IN THE SUPREME COURT

CASE NUMBER: 79,463
FLA. BAR NO. 375111

BERES WAITE,

Petitioner,

vs.

JOYCE WAITE,

Respondent.

ANSWER BRIEF OF RESPONDENT, JOYCE WAITE

Respectfully submitted,

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I. INTRODUCTION

Petitioner seeks review of an opinion of the Third District Court of Appeal which holds that the doctrine of interspousal immunity does not bar an action by Respondent against the Petitioner for personal injuries arising out of an incident which occurred on July 2, 1984. The Third District Court of Appeal found that the policy reasons underlying the doctrine of interspousal immunity do not apply to the factual circumstances of this case, following Sturiano v. Brooks, 523 So.2d 1126 (Fla. 1988).

The parties will be referred to by name or as they appeared in the trial court. The Record will be referred to as (R. 1-150.) All emphasis will be the writer's unless otherwise indicated.

II. STATEMENT OF THE FACTS

This suit arose out of an incident which occurred on July 2, 1984. At the time of the incident the Defendant, BERES WAITE, and the Plaintiff, JOYCE WAITE, were married, and resided in the same household. (R. 37.) There were no children of their marriage. MRS. WAITE by a previous marriage had a daughter, Joy McRae. Joy was married to James McRae, and at that time Joy was six months pregnant. Joy also had a daughter, not of her marriage with James McRae, named Marcia McKay, who was 8 years old. (R. 37.)

Joy, James and Marcia were visiting Plaintiff and Defendant at their house on the date of the incident. On the evening of July 2, 1984, without provocation or warning, the Defendant attacked Plaintiff, Joy, James, and Marcia, with a machete, inflicting severe, permanent and disfiguring injuries. (R. 36; 57-66; 86-91.) Mrs. WAITE suffered severe lacerations and fractures: to her

left arm, including a slicing fracture through her left ulna; to her left leg, including a compound fracture through her left tibia and a compound fracture of her left fibula; and to her neck. Plaintiff's lower leg was nearly hacked off. (R. 37; 65.)

The attack against Mrs. WAITE occurred in the kitchen. Joy McRae was in the living room, heard the screams of her mother, and went to the kitchen entrance. She saw the Defendant striking her mother with the machete and asked him to stop. (R. 59-61.) The Defendant then turned on Joy, striking her repeatedly with a machete, and inflicting lacerations to her scalp, both hands and wrists, and severing four of the fingers from her left hand. (R. 37; 61-63; 68-70.)

James McRae and Marcia McKay, along with the McRaes' infant son, were in one of the bedrooms watching television. James had fallen asleep. (R. 67; 75-76.) Marcia heard the screams of her mother and ran out the bedroom door, which entered into the main hallway. (R. 76-77; 86-88.) She was confronted by the Defendant who was holding the machete over his head. As he began to approach her, she turned and ran back towards the bedroom. James grabbed her by the arm, pulled her into the bedroom, and deflected a descending blow of the machete, apparently meant for Marcia. (R. 77-78; 88-91.)

James wrestled with the Defendant, and eventually subdued him. (R. 78-81.) James suffered numerous lacerations, but none as serious as Joy McRae's or Mrs. WAITE's. (R. 90-91.) The Defendant was arrested that evening. At the time of the incident, the

Defendant was 49 years old. (R. 98.)

The Defendant was tried and convicted in Dade County Circuit Court, Case Number 84-15550, on four separate counts resulting from this incident: two counts of attempted murder, one count of aggravated battery, and one count of aggravated assault. (R. 97-98; 101.) At the trial, Mrs. WAITE, Joy McRae, James McRae and Marcia McKay testified as witnesses called by the prosecution. (R. 38.) The Defendant was sentenced to 27 years in state prison, without parole. (R. 98; 101.)

After the incident, the Plaintiff and Defendant were divorced. (R. 38.) Since the divorce proceedings, Mrs. WAITE has not seen the Defendant, and has no intention or desire to see him. (R. 38.)

The Defendant had a homeowner's insurance policy through Southeastern Fire Insurance Company which included liability coverage with limits in the amount of $300,000 per occurrence. That policy provides coverage for this incident.[1] (R. 38; 48.)

