

1963

Mona McBroom v. Howard Kirtley McBroom : Defendant and Appellant's Reply Brief

Utah Supreme Court

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IN THE SUPREME COURT OF UTAH
of the
STATE OF UTAH

OCT 29 1963

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MONNA McBROOM,
Plaintiff and Respondent,

vs.

HOWARD KIRTLEY
McBROOM,
Defendant and Appellant.

Case No. 9702

DEFENDANT AND APPELLANT'S
REPLY BRIEF

Appeal from the Decree of Divorce of the Third
District Court for Salt Lake County, Utah
HONORABLE JOSEPH G. JEPSON, JUDGE

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STATEMENT OF FACTS

Plaintiff, in her brief in answer to defendant's brief on appeal from the decree of divorce entered by Judge Jeppson, states that the statement of facts set forth in defendant's brief is not a statement of facts but rather an attempt to malign plaintiff with generalities that are not supported by the record. (Plaintiff's Answering Brief, p. 1.) The statement of facts set forth by defendant in his brief on appeal from the decree of divorce is not an attempt to malign plaintiff. It is a statement of the facts as testified to by plaintiff on the witness stand and as set forth by her in her diary and short-

hand notes and translations thereof, which plaintiff admitted on the witness stand were true. (R. 198-338, Exs. 6, 7, 9, 10, 11, 12, 17, 18, 21, 22, 23, 24, 26 and 27.) There is a wide discrepancy between defendant's statement of facts set forth in his brief on appeal from the decree of divorce and plaintiff's statement of facts set forth in her answering brief. It is, therefore, necessary at the risk of repetition that we review the statement of facts set forth by plaintiff in her answering brief and compare it with the record of plaintiff's testimony on the witness stand and with the contents of her diary, shorthand notes and other exhibits.

Plaintiff in her answering brief sets forth at page 2 the finding of the trial court to the effect that plaintiff had in violation of the marriage contract gone out with another man as a specific ground for the court's having awarded defendant the divorce based on mental cruelty. From this plaintiff infers that the trial court did not believe her guilty of adultery. The court did not find that plaintiff was not committing adultery. The record is conclusive that she was, *infra.* p. 7, *et seq.* The findings entered by the court were drawn by plaintiff's counsel, even though defendant was awarded the divorce. (R. 34, 37, 38-44.)

Plaintiff asserts in her answering brief that she did not fraudulently commence the divorce ac-

tion and then sets forth in support of this assertion her testimony on direct examination in the form of conclusions as to her alleged grounds for divorce. (Plaintiff's Answering Brief, pp. 2-3.) The trial court found in favor of defendant and awarded defendant the divorce. (R. 42-44.) Plaintiff did fraudulently commence this divorce action. She was guilty of fraud in two respects. *First*. She commenced this divorce action and caused defendant to be removed from his home under a restraining order because of her relationships with another man and not because of defendant's conduct. She admitted this to be the fact in her diary and shorthand notes, which she testified to on the witness stand, *infra*. p. 10, *et seq.* (See, Defendant's Brief on Appeal from the Decree of Divorce, pp. 13-21.) (R. 286-288, 309-311, 315-318, 341, 199-338, Exs. 23, 6, 7.) *Second*. She signed and swore under oath to a false verified complaint, thereby causing defendant to be removed from his home and children, in which she expressly set forth that defendant, "on many occasions physically beat and abused plaintiff." (R. 1-4.) She testified at trial that she did not know that defendant had ever beaten her (R. 288) and explained twice on the witness stand that she signed the complaint without reading it. (R. 360, 395.) (See, Defendant's Brief on Appeal from the Decree of Divorce, pp. 16-17.)

