

1980

# Joel H. Izatt v. Mary C. Izatt, By and Through Her Guardian and Conservator, Kenneth G. Clark : Appellant'S Reply Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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JOEL H. IZATT, :

Plaintiff, Respondent :  
and Cross-Appellant, :

-vs- :

MARY C. IZATT, by and through  
her Guardian and Conservator, :  
KENNETH G. CLARK, :

Defendant, Appellant :  
and Cross-Respondent. :

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Case No. 16882

APPELLANT'S REPLY BRIEF

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APPEAL FROM THIRD JUDICIAL  
DISTRICT COURT OF SALT LAKE COUNTY,  
THE HONORABLE HOMER F. WILKINSON, JUDGE

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IN THE SUPREME COURT OF THE STATE OF UTAH

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JOEL H. IZATT,	:	
Plaintiff, Respondent	:	
and Cross-Appellant,	:	
-vs-	:	Case No. 16882
MARY C. IZATT, by and through	:	
her Guardian and Conservator,	:	
KENNETH G. CLARK,	:	
Defendant, Appellant	:	
and Cross-Respondent.	:	

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APPELLANT'S REPLY BRIEF

---

The defendant, appellant and cross-respondent, Mary C. Izatt, by and through her guardian and conservator, Kenneth G. Clark, hereby submits this Reply Brief in response to the Brief of the respondent and cross-appellant.

ARGUMENT

POINT I

THE ACTIONS OF THE DEFENDANT DO NOT  
CONSTITUTE MENTAL CRUELTY AS REQUIRED  
BY UTAH CODE ANNOTATED SECTION 30-3-1.

The plaintiff goes to great length in its brief to describe the health of the plaintiff and to point out that the plaintiff adversely reacted to the pressures and demands of living with and caring for the defendant. These reactions are the result of the plaintiff's own mental and physical capabilities. To assert that the plaintiff is entitled to a divorce because

of his reaction to the pressures and demands of life is inconsistent with the requirements of Utah Code Annotated Section 30-3-1 that a party be entitled to a divorce when he or she has been treated in a mentally cruel manner. The plaintiff agreed to accept these pressures and demands when he married the defendant.

As cited in the plaintiff's and the defendant's briefs, Johnson v. Johnson, 107 Ut.147, 152 P.2d 426 (1944) established that a physical condition does not in and of itself constitute mental cruelty. In Johnson the court found other actions (beating one of the children over the head, abusing his wife, using abusive names in the presence of the children and accusing his wife of being unfaithful in the presence of the children) which constituted mental cruelty. However, these acts of mental cruelty were not caused by the physical condition and constituted independent actions.

In the present situation, the plaintiff himself described the marriage of the parties as an "ideal" marriage prior to the time of the defendant's surgery. Thereafter, the defendant's shortcomings or inabilities to deal with her family resulted directly from this condition. Dr. Paul H. Wender testified that the defendant's problems (impaired memory, impaired social judgment, impaired recall of emotional responsibilities to her husband and to her children) resulted from the brain damage. Therefore, the defendant did not treat the plaintiff in a mentally cruel manner because of her condition

and committed no independent acts which constituted mental cruelty.

The plaintiff places considerable emphasis on the fact that the defendant attended the divorce trial and testified. From this attendance and testimony, the plaintiff asserts that the defendant was culpable for her actions towards the plaintiff. It has never been asserted nor is it the case that the defendant does not know right from wrong nor that she is unable to converse with others. Certainly, the defendant was entitled to attend the trial which controlled her future destiny and had the right to attempt to defend herself from the claims of the plaintiff. This does not establish that the defendant's actions toward the plaintiff and her children were not the result of brain damage. The testimony of Dr. Wender, called to testify for the plaintiff, does state the cause of the defendant's actions to be the result of the brain damage.

The plaintiff's description of the defendant's testimony mistates the defendant's ability to state her position. The defendant came under a great deal of stress during her testimony and the line of questioning dealing directly with the family situation, the treatment she had received from her husband and the grounds for divorce were cut short. The following excerpts from the record indicate the difficulties faced by the defendant:

Q(by Mr. Hanson): Are you alright?

A(by Mrs. Izatt): Yes.

Q: Would you like a drink of water or anything?



A: No, I will be alright. (T 506)

\* \* \*

Q: Now, we will get to a stress point here. I don't like to see you in distress. Are you alright now?