As a result of the injuries they suffered, Joy and James McRae filed suit against BERES WAITE in 1985. That suit, McRae v. Waite, Dade County Circuit Court Case Number 85-3730 (12), was resolved

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[1] As discussed infra, settlements were effected through that insurance coverage on behalf of Joy McRae, James McRae and Marcia McKay. Moreover, as noted by Petitioner (Initial Brief, p. 6.), after entry of the summary judgment the ongoing declaratory judgment action brought by the insurer in federal district court, captioned Southeastern Fire Insurance Company v. Waite, et al., United States District Court, Southern District of Florida, Case Number 88-1562 CIV-SCOTT, was dismissed by summary judgment in favor of BERES WAITE and JOYCE WAITE. A copy of the district court's memorandum opinion was attached to Plaintiff's Initial Brief filed with the Third District Court of Appeal, and is attached as part of the appendix to this brief. (See, A. 1-7.)

by settlement on the first day of trial, by payment from Southeastern Fire Insurance Company of $337,500.00. (R. 48.) In 1988, Marcia McKay, through her mother, Joy McRae, also sued BERES WAITE. That suit, McKay v. Waite, Dade County Circuit Court Case Number 88-27972 (5) was resolved by settlement during trial on March 9, 1989, by payment from Southeastern Fire Insurance Company in the amount of $100,000. (R. 37-38; 51-53; 117.)

Although the Defendant has, throughout all proceedings, denied liability as well as any intent to injure, the Defendant has also opposed the various claimants from recovering under his insurance policy. For instance, in the first declaratory judgment action filed by Southeastern Fire Insurance Company during the pendency of Joy and James McRae's action, the Defendant filed a pro se answer seeking a declaration of rights finding that no coverage existed for the injuries sustained by the McRaes. (R. 94-95.)

III. STATEMENT OF THE CASE

Under the Complaint, Mrs. WAITE sought recovery from the Defendant alleging negligence and assault and battery. The complaint further alleged that the Defendant was insane at the time of the incident. (R. 1-3.) The Defendant initially moved to dismiss on the basis of the doctrine of interspousal immunity, (R. 4.), which was denied. (R. 17.) The Defendant's answer generally denied all material allegations, and raised as an affirmative defense the doctrine of interspousal immunity. The Defendant also affirmatively alleged that he was insane at the time of the incident. (R. 18-19.)

Defendant thereafter moved for summary judgment, relying solely on the fact of the marriage at the time of the incident and the doctrine of interspousal tort immunity. (R. 21-24; 114-123.) The facts as established in the trial court by Mrs. WAITE were not contested or contradicted by Defendant. (R. 21-24; 114-123.) Mrs. WAITE argued that Sturiano v. Brooks, 523 So.2d 1126 (Fla. 1988) was controlling, and that the policy considerations supporting the doctrine of interspousal tort immunity did not apply in this case. (R. 25-35; 114-123.) The Defendant, however, argued that a case-by-case determination was inappropriate, and asserted that Krouse v. Krouse, 489 So.2d 106 (Fla. 3d DCA), rev. denied, 492 So.2d 1333 (Fla. 1986) was controlling.

The trial court agreed with the Defendant, did not analyze the policy considerations underlying the doctrine of interspousal immunity as they apply to the facts of this case, and ruled in Defendant's favor.

The Third District Court of Appeal reversed, finding that the policy considerations which could justify application of the doctrine of interspousal immunity did not apply under the facts of this case.

> We find no legal impediment to holding that Mrs. Waite enjoys no lesser status before the court than do the other injured family members and may recover to the extent of available insurance. The intentional tort was so extreme that it eradicated the policy considerations that might justify the barring of claims. The Sturiano decision abrogated immunity to the extent of insurance coverage in cases lacking the policy considerations it set forth.

(R. 129.) (Footnotes omitted.)

The Third District previously had reviewed those facts which it felt established that the policy reasons discussed in Sturiano were not applicable:

> Here, the claim would neither create disharmony nor support collusion. Barring Mrs. Waite's action will not preserve or promote Waite family harmony. Mr. Waite's egregious conduct was so extreme that his victim would be unlikely to conspire with him for the purpose of defrauding an insurance company. Furthermore, there has been no suggestion of collusion in the record. Thus, the policy reasons in support of the doctrine do not exist.

(R. 127-28.)