Plaintiff in her answering brief accused defendant of quoting solely from his own testimony, without any corroboration whatsoever, in support of his assertion that plaintiff persistently disappeared from the home of the parties and stayed out all night. Plaintiff further asserted that defendant totally disregarded her testimony with reference to this matter. (Plaintiff's Answering Brief, pp. 3 & 6.) This is a deliberate and dishonest misrepresentation of the contents of defendant's brief, of the record, and of plaintiff's own testimony. Defendant in his brief set forth the following: that he himself testified that commencing with the year, 1956, and continuing thereafter throughout the marriage, plaintiff periodically disappeared from the home of the parties and returned late at night under the influence of alcohol without satisfactory explanation; that plaintiff on rebuttal generally denied this and, in particular, testified that she did not disappear from the home in May and June of 1961; and, that in this plaintiff perjured herself because she had previously admitted on cross-examination that she repeatedly disappeared from the home to consort with a married man during the month of June, 1961, and continuing thereafter. (See, Defendant's Brief on Appeal from the Decree of Divorce, pp. 5 & 6.) Plaintiff did testify in rebuttal, as pointed out in defendant's brief, that she never disappeared from the home of the parties and that, in

particular, she did not disappear from the home in June of 1961. (R. 533-534, 546.) Plaintiff had previously expressly admitted the following on cross-examination: that commencing on June 2, 1961, and continuing down through and after commencement of the divorce action, she repeatedly and persistently left her home and her children and the defendant to consort with Jarvis during all hours of the day and night (R. 199-338); that during this period she repeatedly and persistently frequented barrooms with Jarvis on the west side of Salt Lake City during the day time and at night until such hours as 1:00 A.M. (R. 204-205, 221, 234, 240, 247, 199-338); and, that she repeatedly and persistently stayed out all night with Jarvis until such hours as 2:00 A.M., 2:30 A.M., 3:00 A.M., 3:30 A.M., 5:00 A.M., and 8:00 A.M. (R. 204, 274, 281-283, 292.) (See, Defendant's Brief on Appeal from the Decree of Divorce, pp. 6-19.) Plaintiff admitted on the witness stand that she repeatedly and persistently lied to defendant as to her whereabouts and activities and by the use of artifice and intrigue with Jarvis kept her relationships from the knowledge of defendant. (R. 248, 271, 283, 299.) Plaintiff testified at pages 247 and 248 of the record, with reference to an occasion when she left her home and met Jarvis at 9:00 o'clock at night and spent the night with him, that she lied to her husband and told him that she was going to play bridge

that night and that Jarvis lied to his wife and told his wife that he was playing bridge, so that they could deceive their respective spouses as to their whereabouts and relationships. At page 283 of the record plaintiff testified that on another occasion Jarvis telephoned her at 11:00 A.M., that thereafter she left her home at 4:30 P.M., that they went to a barroom, that thereafter they went and stayed at Jarvis' home while his wife was away, that she didn't get home until 3:30 A.M., and that she told her husband she was shopping for a wedding present and then went to a show with some "kids" with whom she had formerly worked. At page 299 of the record plaintiff expressly admitted, with reference to her escapades with Jarvis, that she repeatedly lied to her husband as to her whereabouts and, in particular, told him that she went to bridge clubs and to movies and was out with her girl friends. Defendant did not quote solely from his own testimony, without any corroboration, and disregard plaintiff's testimony in establishing that she repeatedly disappeared from the home. The record is clear out of plaintiff's own mouth that she did disappear from the home under the foregoing circumstances.

Plaintiff points out in her brief that she testified that she disclosed her relationship with Jarvis to defendant in September of 1961, when defendant

attempted to effect a reconciliation following commencement of the divorce action. (Plaintiff's Answering Brief, p. 3.) We have previously demonstrated in defendant's brief that this testimony was bald perjury. Defendant discovered the diary of plaintiff's relationships with Jarvis on January 15, 1962. (R. 320, 494.) Plaintiff admitted at trial that three days after this discovery on January 18, 1962, which was four months after the asserted disclosure, she, in a conversation with defendant, denied the contents of the diary and the specific events set forth therein, and told defendant that it was all a fiction. (Ex. 25, R. 320-322.) (Defendant's Brief on Appeal from the Decree of Divorce, p. 22.) It should be noted that by reason of obvious stenographic error or misprint the year, 1962, is printed in place of 1961 at page 3 of plaintiff's brief. (R. 211.)

