2008

Gloria Hayley Ashby v. Dallen Ben Ashby : Brief of Respondent

Utah Supreme Court

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IN THE UTAH SUPREME COURT

GLORIA HAYLEY ASHBY, Plaintiff/Respondent, vs. DALLEN BEN ASHBY, Defendant/Petitioner.	CASE NO. 20080737-SC

BRIEF OF RESPONDENT

ON WRIT OF CERTIORARI TO THE UTAH COURT OF APPEALS, CASE NO. 20070362-CA, BEFORE JUDGES BENCH, BILLINGS, AND ORME.

ON APPEAL FROM THE FOURTH JUDICIAL DISTRICT COURT, UTAH COUNTY, STATE OF UTAH, CASE NO. 060403522, THE HONORABLE STEVEN L. HANSEN, PRESIDING.

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ORAL ARGUMENT AND PUBLISHED OPINION REQUESTED

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BRIEF OF RESPONDENT

JURISDICTION

This Court issued a writ of certiorari in this matter pursuant to Utah Code Ann. § 78A-3-102(3)(a).

STATEMENT OF ISSUES AND STANDARDS OF REVIEW

ISSUE 1: Whether the court of appeals was correct in reversing the trial court's dismissal of Plaintiff's breach of contract claim for failure to state a claim upon which relief can be granted under Rule 12(b)(6) of the Utah Rules of Civil Procedure?

STANDARD OF REVIEW: Because the propriety of a Rule 12(b)(6) dismissal is a question of law, the appellate court gives the lower court's ruling no deference and reviews it under a correctness standard. *St. Benedict's Dev. Co. v. St. Benedicts Hosp.*, 811 P.2d 194, 196 (Utah 1991).

ISSUE 2: Whether the court of appeals was correct in reversing the trial court's dismissal of Plaintiff's unjust enrichment claim for failure to state a claim upon which relief can be granted under Rule 12(b)(6) of the Utah Rules of Civil Procedure?

STANDARD OF REVIEW: Because the propriety of a Rule 12(b)(6) dismissal is a question of law, the appellate court gives the lower court's ruling no deference and reviews it under a correctness standard. *St. Benedict's Dev. Co. v. St. Benedicts Hosp.*, 811 P.2d 194, 196 (Utah 1991).

DETERMINATIVE STATUTORY PROVISIONS

Utah Code Ann. § 25-5-4(1) – Addendum A

Utah Code Ann. § 30-3-5 – Addendum B

STATEMENT OF THE CASE

1. Gloria Hayley Ashby ("Plaintiff") filed a complaint for divorce in the Third District Court on October 11, 2007. In addition to pleading a cause of action for divorce, the complaint alleged that Dallen Ben Ashby ("Defendant") had breached his contract with Plaintiff and was therefore liable for damages.

2. On April 12, 2006, the court entered a bifurcated decree of divorce, reserving all other issues for trial.

3. On August 18, 2006, Defendant filed a motion to dismiss Plaintiff's contract claim.

4. On August 28, 2006, Plaintiff filed an amended complaint adding a claim for unjust enrichment and filed her response to the motion to dismiss.

5. On September 27, 2006, pursuant to a stipulation between the parties, the case was transferred to the Fourth District Court where it was assigned case number 064402051 (the "divorce action").[1]

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[1] The divorce action went to trial on December 12, 2007, where the sole issue was alimony, all other issues having been resolved by stipulation. The trial court ordered that no alimony be awarded even though it specifically found that Defendant was at fault for the dissolution of the marriage and even though it found that he would be making and unknown but substantial income within a few years from the date of the trial. *See* Memorandum Decision, Case No. 064402051 (copy attached hereto as Addendum C) ("Memorandum Decision") at 3-4. Thereafter, Plaintiff appealed the trial court's order and judgment. That appeal has been fully briefed and was scheduled for oral argument before the Utah Court of Appeals on February 25, 2009. In response to Plaintiff's filing a suggestion for certification, however, the court of appeals stayed all proceedings in that case (including the scheduled oral argument) until resolution of this appeal and denied the suggestion to certify.

Plaintiff submits that certification of the divorce action appeal to this Court so that that case may be considered together with this one would make sense. Indeed, the court below stated:

> In terms of judicial economy, the contract and unjust enrichment claims grow out of the same nucleus of facts and should be considered together, one place or another. And any real difficulty is avoided in

6. On October 11, 2006, oral argument on the motion to dismiss was heard by Commissioner Thomas Patton, at which time he recommended that the motion to dismiss be granted. Specifically, the Commissioner ruled that, under *Walther v. Walther*, 709 P.2d 387 (Utah 1985), contract and unjust enrichment claims must be filed separately from a divorce action.

7. On December 11, 2006, the court (Judge Howard) adopted the commissioner's recommendation and dismissed from the divorce action the breach of contract and unjust enrichment claims for improper joinder. This order was not appealed.

8. Based on that dismissal, on December 22, 2006, Plaintiff re-filed her breach of contract and unjust claims as a separate action in a new complaint ("Complaint"). (R. 1-5.)

9. On January 22, 2007, Defendant filed an answer to the Complaint and a motion to dismiss. (R. 6-7, 32-34.)

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this case because the same judge who handled the divorce case was also assigned the instant case and thus had "the big picture."

Ashby v. Ashby, 2008 UT App 25, ¶ 5 n.1. Although the court of appeals was incorrect in its assertion that this case and the divorce case were before the same trial judge who therefore had the "big picture," the court's legal analysis was correct. Having one court consider both of these cases together can only assist in arriving at the proper resolution.

10. On March 6, 2007, the trial court (Judge Hansen), after briefing but without a hearing, issued a memorandum ruling granting the motion to dismiss. (R. 61-65.)

11. On April 12, 2006, the trial court signed the order dismissing Plaintiff's Complaint and thus terminated the case in the trial court. (R. 68-70.)