Finally, the Third District noted that the policy of the State of Florida now permits suit by one spouse against another for battery. (R. 129-30.) Although the court did not base its holding on that statute since the incident predated its effective date, the court recognized the policy behind the statute. (R. 129-30.)

The Third District denied Defendant's motion for rehearing, but certified the following question as one of great public importance:

> Whether Sturiano v. Brooks, 523 So.2d 1126 (Fla. 1988) permits a claim by a former spouse for battery against the other spouse, committed during the marriage, and prior to the effective date of section 741.235, Florida Statutes (1985), where the claim is limited to the extent of insurance coverage, the spouse was convicted of attempted first degree murder stemming from the battery, and the egregious nature of the injuries demonstrates that the policy considerations enunciated in Sturiano-"fear of disruption of the family or other marital discord, or the possibility of fraud or collusion"-were not present when the battery was committed?

(R. 149-150.)

IV. SUMMARY OF ARGUMENT

The trial court incorrectly granted summary judgment on the basis of interspousal tort immunity, because the policy reasons which underlie that doctrine are not applicable to the facts of this case. This Court's opinion in Sturiano v. Brooks, 523 So.2d 1126 (Fla. 1988), represented a change in Florida law in the application of the doctrine of interspousal tort immunity. This Court rejected the foundation of the doctrine - that the marriage of two people creates a unified entity of one singular person - as "outdated" and no longer a valid reason to bar actions. Instead, Sturiano held that the doctrine applies only where the other policy considerations which support the doctrine exist under the facts of the specific case under review. As demonstrated by the Record, and as determined by the Third District Court, none of those policy considerations exist in this case, and therefore, the doctrine of interspousal immunity does not bar Mrs. WAITE's action.

The Third District Court correctly analyzed the holding of Sturiano v. Brooks, and correctly applied it to the facts of this case. Thus, the Third District Court correctly reversed the summary judgment entered in favor of Mr. WAITE. The opinion of the Third District Court therefore does not conflict with that of Sturiano v. Brooks, nor does it conflict with any opinion of any of the other district courts of appeal issued post-Sturiano.

The specific question before this Court will probably never again be raised before any of the appellate courts of this State,

because of the legislature's abrogation of the doctrine as it applies to battery, through Section 741.235, Florida Statutes (1985). Plaintiff therefore submits that this Court need not exercise its discretionary jurisdiction to review the opinion of the Third District Court of Appeal in this matter because that opinion is not in conflict with the decisions of this Court or any other district court of appeal, and insofar as this issue may be one of great public importance, the legislature has enacted legislation which effectively answers the certified question in the positive.

However, if this Court deems it appropriate to exercise its discretionary jurisdiction in this case, the certified question should be answered in the positive, and this case should be remanded back to the trial court for further proceedings. The facts of this case establish that the doctrine of interspousal immunity cannot bar Plaintiff's action, because the policy considerations do not apply. At the very least, the Defendant failed to establish the absence of a genuine issue of material fact concerning the applicability of these policy considerations.

Finally, if this Court believes it necessary to expand the holding in Sturiano to permit Mrs. WAITE to seek compensation from the Defendant, Mrs. WAITE would request that this Court abolish the doctrine of interspousal immunity or abrogate it as applied to the facts of this case.

V. ARGUMENT

A. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT WHERE THE FACTS ESTABLISH THAT DEFENDANT IS NOT ENTITLED TO PROTECTION FROM THE DOCTRINE OF INTERSPOUSAL IMMUNITY AS A MATTER OF LAW.

1. STURIANO V. BROOKS REQUIRES AN ANALYSIS OF THE APPLICABILITY OF THE UNDERLYING POLICY CONSIDERATIONS.

As of 1991, 32 states had abolished the doctrine of interspousal tort immunity, and 15 other states had abrogated the doctrine for intentional or negligent torts. (R. 135.) The Restatement of Torts (Second), Section 895F (1979), repudiates the doctrine. Florida's legislature abrogated the doctrine as to battery in 1985. And, in 1988, this Court held that the doctrine of interspousal tort immunity was waived to the extent of applicable liability insurance, when the policy reasons underlying the doctrine do not exist.