Plaintiff asserts in her brief that she was not carrying on an immoral and adulterous relationship with a married man and that there is no evidence in the record to support the conclusion. (Plaintiff's Answering Brief, p. 3.) We have previously demonstrated conclusively by direct quotations from the record of plaintiff's testimony that she was committing adultery, and there is no occasion to restate the evidence here. (See, Defendant's Brief on Appeal from the Decree of Divorce, pp. 7-10.) Plaintiff's testimony that her relationships with Jarvis were

not “immoral” is demonstrative of her unfitness and of the fact that her concept of morality does not conform to ordinary standards.

Plaintiff asserts in her brief that defendant’s statement to the effect that plaintiff deliberately set out in her own handwriting a design, scheme and plan to commence this divorce action and take from defendant his home, children and money is purely imagination on the part of defendant. She then, in support of this assertion, quotes in part from Exhibit 6 without indicating her deletions. She then asserts that the partial quotation does not indicate any intent on her part to take from defendant his children, home and money, but rather a sincere effort on her part to determine what was wrong with their marriage and an attempt to correct the difficulties. (Plaintiff’s Answering Brief, pp. 4-5.) The portions that she deleted from Exhibit 6 are as follows: “Live your own life. * * * Keep your mouth shut. Work towards your goal. * * * Keep records of his business — chance to see if you get your share of the money. Sometime: go through his desk — maybe some Sunday. * * * I will not discuss my problems, the children’s problems, or our problems. I will live my own life, going and coming as I decide and in effect acting as though I am a divorcee. * * *”. Does this indicate a sincere effort on the part of plaintiff to determine

what was wrong with her marriage and an attempt on her part to correct the difficulties, or does it indicate a scheme to commence this divorce action and take from defendant his children, his home and his money? Furthermore, Exhibit 6 was written by plaintiff on July 22, 1961, at the height of her affair with a married man. (Ex. 6, R. 214-219.) One week before, on July 14, she stayed out all night with Jarvis. (R. 204.) On July 18 she made an engagement with Jarvis for the following night. (R. 208.) On July 19 she spent the night with Jarvis in a barroom. (R. 209.) She thereupon on July 22 wrote Exhibit 6. For over two months before this writing she had been leaving her children, her home and her husband and carrying on with Jarvis all hours of the night and day. (R. 199-310.) It is not conceivable that she needed to resort to the writing of Exhibit 6 in order to find out what was wrong with her marriage. If any fault on the part of the husband is revealed in Exhibit 6, stated in its strongest terms, it is that he failed to keep the house neat and clean and in the same order in which he found it, at a time when he was working all day and caring for his children at night and his wife was consorting in barrooms on the west side of Salt Lake City and in other places all hours of the night and day with a married man. (R. 199-328.) See, also, pages 17 and 18 of defendant's brief wherein it is

pointed out that on one occasion plaintiff insisted that defendant remain away from the home, and she explained on the witness stand that she did so because she wanted to give her husband some time to "think" and because she wanted to find out about her "family problems". She had in fact that day made an appointment to meet Jarvis and thereafter met him at 3:00 P.M. and consorted with him until 2:00 A.M. on the following morning.

Plaintiff asserts in her brief that she did not admit in her handwriting that her motive in commencing the divorce action was because of her relationship with Jarvis. (Plaintiff's Answering Brief, p. 5.) This assertion is false. Just prior to commencement of the divorce action Jarvis stopped contacting plaintiff. (R. 286-288.) She then made the following entries in her diary concerning Jarvis. Monday, August 21, "Not a word did I hear." (R. 286.) Tuesday, August 22, "Not a word again. I don't understand." (R. 286.) Wednesday, August 23, "It is now 12:30. No phone call today. *The message seems to be coming through loud and clear. I made an appointment to see Mr. McCullough.*" (R. 287.) The next day she met with McCullough, signed the false verified complaint, and caused the divorce action to be commenced on August 25 and defendant to be removed from his home and children under the restraining order. (R. 1-4, 7-8.) (De-

