel is upon him who asserts it.

The State believes Mr. Ross was in a "preconceived" state of mind and did not reasonably rely on or believe the $22 letter was a modification. Mr. Ross's mother, Mary McKendrick, testified that after Mr. Ross left California he sent between $200 and $225 per month (T.83, 85, 90), this, even though he knew the divorce order was $450. He further told Mrs. Ross he would never pay more than $225 per month (T.67). His Texas att wrote him a letter saying that welfare was paying Mrs. Ross $2 so he should send that much to Recovery Services (Ex.17). In essence, Mr. Ross had his mind made up as to "how much" he was going to pay before, during and after he spoke to Mr. Zambos. Where is the "reasonable" reliance? If anything, it could be argued that Mr. Ross put words into Mr. Zambos' mouth, though M Zambos testified he could not recall the conversation directly and that the file showed no relation except the letter dated Oct 4, 1973 (T. 98-9, 114-115). If, as the court says in Corporati Nine, id., the standard is an objective one, the plaintiff's ca fails.

As to plaintiff's contention that estoppel by laches appl Blacks Law Dictionary, Revised Fourth Edition, 1968, defines est by laches as follows:

> A failure to do something which should be done or too claim or enforce a right at a proper time . . . A neglect to do something one should do, or to seek to enforce a right at a proper time.

Since this court held in Seeley v. Park, 532 P.2d 684 (Utah, 1975), that for purposes of child support and alimony the statute of limitations is eight years, and further since the legislature has codified this position in U.C.A. 78-12-22, the State cannot accept the proposition that the State did not act in time. Five and one-half years after the first welfare was given and four and one-half years after the last.

In addition, according to U.C.A. 78-12-35 the absence from the State of one against whom an action accrues tolls the statute of limitations. However, in November 1973, the State of Utah made the attempt through a URESA action (Ex.20) to establish a support order for ongoing support, U.C.A. 77-61a-1 et. seq. This itself asked for more than the $225 claimed by the plaintiff as ongoing support. The State had no control of the action in Texas, and the matter was dismissed for lack of prosecution there. Upon learning of the presence of the plaintiff in Utah because of this action the matter was revived - well within the eight year period and in conformity with its right to do so. Plaintiff's argument of laches is therefore without merit.

POINT IV

THE COURT DID NOT ERR IN ALLOWING TESTIMONY OF MR. ZAMBOS ON CROSS-EXAMINATION AS TO HIS PROCEDURE AS AN INVESTIGATOR.

Plaintiff points out several statements made by Mr. Zambos on cross-examination which he claims are "legal error" by the court. Mr. Zambos was never called as a witness for the State, though his testimony on direct and cross examination could have benefited or hindered the State, as the court would view it. Cross-examination is for the purpose of clarifying, expanding

and delving into what was brought out in direct testimony. It is this that plaintiff objects to.

As to the contention that specific errors were committed, plaintiff contends the Mr. Zambos' testimony was "totally" irre and immaterial as to what he did in his six years with Recover Services. Referring to modifying decrees by accepting less tha that ordered by the court, Mr. Zambos said in answer to a que on cross-examination:

> Q. And in that period of time have you ever made an agreement to accept less child support than what was ordered in the divorce decree?
>
> A. No. (T.115)

It is relevant and material to know whether Mr. Zambos had ever agreed to "modifications" when the State was entitled to the full amounts under the decree. Naturally, if he never h then he wouldn't have done it on this case. However, simply bec evidence is not "direct" evidence does not per se make it objec tionable. The trier of fact is entitled to give little or no weight to this testimony since it was not specific enough in the eyes of the plaintiff. The fact that it was not stricken is not error.

Plaintiff's second claim of error is that because Mr. Za had said he had no independent recollection of the events deal with the phone conversation, it was error for the State's atto to speak of exhibit 16 as being the only thing that could refr his recollection of the events. (T.115) It is true that wher there is no recollection it cannot be refreshed. However, Mr. was not asked if his memory was refreshed, he was only asked i letter which he wrote would be the only thing that would refre

his memory, and he answered, "Yes." The State sees no prejudice with that answer. If it "would" be the only thing that would refresh his memory and didn't, as Mr. Zambos testified, no harm or inappropriate testimony was permitted. If error there was, Rule 61 of the Utah Rules of Civil Procedure would declare that harmless error is not critical.

As to plaintiff's next objection, plaintiff is saying that a person who writes a letter cannot give testimony regarding it. Such a position strains reason. Mr. Zambos never testified he had no recollection of the letter. He did testify that he had no independent recollection of the phone conversation. (T.115) He testified that his recollection of the letter was that Mr. Ross was to pay $450 at the end of October. (T.116) Somehow plaintiff is confusing the letter and the phone conversation. They are independent actions.

Since all evidence, whether direct, circumstantial, opinion, etc., is to be viewed by the trier of fact, then simply because the author of a letter testifies to what it meant must be viewed in light of what the letter itself says as well as what the parties say. Plaintiff's argument here is without merit.

The next two claims of error relate to the same set of questions on T. 116-117. Once again it is pointed out that Mr. Zambos was under cross-examination by defendant's counsel. The trier of fact has broad discretion in determining what types of "leading questions" if any, are allowable. 98 C.J.S. Witnesses 329.