Here, the trial court entered summary judgment in favor of the husband-Defendant, solely on the basis of the parties' marriage at the time of the incident, without looking to the applicability of the policy reasons which underlie the doctrine of interspousal immunity. Based on Sturiano, the Third District Court of Appeal reversed the summary judgment, holding that the underlying policy reasons were not applicable under the facts of this case. (A copy of the district court's opinion is attached as part of the appendix.)[2] In seeking review of the Third District Court of

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[2] The dissenting opinion distinguished Sturiano on the basis that it involved a negligent tort, where this case involves an intentional tort. Nevertheless, the dissent called for abrogation of the doctrine. Although Plaintiff agrees that the doctrine of

Appeal's opinion, and reinstatement of the summary judgment, Defendant in essence asks this Court to ignore--or at the least strictly limit--the language and holding of Sturiano. Without reviewing any of this Court's reasoning in Sturiano concerning the underlying policy considerations for the doctrine, Defendant argues that Sturiano did not abrogate the doctrine of interspousal immunity, and that under Sturiano the doctrine of interspousal immunity is viable where both spouses are still alive.

The Defendant-husband implicitly asks this Court to recede from its holding in Sturiano v. Brooks. Despite our legislature's pronouncement of the public policy of this State by abrogating the doctrine of interspousal immunity for the tort of battery, despite the weight of opinion of the other states abrogating or partially abrogating the doctrine, and despite the clear language of Sturiano, the Defendant-husband asks this Court to prevent his Plaintiff-wife from recovering from him based upon a doctrine which has no rational application under the circumstances surrounding this case. Sturiano v. Brooks is controlling here, and requires reversal of the final summary judgment. This Court should affirm the opinion and holding of the Third District Court of Appeal.

In Sturiano, the plaintiff, Mrs. Sturiano, was injured when a car in which she was a passenger struck a tree. Her husband,

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interspousal immunity should not bar this action, Plaintiff respectfully disagrees with the dissenting opinion's method of distinguishing Sturiano. If the doctrine would not bar an action for a negligent tort where the underlying policy considerations are not applicable, then the doctrine should not bar an action for an intentional tort under the same circumstances.

Vito Sturiano, was the driver of the car and was killed in the collision. Mrs. Sturiano brought an action against his estate alleging negligence. She received a jury verdict, with a subsequent reduction of that verdict to the amount of applicable insurance coverage. On appeal, the Fourth District Court held that the doctrine of interspousal immunity did not bar the action, reasoning that the traditional policy reasons for maintaining the doctrine simply did not apply. 523 So.2d at 1127. The Fourth District Court certified the issue, and this Court accepted jurisdiction.

After review of the facts, Sturiano began its analysis with a brief review of the history of the doctrine, noting that until this decade, the doctrine had barred actions by one spouse against the other, but that "inroads had been made eroding the traditional basis for upholding the doctrine."[3]

Looking to the policy reasons underlying the doctrine, Sturiano held that the foundation of the doctrine, that the marriage of two people creates a unified entity of one singular person, was no longer valid. "Despite dicta to the contrary and prior opinions of this Court, we believe that this outdated policy consideration can no longer be regarded as a valid reason to bar actions." Id. Quoting the dissenting opinion in Raisen v. Raisen, 379 So.2d 352, 357 (Fla. 1979), this Court held: "The common law unity concept is no longer a valid justification for the doctrine

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[3] The opinion cited as examples Dressler v. Tubbs, 435 So.2d 792 (Fla. 1983) (wrongful death action by wife's estate against husband's estate was not barred); Ard v. Ard, 414 So.2d 1066 (Fla. 1982) (abolishing interfamily, but not interspousal, immunity to the extent of liability insurance). 523 So.2d at 1127, n.2.

of interspousal immunity." 523 So.2d at 1128.

Sturiano, however, noted that the doctrine **could** apply when the other policy reasons existed under the facts and circumstances of the specific case in review:

> Several other reasons to bar interspousal actions, however, still exist under certain conditions. Domestic tranquility, peace and harmony in the family unit, and the possibilities of fraud or collusion are the most frequently cited policy reasons for maintaining interspousal immunity. In cases where these considerations apply, the doctrine of interspousal immunity shall continue to bar actions between spouses.

Id. Thus, the doctrine applies **only** when facts and circumstances of the particular case under consideration support the underlying policy reasons for the doctrine.