fendant's Brief on Appeal from the Decree of Divorce, pp. 13-17.) Thereafter defendant attempted a reconciliation. (R. 10, 292-294, 457.) Plaintiff again on September 12 caused defendant to be removed from his home and children under the threat of a restraining order and under circumstances identical to those under which she commenced the divorce action. She again admitted in her diary in her own handwriting and in Exhibit 23 that she did so because Jarvis again stopped contacting her. She wrote in her letter to Jarvis, Exhibit 23, the following concerning the event: "Your last words to me were: 'I will call tomorrow' (Monday). You didn't call Monday. I had a quarrel with Howard on Tuesday and insisted he move out. *I am tired of going to see the attorney again if he didn't.* He did move. You didn't phone on Tuesday. You didn't phone on Wednesday. I was sick Wednesday night." She wrote in her diary on Thursday, September 14th, concerning Jarvis: "It is now 1:00 and so far no phone call * * * The writing on the wall is pretty clear. Guess this is it * * *." (R. 286-288, 309, 311, 316, 317, 447, Ex. 23.) (See, Defendant's Brief on Appeal from the Decree of Divorce, pp. 19-20.)

Plaintiff asserts in her brief that defendant's conduct was responsible for causing this divorce. (Plaintiff's Answering Brief, pp. 5-6.) It must again be pointed out that plaintiff testified at trial,

as an excuse for her misconduct with Jarvis that resulted in this divorce, that it made up for some of the hurt that she had suffered at the hands of defendant. (R. 328.) When Jarvis terminated his relationship with plaintiff, she blamed Jarvis for all of her difficulties and wrote in Exhibit 23 the following concerning Jarvis, "If I could only turn some of the hurt I feel for myself into hurting you." (R. 315.) She further berated Jarvis in Exhibit 23 for terminating his relationship with her after she had caused defendant to be removed from his home and children and thereupon said of her husband that he had put forth extra effort to get along and was truly in love with her, "true his every glance, his every deed." (Ex. 23, R. 315-318, 340-341.) (See Defendant's Brief on Appeal from the Decree of Divorce, pp. 29-30, 21.))

Plaintiff in her brief accuses defendant of excessive drinking. (Plaintiff's Answering Brief, pp. 5 & 10.) Defendant denied the accusation (R. 431), and plaintiff's own witnesses, called for the purpose of corroborating her testimony, testified that defendant did not drink to excess and always conducted himself as a gentleman and was never intoxicated. (R. 365-368, 386, 388.) (See, also, Defendant's Brief on Appeal from the Decree of Divorce, pp. 28-29.)

Plaintiff's assertion in her brief that defendant

had gone out with other women (Plaintiff's Answering Brief, p. 6) was denied by defendant (R. 428.) Defendant's denial of such relationships was corroborated by plaintiff in Exhibit 23, *supra*. p. 12, and specifically corroborated by plaintiff in her diary concerning a girl named Karen, wherein she stated, "He has never had her out." (R. 225.) (See, Defendant's Brief on Appeal from the Decree of Divorce, pp. 27-28.)

Plaintiff in her brief and in her testimony asserted that defendant refused to assume any responsibility with respect to yard work and maintenance of the home and, in particular, stated that he would not water the lawn, take care of the yard and paint the house. (Plaintiff's Answering Brief, p. 5.) For the purpose of corroborating her testimony, plaintiff called as a witness Mr. Lawrence McCormack, who was a next door neighbor of the parties. (R. 386.) On direct examination plaintiff's counsel asked Mr. McCormack whether he ever saw Mr. McBroom watering the lawn. Mr. McCormack answered, "Yes." (R. 386.) When asked on cross-examination whether he had observed Mr. McBroom working in his yard, Mr. McCormack answered, "It seemed as though he had pride in his yard, yes." (R. 387.) Mr. McCormack also testified that he saw Mr. McBroom painting the house. (R. 389.) Plaintiff's accusations in this respect are immaterial to

the issues before the court on this appeal except that they demonstrate again that plaintiff lied on the witness stand and testified falsely concerning defendant's character and conduct.

