

1983

Howard Hitchings Walther v. Celeste J. Walther : Appellant's Brief

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IN THE SUPREME COURT OF THE STATE OF UTAH

HOWARD HITCHINGS WALTHER,)
)
Plaintiff and Appellant)
)
vs.) No. 19018
)
CELESTE J. WALTHER,)
)
Defendant and Respondant)

APPELLANT'S BRIEF

Appeal from the Order of the Third Judicial District
Court for Salt Lake County, State of Utah
Hon. Larry C. Keller, Judge

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FILED

JUN 10 1983

Clerk, Supreme Court, Utah

COURT OF THE STATE OF UTAH

DELESTE J. WALTHER,)
)
Plaintiff and Appellant)
)
vs.) No. 19018
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CELLESTE J. WALTHER,)
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Defendant and Respondant)

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Authorities Cited

Hartford vs. Clegg, 135 P.2d 919 (Utah 1943)
Stoker v. Stoker, 616 P.2d 590 (Utah 1980)
Kallas v. Kallas, 614 P.2d 641 (Utah 1980)
Kerr v. Kerr, 619 P.2d 1380 (Utah 1980)
Utah Code Annotated Title 30, Section 1
Utah Code Annotated Title 30, Section 2
Utah Code Annotated Title 30, Section 85
Utah Code Annotated Title 30, Section 86
Utah Code Annotated Title 30, Section 571
Utah Code Annotated Title 30, Section 573

Statutes Cited

Utah Code Annotated Section 30-3-1 et seq. (1953, as amended)
Utah Code Annotated Section 30-3-5 (1953, as amended)

Utah Code Annotated Section 78-21-1 (1953, as amended)
Utah Code Annotated Section 30-2-4 (1953, as amended)

DR 55126

STATE OF UTAH OF KIND OF CASE

This is an action in equity pursuant to Utah Code Annotated (1953) Section 30-3-1 et seq. to obtain a divorce and property settlement.

DISPOSITION IN LOWER COURT

Plaintiff-Appellant's Complaint for Divorce and Defendant-Respondant's Counterclaim for divorce were heard before the honorable Larry C. Keller, District Court Judge Pro Tempore in the Third Judicial District Court in and for Salt Lake County, state of Utah. Judge Keller granted a divorce and issued a memorandum decision which made provision, among other things, for settlement of property, a lump sum award from Plaintiff-Appellant to Defendant-Respondant of \$284.00 to reimburse Defendant for medical expenses, a lump sum from Plaintiff-Appellant to Defendant-Respondant of \$5,000 to compensate for pain and suffering and future medical expenses, and an award from Plaintiff-Appellant to Defendant-Respondant of \$2,000 for partial restitution of her costs and attorney's fees.

RELIEF SOUGHT ON APPEAL

Plaintiff-Appellant seeks a ruling by the Utah Supreme

Court that the District Court should be affirmed in fact and law by awarding Appellant the sum of \$5,000 to compensate for pain and suffering and future medical expenses and for awarding Defendant-Respondent the sum of \$2,000 for her costs and attorney's fees, and seeks an order reversing the decision of the District Court.

STATEMENT OF FACTS

The parties to this divorce action were married on the 5th day of December, 1977 in Ogden, Utah. They resided during the course of the marriage in Salt Lake City, Utah in a home purchased prior to the marriage by Plaintiff-Appellant. In approximately January, 1980 the parties separated. The Plaintiff-Appellant initiated this action for divorce on the 20th day of August, 1980.

In approximately October, 1980 the Defendant-Respondant, through her counsel, filed an answer and counterclaim alleging among other things that Plaintiff-Appellant had "treated Defendant cruelly, both mentally and physically, causing her great mental distress and damage to her body." (Paragraph 3 Answer and Counterclaim)

There were no children born to the parties. The predominant issues concerned property distribution, alimony, debts

The parties were unable to agree on these issues. The trial was commenced on the 20th day of April, 1982. Due to the restraints, it was continued until the 14th day of May, 1982 and finally completed on the 4th day of June, 1982.

On May 12, 1982, just prior to the second day of trial, counsel for Defendant-Respondant filed a motion to allow the filing of an amended counterclaim which set out a new second cause of action for intentional tort. The parties were instructed to file briefs and the Court ultimately denied Defendant-Respondant's motion.