Plaintiff, however, argues that Sturiano did not overrule Snowten v. United States Fidelity and Guaranty Company, 475 So.2d 1211 (Fla. 1985).[4] What Plaintiff fails to point out is that Sturiano analyzed the application of the doctrine to the facts in Snowten. There, the injured plaintiff and the negligent defendant were both living, and apparently still married. Sturiano noted there was reason to believe collusion would be a possibility, and further that the specter of a lawsuit by one spouse against the other would be disruptive to the family, causing significant disharmony within the family unit. Even assuming the absence of fraud, this Court believed that the lawsuit would only serve to promote marital discord. 523 So.2d at 1228.

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[4] The question certified to this Court in Snowten was: "Is the doctrine of interspousal immunity waived, to the extent of available liability insurance, when the action is for a negligent tort?" 475 So.2d at 1212.

In other words, Sturiano analyzed the facts present in Snowten, and determined that the underlying policy reasons supporting the doctrine of interspousal immunity were applicable. Thus, Sturiano held that Snowten was still valid under its facts. But, Snowten's blanket application of the doctrine of interspousal immunity necessarily was modified by Sturiano's holding.

The Defendant in essence asks this Court to ignore the plain language and import of Sturiano. As the Defendant does here, the defendant in Sturiano argued that the doctrine of interspousal immunity should continue without exception, regardless of the absence of policy reasons for doing so. 523 So.2d at 1128. Brooks contended that Snowten should control and interspousal tort immunity should apply in all actions between spouses to maintain consistency in law. Id. This Court disagreed: "We will not blindly adhere to a doctrine that has no application to these facts. To do so would promote injustice for the sake of expediency and consistency." Id.

> [W]e hold that when no such policy considerations exist, the doctrine of interspousal tort immunity is waived to the extent of applicable liability insurance.

Id.

2. APPLICATION OF THE FACTS TO THE UNDERLYING POLICY CONSIDERATIONS.

Sturiano calls for a case-by-case analysis of the applicability of those policy considerations which support the doctrine. The trial court did not conduct this analysis in entering summary judgment. The Third District Court conducted such

an analysis, finding that the policy considerations were not applicable to the facts of this case. These policy considerations are reviewed below.

a. Possibility of Fraud or Collusion.

Certainly, under the facts of this case, there is no possibility of fraud or collusion. This case involves a battery against the Plaintiff, with a machete, in which Plaintiff was horribly injured and almost killed. Plaintiff suffered a slicing fracture **through** the ulna of her left arm, a compound fracture **through** the tibia of her left leg, a compound fracture of her left fibula, and multiple lacerations to her arms, legs and neck. Plaintiff's lower leg was nearly hacked off. (R. 37; 65.) The Plaintiff's daughter, Joy McRae, lost four of the fingers of her left hand, among other serious injuries. Joy McRae's daughter, Maria McKay and her husband, James McRae, were also victims of the assault. The Defendant has previously indicated his position that the victims of this battery not be compensated. (R. 94-95.) That the Defendant-husband inflicted these injuries, unprovoked, is not seriously contested. There is no possibility of fraud or collusion here.

The Third District Court similarly concluded: "Mr. Waite's egregious conduct was so extreme that his victim would be unlikely to conspire with him for the purpose of defrauding an insurance company. Furthermore, there has been no suggestion of collusion in the record." (R. 127-28). Waite v. Waite, 16 FLWD 1433 (Fla. 3d DCA May 28, 1991) (footnote omitted).

b. Disruption of Marital Harmony

This policy consideration similarly does not exist under the facts of this case. The marriage was destroyed by the actions of the Defendant. There is **no possibility--no desire**--for reconciliation. This marriage is not "foundering", it is dead.

Mrs. WAITE loathes and fears the Defendant. Along with her daughter, Joy McRae, her stepson, James, and her granddaughter, Marcia McKay, Mrs. WAITE testified on behalf of the State at Defendant's criminal trial. The Defendant was sentenced to 27 years in prison, without parole. Mrs. WAITE has not seen the Defendant since the divorce, and does not want to see him. Although the Defendant did not actually die in the incident (as in Sturiano), the marital and family unit perished from the incident as surely as if he had. Under Sturiano, Mrs. WAITE's action cannot be barred based on the "possibility of disruption of martial harmony." This too is the conclusion of the Third District Court. 16 FLWD at 1433.

c. Disruption of the Family Unit, Domestic Tranquility and Peace and Harmony.