A: I think so. (T 507)

At this point, Mr. Hanson brought a drink of water to Mrs. Izatt. No further questioning was pursued with regard to the grounds for divorce and the relationship between the plaintiff and the defendant. The defendant should not, of course, be penalized because of her inability to continue to discuss this relationship.

## POINT II

THE AMOUNTS RECEIVED AS COMPENSATION FOR THE DEFENDANT'S PERSONAL INJURIES ARE THE SEPARATE PROPERTY OF THE DEFENDANT. THESE AMOUNTS ARE IN LARGE PART COMPENSATION FOR LOSSES WHICH THE DEFENDANT HAS AND WILL FACE SUBSEQUENT TO THE DIVORCE.

Utah Code Annotated Section 30-2-1 et. seq. outlines the property rights of women. Section 30-2-1 states:

Real and personal estate of every female acquired before marriage, and all property to which she may afterwards become entitled by purchase, gift, grant, inheritance, bequest or devise, shall be and remain the estate and property of such female, and shall not be liable for the debts, obligations or engagements of her husband and may be conveyed, devised or bequeathed by her as if she were unmarried.

Utah Code Annotated Section 30-2-4 denies a husband any recovery for personal wrong to a married woman. As pertinent to actions for personal injury, this statute states:



...there shall be no right of recovery by the husband on account of personal injury or wrong to his wife, or for expenses connected therewith, but the wife may recover against a third person for such injury or wrong as if unmarried, and such recovery shall include expenses of medical treatment and other expenses paid or assumed by the husband. (Emphasis added)

In Corbridge v. M. Morrin & Son, Inc., 19 Ut.2d 409, 432 P.2d 41 (1967), the plaintiff's husband brought an action for expenses incurred in providing care for his family while his wife recovered from injuries sustained in a fall. This court upheld that trial court's grant of a summary judgment which disallowed recovery to the husband for personal injuries sustained by the wife.

In W.W. Clyde & Company v. Dyess, 126 F.2d 719 (10th Circuit 1972), the plaintiff, a married woman, sued the defendant to recover for personal injuries allegedly incurred in an automobile accident. The Tenth Circuit, applying Utah law, construed the predecessor to Utah Code Annotated Section 30-2-4 as follows:

...more than that, the material part of Section 40-2-4, Revised Statutes of Utah 1933 (the predecessor of Utah Code Annotated Section 30-2-4), provides in substance that the husband shall have no right of recovery for personal injuries to the wife, that she may recover for such injuries as though she were unmarried and that the recovery shall include medical and other expenses paid or assumed by the husband...We think the statute, when fairly construed, embraces both substantive and remedial elements. It strips the husband of any right of recovery for personal injuries by the wife arising out of the tort of a third person, and it vests in her the right to

recovery for such a wrong as though she were an unmarried woman. It places a married woman on equal footing with an unmarried woman in respect to redress for personal injuries occurring out of a tort. It empowers a married woman to maintain in her own name a suit to recover for such injuries and it vests in her recovery therefor to the same extent and for all purposes as through she were a single woman. 126 F.2d at 722.

The Utah law clearly provides that the funds received in settlement of the malpractice action belong to the defendant. The plaintiff should not receive directly or indirectly (by requiring the defendant to pay the plaintiff's parents) the settlement assets. The law, in attempting to equate the rights of married and unmarried woman, is applicable here since the defendant now faces the future as an unmarried woman.

The vague assertions in the plaintiff's brief that payments on loans to various banks or to his parents were for medical bills are not supported by the record and do not substantiate that the plaintiff actually incurred any medical expenses on behalf of the defendant. The plaintiff further failed to provide the court with evidence of payments made or reimbursements from insurance companies for the medical expenses of the defendant. Therefore, the plaintiff nor his parents should receive any portions, directly or indirectly, of the settlement assets.

A major part of the personal injury settlement is compensation for losses the defendant has and will incur subsequent to the divorce. Her abilities to function have been impaired, her family has been broken up and she will require continued

supervision and medical treatment. She will need and will use the settlement assets to provide for her own needs throughout the remainder of her life. The trial court obviously considered this in awarding the defendant, who has a right to be supported by her husband, only \$1.00 per year in alimony.