At the conclusion of the trial on June 4, 1982, Judge Heller took the matter under advisement. Subsequently, he issued a memorandum decision dated the 30th day of July, 1982.

In its memorandum decision, the Court stated as follows:

The Court further finds that during the course of the marriage plaintiff physically abused defendant at times. Particularly the Court finds that on or about April 1, 1980 plaintiff so abused defendant as to require medical treatment for injuries to her hip and pelvis caused by him. It is fair and reasonable, based upon the published deposition of Richard E. Nilsson, M.D. and defendant's testimony, that plaintiff reimburse defendant for Dr. Nilsson's bill (defendant's Exhibit 17) in the amount of two hundred eighty-four dollars and fifty cents. The Court finds that defendant may have pain and restriction of physical activity as a result of her injury as a consequence of plaintiff's physical abuse. In addition, she may have incurred medical expenses and will have to purchase medicine to relieve such pain. Therefore, the Court finds it reasonable and fair to award de-

Defendant is obligated to pay Plaintiff a lump sum of \$5,000 to compensate her for future medical expenses necessary to relieve her pain and suffering. This shall be immediately due and payable. (Memorandum Decision July 30, 1984 p. 2-3)

The Court further finds that it was plaintiff who chose to end the marriage and require defendant to hire an attorney to represent her interests. Considering all circumstances of the case, the Court awards defendant the sum of two thousand dollars (\$2,000) for restitution of her costs and attorney's fees, at least in part, and further finds such sum to be just and reasonable in the premises. (Memorandum Decision, page 3.)

On the 11th day of December, after the parties were unable to agree on the wording of the Findings of Fact and Conclusions of Law and the Decree of Divorce, D.M. Amoss, counsel for Defendant-Respondant, moved the Court for an order amending the memorandum decision to read "Therefore, the court finds it reasonable and fair to award defendant a lump sum of five thousand dollars, \$5,000, to compensate her for future medical expenses necessary to relieve her pain and suffering." This motion was heard by Judge Keller who granted the motion and approved the amended language.

STATEMENT OF POINTS

POINT 1

THE TRIAL COURT ERRED IN ITS DECISION TO AWARD A LUMP SUM PAYMENT OF \$5,000 TO DEFENDANT-RESPONDANT TO COMPENSATE HER FOR FUTURE MEDICAL EXPENSES NECESSARY TO RELIEVE HER PAIN AND SUFFERING

AND THE TRIAL COURT HAS JURISDICTION TO MAKE ORDERS IN REGARD TO PROPERTY, THE PARTIES AND THE MAINTENANCE OF THE PARTIES AS SET BY LAW.

... TO AWARD FOR PAIN AND SUFFERING ...
... A DAMAGE AWARD FOR TORTIOUS ...
... OR PERSONAL INJURY AND IS NOT ...
... APPROPRIATELY CONSIDERED IN AN ACTION FOR ...
... SEVERAL.

C. THE PLAINTIFF-APPELLANT WAS ENTITLED TO HAVE ANY ALLEGATION OF AN INTENTIONAL TORT HEARD BEFORE A JURY.

D. DEFENDANT-RESPONDANT WAS NOT PRECLUDED ON ANY THEORY OF INTERSPOUSAL TORT IMMUNITY FROM BRINGING A SEPARATE CAUSE OF ACTION.

POINT 11

THE TRIAL COURT ABUSED ITS DISCRETION AND ERRED IN ITS DECISION TO AWARD THE DEFENDANT-RESPONDANT ATTORNEY'S FEES IN THE AMOUNT OF \$2,000.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN ITS DECISION TO AWARD A LUMP SUM PAYMENT OF \$5,000 TO DEFENDANT-RESPONDANT TO COMPENSATE HER FOR FUTURE MEDICAL EXPENSES NECESSARY TO RELIEVE HER PAIN AND SUFFERING.

A. THE TRIAL COURT HAS JURISDICTION TO MAKE ORDERS IN RELATION TO PROPERTY, THE PARTIES AND THE MAINTENANCE OF THE PARTIES AS MAY BE EQUITABLE.

Pursuant to Utah Code Annotated Section 30-5-5, (1953, as amended)

when a decree of divorce is made, the court may make such orders in relation to the children, property, and parties, and the maintenance of the parties and children, as may be equitable.