Plaintiff in her brief asserts that defendant would not allow her to sleep for three nights in a row and makes reference to the fact that she asked defendant's brother, Ralph A. McBroom, to tell defendant to let her get some sleep because she was exhausted. (Plaintiff's Answering Brief, p. 5.) The three days that plaintiff testified she did not sleep were from January 15, 1962, the day that defendant discovered the contents of plaintiff's diary and her relationships with Jarvis, through January 18, 1962. (R. 379-380, 320, 494.) Compare this assertion with the assertion on page 3 of plaintiff's brief to the effect that she disclosed her relationship with Jarvis to defendant four months before in September of 1961. (R. 211.) If plaintiff had disclosed her relationship with Jarvis to defendant in September of 1961, there would have been no occasion for her to lose any sleep after defendant discovered the contents of her diary on January 15, 1962. Furthermore, on January 18, 1962, plaintiff in a conversation with defendant denied the contents of the diary and the specific events set forth therein and stated that it was all a fiction, *supra.* p. 6, *et seq.* It is submitted that plaintiff again perjured herself and

that she is now lying to this court on this appeal.

Plaintiff in her brief on page 6 again denied that she disappeared from the home of the parties and denied that she refused to participate in activities of the family with the minor children. The matter of plaintiff's disappearing from the home has already been disposed of, *supra*. p. 4, *et seq.* With reference to the plaintiff's assertion in her brief that she did not refuse to participate in activities of the family with the minor children, plaintiff in particular asserted that she did not attend a Lagoon outing with her children and the defendant because she was not invited. (Plaintiff's Answering Brief, p. 6.) Plaintiff on this occasion had the day before, July 13th, invited Jarvis to meet her on July 14th because her husband and children would be at Lagoon. Thereafter on July 14th defendant took the children to the outing alone and plaintiff met Jarvis at approximately 4:30 P.M., drank with him in barrooms and thereafter stayed out with him all night and did not return to her home and family until 8:00 A.M. the next morning. (See, plaintiff's testimony on the witness stand. (R. 203-204.) On another occasion plaintiff asserts that she failed to go to Lagoon with her children and defendant in celebration of defendant's birthday because she stayed home to clean the house. (Plaintiff's Answering Brief, p. 6.) On this occa-

sion, June 3, plaintiff in fact went and consorted with Jarvis pursuant to a previous arrangement that she had made on June 2 when she was with him in a barroom. Defendant took the children to Lagoon alone. (See testimony of plaintiff on the witness stand.) (R.234-235.) Plaintiff has again misrepresented the facts to this court.

Plaintiff states in her brief that, when she went into Jarvis' home in Kearns, she stayed in his home for approximately forty-five minutes, and to support this statement refers to her testimony on cross-examination at page 284 of the record. (Plaintiff's Answering Brief, pp. 6-7.) This refers to an occasion on August 14, 1961, when she wrote in her diary and testified on the witness stand as follows: "Met him at 4:30 (P.M.). We went to the Pecon (a barroom) * * *. We went out to Bert's house * * *. Didn't get home until 3:30 (A.M.)." (R. 283-284.)

Plaintiff notes in her brief that she went to Jarvis' apartment for the purpose of helping him put his work pants on a stretcher. (Plaintiff's Answering Brief, p. 7.) This observation by plaintiff requires no comment from us.

Plaintiff on page 7 of her answering brief protests her innocence because on one occasion she made it home by 8:00 P.M. after an affair with Jarvis. She neglected to state that on this occasion

she left her home and met Jarvis at 11:00 A.M., drank with him that afternoon in a barroom until 5:00 P.M., and thereafter parked with him in a canyon and returned home at 8:00 P.M. (R. 240-241.) We submit that a woman who would protest her innocence based on these circumstances is not a fit and proper person to have the custody of minor children. Furthermore, the fact that plaintiff on one occasion stayed out with Jarvis until 8:00 P.M. does not alter the fact that on innumerable occasions she stayed with him all night, *supra.* p. 5, *et. seq.*

Plaintiff at page 7 of her answering brief comments, "It would seem strange that if the contentions of the defendant are true, as he has set forth in his brief, that the trial judge would not have made findings of fact which were more consistent with the contentions of the defendant." It is strange indeed. This is one of the bases of this appeal. The contentions of defendant are not only true. They were testified to by plaintiff, herself, on the witness stand and admitted by her in her diary and shorthand notes. (R. 199-338.)