This policy consideration, just as the one above, does not apply to this case. The family unit, as it concerned the Defendant, was destroyed by the acts of the Defendant. There were no children of the marriage of Plaintiff and Defendant. Joy McRae was Plaintiff's daughter only. (R. 37.) Although Joy and her daughter were staying in the house at the time of the incident, they did not reside there. (R. 37.) Further, each of the other

three victims of the incident sued and recovered money damages from Defendant. (R. 37-38; 48; 51-53; 117.)[5] All four testified against the Defendant at his criminal trial. (R. 38.)

Mrs. WAITE's suit is the last of the four. The "family unit, domestic tranquility, peace and harmony" were long ago destroyed, and cannot be resurrected. Maintenance of this suit cannot disrupt that which does not exist. Mrs. WAITE's action against Defendant should not be barred on the basis of this policy consideration.

d. Applicability of Liability Insurance.

The Defendant, in his answer brief, argues that the availability of insurance coverage is irrelevant to the applicability of the doctrine of interspousal immunity, citing Snowten. (Answer brief, page 5.) To make this argument, Defendant ignores Sturiano's holding: "[W]e hold that when no such policy considerations exist, the doctrine of interspousal tort immunity is waived to the extent of applicable liability insurance." 523 So.2d at 1128.

Here, the Record establishes that the Defendant has insurance coverage in the amount of $300,000 per occurrence which provided coverage for this incident. The other victims of this incident have recovered under that policy. In total, these three other victims have been paid by Defendant's insurer $437,500.00 to settle their claims. As noted by Defendant, Mrs. WAITE won a summary judgment in the insurer's declaratory judgment action on the issue

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[5] In total, to these three victims of this incident, Southeastern Fire Insurance Company has paid $437,500.00 in settlement of their claims.

of coverage under the policy. (See, Initial Brief, page 6; A. 1-8).

Jumping off from there, Defendant apparently argues that Mrs. WAITE is not entitled to insurance coverage, and that it is not available, despite Mr. WAITE's insurer's previous settlements with the other victims, and the federal court's summary judgment. For instance, the Defendant argues that most policies include standard family exclusions, and that intentional torts are generally excluded from coverage. Defendant also argues that Plaintiff is taking inconsistent positions, suggesting that she is arguing here that Mr. WAITE's conduct was intentional and egregious, and arguing in federal court that his conduct was "benign" for purposes of providing coverage. (Answer brief, page 6.)

None of these arguments have any merit here. First, Plaintiff has never been inconsistent in her treatment of Mr. WAITE's conduct. The facts of this case are horrifying and extreme. Mr. WAITE took a machete and nearly hacked to death his wife, and his wife's daughter, Joy McRae. He attempted to do the same to Joy McRae's daughter, Marcia McKay, and James McRae. Mrs. WAITE suffered serious, disfiguring and life threatening injuries. But, Mrs. WAITE, just as the other victims of this incident, has never taken the position that Mr. WAITE was anything but insane at the time of this incident.[6] Similarly, Mr. WAITE has always taken the position that he was insane at the time of this incident. In fact,

[6] See Plaintiff's complaint, R. 3, paragraphs 15 and 16; the complaint of Joy and James McRae, R. 45, paragraph 12; and the complaint of Marcia McKay, R. 52, paragraph 11.

in his answer to the complaint, he alleged insanity as an affirmative defense: "Alternatively, as to Count I, Beres Waite was insane at the time and, therefore, can not be found guilty of an intentional tort." (R. 19, paragraph 6).[7]

Second, whether or not Mrs. WAITE is denied insurance coverage at some future time is irrelevant to this Court's determination of the applicability of the doctrine of interspousal immunity in this case. If there is no applicable insurance coverage, then under Sturiano, the doctrine would not be waived. This Court cannot determine the applicability of insurance coverage upon the record before it. Mr. WAITE's insurer decided to litigate that question in federal court, and Mr. WAITE should not be arguing the question of coverage here under any circumstances.[8]

Third, insurance coverage can be available to one guilty of an intentional tort where that one was insane at the time the tort was committed. See, Northland Insurance Company v. Mautino, 433 So.2d 1225 (Fla. 3d DCA 1983), rev. denied, 447 So.2d 887 (Fla. 1984); Arkwright-Boston Manufacturers Mutual Insurance Company v. Dunkel, 363 So.2d 190 (Fla. 3d DCA 1978); George v. Stone, 260 So.2d 259 (Fla. 4th DCA 1972); Preferred Risk Mutual Insurance

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[7] See also, R. 102, paragraph 5(d); R. 106-107.