This statute requires that the court has the authority to make orders in only limited areas specifically related to the divorce. The statute does not authorize the court to make awards for claims related to injuries to the body.

**B. AN AWARD FOR PAIN AND SUFFERING
CONSTITUTES A DAMAGE AWARD FOR TORTIOUS
CONDUCT OR PERSONAL INJURY AND IS NOT
APPROPRIATELY CONSIDERED IN AN ACTION FOR
DIVORCE.**

A tortious act has been defined as "the commission or omission of an act by one, without right, whereby another receives some injury, directly or indirectly, in person, property, or reputation." 74 AmJur 2d Torts Section 1. "The phrase 'personal injury' denotes primarily an injury to the body of a person. And a personal injury, whether administered intentionally, wantonly, or by negligence, constitutes a tort." 74 AmJur 2d Torts Section 2.

In this case the Defendant-Respondant made allegations that she had been physically injured by Plaintiff and Plaintiff denied all such allegations. By definition an injury such as that for which Defendant Respondant complained and ultimately received an award is a tort. The trial court, in its Memorandum Decision, ruled that Defendant-Respondant had been injured on or about April 1, 1960 and on the basis of that injury, an alleged intentional tort, determined that she should be compensated for her pain and suffering. (Memorandum Decision July 20, 1982 P. 2)

As has been previously stated, the trial court is limit-

to statute (see Argument Point 1A above) as to the areas it covers when making an order in a divorce. An award for tort as part of a decree of divorce is not specifically delineated and is not appropriate under any circumstance.

As further evidence that the trial court awarded on the basis of a tort is the fact that a normal part of damages for a tort or personal injury is represented in the form of pain and suffering.

Generally speaking, and as in any tort action, recovery in a personal injury action may be had for all natural and proximate consequences of the defendant's wrongful act or omission, such as pain and suffering (including future pain and suffering). . . Compensation may be had from a wrongdoer for any personal injury which immediately results from his act and for any consequential injuries directly traceable to the wrong done and arising without an intervening agency and without fault of the injured person himself. 22 AmJur 2d Damages Section 85.

C. THE PLAINTIFF-APELLANT WAS ENTITLED TO HAVE ANY ALLEGATION OF AN INTENTIONAL TORT HEARD BEFORE A JURY.

On the 12th of May, 1982, in the middle of the divorce proceedings, Defendant-Respondant attempted by motion to amend her complaint for divorce to include an intentional tort for battery. The honorable Judge Larry Keller requested counsel to appear on his on the issues of law. On June 4, 1982 at the commencement of the last day of trial he denied Defendant-Respondant's motion and stated as follows:

In an assault and battery action, had it been filed independent of a divorce action, for in-

states, "In particular, when a plaintiff brings an action in a court of equity, the court is not allowed simply to say that the plaintiff is to have that an assault and battery action could be combined in an action in domestic relations, what we would be doing would be sitting with our hat both as a court of law and as a court of equity, and I just don't know of any precedence for that. I think I have to sit as a court of equity only.

It is for that reason that the court denies the motion to amend the complaint to allow for an additional cause of action. (Transcript June 4, 1962 Volume I P. 6.)

Utah Code Annotated 78-21-1 (1953 as amended) states with respect to the rights of individuals to jury trials as follows:

In actions for recovery of specific real or personal property, with or without damages, or for money claimed as due upon contract or as damages for breach of contract, or for injuries, an issue of fact may be tried by a jury, unless a jury trial is waived or a reference is ordered. (emphasis added)

The right to a trial by jury is fundamental to our democratic society and has been incorporated in our system since the early colonists. It is a right which deserves to be guarded jealously by the courts.

In successfully objecting to Defendant-Respondant's motion to amend the counterclaim, the Plaintiff-Appellant assumed that he did not have to defend on the issue of an intentional tort. Because the court subsequently awarded a damage award for pain and suffering Plaintiff-Appellant was essentially deprived of his opportunity to request a trial by jury on the issue of the personal injury. Plaintiff-Appellant's argument remains of any

... (see transcript June 4, 1982 Volume 2 p. 56) were
... court sitting in equity and not by a jury of his
... .