12. On April 19, 2006, Plaintiff filed her Notice of Appeal. (R. 71-73.)

13. After full briefing and oral argument, on July 3, 2008, the Utah Court of Appeals reversed the trial court's decision as to both the breach of contract and unjust enrichment claims and remanded them for further proceedings.

STATEMENT OF FACTS[2]

1. Plaintiff and Defendant were married on December 6, 1997, and remained so until April 12, 2006, when the Third District Court (Judge Terry Christiansen) granted a bifurcated decree of divorce. Complaint ¶ 5.

2. Prior to and during their marriage, Defendant requested that Plaintiff work and support him during the years that he was obtaining his undergraduate and medical degrees. In return, Defendant promised to provide for and support

[2] Because, as discussed hereafter, the Court is required to accept as true the facts pleaded in the Complaint when considering the propriety of a motion to dismiss under Rule 12(b)(6), the facts stated herein are taken directly from Plaintiff's Complaint. All references to the Complaint are referring to R. 1-5.

Plaintiff thereafter at a certain level with the income he would earn as the holder of a medical degree. Complaint ¶¶ 8, 13.

3. Defendant further requested that Plaintiff forego an opportunity presented to her to take over an ongoing, successful business so that she could accompany him to Missouri while he attended medical school. Complaint ¶ 14.

4. Defendant further requested Plaintiff forego or delay indefinitely her efforts to earn her bachelors degree. Complaint ¶ 15.

5. Defendant further requested Plaintiff to live at a lower standard of living than would otherwise have been necessary during the period of his education, both undergraduate and graduate. Complaint ¶ 16.

6. Plaintiff agreed to each of these requests because of her understanding, based upon communications with Defendant, that these sacrifices would allow him to earn a much higher income and that she would be the beneficiary thereof. Complaint ¶ 17. In other words, Plaintiff accepted Defendant's offer and fully performed her obligations under the bargain by working and providing support for Defendant during his educational years. Complaint ¶ 9.

7. During their marriage and as a result of Plaintiff's contributions and sacrifices, Defendant obtained a medical degree and is now in the process of

beginning a career in radiology, in which he can be expected to earn a substantial income for the rest of his working life. Complaint ¶ 18.

8. Defendant breached his obligation to Plaintiff in that as soon as he finished medical school and obtained his degree, he stopped supporting Plaintiff. Indeed, through various acts and omissions on his part, Defendant has made it intolerable for Plaintiff to continue to reside with him, thus preventing his fulfilling of his obligations by means of living together as husband and wife. Complaint ¶ 10.

9. By foregoing specific opportunities presented to her, by working to earn an income to support Defendant, and by giving up a higher standard of living, Plaintiff conferred a benefit on Defendant. Complaint ¶ 19.

10. Defendant was fully aware of the conferral of this benefit at all times relevant hereto. Complaint ¶ 20.

11. Plaintiff did not confer this benefit officiously or gratuitously or solely for her own benefit. Moreover, the benefit to Defendant was direct and intentional, not merely incidental to some other action. Complaint ¶ 21.

12. The circumstances surrounding the conferral of this benefit were such that it would be unjust to allow Defendant to retain the benefit conferred by Plaintiff without compensating Plaintiff therefore. In particular, Plaintiff conferred this benefit on Defendant at great personal effort and sacrifice, including foregoing

her own business and educational opportunities, some of which are now lost forever. Complaint ¶ 22.

SUMMARY OF ARGUMENT

Because Defendant had not shown that Plaintiff cannot prevail on her breach of contract or unjust enrichment claims, Plaintiff asks this Court to affirm the decision of the court of appeals which reversed the trial court decision granting Defendant's motion to dismiss. Indeed, Plaintiff's Complaint alleges facts that are sufficient to establish viable claims for breach of contract and unjust enrichment. Thus, because this Court must consider the allegations in the Complaint as being true in its consideration of the lower courts' decisions, the appellate court's ruling should be affirmed.

The Complaint establishes a viable breach of contract claim because it alleges: (1) There was an agreement between the parties to the effect that if Plaintiff supported Defendant during his medical school studies, Defendant would thereafter support Plaintiff with the niceties of life that go with the substantial income that would result from the medical degree; (2) Plaintiff performed all of her obligations under the agreement by supporting Defendant during his medical school studies; (3) Defendant breached the agreement by failing to support Plaintiff since his graduation from medical school and has anticipatorily breached his obligation to support her at income levels he will be earning after he finishes his

residency; and (4) Plaintiff has suffered and will continue to suffer damages from Defendant's breach of his obligations because Plaintiff is now forced to work full time in a less lucrative career than she otherwise would have been able to, and will not enjoy the level of income that Defendant promised her after he finishes his residency and fellowship.

In addition, the facts of this case show starkly the limitations of alimony as a method by which Defendant can perform his obligations under the contract and cure the injustice inflicted on Plaintiff. It is only after he completes his residency, shortly before the statutory alimony period will expire, that Defendant will be earning a significant income. This will leave only a very short period within which Defendant will be able to use alimony as a means of performing his contractual obligation to support Plaintiff at the promised level of income.

Finally, the statute of frauds does not bar Plaintiff's breach of contract claim for three separate reasons: first, at the motion to dismiss stage, Plaintiff had no obligation to plead that the agreement between the parties complied with the statute; second, the terms of the agreement did not require all performance of the agreement to completed within one year, nor was it impossible that Plaintiff's obligations be performed within one year; and, third, Plaintiff has at least partially performed her obligations under the agreement, thereby taking the entire matter outside the statute of frauds.

The Complaint also establishes a viable claim for unjust enrichment because it alleges that (1) Plaintiff conferred a benefit on defendant by supporting him through medical school, (2) Defendant not only knew about and appreciated the benefit but in addition bargained for it, and (3) Plaintiff's conferral of this benefit on Defendant makes it unjust for Defendant to fail to compensate Plaintiff therefore. Again, for the reasons stated above, alimony is an insufficient method for Defendant to compensate Plaintiff for the benefit conferred upon him.