[8] Since the language of the policy which provides coverage to Mr. WAITE is not of record, it would be difficult for this court to make any determination, even if appropriate, as to whether or not coverage is available.

Company v. Saboda, 489 So.2d 768 (Fla. 5th DCA 1986).[9] And, an insane person is liable for his torts, including the tort of assault and battery. See, e.g., Kaczer v. Marrero, 324 So.2d 717 (Fla. 3d DCA 1976); Jolley v. Powell, 299 So.2d 647 (Fla. 2d DCA 1974).

Thus, the question of available insurance coverage is relevant, and there is a fund of available and applicable insurance for this incident. The Third District Court of Appeal agreed in Plaintiff's analysis: "We find no legal impediment to holding that Mrs. WAITE enjoys no lesser status before the court than do the other injured family members and may recover to the extent of available insurance." 16 FLWD at 1433.

3. MRS. WAITE COULD NOT OBTAIN ADEQUATE REDRESS FOR THIS TORT AS PART OF THE DIVORCE PROCEEDINGS.

In pages 6 through 9 of his initial brief, Mr. WAITE essentially argues that any complaints Mrs. WAITE had arising from this incident should have been raised during the divorce proceedings. For instance, without any record support, Defendant argues that it is "presumed" that the court in the divorce proceedings considered this incident when directing the distribution of marital assets, and the allowance of alimony. (Initial Brief, page 7.) The Defendant again ignores the fact that there is a fund of available insurance coverage, and that Sturiano

[9] Landis v. Allstate Insurance Company, 546 So.2d 1051 (Fla. 1989) involving the question of whether coverage existed for the benefit of a child molester and allegations of "diminished mental capacity", did not overrule this precedent, nor did it deal with the interaction of an intentional acts exclusion clause and an insured's insane actions.

v. Brooks permits the wavier of the doctrine of interspousal immunity to the extent of available insurance coverage. Additionally, in light of Sturiano Mr. WAITE does not suggest the existence of any public policy grounds which would prevent a separate tort action here. The Defendant's conclusion, espoused without factual record support, does not bear scrutiny under the facts of this case. Defendant's argument that Mrs. WAITE should have looked to her dissolution proceedings to obtain compensation for the injuries caused in the subject incident is invalid under Sturiano, and the facts of this case. The Third District addressed this issue, and found Sturiano permitted this action outside of divorce proceedings. The Plaintiff's day in court is now.

A fair reading of Hill v. Hill, 415 So.2d 20 (Fla. 1982), demonstrates that the Court was trying to provide some avenue of relief for the injured victim while at the same time denying the victim the right to seek relief through a traditional tort action. Certainly, a divorce proceeding could not compensate Mrs. WAITE with the same type - or amount - of damages available to her through this action. And, even more importantly, a divorce proceeding could not distribute funds available through a liability insurance policy. Since Sturiano permits Mrs. WAITE to seek damages to the extent of available insurance coverage, the rationale behind the rule espoused in Hill is no longer valid. Mrs. WAITE should be permitted to seek compensation through this tort action.

4. PUBLIC POLICY IN FLORIDA MILITATES AGAINST APPLICATION OF THE DOCTRINE IN THIS CASE.

The public policy of this state is that for every wrong there is a remedy. See, e.g., Florida Public Utilities Company v. Wester, 7 So.2d 788 (Fla. 1942); Article I, Section 21, Florida Constitution. The policy of compensating one individual for injuries and damages caused by the tortious actions of another has its roots deep in our jurisprudence. See, generally, 55 Fla.Jur.2d, Torts, Sections 1-2. In furtherance of this policy, Florida's tort law has broadened significantly over the past 20 years. See, e.g., Hoffman v. Jones, 280 So.2d 431 (Fla. 1973) (adopting comparative negligence); West v. Caterpillar, 336 So.2d 80 (Fla. 1976) (adopting strict products liability); Ard v. Ard, 414 So.2d 1066 (Fla. 1982) (abolishing interfamily immunity to the limits of applicable liability insurance); Section 741.235, Florida Statutes (1985) (abolishing interspousal immunity for the tort of battery). Sturiano v. Brooks continues this trend.