... additionally, in personal injury matters the award
should be determined by a jury. "The amount to be awarded is
therefore largely a question for the jury, to be determined by it
in view of the facts and circumstances of each particular case,
and wide discretion is usually left to the jury in determining
the amount of the award." 22 AmJur 2d Damages Section 86. The
determination of the award should then be based on all of the
factors and circumstances of the case as considered by a jury.

D. DEFENDANT-RESPONDANT WAS NOT
PRECLUDED ON ANY THEORY OF
INTERSPOUSAL TORT IMMUNITY FROM
BRINGING A SEPARATE CAUSE OF ACTION.

... in defining a new or separate cause of action the Utah
supreme Court in Hartford vs. Clegg, 135 P.2d 919 (Utah 1943)
... stated that nothing more is meant than that the defendant is
not required to answer to a wholly different legal liability or
obligation from that originally stated. In the present case, an
intentional tort represents a separate cause of action which
creates different liabilities and obligations from those allowed
... in divorce.

... of interspousal tort immunity has
... precluded tort actions against a spouse. That
... no longer exists in Utah. Pursuant to Stoker v. Stoker,
... (Utah 1980) the Utah supreme Court determined that

the doctrine of inter-spousal tort immunity did not hold where in that case the Plaintiff's action was for personal injuries which were alleged to have been intentionally inflicted and suffered at the hands of the Defendant prior to the divorce of the parties. In that decision, the court cited the Utah Married Women's Act, as found in U.C.A. Section 30-2-4 (1953 as amended) and stated that:

The statute authorizes her to prosecute and defend all actions for the preservation and protection of her rights and property as if unmarried.

Additionally, the Court went on to say that:

To read into our Married Women's Act a proscription against a wife suing her husband, would be to construe it so strictly as to add a provision which the legislature did not put there. Stoker v. Stoker, 616 P.2d 590 (Utah, 1980) at 591.

It is on this basis that the Defendant-Respondant had a civil action in tort against the Plaintiff-Appellant. That cause of action raised for an intentional tort was raised in this matter by motion for amendment but because it represented a separate cause of action and was appropriate for a jury, Defendant-Respondant's motion was denied. Despite the fact that no prayer for damages, either compensatory or punitive was before the Court, the Court wrongfully awarded pain and suffering damages for an intentional tort.

POINT 11

THE TRIAL COURT ABUSED ITS DISCRETION AND ERRED IN ITS DECISION TO AWARD THE DEFENDANT-RESPONDANT ATTORNEY'S FEES IN THE AMOUNT OF \$2,000

In the instant case, the Plaintiff-Appellant husband testified that he did not work during the marriage and was in fact engaged full time as a student during the entire time of the marriage up through and including the time of trial. (Transcript April 20, 1982 p. 14) His financial affidavit which is part of the record and his testimony indicated that his only source of income was a monthly loan which he received from his mother and dividends from certain stocks, both of which were used for household expenses. (Transcript April 20, 1982 pp. 14-16)

The Defendant-Respondant wife on the other hand, worked during the marriage and submitted a financial affidavit which indicated total monthly income of \$1,002.00 per month. Additionally, the record contains no testimony or presentation of facts which establish the Defendant-Respondant's need for attorney's fees.

While Utah Code Annotated 30-3-5 (1953 as amended) gives the trial court broad discretion in awarding attorney's fees, the Utah Supreme Court has set certain limitations and guide lines. Essentially all awards for attorney's fees must be based on reasonableness and on a demonstrated need.

The standard is set in Kallas v. Kallas, 614 P.2d 641 at 646 which states as follows:

However, a proper determination of whether fees should be awarded and the amount, if any, cannot be made without an examination of the facts. Anderson v. Anderson, supra. Because there was no

presentation of facts establishing petitioner's financial need accompanying the motion, the award was inadequately supported. In the Kullas case, the subject matter was a petition

for modification, but the applicable principal, that a factual presentation is necessary to determine the need for attorney's fees, is still applicable.

The Court has held in other cases that criteria such as need and reasonableness are essential considerations in the determination of attorney's fees. In Kerr v. Kerr, 610 P.2d 1380 at 1384 (Utah, 1980) the Court said:

The decision to make such an award, together with the amount thereof, rests, primarily with the sound discretion of the trial court. As with the award of alimony, however, an award of attorneys' fees must rely as the basis of evidence of need and reasonableness. (emphasis added)

In the present case, there was no presentation of facts or evidence showing any need for attorney's fees on behalf of Dependant-Respondant.