Counsel for plaintiff appears to be inconsistent in his position in claiming that Mr. Zambos cannot testify as to "general principle" or "practice of himself or the office he represented.

Yet Mr. Sykes, plaintiff's counsel, opened the whole vista himself on direct examination. On three specific occasions immediately preceeding cross examination, counsel for plaintiff asked Mr. Zambos what was the "customary practice." (T.102, lines 24-29; T.104, lines 2-3; T.104, lines 5-7) Further, counsel for plaintiff asked two specific questions where he wanted to know what the "customary procedure" was. (T.130, lines 20-21; T.103, lines 23-25) Counsel also asked Mr. Zambos once whether something done was the "typical procedure." (T.99, lines 1-2) In addition, counsel for plaintiff and the court had a discussion about what counsel was driving at with this "customary practice" (T.104, lines 15-25) and Mr. Sykes told the court (as it related to the questions he was asking) "This is very important to my case." (T.104, Line 24)

Counsel for the State of Utah finds it very difficult to understand how counsel for plaintiff opens up the testimony of "customary practice, procedure, etc.," and objects to counsel for the adverse parties to cross-examine Mr. Zambos on the direct examination that was so "very important to my case." Counsel sees no error in allowing Mr. Zambos to testify to the same questions in cross-examination that were asked by counsel who is now objecting.

When witnesses are called, direct is not the only testimony that is credible. Cross-examination is oft times just as revealing. But, the fact that cross-examination - using the same questioning form as plaintiff - proves disadvantageous to plaintiff's case is no reason for this court to allow the answers given by Mr. Zambos to Mr. Sykes' questions and dismiss

as "prejudicial" the answers given when the same type of questions were posed by Mr. Williams or Mr. Schwendiman. That is an inconsistent position and should be rejected.

As to whether Mr. Zambos gave a "legal conclusion" in his answer at T.117, lines 8-9, is a matter of interpretation.

If this court holds that it is not an established fact that only the court can modify a court order, or perhaps that it was not common knowledge of that fact, or if it was a legal question as to whether the court was the only one that could change a court order, then perhaps counsel would have a point. Mr. Zambos was testifying to his understanding.

Even if his answer was error, which counsel for the State does not believe, where is this entire case prejudiced? This whole lawsuit is over the fact that the court order was not changed. Mr. Zambos testified as to his belief and how he acted. The trier of fact can discern whether or not his answer was proper, and so ruled. Plaintiff's claim should be rejected. No prejudice has been shown, and counsel for the State believes there was none from this answer.

Turning the court's attention to Plaintiff's last assertion that error was committed by the court in allowing Mr. Schwendiman to ask what understanding Mr. Zambos had in the compromise of cases, plaintiff's counsel asserts there was no foundation. Mr. Sykes, on re-direct examination opened the whole area of compromise (T.118-120):

> Q. Okay. So you are authorized to compromise claims or . . . (T.118)
>
> * * * * *
>
> Q. You -- you do have the authority to compromise claims with the Bureau and director's approval, right? (T.119)
>
> * * * * *

Q. And in fact isn't that a common practice where a husband is behind on his child support or alimony payments?

A. Common practice to do what?

Q. To compromise a claim to get the guy to start paying in the future, compromise a past alimony or -- (T.119) (Emphasis added.)

It was totally proper cross-examination for Mr. Schwendi to ask Mr. Zambos "What is your understanding of the procedure as to what amounts you can compromise?" (T.120) Mr. Sykes elicited the facts that the State could compromise, etc., yet now counsel is objecting to Mr. Zambos explaining in more deta the questions asked by Mr. Sykes. The foundation for the whol of questioning was laid by Mr. Sykes. Mr. Schwendiman did not need to "re-lay" the same foundation on "re-cross-examination."

Therefore, the claims made by plaintiff seem to be claim to keep legitimate testimony out of the hearing of the court th he feels might weaken his case. Plaintiff called the witness, the questions objected to were appropriate cross-examination questions, and the lower court ruled properly.

CONCLUSION

Plaintiff has a very high burden of establishing facts sufficient for this court to abandon legal rights by substituti its own parameters through an equitable doctrines. This burden has not been met.

First, there is no clear or convincing evidence that any agreement was entered into by the State either dismissing arrearages or modifying the decree of divorce. The evidence is ambiguous at most and presents several options for the lower co

to adopt.

Second, the assignment given the State of Utah is not one of unbounded authority whereby the State of Utah can do what it pleases without concern for the assignor.

Third, the court properly allowed testimony of Mr. Zambos to be admitted. No error was committed.

The lower court, as the trier of fact, was in a position to properly see the issues and evidence and ruled properly in this matter.

Respectfully submitted,

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MAILING CERTIFICATE

This is to certify that I sent two copies of the foregoing Brief to the following attorneys: Robert B. Sykes, 320 South 300 East, Suite 2, Salt Lake City, Utah and R. Scott Williams 604 Boston Building, Salt Lake City, Utah 84111 on this _____ day of _____, 1978.

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