Plaintiff's reference in her answering brief at page 7 to the fact that she commenced using contraceptives at a time when she admittedly was staying out all night with Jarvis and not sleeping with her husband requires no further comment. (See, De-

fendant's Brief on Appeal from the Decree of Divorce, pp. 9-10.)

At pages 8 and 9 of her brief plaintiff quotes in detail from the testimony of Mrs. Dorothea M. McDonald, one of the children's school teachers, in which Mrs. McDonald testified as a conclusion that the plaintiff showed deep concern for the children. Mrs. McDonald admitted that she had only seen plaintiff on three occasions, once at a Parent Teachers Association meeting, once for a few moments at the school, and once for a few moments just before trial. (R. 352.) Mrs. McDonald knew absolutely nothing about plaintiff's immoral activities and her neglect and visitation of depravity upon the children. (R. 346-352.) (Defendant's Brief on Appeal from the Decree of Divorce, pp. 30-31.)

At pages 9 and 10 of her brief plaintiff quotes from her own testimony to the effect that she did not worry about the children when they were with their father unless he was drinking. She neglected to quote the rest of her testimony to which the quoted testimony related. Her testimony at pages 204 to 206 of the record with reference to this matter was as follows. Her husband took the children on an outing during the daytime on this occasion. Jarvis called her at 11:00 o'clock in the morning. She picked him up at 4:30 P.M. They drank in a barroom known as the 451 Club located on South

West Temple and in another barroom known as the Pecon located at West Temple and 3rd South, from 4:30 P.M. until 1:00 o'clock A.M. Thereafter she stayed out all night with Jarvis and did not return to her home and children until 8:00 A.M. the following morning. (R. 204-206.) We have demonstrated conclusively out of plaintiff's own testimony that, time, time, and again, while plaintiff has been frequenting barrooms and drinking all hours of the day and night with another man, defendant has provided the care and protection for the children. (See, Defendant's Brief on Appeal from the Decree of Divorce, pp. 6-20, R. 199-328.))

Plaintiff denies at page 10 of her brief that by reason of her staying out all night and drinking she thereby neglected her children and rendered herself unfit to properly care for them. She then admits that, if this were the fact, the trial court should not have found her a fit and proper person to have the care and custody of the children. (Plaintiff's Answering Brief, p. 10.) That is one of the bases of this appeal. Plaintiff testified on the witness stand that she repeatedly left her home and children all hours of the day and night and spent her time drinking in barrooms and engaging in other misconduct. (1) This conduct, in and of itself, constituted neglect by plaintiff of her children. (2) A woman who spends her time drinking in bar-

rooms and staying out all hours of the day and night with a man other than her husband cannot possibly be in fit condition to provide proper care for her children. It is submitted that plaintiff was not. See pages 461-462, 432, 449, 452, and 457, of the record wherein defendant testified that, when plaintiff arrived home after these occurrences, she was repeatedly sick and unable to care for the children and that on such occasions defendant did care for the children.

Plaintiff at page 10 of her brief cites the testimony of certain of her neighbors to the effect that, when they observed the children, the children appeared to be properly cared for. These witnesses, Mrs. Beverly Chase, Mr. Lawrence McCormack, Mrs. Glade J. Jensen, and Mrs. Clarence L. Hall, knew absolutely nothing about plaintiff's dissipated and adulterous activities and her attendant visitation of neglect and moral depravity upon the children. (R. 356, 357, 519, 384-389, 514-518, 506-511.)

At page 12 of her brief plaintiff refers to the obscene literature, Exhibits 28 through 37, which she admittedly, unbeknown to her husband, brought into the marriage of the parties, carried from home to home of the parties, and was keeping in a drawer in an open room together with other things belonging to her children. (R. 332, 333, 337, 416-419.) We have already demonstrated conclusively that

plaintiff did recall these documents and knew their contents and, when defendant first discovered them, plaintiff promised him that she would get rid of them; but, she did not do so. (See, Defendant's Brief on Appeal from the Decree of Divorce, pp. 24-26.)