Thus, because Plaintiff's Complaint establishes viable claims for breach of contract and unjust enrichment, and because alimony is an insufficient method of compensating Plaintiff under these claims and curing the injustice inflicted upon her, the trial court's order of dismissal should be reversed as to both the breach of contract and unjust enrichment claims.

ARGUMENT

I. STANDARDS FOR ANALYZING A DISMISSAL UNDER RULE 12(b)(6)

It is basic procedural law that on a motion to dismiss, a court must consider the allegations in the complaint as being true and must read those allegations in the light most favorable to and with all reasonable inferences drawn in favor of the non-moving party. *Fenn v. MLeads Enterprises, Inc.*, 2006 UT 8 ¶ 2, 137 P.3d 706, 709 (Utah 2006). A dismissal under Rule 12(b)(6) will be affirmed *only* if it appears to a certainty that the plaintiff would not be entitled to relief under any

state of facts which could be proven in support of it claims. *Heiner v. S.J. Groves & Sons Co.*, 790 P.2d 107 (Utah App. 1990). When reviewing a dismissal under this rule, an appellate court must accept the material allegations of the complaint as true, and the trial court's ruling should be affirmed only if it clearly appears that the Plaintiff can prove no set of facts in support of her claim. *Colman v. Utah State Land Bd.*, 795 P.2d 622 (Utah 1990).

Because the propriety of a Rule 12(b)(6) dismissal is a question of law, the appellate court gives the trial court's ruling no deference and reviews it under a correctness standard. *St. Benedict's Dev. Co. v. St. Benedicts Hosp.*, 811 P.2d 194, 196 (Utah 1991).

II. THE COURT SHOULD AFFIRM THE COURT OF APPEALS' REVERSAL OF THE DISMISSAL OF PLAINTIFF'S COMPLAINT BECAUSE THE COMPLAINT STATES A VIABLE CLAIM FOR BREACH OF CONTRACT

A. The Facts Alleged in the Complaint Are Sufficient to Establish a Breach of Contract Claim

The dismissal of Plaintiff's Complaint should be reversed because it states a viable claim for breach of contract. Under Utah law, the elements of a breach of contract claim are: "(1) a contract, (2) performance by the party seeking recovery, (3) breach of the contract by the other party, and (4) damages." *Bair v. Axiom Design, L.L.C.*, 2001 UT 20 ¶ 14, 20 P.3d 388, 392 (Utah 2001). In the instant case, each of these elements is present.

First, the parties had a valid contract. The elements of a valid contract are "proper subject matter, offer and acceptance, competent parties, and consideration." *Neiderhauser Builders & Dev. Corp. v. Campbell*, 824 P.2d 1193, 1197 (Utah App. 1992). There is nothing improper or unlawful about a man and a woman making an agreement whereby one agrees to pay for the education of the other in exchange for a certain financial compensation. Similarly, there is no issue as to the competency of the parties to have entered into this agreement, which can readily be inferred from the allegations of the Complaint. Next, Defendant offered to provide Plaintiff with the niceties of life that go with the substantial income of a medical doctor in exchange for her supporting him during his undergraduate and medical studies. Complaint ¶ 8. Plaintiff accepted this offer. Complaint ¶ 9. The terms of the offer and acceptance included mutual consideration. Specifically, Plaintiff provided the consideration of agreeing to support Defendant through his educational years. Complaint ¶ 8. Similarly, Defendant agreed to support Plaintiff thereafter at a significant level. *Id.* Accordingly, all the elements of a lawful valid contract are present.

Second, the Complaint alleges that Plaintiff performed her obligations under the contract by supporting Defendant during his educational years. Complaint ¶ 9.

Third, Defendant breached the contract by failing to support Plaintiff since his graduation from medical school and has anticipatorily breached his obligation

to support her at the income levels he will be earning after he finishes his residency. Complaint ¶ 10.

Finally, Plaintiff has suffered damages and will continue to suffer damages from Defendant's breach of the contract. Complaint ¶ 11. Plaintiff is now working full-time, not by choice, but because she has no other means of support. Plaintiff will not enjoy the income that Defendant promised her. Although not specifically pled in the Complaint, the Court should accept these facts as true because they are reasonably inferable given the facts alleged in the Complaint.

Defendant asserts that there are numerous questions that suggest the alleged contract must fail for lack of definiteness.

> What if Husband chose to change careers? What if chose to work for a job that generated less income than expected? How long was Wife to work – only while Husband was in school, during his internship and/or residency, or until they had children? What was the level of income promised by Husband to ensure he met the standard of living contemplated by Wife?

Brief of Petitioner at 7-8.[3] Defendant, however, fails to acknowledge that this matter arises based on the trial court's Rule 12(b)(6) dismissal of Plaintiff's Complaint. The answers to each of these questions may, at this stage, be answered by inferences, and the Court is obligated to accept only those inferences that favor

[3] The case law cited by Defendant, *Sachs v. Lesser*, 2007 UT App 169 and *Stangl v. Todd*, 554 P.2d 1316 (Utah 1976), both held that the contracts before them were unenforceable as insufficiently definite but did so only after taking evidence on the matter, either as part of a summary judgment motion or after trial.

Plaintiff. Later, these questions will be answered by a trial and a record based upon evidence, not Defendant's current speculations.

