

1951

Mahala E. Lawlor v. R. Keith Lawlor : Brief of Appellant

Utah Supreme Court

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In the Supreme Court of the State of Utah

MAHALA E. LAWLOR,
Plaintiff and Respondent

VS

R. KEITH LAWLOR,
Defendant and Appellant

APPELLANTS

BRIEF

Case No. 7742

Appeal from the District Court of Cache County, Utah

Honorable Lewis Jones, District Judge

FILED

NOV 15 1951

Harvey A. Sjostrom

*Attorney for defendant
and appellant*

Clerk, Supreme Court, Utah

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INDEX TO CASES OR AUTHORITIES CITED

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In the Supreme Court of the State of Utah

MAHALA E. LAWLOR,

Plaintiff and Respondent

vs

R. KEITH LAWLOR,

Defendant and Appellant

APPELLANTS

BRIEF

Case No. 7742

STATEMENT OF FACT

Mahala E. Lawlor filed suit against her husband, R. Keith Lawlor, for divorce. She alleged in her complaint, among other things, that said defendant had treated her cruelly, causing her great mental distress. She failed to allege the value of a lot and house owned by the parties, but alleged the value of certain bonds (Canadian) at \$1340.00, a 1938 Plymouth car at \$500.00 and household furniture at \$200.00 belonging to both parties and other household goods belonging to her exclusively with no allegation of value. She prayed for divorce and \$150.00 attorney fees as against defendant and a reasonable property settlement. (pp. 1) The defendant answered and put in a counterclaim denying the cruelty but alleging if true there was condonation.

He alleged cruelty on plaintiff's part causing him great mental distress. He further alleged plaintiff had no interest in said Canadian bonds, that the car was worth not more than \$300.00, that he was 100% totally disabled and was now unable to make a proper living for himself; that plaintiff was of full health and vigor and making about \$135.00 per month. He prayed plaintiff's action be dismissed and that divorce be given him together with real property and that inasmuch as plaintiff had taken all Canadian bonds that she be made to give him \$250.00 so he could pay his attorney (pp. 5). Plaintiff filed her reply alleging that 1/5 of said bonds belonged to her, denied the cruelty alleged by defendant, admitted defendant's disability, employment of plaintiff, possession of said bonds, alleged that defendant has contributed very little to support of family and among other things enlarging on defendant's cruelty. She further alleged house and lot was worth approximately \$2500.00 (pp. 7).

The Court granted the plaintiff a divorce but prior thereto made an interlocutory order (pp 10) to the effect that if defendant desired house and lot he deposit with the Clerk of the Court \$5000.00 by July 9th, 1951 and if it be not so deposited as payment to the plaintiff then the said property shall be awarded to plaintiff together with other property (pp. 16).

We further find the facts to be that plaintiff in all these years of married life had by her own testimony

never brought up the subject of divorce, not even once (tr. 46, 53)that she further testified that defendant had done all he could do under his physical handicaps and that he was so handicapped when she married him about 20 years ago (tr. 40) through service in World War 1 and that she knew that defendant had been badly shot-up and shell shocked (tr. 51). However, as stated plaintiff admitted that defendant had done all he could to make a living and that when he was turned down in his applications for jobs because of his physical handicaps he made public issue of the matter in the newspaper (tr. 47, 48).

*STATEMENT OF POINTS UPON WHICH
APPELLANT INTENDS TO RELY FOR REVERSAL
OF JUDGMENT AND DECREE*

Point No. 1. The Court erred in its finding No. 4 of its finding of fact that defendant and appellant contributed very little to the support of the family since the parties marriage and that plaintiff had supported defendant and their son since their marriage.

Point No. 2. The Court erred in finding No. 5 of its finding of fact that appellant was but partially disabled and in not finding him totally disabled, and erred also in finding that since 1942 appellant had earned but \$2000.00 in addition to his pension and that same had been mostly used for his own expenses.

Point No. 3. The Court erred in its finding No. 6

and every part thereof in finding that the defendant been intoxicated on various occasions and precipitated quarrels with respondent and that he had struck her both in public and private causing her great mental distress and causing her to lose her love for him.

Point No. 4. The Court erred in its finding No. 7 in finding that said facts as found in No. 6 of its findings, had caused her, the plaintiff, great mental and physical distress and nervousness.

Point No. 5. The Court erred in that part of finding No. 8 which found Plymouth car worth the sum of \$500.00.

Point No. 6. The Court erred in its finding No. 10 and every part thereof in finding that the defendant must deposit the sum of \$5000.00 with the Clerk of the Court if he should desire the house and lot and in the event he did not the home should go to the plaintiff and in failing to make the sum of \$2500.00 or less if he should want the home.