Pursuant to Utah Code Annotated Section 30-3-5, the trial court provided to the defendant's guardian and conservator, Kenneth G. Clark, \$15,000 to meet the defendant's current needs. The court ordered that the additional money be invested in government insured investments. This money is now invested in government insured money market certificates. However, the plaintiff now asserts that the interest on this money market certificate is an asset to be divided by the court. This income relates to investments made pursuant to the court order of monies already granted to and properly belonging to the defendant to which the plaintiff has no claim. Further, this interest is and will be necessary to meet the living expenses of the defendant. At trial, the cost of institutional care for the defendant was established at approximately \$1,125 per month. (T 487) While the defendant has spent the summer with her parents outside the Plantation Convalescent Center, there is no way of knowing when and for how long she may require full-time convalescent center care during the remainder of her life. The defendant through her guardian and conservator, is attempting to provide for her own needs and to allow the plaintiff to do likewise. However, claims by the plaintiff to the income or principal of the settlement

assets do not allow the defendant to do so.

### POINT III

THE DEFENDANT IS ENTITLED TO A LIEN  
EQUAL TO 1/2 OF THE EQUITY IN THE  
HOME. THIS LIEN DOES NOT INTERFERE  
WITH THE PLAINTIFF'S RIGHTS.

The plaintiff asserts that the defendant is not entitled to any lien in the home because this lien infringes upon the defendant's rights to move from the home and the defendant's obligations to his family. To the contrary, however, the defendant is not infringing on any of the plaintiff's rights and is materially contributing to the needs of the children.

The defendant served faithfully (in an "ideal" marriage) as the plaintiff's wife for 16 years. She is the mother of the parties' four children. The defendant has attempted to assist her family and not stand in the way of the plaintiff's building of a new life which he believes he must have.

The defendant has taken significant steps to assist her family and not interfere with the plaintiff's activities. The defendant stipulated to a modification of the original Decree of Divorce so that the plaintiff could remain in the home and not be forced to pay the defendant for her interest in the home because of the plaintiff's remarriage. The defendant is not seeking a review of the \$1.00 per year alimony award even though the plaintiff has a recognized duty to support the defendant. The defendant is paying for counseling for her children. These actions do not infringe on the plaintiff's rights.

The defendant is asking for a non-interest bearing

lien for 1/2 of the equity in the parties' home as of the time of trial. This lien is not payable until the parties' minor children reach majority; the house is sold; or the house is not used as a home for the children. The defendant is allowing the plaintiff, his new wife, her children, his new wife's children and perhaps the plaintiff and his new wife's children to live in the home. The defendant will not receive any increase in the value of the home after the time of the divorce. Part of this increase would, of course, be attributable to the defendant's share of the home.

The plaintiff further asserts that he faces financial obligations he cannot meet and that the defendant's interest in the home interferes with his ability to meet his obligations. This assertion fails to recognize that the defendant is entitled to an equitable portion of the marital estate and that the plaintiff has no continuing obligations to the defendant (except for \$1.00 per year alimony). The plaintiff has had and may continue to have the benefit of his new wife's income in meeting his obligations. Further, the parties' children will soon start reaching majority so that plaintiff's obligations to the children will be reduced and eventually eliminated.

Under the circumstances, it seems the defendant is entitled to receive a lien for 1/2 of the equity in the parties' home.



#### POINT IV

THE PLAINTIFF'S PARENTS ARE NOT  
ENTITLED TO RECOVER ANY AMOUNTS  
FROM THE DEFENDANT.

The plaintiff attempts to place upon the defendant a procedural burden of raising the statute of limitations as an affirmative defense to the plaintiff's claims for the alleged debts owed to his father. The Plaintiff's Amended Complaint (T 17-19) makes no mention of the existence of or elements of the parents' claim. Therefore, the defendant cannot be required to raise an affirmative defense to a claim of which she had no notice of.

The plaintiff's responses to the defendant's challenge of the plaintiff's parents' claims are contrary to the law and the evidence. The plaintiff's father testified that he made advances to the family out of a moral obligation (not a desire to collect) which he felt to his son because he was the plaintiff's father. This moral obligation is not enforceable against the defendant.