Plaintiff argues at pages 11 and 12 of her m 4 brief that she has provided adequate care for the children since defendant moved out of the home by leaving them daily in the homes of baby tenders. She asserts that defendant could offer no other alternative. This assertion is directly contrary to the undisputed record. See the testimony of defendant, Mrs. R. A. McBroom, Sr., and Mrs. Ralph A. McBroom. (R. 480-481, 500-502, 502-504.) (See, also, Defendant's Brief on Appeal from the Decree of Divorce, pp. 32-33, 45-47.)

Plaintiff at page 13 of her brief denies that she visited immorality upon the children. She generally denied this at trial. But, when confronted with specific proof, she was forced to admit that she subjectively visited obscenity and immorality upon the children. (See pp. 23 and 24 of Defendant's Brief on Appeal from the Decree of Divorce.) Plaintiff's assertion that this type of conduct is not immoral is again demonstrative of her unfitness.

Plaintiff in her brief deliberately misrepresents the admitted and undisputed facts as to the

financial situation of the parties. (Plaintiff's Answering Brief, pp. 10-11, 14-16.)

The undisputed evidence was that defendant's net income, after deduction of non-recoverable business expenses incident to his occupation as a life insurance salesman such as car expense and depreciation and before payment of state and federal income taxes, was \$547.00 per month. (R. 181.) The trial court so found in its findings of fact, which were drafted by plaintiff's attorney. (R. 39.) Plaintiff's own testimony was that her net income at the time of trial was \$370.00 per month, without deduction of business expenses because she had none and before payment of federal and state income taxes. (R. 185.) The trial court so found in its findings of fact drawn by plaintiff's attorney. (R. 39.) Plaintiff in her brief asserts that defendant deliberately misrepresented the facts as to her net income of \$370.00 per month and in support of this assertion sets forth that her net income was \$214.56 per month. Plaintiff arrived at her net income of \$214.56 per month by deducting \$90.00 per month in payments on her Cadillac automobile, which is withheld from her check under a credit union arrangement, and by deducting federal and state taxes that are withheld. (Plaintiff's Answering Brief, p. 11, Ex. 1.) Defendant's net income, as represented by defendant, was \$547.00 per month before deduc-

tion of the \$78.00 per month payment on his Chevrolet automobile and before deduction of federal and state income taxes. Plaintiff in her assertion has deliberately attempted to distort the comparison of the net incomes and monthly obligations of the parties imposed by the decree of divorce.

Plaintiff in her brief asserts that defendant in his motion to amend the findings and decree specifically stated that his monthly obligations, in addition to the \$200.00 per month support money, amounted to the sum of \$146.00 per month. (Plaintiff's Answering Brief, p. 15.) Defendant did not so state. Defendant stated the following in the affidavit in support of his motion to amend the findings and decree. (R. 52-54.) That, in addition to the \$200.00 per month support money and \$146.00 per month in installment obligations which the court ordered him to pay, the court ordered him to pay all of the existing obligations of the parties which totaled \$1,838.02. That defendant was without funds to pay the \$1,838.02 and would be required to finance the same through a collateral loan upon which the monthly payments in addition to the foregoing would be \$115.90. That by reason of the foregoing defendant's total monthly installment obligations under the findings and decree was the sum of \$461.90.

A detailed statement of the financial situation of the parties and of the effect of the trial court's findings and decree is set forth, strictly in accordance with the record and the admitted facts, at pages 33 to 37 and pages 47 to 49 of defendant's brief on appeal from the decree of divorce.

Plaintiff at page 11 of her answering brief represents that, "While at page 21 of defendant's brief, the defendant is extolling his virtues as to being a provider in the home, *the plaintiff was also working and earning a monthly income of \$370.00 per month gross income*, which plaintiff was contributing to the family expenses * * *." This is a deliberate misrepresentation of fact. At page 21 of defendant's brief on appeal from the decree of divorce defendant represented the facts as to his employment at Equitable Life Assurance Society for the entire year 1961. Plaintiff by her own testimony did not work from January to November of 1961. (See, p. 184 of the record and Ex. 1, offered in evidence by plaintiff.) Plaintiff during the period spoken of by defendant at page 21 of his brief was not only not working, she was engaged in destroying the family and leaving her home, her children and her husband during all hours of the day and night for the purpose of dissipating and engaging in adulterous activities with a married man; and, during this period she was,

unbeknown to her husband, surreptitiously using family funds for the purpose of purchasing gifts for, and dissipating with, a married man. (Exs. 14 & 19, R. 264-265, 274-275, 277-281, 198-328.) (See, also, Defendant's Brief on Appeal from the Decree of Divorce, pp. 6-22.)