Point No. 7. The Court erred in its finding No. 11 that plaintiff had not been cruel toward the defendant in any respect.

Point No. 8. The Court erred in its finding No. 12 that all of the allegations of the complaint are true while those of the answer and counterclaim are untrue.

Point No. 9. The Court erred in making its finding

No. 13 of its supplemental finding that there were grounds for condonation of the plaintiff toward the defendant but if there was, then the Court erred in finding that defendant had violated the terms of condonation in drinking and not providing himself with a job.

Point No. 10. The Court erred in its conclusion of law no. 1, that plaintiff is entitled to a decree of divorce against the defendant and appellant, and in not concluding that defendant was entitled to a decree of divorce against the plaintiff.

Point No. 11. The Court erred in its conclusion of law No. 4 that unless the defendant deposited the sum of 5000.00 with the Clerk of the Court by a certain time the plaintiff was entitled to have the home awarded to her and in not making the sum of \$2500.00 or less as a condition of defendant acquiring home.

Point No. 12. The Court erred in awarding the plaintiff a decree of divorce against the defendant and appellant as set forth in paragraph 1 and 2 thereof and in not awarding said decree to defendant.

Point No. 13. The Court erred in its decree of divorce in awarding the home and lot of the parties to the plaintiff and respondent as set forth in paragraph No. 6 thereof, and in not awarding the defendant the same upon the payment of \$2500.00 by defendant and in further finding that defendant had made an election not to take the home as he had done no affirmative act one way

or the other to indicate that.

Point No. 14. The Court erred in its decree of divorce in favor of plaintiff and against the defendant that he must remove himself and personal effects by a certain time from said home and in case he did not that a writ of possession would be issued by the Court and defendant ousted as set forth in paragraphs 7 and 8 of said decree.

ARGUMENT

Points No. 1 and 2

Point No. 1 and 2 cover the findings contained in paragraphs 4 and 5 of the Court that defendant contributed but very little to the support of the family and that defendant made but \$2000.00 from the year 1942 until the divorce complaint was filed in addition to the pension that he received for his injuries suffered in the 1st World War and that he is only partially disabled. (pp. 11, 12) The defendant testified that he made approximately the sum of \$16000.00 since coming to Logan (tr. 176) including pensions. The plaintiff herself admitted that defendant had done all he could under his physical handicaps and conditions (tr. 48) and that he even went so far in order to obtain work to make a public issue of it in the newspaper (tr. 47) and that he then got work. What more can be asked of defendant?

That he is totally disabled is admitted in the plead-

ings of the plaintiff. It will be noticed that in paragraph 4 of our counterclaim we allege 100 per cent total disability. (p 6) In paragraph 6 of plaintiff's reply (pp. 7) plaintiff admits that "defendant is disabled." From this we have a right to assume an admission of 100 per cent disability under sub-paragraph b of Rule 8 Utah Rule of Civil Procedure which says on page 11 "that denials shall fairly meet the substance of the averments denied". The fact that plaintiff denies the remainder of paragraph four, we believe, cannot be said to apply to said allegation of 100 per cent disability, but to other averment in said paragraph 4 of our counter-claim.

That defendant placed money in bank made by him in both of parties names (tr. 57) is not denied and plaintiff drew on same by own admission. When asked if she had placed money in said account she said occasionally, but she could produce no receipts (tr. 37) and it will be observed plaintiff was exceedingly evasive in her answers on this subject (tr. 37). Plaintiff admitted that the last income tax that she paid she drew on the joint bank account of the parties (tr. 39). If defendant had only made \$2000.00 since 1942 as the Court found it is most peculiar that defendant should have an account at all for he would have an average income of only \$200.00 per year. Plaintiff further testified she wrote no checks out without appellant's consent and she did so in paying the income tax of the parties last year.

(tr. 39) This would certainly seem to indicate that appellant was really making a substantial contribution to the family in spite of his many handicaps and that he was the only one placing his income in the joint account, otherwise, why would respondent mention to him about writing checks on said account. In conclusion on these points and as having reference to the division of the property made by the Court in the decree, we maintain it is inequitable for it gave to plaintiff in the neighborhood of \$6000.00 and appellant about \$1350.00. In this connection it will be noted that as defendant said he had matched the plaintiff dollar for dollar in what he made during their married life about \$16,000.00 (tr. 176) and when I as defendant's counsel sought to elicit the items that went to make up this sum the Court said, "he testified he earned \$16,000.00 Mr. Sjostrom, why don't you let him cross-examine (tr. 177) to which writer consented. But strange to say counsel for plaintiff found it inadvisable to go into the various sources of defendant's income. One thing more: Plaintiff was questioned by defendant's counsel if defendant had ever asked her to go to work.