The plaintiff cites In Re Clover's Estate, 237 P.2d 391 (Kan. 1951) for the proposition that a promise to pay when one is able does not have the statute of limitations run against the claim until the party is shown to be able to pay the indebtedness. O'Hair v. Kounalis, 463 P.2d 799 (Ut. 1970) establishes contrary Utah law. In O'Hair, the plaintiff, following her eighteenth birthday, lived next door to the

defendant's family. The defendant's family was the closest thing the plaintiff had to a real family after the plaintiff was orphaned at age 14. The defendant, following his brother's arrest for violations of Federal law, asked to borrow money to pay legal fees. The plaintiff asserted that there was an oral loan agreement to be repaid in about five (5) years. The defendants raised the defense of the four year statute of limitations of Utah Code Annotated Section 78-12-25(1). In determining when the statute of limitations began to run, the court stated:

In Grayson v. Crawford, 189 Okla. 546, 119 P.2d 42 (1941) the court stated that a reasonable time for performance is allowed, when the evidence indicates that the cause of action did not accrue at the time the money was loaned, and the parties although they did not fix a definite date, intended that payment was to be made at a future time. Under such circumstances, the statute of limitations does not begin to run until a reasonable time has elapsed. What is a reasonable time is a question to be determined from consideration of all the facts and circumstances in the case in which the question arises... 463 P.2d at 800-801.

Under the present circumstances, the plaintiff's father advanced money to the plaintiff without determining whether the plaintiff was able to repay the money or without determining when the plaintiff would be in a position to return the money. The plaintiff, at the time of all or part of the advances, was fully employed; and had and was receiving assistance from the L.D.S. church. Therefore, there is no reason why the plaintiff could not repay these amounts to his



father at the time they were incurred. Therefore, the debt became due and payable at the time of the advance and the statute of limitations has run against the obligations.

The problems with the plaintiff's parents' claim are further exemplified by the assertion of this claim by the plaintiff rather than the parents themselves. The plaintiff's parents' claim should be required to stand or fall on its own merits rather than being asserted by the plaintiff.

#### CONCLUSION

The defendant does not dispute that under the circumstances where the plaintiff had placed the defendant in the Plantation Convalescent Center and had brought an action for a divorce against the defendant that the court had little choice but to grant a divorce. This does not mean that the plaintiff was not required to show that the defendant treated him in a mentally cruel manner in order to be entitled to have a divorce granted to him. The plaintiff has failed to meet the requirements of Utah Code Annotated Section 30-3-1 and, therefore, the plaintiff should not be entitled to a divorce from the defendant.

The defendant is entitled to the proceeds from the personal injury settlement. The principal and income on this amount is and will be required by the defendant to meet her living expenses in future years. Any claims to the contrary by the plaintiff are without merit and are contradictory to

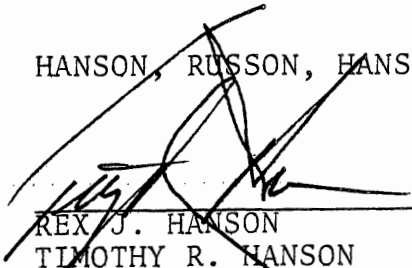
the obligation of the plaintiff to provide for his wife.

The defendant is equitably entitled to a lien for 1/2 of the equity at the time of trial in the parties' home. Granting such a lien to the defendant does not violate any of the plaintiff's rights nor does it hinder his ability to provide for his family. To the contrary, the terms of the lien (no interest and payable only on resale, adulthood of the minor children or if the property is no longer used as a home for the minor children) constitutes a direct contribution by the defendant to the economic needs of the defendant's children. Further, the assets which the defendant will ultimately receive as a result of this lien will likely be required to meet the living requirements of the defendant in the future.

The plaintiff's parents are not entitled to any recovery of any amount of the personal injury settlement. The claim of the parents is not a valid obligation of the defendant. Therefore, the defendant should not be responsible for any portion of the alleged debt to the plaintiff's parents.

RESPECTFULLY SUBMITTED this 4 day of December, 1980.

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DELIVERY CERTIFICATE

I hereby certify that I delivered two (2) copies of the foregoing to Gordon A. Madsen and Robert C. Cummings, Attorneys for Plaintiff, Respondent and Cross-Appellant Joel H. Izatt, 320 South 300 East, Salt Lake City, Utah 84111, this 4 day of December, 1980.

A handwritten signature in black ink, appearing to be "J. H. Izatt", is written over a horizontal line. The signature is stylized with a large loop and a long horizontal stroke.