



# THE ENFORCER

BY DAVID FINDLING  
THE FINDLING LAW FIRM

## Fighting Back-Tort Claims in Divorce

What can you do for a client who has been physically battered and has garnered the courage to leave an abusing spouse? Securing a personal protection order, a divorce and compassionate counseling top the list. But also consider that for those clients who so desire, the law empowers your client to sue for divorce *and* tort – all in one action.

It's hard to imagine now, but back when the common law ruled the land, marriage itself barred tort suits between spouses.<sup>1</sup> Through legislative enactment, Michigan abrogated this draconian doctrine.<sup>2</sup> This change is consistent with Michigan's permissive joinder rule allowing a claimant to "join as either independent or alternate claims as many claims, legal or equitable,"<sup>3</sup> that she has in one action (limited by the applicable statute of limitations). In Michigan, the period of limitations is five years for an action to recover damages for injury to a person or property brought by a person who has been assaulted or battered by a spouse or former spouse.<sup>4</sup>

Tort counts, whether for assault, or fraud, or other torts, must be plead in a manner that ensures independence from the "breakdown of the marriage relationship"<sup>5</sup> requirement in divorce complaints. One court concluded that a party could not maintain a "love fraud" count in a divorce action.<sup>6</sup> In this case, the tort involved fraudulently inducing the plaintiff to marry the defendant, which was the very reason for the marital breakdown.<sup>7</sup>

Tort claims are permitted in divorce cases, so long as the claims are not "bound so intimately with the breakdown of the marriage itself."<sup>8</sup> Therefore, make sure the facts that support the divorce count – the breakdown of the marriage – are segregated from the tort claims. Do not plead that the breakdown of the marriage resulted from the abuse (although that may be an obvious reality). This is unnecessary and could prove detrimental to joinder.

If you do not want to intermix the divorce proceedings with tort claims, your client can sue in tort after the court enters the divorce judgment. However, if you travel down this path, proceed with caution in the divorce case as potential traps exist.

While proceeding in the divorce action, be cognizant of the effects of collateral estoppel. It can help your client in two ways. First, if possible, request that the divorce court determine that your client's spouse battered or assaulted her. This determination estops the abusing spouse from denying the injury in a subsequent suit.<sup>9</sup> Second, consider that consent judgments are not given collateral effect.<sup>10</sup> A property settlement in the divorce proceeding *may* prevent the abusing spouse from raising a collateral estoppel argument. However, if the abuser's fault is taken into account in dividing the marital property,<sup>11</sup> he can raise this "set-off" as an affirmative defense in the subsequent tort action.<sup>12</sup>

Once your client obtains a judgment in tort, this debt may follow her ex-spouse until satisfaction or death (provided the judgment is appropriately renewed). His net disposable earnings may be garnished subject to federal limits.<sup>13</sup> Further, if the offending spouse seeks relief in Bankruptcy Court, he will discover that his tort liability arising out of abuse of your client is not dischargeable. The Bankruptcy Code excepts from discharge "all liabilities resulting from the willful and malicious act" of the debtor.<sup>14</sup>

Not every situation involving spousal abuse lends itself to a favorable tort case. Obviously, make sure that the defendant is collectible. After all, you want to collect money for your client, not judgments. Balance that with the understanding that things change; being uncollectible at present does not mean he will be uncollectible in the future.

## Endnotes

1. Bilyeu, *Joining Interspousal Personal Injury Tort Claims with Divorce Actions*, 30 Idaho L Rev 859 (1994).
2. *Hosko v Hosko*, 385 Mich 39, 187 NW2d 236 (1971).
3. MCR 2.203(B).
4. MCL 600.5805(11).
5. MCL 552.6



6. *Gubin v Lodisev*, 197 Mich App 84, 494 NW2d 782 (1992)
7. *Id.*
8. *Id.* citing *McCoy v Cooke*, 165 Mich App 662, 419 NW2d 44 (1988), and *Goldman v Wexler*, 122 Mich App 744, 333 NW2d 121 (1983).
9. *Id.*
10. *Id.*
11. *See Davey v Davey*, 106 Mich App 579, 308 NW2d 468 (1981)
12. *Goldman*, *supra*.
13. *See* 15 USC 1673.
14. *In re: Nabil Hamama*, 182 BR 757 (1995) citing 11 USC 523(6).