A. Well, in actions, yes.

Q. That's the way you want to answer the question?

A. When I'm hungry I would have sense enough to go to work, so I guess I would answer yes in a case of that kind (tr. 50).

This is indeed a strange answer in view of the fact that the parties had Canadian bonds of the face value of \$1340.00 (tr. 55) and which defendant had received in lieu of taking his pension check of \$25.00 per month. That being undisputed it must be assumed that the income of the parties was easily sufficient to take care of living expenses and to which defendant testified that he contributed as much as plaintiff.

ARGUMENT

Points 3, 4, 7 and 8

Points 3 and 4 take up findings of 6 and 7 (pp. 12) of the Court which in substance say that the defendant had treated plaintiff cruelly causing her great distress. Points 7 and 8 take up the findings of the Court in paragraphs 11 and 12 (pp. 13) to the effect respectively that plaintiff has not been cruel to defendant and that all of the allegation of the complaint are true while those of the answer and counter-claim of the defendant are untrue. First as to the findings of the Court under points 3 and 4 (finding 6 and 7) and then points 7 and 8 as it seems that it would be better, to a more clear understanding of these findings, by discussing them together in the order indicated.

It will be observed that plaintiff testified that in 1939 after a visit to "Mitch and Sallies", that defendant beat up on her so as to confine her to bed for 3 days (tr. 14) but in regard to this matter defendant testified

that they had been drinking and that he slapped her after her giving him a shove (tr. 98) and that she was up the next morning. It is peculiar indeed that he could put her in bed for 3 days yet there is no testimony that a doctor or police were called. (In as much as this is an equity case this Court has the right to make such findings as to the truth of alleged matters and findings as to them the evidence warrants.) That she should wait for 11 years to bring up this matter is also indeed peculiar. She further testified that he slapped her for buying a pair of shoes 3 or 4 years after their marriage (tr. 39) (16 years ago), but he denies this and says that she had purchased gloves that were too large for him (tr. 98) and there was no slapping that he merely chided her; that he never threw her against the bathtub or sink as she testified (tr. 99) nor did he ever threaten her with butcher knives (tr. 99); and that all there was to the knife incident was that he and the boys at a party in his home had been sticking knives in a hat and a cabinet and she became angry at the incident as they were passing the "buck" as to who actually did it, (tr. 99, 100) when she tried to find the guilty party.

As to plaintiff's cruelty to defendant we believe there is real substantial ground to believe it true. That she went to Al Larsen's and told him not to let her husband have any guns is not denied because of his alleged instability, according to her (tr. 139, 170) yet

at the same time she testified that she let the guns that defendant kept in their home out for cleaning only (tr. 170) and for no other purpose; that she left all the butcher knives at their home (tr. 171) and she knew he could get guns and ammunition elsewhere (tr. 171, 172) So it is our opinion that she wanted his friends to turn away from him so he would leave for Canada where she wanted him so much to go. (tr. 171) Defendant further testified that plaintiff had on numerous occasions called his afflictions to his attention comparing him with the salesman that she was in the habit of seeing (tr. 96); that he wanted the boy to go to college but she wouldn't let him and also turned the boy against him (tr. 96); that she would stay out at night until 3 in the morning then come in with liquor on her breath (tr. 97); that she insisted on keeping all the obscene exhibits in the house though he pleaded with her to get rid of them, (tr. 104, 108 exhibit 1, 2, 3, 4, 4, 5, 6,) but he received nothing in return but a tirade from her; that she kissed and hugged other men (tr. 132) which she did not deny. That plaintiff never put any money in their joint bank account since coming to Logan as he had (tr. 94) and she never told him what her salary was (tr. 94).

We have the most conclusive exhibits in this cause that shows the character of the plaintiff and for which keeping she was subject to a court action—it being a misdemeanor to have such exhibits. We are unable to

bring ourselves to a point that anything that defendant did could have affected her in any undesirable way taking her testimony as being true. But we say with the exception of the admitted slap he treated her in a most proper way. And it may be said further, in connection with her charge of cruelty, why did she not bring corroborating witness in such matters, they were readily at hand and particularly her friend Johnson.