B. The *Martinez* Decision is Not Relevant to the Viability of Plaintiff's Breach of Contract Claim

Defendant's primary argument against Plaintiff's breach of contract claim is that it is contrary to *Martinez v. Martinez*, 818 P.2d 538 (Utah 1991). In that case, the supreme court rejected the claim that a working spouse should receive "equitable restitution" to compensate her for her contributions to the marriage while her husband was pursuing higher education. That case, however, is wholly distinguishable from that now before this Court. First, in *Martinez* there was no breach of contract claim presented. As shown above, not only is Plaintiff seeking a remedy for breach of contract, she has adequately pled that claim. Second, in *Martinez*, there was no allegation of an agreement that the working spouse would do certain specific things to enable the student spouse to complete his education. Again, this case is different in that Plaintiff has proffered such allegations.

Indeed, the only basis Defendant raises for even considering the *Martinez* case in connection with Plaintiff's breach of contract claim is the *Martinez* court's discussion of marriage in general. *See, e.g., Martinez*, 818 P.2d at 540 ("Although marriage is a partnership in some respects, a marriage is certainly not comparable to a commercial partnership.") This statement, however, cannot be understood to mean that there can never be a breach of contract claim by one spouse against

another. For instance, assume a situation where a doctor hired his spouse to work in his office to manage the practice and oversee billing and other clerical matters and agreed to pay a specific wage or salary. If Defendant's reading of *Martinez* were correct, the spouse would have no recourse if the doctor failed to pay for the work performed. The arguments that Plaintiff raises here will not apply to all divorces because many, if not most, marriages do not have the commercial/contractual nature that the *Martinez* court referred to. As in the hypothetical situation just discussed, however, the parties in this case themselves chose to import such concepts into their marriage. When both parties agree to such an arrangement, the courts should not refuse to honor that choice. *See, e.g., Dorsett v. Dorsett*, 111 S.E. 541, 543 (N.C. 1922).

Defendant tries to skirt this issue by asserting a distinction between agreements that are intrinsic to the marriage relationship and those that are extrinsic:

> Most agreements between spouses relate to decisions that are *intrinsic* and commonplace to a marital relationship such as (1) deciding how many children to have, (2) whether one or both spouses will work, or (3) where to live.
>
> However, there are some agreements *extrinsic* to a marital relationship that spouses may enter together such as (1) a partnership or business relationship, (2) an employer-employee relationship between spouses, or (3) written financial arrangements between spouses where separate property is involved as collateral or for lending.

> The fact of this case are essentially present in every marriage. Spouses routinely discuss their individual and collective employment or educational aspirations and take steps to achieve those goals.

Brief of Petitioner at 7. The record provides absolutely no basis for Defendant's factual assertions here. Additionally, Defendant cites no authority for such a distinction. Moreover, on their face these conclusions seem somewhat contradictory. For instance, Defendant would have this Court believe that a couple's decision as to whether the wife will work is intrinsic (and therefore not the subject of a breach of contract claim) but whether she will work for the husband is an extrinsic decision and therefore subject to the full panoply of legal remedies. One might pity the trial court that would have to apply the distinction between those decisions that intrinsic and those that are extrinsic.

Defendant also asserts two additional holdings of the *Martinez* case, i.e., (1) that an award of "equitable restitution" would be too speculative, and (2) that a person's educational degree may not be divided as marital property in a divorce. Brief of Petitioner at 9, 10. These assertions also fall short. First, it is certainly possible that in a particular case an agreement may be too speculative to support a judgment of breach of contract. That does not mean that we throw out the entire claim on the pleadings before a trial has been held or even before any discovery is had. Whether a particular claim is too speculative is a question of fact, not one of pleading.

Second, even though the courts will not grant a divorcing a spouse an interest in her husband's educational degree, that does not preclude a contractual right to such an interest. Two men may agree that one will support the other in his graduate education on condition that the other will repay the favor by paying to the one a percentage of the other's income for a specific number of years after graduation. These two men may even set a minimum annual payment to ensure that the one does not avoid his obligation by not fully exploiting his training and education. Defendant has provided no reason that such an arrangement would be permissible between to male friends but not between spouses.

While it may be true under *Martinez* that a marriage relationship standing alone will be insufficient to create a right to "equitable restitution," the relationship between Plaintiff and Defendant was not so limited. Neither should Plaintiff's available remedies. The import of the trial court's dismissal can be understood by further comparing the facts of this case with those of the hypothetical in the previous paragraph. In that situation, if the individual that received the assistance failed to make the repayments, the other party would have a clear claim for breach of contract. This means that Defendant is actually asserting marriage as a *defense* to breach of contract.[4] That is surely not what the *Martinez* court intended.

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[4] That this is Defendant's true aim is witnessed by the fact that nowhere in his motion to dismiss papers, his briefing before the court of appeals, nor in his

While it may be true that there are no published decisions from Utah courts holding that marriage is not a defense to a breach of contract claim, that does not mean there are no decisions available to give guidance to the Court. In particular, *Pyeatte v. Pyeatte*, 135 Ariz. 346, 661 P.2d 196 (Ariz. App. 1982), is especially helpful. That case presented the court with a situation similar to that before this Court: The wife agreed to "'put him through three years of law school without his having to work, and when he finished, he would put [her] through for [her] masters degree without [her] having to work.'" *Id.* at 349, 661 P.2d at 199 (alterations in original). After the husband graduated from law school and after the couple had deferred her education an additional two years due to his income shortfall, he told her that he wanted a divorce.

The wife included breach of contract and unjust enrichment claims in her divorce petition. After trial, the trial court found in favor of the wife on both claims and the husband appealed. On appeal, the court reversed the breach of contract claim. Specifically, the court held that the *evidence* presented at trial failed to establish the terms of the contract with sufficient definiteness. *Id.* at 350, 661 P.2d at 200. Specifically, the agreement as proven at trial did not specify

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opening brief before this Court did Defendant even identify the elements necessary to plead a prima facie case of breach of contract (or of unjust enrichment).

when or where the wife would attend graduate school or how long her graduate program would take to complete. *Id.* at 350-51, 661 P.2d at 200-01.[5]

It is important to note what the *Pyeatte* court did not hold – that breach of contract claims in a marriage context are not legally recognized. If, as Defendant suggests, such an action could not be pursued, the *Pyeatte* court would have dismissed on those grounds rather than looking to whether the terms of the contract were sufficiently definite, a fact-specific inquiry.