Plaintiff at page 18 of her brief sets forth that, "It was specifically agreed between plaintiff and defendant that the question of attorneys fees and the amount thereof would be left to the discretion of the trial judge." This statement is incorrect. Defendant's counsel only stipulated that the question of attorneys fees might be submitted without testimony of plaintiff's counsel as to the extent of his services. Defendant's counsel did not stipulate that the plaintiff should be awarded attorneys fees and defendant's counsel did not stipulate as to the amount. The record is clear that defendant's counsel did not expressly or by implication waive the right to claim error with respect to the award of attorney's fees. (R. 410.)

ARGUMENT

POINT 1.

THE TRIAL COURT ERRED IN GRANTING CUSTODY OF THE MINOR CHILDREN TO PLAINTIFF.

We do not disagree with the statement in *Smith*

v. *Smith* (1953) 1 U.2d 75, 262 P.2d 283, cited in plaintiff's brief at page 13, to the effect that there is a presumption in favor of the correctness of a decision of a trial court. It is submitted that, in view of the admitted facts as to plaintiff's conduct during the marriage and during the course of this litigation, particularly with reference to the children, and in view of the admitted facts as to defendant's conduct, particularly with reference to the children, (1) plaintiff is not a fit and proper person to have their care and custody, and (2) it is in the best interest of the children that custody be awarded to defendant. *Supra.* p. 2, *et seq.* and see, Defendant's Brief on Appeal from the Decree of Divorce, pp. 2-38 and 39-47. We have reviewed in detail the decisions of the Supreme Court with reference to the issues raised by this appeal. (See, Defendant's Brief on Appeal from the Decree of Divorce, pp. 39-47.) We submit that they are in accord with our contention here.

POINT 2.

THE TRIAL COURT ERRED IN AWARDING PLAINTIFF \$200.00 PER MONTH FOR THE SUPPORT OF THE TWO MINOR CHILDREN AND ALL OF THE PROPERTY OF THE PARTIES.

We again do not disagree with the statement in *Wilson v. Wilson*, (1956) 5 U.2d 79, 296 P.2d 977, cited in plaintiff's brief at page 16, to the effect that there is a presumption in favor of the cor-

rectness of a trial court's decision and that it will not be overturned unless there is a manifest injustice or inequity.

The uncontrovertible facts are that the effect of the trial court's decree is to leave defendant with \$56.92 per month upon which to live, after payment of the imposed monthly installment obligations and before payment of rent, and to leave plaintiff with \$402.00 per month for the support of herself and the children, after payment of the imposed monthly installment obligations and with no obligation to pay rent. (See, Defendant's Brief on Appeal from the Decree of Divorce, pp. 33-37, 47-49.)

The further effect of the decree is to take from defendant all of his property and reward plaintiff in the face of the admitted facts before this court as to her conduct. (See, Defendant's Brief on Appeal from the Decree of Divorce, pp. 33-37, 47-49.)

POINT 3.

THE TRIAL COURT ERRED IN AWARDING PLAINTIFF \$1.00 PER YEAR ALIMONY AND \$750.00 ATTORNEYS FEES.

We submit this matter on the statement of facts, *supra*. p. 2, *et seq.*, and Point 3 of defendant's brief on appeal from the decree of divorce, pages 50-51, with the following additional observation.

We have heretofore demonstrated that plain-

tiff's answering brief is a misrepresentation of the record, *supra.* p. 2, *et seq.* As a result, defendant in this reply brief has been put to the labor and expense of comparing the false statements of fact contained in plaintiff's answering brief with the record in order to present the issues clearly before this court. The reply brief would not have been necessary but for plaintiff's misrepresentations.

The italics are by the writer.

Respectfully submitted,

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