A person insisting on keeping the exhibits some of which are, in her own handwriting, as here shown to have been harbored and treasured by plaintiff even after requests by her husband to get rid of it depicts, to our way of thinking, a person not steeped in the normal refinements of life but the opposite and to really injure such a person a party would indeed have to go to the extreme. And no such injury or cruelty is shown by plaintiff even if all she testified to is true which we do not admit. If what we say here is true and we add to this her intoxication in the small hours of the morning and her calling defendant's and appellant's attention to his physical handicaps which he certainly was in no way to blame for and her kissing and hugging other men, we urge that respondent has not made out a case of legal cruelty against appellant. For as is said in Am. Jur. Vol. 17 pp. 178, sec. 55 on divorce:

“While mere incompatibility of temperament is not itself grounds for divorce, it is well recognized, especially in the modern cases, that the jury, or the court sitting as a trier of the facts,

in determining whether the circumstances show cruelty, should always keep in view the intelligence, apparent refinement, and delicacy of sentiment of the complaining party. These facts, of course, may tend either to strengthen or weaken the case made for there may be cases in which mere blows should not be considered cruelty. These may be given, but still there may be strong affection between the parties. Among persons of coarse habits they might pass for very little more than rudeness of language or manner. They might occasion no apprehension and be productive of only slight unhappiness. As strongly expressed by one court: "It is not all unlawful and barbarous acts that are made grounds of divorce: We do not divorce savages and barbarians because they act as such towards each other."

In paragraphs 11 and 12 (points 8 and 9) the Court finds that plaintiff has not been cruel to defendant in any respect and all allegations of complaint are true while those of the answer and counterclaim are untrue as above mentioned.

We believe we have shown in the forgoing discussion that plaintiff was cruel to defendant and that the allegation of the complaint were untrue and that the answer and counterclaim are true. In this connection, as going to plaintiff's credility may we further point out that in plaintiff's reply she alleges the home to be worth \$2500.00 (pp. 9) and testified to same amount (tr. 52) yet the Court finds the home to be worth \$5000.00 (pp. 13) the amount which appel-

lant testified to as being its approximate value to him for therapy purposes (tr. 1333) Also, the Court finds the Plymouth car, which was awarded to defendant worth \$500.00 (pp 13) when in open court defendant offered her the car for \$200.00 (tr. 53) and further offered to give her \$2500.00 for the home, (tr. 57, 8) which was refused.

It is only fair to assume from the evidence that the plaintiff has found her "salesman" that she so often spoke about and so often compared to the defendant who was getting along in years and that she might as well drop him for another and evidently started laying her plans months before trial, for it will be noted defendant testified: "She complained about being the only bread winner of the home. Claims all sundry bringing home the groceries. I've wanted to go down and help her with the groceries for the last six months and it seemed funny now that this thing comes up. She doesn't want me around the store (meaning the store in Logan where she worked) neither does she want me to haul her around in the car with them. She'll lug the big packages across the square and complain that they hurt her. I said "you don't have to do that (tr. 94) There was no denial of this. And we must remember that there are \$1340.00 (face value) of Canadian bonds that could be used.

ARGUMENT

Points 5 and 6

We believe point No. 5 is taken care of and covered in our discussion points 7 and 8 (findings 11 and 12) and will add but little to it. The Court found in its finding No. 8 that the home was worth the sum of \$5000.00 and the Plymouth car the sum of \$500.00. As stated before we offered to let plaintiff have the car for \$200.00 in open Court but she refused it and further offered her \$2500.00 for the home the sum she testified and alleged it was worth. It is true that defendant said that the home was worth the sum of approximately \$4800.00 to him because he needed it for his therapy purposes (tr. 133) Yet the Court below found both the allegations and testimony of the plaintiff as to this property untrue and then in findings No.10 (point No. 6) said that defendant must pay the sum of \$5000.00 to plaintiff if he was to take the home.

We can see no justice in that. It may be further pointed out that the Court also made findings, findings No. 11 and 12, to the effect that all the allegations of the plaintiff's complaint were true which of course found that the home was worth but \$2500.00. Why then should the defendant be forced to give \$5000.00 in order to be awarded the place as found in finding No. 10 point No. 6. In this finding of the Court below that the home was worth \$5000.00 it seems to us that the plaintiff had knowingly testified falsely as well as misstating the

value in her pleadings. It was evidently the plaintiff's purpose to so mislead the Court in this matter that the Court could, without abuse of discretion, award the home to her and award to the defendant what was actually awarded him in the decree to wit, the bonds, face value of \$1340.00, the car, value of \$500.00 as found by the Court, but which we offered to plaintiff in open Court for \$200.00 and which she refused to take, and a few tools of practically no value.

ARGUMENT

Point No. 9

We believe the Court in its supplemental finding No. 13 to the effect that there were grounds for condonation of the plaintiff toward the defendant but if there were grounds for condonation (accepting the fact that there had been legal cruelty by the defendant toward the plaintiff) then the Court erred in finding that defendant violated the terms of condonation in drinking and not providing himself with a job.