The *Martinez* court did not even pretend to address the issues presented by this case. Indeed, the *Martinez* court stated explicitly that it was limiting its analysis to whether the law recognizes "equitable restitution." *Martinez*, 818 P.2d at 538 ("This case is here on a writ of certiorari to the Utah Court of Appeals to review the *single issue* of whether that court erred in fashioning a new remedy in divorce cases which it called equitable restitution and which may be awarded in addition to alimony, child support, and property." (emphases added)); *id.* at 543 ("We granted certiorari *solely* on the issue of equitable restitution and denied

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[5] The *Pyeatte* court also rejected the wife's claim that she should be awarded a larger share of the marital estate because the husband took with him an asset – his legal degree and license – obtained with marital property. The court followed Arizona precedent holding that educational degrees and licenses are not property. *Id.* at 351-52, 661 P.2d at 201-02 (citing *Wisner v. Wisner*, 129 Ariz. 333, 631 P.2d 115 (Ariz. App. 1981)). Because this Court has previously reached the same conclusion, *see Martinez*, 818 P.2d at 541-42, Plaintiff has not made this type of claim in the divorce action.

certiorari on all other issues." (emphases added)). The Court should not view itself as bound in anyway by that decision. Instead, the Court should view this case as one of first impression in this state.

C. Defendant Cannot Perform His Contractual Obligations Through the Payment of Alimony

Defendant also argues that the remedy for Defendant's breaches must be limited to that found in Utah Code 30-3-5(8)(a)(vii). That provision provides the divorce court shall, in determining whether to award alimony and the amount thereof, consider the contributions one spouse made to the other's education and earning power during the marriage. Brief of Petitioner at 7, 11-12, 14-15. The facts of this case, however, show starkly the limitations of alimony as a method by which Defendant can perform his contractual obligations and cure the injustices inflicted on Plaintiff.

First, Defendant's brief makes it appear that in the natural course of things, Plaintiff will be awarded, as part of the alimony to be awarded to her in connection with her divorce, all she is entitled to for her claims in the Complaint. Defendant fails to acknowledge that he fought any award of alimony to Plaintiff and, at least in the trial court, he was wholly successful. The Utah divorce statute is simply no guarantee that a spouse who specifically contracts for a certain compensation will be granted that compensation through divorce; the vagaries of divorce proceedings

are too incalculable to require spouses to rely solely on that to protect their expectations.

Making it even worse, by statute, a court may not, absent "extenuating circumstances," impose an alimony obligation extending beyond the length of the marriage at issue. Utah Code Ann. § 30-3-5(8)(h). A review of case law on this subject shows only one appellate case where an award of alimony extending beyond the length of the marriage was approved. In *Kelley v. Kelley*, 2003 UT App 317, 79 P.3d 428 (Utah App. 2003), the court held that the trial court was justified in finding extenuating circumstances to allow such an award of alimony. The specific circumstances were that the parties had been married for fourteen years which ended in a "sham divorce" (i.e., for financial reasons only). After this divorce, the parties continued to live together in a common law marriage relationship. The wife then filed for divorce. The trial court found that although the length of the second marriage was only five years, the alimony should be based on the length of the entire relationship. The court of appeals affirmed:

> holding that under the unusual facts of this case the trial court did not abuse its discretion in finding extenuating circumstances where, after what was essentially a sham divorce, the parties continued to live in exactly the same factual situation as they had previously. Conversely, in the somewhat more usual, but still comparatively rare, circumstance of a couple divorcing, reconciling later, and remarrying, there would not be, without more, the requisite extraordinariness.

Id. at ¶ 7, n.3, 79 P.3d 430. Thus, even the relatively unusual circumstance of two parties divorcing, reconciling, marrying, and divorcing again will not constitute extenuating circumstances. It is far from certain that the appellate courts will approve a finding of extenuating circumstances when faced with "the not uncommon" situation, *see Lundberg v. Lundberg*, 107 Wis.2d 1, 7, 318 N.W.2d 918, 921 (Wis. 1982), of a divorce happening at the end of significant graduate studies in breach of various promises of future support.

The statutory limitation on alimony is significant in this case because for the next three or four years, Defendant's income is expected to remain fairly modest. It is only after he completes his residency, shortly before the statutory alimony period will expire, that Defendant would be earning significant amounts. This will leave only a very short period within which Defendant could use alimony as a means to perform his contractual obligations and repay Plaintiff for the debt which he has incurred. Moreover, any such alimony would cease should Plaintiff remarry or cohabitate, even though Defendant would be free to do so without consequence. Utah Code Ann. § 30-3-5(8), -5(9).

Defendant relies heavily on the provisions of Utah Code Ann. § 30-3-5. Of course, nowhere does that statute (or any other statute) state that it is to be the exclusive remedy between divorcing spouses and that any contract or other legal or equitable claim between the two parties are preempted by the statute.

The Court should not leave Plaintiff subject to both the inherent and unpredictable limits of alimony. Rather, justice requires that the spouse that has performed such services for her student spouse not be left out in the cold, while the student spouse goes on to enjoy the fruits of both their labors, especially where the latter spouse expressly agreed to the contrary. Instead, the non-breaching spouse should be granted the benefit of her bargain, which, in this case, requires more than she might be able to obtain under alimony.

D. Plaintiff's Breach of Contract Claim Is Not Barred by the Statute of Frauds

The trial court dismissed Plaintiff's breach of contract claim on the basis that it was barred by the statute of frauds.[6] Specifically, it relied on Utah Code Ann. § 25-5-4(1)(a), which states in pertinent part:

> The following agreements are void unless the agreement, or some note or memorandum of the agreement, is in writing, signed by the party to be charged with the agreement: . . . (a) every agreement that by its terms is not to be performed within one year from the making of the agreement . . . .