The general legal literature supports this conclusion and also adds the husband's ability to pay as an essential consideration upon which to base attorney's fees.

Amour reports as follows:

When, however, the husband requests a hearing on the question of fees the court must grant a hearing; the wife must sustain her application by evidence of her needs, the husband's ability to pay, and the items of service for which an award is to be made, and the husband may present evidence in opposition. 24 Amour on Divorce and Separation, Section 571 at P. 094.

thus, where it does not appear that the wife has been hampered in making her defense or is financially unable to pay expenses necessarily incurred, the decision of the lower court denying an allowance will be affirmed. . . Moreover, no matter how clearly the necessities of the wife may appear, an allowance will be set aside on appeal where it was made in the total absence of proof as to the financial means and ability of the husband, who by answer had put them in issue. 24 AmJur 2d Divorce and Separation Section 573 at P. 695-696.

In the present case, the Defendants-Respondants failure to support her request for attorneys fees with a showing of need and the Plaintiff/Appellant's demonstrated inability to pay attorneys fees do not justify an award of attorney's fees to Defendant-Respondant.

CONCLUSION

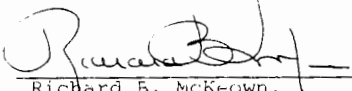
The trial court has abused its discretion in awarding damages for an intentional tort under the umbrella of an action in divorce. It has likewise awarded attorney's fees in the absence of any showing of need on the part of Defendant-Respondant or of any ability to pay on behalf of Plaintiff-appellant.

For the reasons set forth above, these two awards should be reversed.

DATED this 10 day of JUNE, 1965.

Respectrully submitted,

PARKER, McKEOWN & McCONKIE

By: 
Richard B. McKeown,
Attorney for Plaintiff-
Appellant

DCC53:25

Case No. 19018
District Court No. D80-3212
Salt Lake City, Utah 84111
June 2, 1983

IN THE SUPREME COURT OF THE STATE OF UTAH

HOWARD HITCHINGS WALTHER,
Plaintiff-Appellant,
vs.
RICHARD B. MCKEOWN,
Defendant-Respondent.

ADDENDUM OF NEWLY
UNCOVERED CASE
U.R.C.P. 75(p)(3)
Case No.: 19018
District Court No.: D80-3212

Pursuant to Rule 75(p)(3) Richard B. McKeown of Parker, McKeown and McConkie, attorneys for Plaintiff and Appellant, Howard Hitchings Walther hereby submit that a newly uncovered and reported Utah Case be considered as part of the record in this matter.

The case which has a bearing in this matter is captioned as follows:

Carol Jean Shaw Lord,
Plaintiff and Appellant,
vs.
Elijah Shaw, Jr.
Defendant and Respondent.

Case No. 17993

Case Filed:
June 2, 1983

FILED

JUN 2 1983

... for Plaintiff and Appellant has been ...
... Pacific Digest citation number has ...
...
...

... counsel is directed to design-
... to which the newly uncovered case applies.
... newly uncovered case is directly responsive
... of Plaintiff and Appellant's brief rela-
... of tort damages in a divorce action. In the
... above cited, the court made the following
...:

As an additional ground for the summary judgment
against the Plaintiff, the trial court held that
the Plaintiff was barred by res judicata from
suing her ex-husband for torts which occurred during
the marriage, because his liability for any tort
should have been litigated in the divorce action.
We do not comment on this ruling other than to observe
that actionable torts between married persons should
not be litigated in a divorce proceeding. We believe
that divorce action will become unduly complicated
if their trial and disposition in torts can be or
must be litigated in the same action. A divorce
action is highly equitable in nature, whereas the
trial of a tort claim is at law and may well in-
volve as in this case, a request for trial by
jury. The administration of justice will be better
served by keeping the two proceedings separate.
Utah Bulletin, last complete paragraph
...

... this Court has determined that the con-
... in a divorce action is inappropriate.

... of December, 1983.

Respectfully submitted,


Richard B. McKeown

Mailing Certificate

I hereby certify that I mailed a true and correct copy of the document foregoing to Frank M. Wells, Attorney at Law, 200 South Main Street, Ogden, Utah 84401 this 14th day of December, 1961, first-class, postage prepaid.

Barbara J. Matthews

11/15/61