As to alleged acts of cruelty we have already discussed that in points 3, 4, 7 and 8 and will not repeat. We have searched the record and fail to find any testimony on respondent's part that appellant had been cruel to her within two years next prior to the bringing of these proceedings or that he had been drinking or failed to do all in his power to contribute to the family. Respondent, as has been heretofore pointed out, testified that appellant had done all he could under his phy-

sical handicaps (tr 47, 48). And it may be further noted that at the very time that plaintiff filed suit for divorce defendant was in Montpelier working for the Deseret News, a job she had told him to stay with and not go to Hill Field or Second Street. (tr. 101, 96) This was not denied by the plaintiff as far as we have been able to see by the record or remember from the trial.

ARGUMENT

Points 10, 11, 12, 13, 14

In it's conclusion of law No. 1 (point No. 10) the Court found that the plaintiff was entitled to a decree of divorce against the defendant and failed to find that the defendant was entitled to a decree against the plaintiff, and in it's conclusion of law No. 4 (point No. 11) the Court found that unless the defendant had deposited the sum of \$5000.00 with the Clerk of the Court by July 9th, 1951, that he should not be entitled to the home.

In the Courts decree of divorce contained in paragraph No. 1 (point 12) the Court below awarded the decree of divorce to plaintiff as against the defendant and failed to award the decree in favor of the defendant and appellant. And in paragraph 6, 7, and 8 of said decree (points 13 and 14) the Court respectively awarded the home to plaintiff and ordered the appellant to leave said home by July 9th, 1951 or the Court

would issue a writ of possession in favor of the plaintiff.

We urge that the Court erred in all these matters and say, that in our opinion, the decree should have been awarded to the defendant on the grounds of cruelty. In support of this we direct the Court's attention to our statement of the evidence and the transcription of the same and further urge in argument the argument put forth in support of our points 3, 4, 7, and 8, which we believe shows no legal cruelty toward the plaintiff by defendant but just the reverse and show that it was plaintiff who was guilty of the acts of cruelty toward the defendant.

In regards to the disposition of the property of the parties we feel, too, that it was inequitable for the plaintiff in this case to receive 3 times as much property as the defendant. It will be noted that the property was accumulated from the joint efforts of the parties, the defendant contributing no less than the plaintiff even though he was disabled to such an extent as would have discouraged many persons in like circumstances from making any effort toward earning any income at all. That his disabilities were known and fully appreciated by the plaintiff is admitted by the plaintiff as heretofore shown and she had no right to assume and she did not assume that the defendant would be able to wholly support a family, that she would have to lend a substantial supporting hand in making a living. And

also, as stated before and as proved by the record, as has also been pointed out, plaintiff admitted that defendant had done all he could do under his many disabilities, and that he, in order to obtain some work had to sign a waiver that if he was injured that no claim would be made for insurance, etc. (tr. 91)

May we now again draw this Court's attention to a most peculiar finding or findings of the Court below in finding that the car in question, and which was awarded to defendant, was worth \$500.00 as alleged and testified to by the plaintiff even though the defendant in open Court offered her the same for \$200.00, and the further finding of the Court that the home was worth the sum of \$5000.00, the amount the defendant testified to as being it's worth, and not the sum of \$2500.00, the sum alleged in plaintiff's pleading and so testified to in open Court by her. The Court further made the finding that if defendant would pay to plaintiff the sum of \$5000.00 that he could have the home. In this connection it should be remembered that in open Court we offered plaintiff the sum she both alleged and testified to as to what the home was worth. May we not then well ask: why should the Court take the value of the automobile as set by the plaintiff and not by the defendant, and two, why should the Court take the value of the home as set by the defendant, to-wit, the sum of \$5000.00 and not the value as set by the plaintiff at \$2500.00, a value she knew well, in our opinion to be

false. And, too, if she swore falsely in this matter did she not do so in other matters and particularly in regards to the alleged cruelty of the defendant toward her and this all the more so when she had no corroborating witness or witnesses?

CONCLUSION

In conclusion we urge that the Decree of Divorce that the Court below awarded to the plaintiff be set aside and a Decree be awarded to defendant and counter-claimant, and further, that this Court set aside the award of the home to the plaintiff and allow the defendant the right to pay to plaintiff the sum of \$2500.00 in lieu thereof or in the alternative, if this Court sees fit, that plaintiff keep the home upon payment to defendant the sum of at least \$1500.00. Of course this \$1500.00 is in addition to what Court below awarded defendant.

Respectfully submitted,
HARVEY A. SJOSTROM
Attorney for Defendant and
Appellant.