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[6] Although Defendant pressed this point strongly before the trial court and the court of appeals, in his opening brief before this Court, he has dropped this argument to little more than a mention. Brief of Petitioner at 1. Accordingly, the Court should consider this argument waived. *American Towers Owners Ass'n. v. CCI Mechanical, Inc.*, 930 P.2d 1182, 1185 n.5 (Utah 1996) ("Issues not briefed by an appellant are deemed waived and abandoned.") In the event the Court actually considers this argument, Plaintiff presents the following argument.

Utah Code Ann. § 25-5-4(1).[7] There are three reasons, one procedural and two substantive, why this provision cannot be used to support the dismissal of Plaintiff's breach of contract claim in this case.

1. The Statute of Frauds Is an Affirmative Defense that Need Not Be Pleaded by Plaintiff

Rule 8(a) of the Utah Rules of Civil Procedure requires that when pleading a claim for relief, the pleader must include "a short and plain statement of the claim showing that the pleader is entitled to relief." As noted above in Section 2.A., Plaintiff has done that by pleading each of the elements of a breach of contract claim. Accordingly, Plaintiff has complied with the pleading requirements applicable to this case.

Because this appeal is addressing the propriety of a motion to dismiss, the Court is limited to considering the pleadings only. At this stage, there are only two ways that Defendant can assert the agreement between Plaintiff and Defendant violated the statute of frauds: (1) to point to an allegation in the Complaint alleging that there was no writing memorializing the agreement, or (2) to impose on Plaintiff an obligation to plead a disclaimer of a violation of the statute of

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[7] Although there are other statute of frauds provisions in the Utah Code that could be argued to apply to this matter, the trial court did not rely on any of them. Moreover, Defendant failed to argue any of these provisions before the court of appeals. Any applicability of these provisions is thus waived. *American Towers*, 930 P.2d at 1185 n.5 ("Issues not briefed by an appellant are deemed waived and abandoned.")

frauds. As to the first, in this case, nothing in the Complaint can be construed to allege that the agreement between the parties was not in writing. As to the second, Rule 8(c) of the Utah Rules of Civil Procedure clearly places on the party responding to a prior pleading the burden of setting forth any of various affirmative defenses, including statute frauds, statute of limitations, accord and satisfaction, assumption of risk, etc. If Defendant's position were to be accepted, then logically Plaintiff would have been required to plead not only that the agreement between Plaintiff and Defendant was in writing, but also that the statute of limitations had not run, that there had been no accord and satisfaction, and that Plaintiff had not assumed the risk. That is not the state of law.

The court of appeals was correct when it concluded that, in order for Defendant to prevail on his Rule 12(b)(6) motion with respect to an affirmative defense, he must show that there is a facial deficiency in the Complaint. *Ashby v. Ashby*, 2008 UT App 25, ¶ 10 (citing *Heiner v. S.J. Groves & Sons Co.*, 790 P.2d 107, 109 (Utah Ct. App. 1990)). He has not done so and this argument should be rejected.

2. Plaintiff's Contract with Defendant Does Not Come Within the Statute of Frauds

Next, this provision only applies to a contract "that *by its terms* is not to be performed within one year." Utah Code Ann. § 25-5-4(1)(a) (emphasis added). The United States Supreme Court, interpreting this one-year-requirement, has

stated that "[t]he question is not what the probable, or expected, or actual performance of the contract was; but whether the contract, according to the reasonable interpretation of its terms, *required* that it should not be performed within one year." *Warner v. Texas & Pac. Ry. Co.*, 164 U.S. 418, 434 (1896). Thus, this provision plainly establishes that the requirement of a writing does not apply unless "by its terms" the contract "requires" that the agreement not be performed in one year.

Utah case law in accordance with the *Warner* decision. In *Pasquin v. Pasquin*, 1999 UT App 245, 988 P.2d 1 (Utah App. 1999), the court stated: "we reiterate the well-settled proposition that the one-year clause applies only to contracts that are literally *incapable* of being performed within one year." *See* 1999 UT App 245 ¶ 18, 988 P.2d at 6 (emphasis in original). There are a number of cases establishing that even unexpected and highly unlikely occurrences that might prevent the term of the contract from extending beyond one year are sufficient to take the contract out of the statute of frauds. *See, e.g., Zion's Serv. Corp. v. Danielson*, 366 P.2d 982, 984-85 (Utah 1961) (holding that a contract entered into by the individual members of an incorporated trade association was not barred by the one year clause because each member of the corporation was free to leave at any time and, thus, the agreement was capable of performance within one year); *Johnson v. Johnson*, 88 P. 230, 231 (Utah 1906) (holding that, where the

agreement was that the buyer of property would supply a percentage of the crops to the seller each year, the agreement was not barred by the statute of frauds because the seller could die within one year).

These cases establish that for the one-year-rule to bar a claim under the statute of frauds, it must be impossible for the performance to be completed within one year. In this case, it is clear that the parties' contract was not impossible to fully perform within one year. Any number of things may have happened within one year that would have ended the contract. For example, Defendant could have voluntarily chosen not to continue his education; Defendant's poor academic performance or medical circumstances could have rendered continuing his education impossible or impracticable; Defendant may have been the victim of a tragic accident or death which precluded additional education; or the parties may have become financially unable to continue his education despite Plaintiff's efforts. If for any of these reasons (or any other reason) Defendant had ceased his educational pursuits within one year, Plaintiff's performance would have been fulfilled.

That these occurrences were unlikely is not relevant. They are in no way different than the possible death of the seller of the property in *Johnson*, which may also have been unlikely. In addition, that these occurrences did not actually happen is also irrelevant. Again, "[t]he question is not what the probable, or

expected, or actual performance of the contract was, but whether the contract . . . *required* that it should not be performed within one year. *Warner*, 164 U.S. at 434 (emphasis added).

Thus, because the terms of the contract do not *require* that performance not to be rendered within one year, and because it was possible that performance could be completed within one year, Plaintiff's breach of contract claim is not barred by the statute of frauds. Therefore, because Plaintiff's Complaint states a viable claim for breach of contract, and is not barred by the any version of the statue of frauds, the dismissal of Plaintiff's breach of contract claim must be reversed.

3. Even If the Statute Applied, Plaintiff's Partial Performance Takes This Case Out of the Statute

Even if one were to assume that the statute of frauds applies to this particular contract, there are a number of circumstances where the courts will enforce the contract even though there was no required writing. In this case, the relevant circumstance is Plaintiff's partial performance. To take an oral agreement out of the statute of frauds, Plaintiff must show three things.

> First, the oral contract and its terms must be clear and definite; second, the acts done in performance of the contract must be equally clear and definite; and third, the acts must be in reliance on the contract.

Randall v. Tracy Collins Trust Co., 305 P.2d 480, 484 (Utah 1956).

In this case, Plaintiff has been given no opportunity to make the required showings. There have been no depositions taken; there have been no

interrogatories promulgated or documents requested. While it is clearly Plaintiff's burden to establish the partial performance defense, she must be given an opportunity to do so. The trial court's dismissal of the case denied her that opportunity.

Indeed, this issue goes back to the Rule 12(b)(6) standard discussed above. Under that standard, the claim may be dismissed only if the record establishes that it is impossible for Plaintiff to prove any set of circumstances under which relief might be granted. In this case, that means that before the claim may be dismissed, the Court must be certain that, even if the statute of frauds applies, Plaintiff can in no way prove a partial performance defense. On the record now before the Court, the Court cannot reach such a conclusion.

III. THE COURT SHOULD AFFIRM THE COURT OF APPEALS' REVERSAL OF THE DISMISSAL OF PLAINTIFF'S COMPLAINT BECAUSE THE COMPLAINT STATES A VIABLE CLAIM FOR UNJUST ENRICHMENT

The trial court's dismissal of that claim was in error and should not be allowed to stand because the Complaint states a viable claim for unjust enrichment. The elements of such a claim are: 1) a benefit conferred on one person by another, 2) the person receiving the benefit must appreciate or have knowledge of the benefit; and 3) the person receiving the benefits retains it under circumstances making it unjust for him to retain it without compensating the person that conferred

the benefit. *Deseret Miriah, Inc. v. B&L Auto, Inc.*, 2000 UT 83 ¶ 13, 12 P.3d 580, 582 (Utah 2000). Plaintiff has pled each element.

First, Defendant received his medical degree which was made possible because of Plaintiff's efforts and sacrifices; that is, Plaintiff conferred this benefit on Defendant. Complaint ¶ 18. Defendant was aware of this benefit during all times while he was receiving it. Complaint ¶¶ 19-20. Finally, the circumstances of Plaintiff's conferral of this benefit on Defendant make it unjust for Defendant to retain the benefit without compensating Plaintiff therefor. Complaint ¶ 22. Again, as shown above, because of the statutory limitations connected with alimony, alimony is an insufficient means by which Defendant can compensate Plaintiff for the benefit incurred upon him and remedy the injustice inflicted upon her. Accordingly, Defendant cannot argue against Plaintiff's unjust enrichment claim except to assert that unjust enrichment cannot be found in the context of a marital relationship, i.e., that marriage is again a defense to a claim.

Defendant relies on *Martinez* to defeat this claim as well as the breach of contract claim discussed above. Again, *Martinez* is distinguishable. It did not involve a specific promise by the working spouse to forego personal opportunities and to provide for the student spouse in exchange for a specific promise by the student spouse to provide future support at certain levels. Indeed, the facts of *Martinez* are precisely the opposite: Mr. Martinez attended medical school over

Mrs. Martinez's objection. 818 P.2d at 539. Instead, the *Martinez* case involved only a generic claim for divorce; it did not involve a legally sufficient claim for unjust enrichment. Moreover, the *Martinez* court limited its analysis to the specific issue of "equitable restitution" then before it: "We granted certiorari solely on the issue of equitable restitution and denied certiorari on all other issues. We therefore express no opinion on the appropriateness of the other modifications made by the Court of Appeals in the divorce decree." *Id.* at 543.

Although there is no Utah case addressing whether a claim for unjust enrichment can lie in the context of a married couple seeking a divorce, case law from across the country does. For instance, the *Pyeatte* decision is again instructive. After holding that the wife in that case could not recover on her breach of contract case (for the case-specific reasons discussed above), the court turned to her unjust enrichment claim.[8] In addressing whether unjust enrichment is appropriate in the context of the marital relationship, the court held that

> [w]here both spouses perform the usual and incidental activities of the marital relationship, upon dissolution there can be no restitution for performance of those activities. [Citation omitted.] Where, however, the facts demonstrate an agreement between the spouses and an extraordinary or unilateral effort by one spouse which inures solely to the benefit of the other by the time of the dissolution, the remedy of restitution is appropriate.

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[8] The elements for such a claim under Arizona law are similar to those under Utah law. *Compare Pyeatte*, 135 Ariz. at 202, 661 P.2d at 352 *with Deseret Miriah*, 2000 UT 83, ¶ 13, 12 P.3d at 582.

Pyeatte, 135 Ariz. At 203, 661 P.2d at 353. In addressing the situation where the spouse of a graduate student works to support the student, the court cited the "emerging consensus" that "restitution to the working spouse is appropriate to prevent unjust enrichment of the student spouse." *Id.* at 354-55 (citing cases); *accord In re Weinstein,* 128 Ill. App. 3d 234, 241, 470 N.E.2d 551, 557 (Ill. App. 1984) (noting that although there is a "seeming divergence of opinion [among various states] on the characterization of a degree or license, there is nevertheless clear agreement that the contributing spouse should be entitled to some form of compensation for the financial efforts and support provided to the student spouse in the expectation that the marital unit would prosper in the future as a direct result of the couple's previous sacrifices.").

The trend is for courts to recognize the importance of avoiding a windfall to the student spouse to the detriment of the working spouse. As the Kentucky Court of Appeals acknowledged, "[a]s a matter of economic reality the most valuable asset acquired by either party during this six-year marriage was the husband's increased earning capacity. . . . In cases such as this, equity demands that courts seek extraordinary remedies to prevent extraordinary injustice." *Inman v. Inman*, 578 S.W.2d 266, 269-70 (Ky. App. 1979). Although the *Inman* court is correct that this situation would justify "extraordinary remedies" to avoid the injustice

presented, in Utah, the courts need look no farther than the ordinary remedy of unjust enrichment.

Defendant argues, again based on *Martinez*, that the remedies Plaintiff seeks are too speculative. Even setting aside the fact that *Martinez* is wholly distinguishable from this case, the fact that damages may be speculative is not a proper basis for granting a Rule 12(b)(6) motion. The *Martinez* court made its decision after the case had been tried and the actual facts had been determined by the trial court. It was not decided on a motion to dismiss where the court was obligated to view fact and inference in the light most favorable to the non-moving party. This argument is, at best, premature and should be rejected.

Defendant again relies on Utah Code Ann. § 30-3-5. Specifically, he asserts that with the post-*Martinez* amendments to that statute, there is no need for an unjust enrichment claim. After all, the courts are directed to consider "whether the recipient spouse directly contributed to any increase in the payor spouse's skill by paying for education received by the payor spouse or allowing the payor spouse to attend school during the marriage." The facts of this case directly and starkly contradict Defendant's argument. Despite the divorce action court's findings that Defendant was at fault for the dissolution of the marriage and that Plaintiff contributed directly to Defendant's skill by paying for or allowing Defendant to attend school during the marriage (Memorandum Decision at 3-4, 5), the trial court

awarded no alimony at all. If Defendant truly believed the arguments he is making to this Court about the sufficiency of alimony, he would not have argued to the trial court that no alimony should be awarded in this case. The alimony result in this matter establishes beyond question the vagaries of divorce remedies as compared to breach of contract and unjust enrichment remedies.

Finally, Defendant tries to undermine the foregoing analysis by citing the decision in *Kuder v. Schroeder* 430 S.E.2d 271 (N.C. App. 1993). Defendant argues that the rule of this case is to view the extraordinary efforts that Plaintiff undertook and the deprivations she suffered should simply be viewed as "providing income, domestic assistance, and other services." Brief of Petitioner at 13. Defendant cites no authority that Utah accepts the rule that North Carolina applied in that case. Moreover, as society has evolved and changed, we have learned that treating women as the domestic help without equal rights before the law or in the marital relationship does not serve society's interests. Defendant's ideas on this subject are throwbacks to the 1950s, if not further. Even if one were to interpret Defendant's position as only being that of spouses assisting each other in the common manner that spouses often do, Plaintiff's efforts to put Defendant through undergraduate and medical school went far beyond income and domestic assistance. They included foregoing her own educational and professional

opportunities and the accepting for a significant period of a lower standard of living than would otherwise have been required.

Thus, because Plaintiff's Complaint establishes a viable claim for unjust enrichment, its dismissal must be reversed.

IV. REQUIRING SPOUSES TO COMPLY WITH THEIR EXPRESS PROMISES WILL PROTECT AND PROMOTE THE INSTITUTION OF MARRIAGE

Defendant argues that the *Martinez* case stands as a protection of the institution of marriage against its exploitation as primarily an economic joint venture. Brief of the Petitioner at 18-19. He expresses concern for the degradation that marriage as an institution will suffer if Plaintiff's claims are allowed to proceed. *Id.* at 19.

Such arguments ring hollow when the *Martinez* case is being used to excuse the philandering spouse from keeping the specific commitments he made to the spouse that loyally supported and sustained him through his educational programs at great personal sacrifice to herself. The true threat to marriage would be having individuals know that their spouse's promises are wholly unenforceable. It is important to the institution that individuals realize that there are consequences if they should fail to live up to their promises to their spouse, whether those are traditional marital promises (the consequence therefor being the traditional marital remedies of alimony, property division, and child support) or other promises that

are more akin to contracts. It is such consequences that give individuals the willingness to continue to work at the marital relationship even when things are difficult.

For instance, in many cases, it will be very much in the interest of both parties to a marriage for one of the spouses to seek a higher education. Such an endeavor will of necessity require substantial personal sacrifices by the other spouse (often the wife). If the wife knows that the husband will be able to leave after the education is complete and not provide to her any of the benefits of that education, it would be a rare wife willing to make those personal sacrifices. The result of that would be that fewer marriages will have a spouse seeking a higher education, even though it might be absolutely clear that such an education would make both parties (and their family) better off.

If the Court truly wishes to protect the institution of marriage, it should make it clear that spouses that make express commitments to each other will not be able to avoid those commitments just by getting divorced (or by making life so miserable for the spouse that the spouse has no reasonable alternative but to seek divorce). A ruling in favor of Plaintiff will enhance the favor with which the State of Utah treats marriage.

CONCLUSION

For all of the foregoing reasons, Plaintiff asks this Court to reverse the decision of the trial court, reinstate the claims in her Complaint, thereby allowing Plaintiff the opportunity to proceed forward in the normal course with her claims.

DATED this 26th day of February, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing BRIEF OF RESPONDENT to be mailed, first-class, postage prepaid, this 26th day of February, 2009, to the following:

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