Ard v. Ard waived the doctrine of parental immunity to the extent of the parents' available liability insurance. In Ard, this Court addressed and rejected one of the primary considerations raised in Hill v. Hill, 415 So.2d 20 (Fla. 1982), cited extensively by Defendant here: disruption of the family unit and depletion of the family resources.[10]

> When recovery is allowed from an insurance policy, the claimant will not force a depletion of the family assets

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[10] The Ard court also rejected "the possibility of fraud" as a sufficient policy consideration to permit the continued application of parental immunity. 414 So.2d at 1069.

> at the expense of other family members. As stated in Sorenson, rather than a source of disharmony, the action is more likely to ease the financial difficulties stemming from the injuries.

414 So.2d at 1068, 69. Sturiano implicitly adopted this rationale. Liability insurance coverage is available to the Defendant here.

Although Sturiano did not abolish the doctrine of interspousal immunity, it represents a marked change in the application of the doctrine. Sturiano recognized that the foundation of the doctrine, the common law unity concept, was no longer viable in today's society. Sturiano further recognized that the doctrine should not be applied where the other policy considerations underlying the doctrine do not exist. In handing down Sturiano, this Court recognized that it had the power--and the responsibility--to modify a common law rule "where great social upheaval dictates." Hoffman v. Jones, 280 So.2d at 435. There are few other areas of our society which have undergone greater change than women's rights and marriage. Sturiano recognized this change.

Florida's legislature also recognized this social change and enacted Section 741.235, Florida Statutes (1985), which abrogated the doctrine of interspousal tort immunity for the tort of battery. The public policy promulgated by this statute is that a spouse should not be permitted to shield himself from his intentional torts through the doctrine of interspousal tort immunity. This public policy is applicable in this case.

The public policy considerations against application of this doctrine, under the facts of this case, are strong and universally supported. Thus, the trial court erred in granting summary

judgment, because the facts and circumstances of this case demonstrate that the doctrine of interspousal immunity should not be applied.

5. THIS COURT SHOULD HOLD THAT, UNDER THE FACTS OF THIS CASE, THE DOCTRINE OF INTERSPOUSAL IMMUNITY DOES NOT APPLY, REGARDLESS OF THE APPLICATION OF INSURANCE COVERAGE.

Although the Court does not need to expand the holding of Sturiano to permit Plaintiff to proceed against the Defendant, there are no public policy grounds preventing this Court from abolishing the doctrine of interspousal immunity for the tort of battery. Florida's legislature has abrogated the doctrine of interspousal tort immunity for the intentional tort of battery. Section 741.235, Florida Statutes (1985). Although that statute does not act retroactively, this Court can look to the public policy behind the statute.

Additionally, for similar reasons, there should be no reason to prevent Mrs. WAITE from recovering whether or not there is insurance coverage. Again, there is no public policy grounds for denying her the ability to recover, particularly where Florida law permits any spouse injured after October 1, 1985 through a battery committed by the other spouse to recover regardless of the existence of insurance coverage.

Although the Defendant contends that his rights "vested", thus empowering him to turn away Mrs. WAITE's suit for damages through the shield of interspousal immunity, this Court--as it did in Sturiano--can modify a common law doctrine with retroactive effect. In other words, this Court can determine that the common law

doctrine of interspousal immunity does not bar Mrs. WAITE's action, regardless of the existence of insurance coverage.[11]

Judge Gerstein's dissent in this case, calling for the abrogation of the doctrine of interspousal immunity is compelling. Similarly, the dissenting opinions in Raisen v. Raisen, 379 So.2d 352 (Fla. 1979) and Bencomo v. Bencomo, 200 So.2d 171 (Fla. 1967), both seeking total abrogation of the doctrine, are well-reasoned, supported by the public policy of this State, and the weight of authority from our sister states. There is no compelling policy reason in this State which should permit one spouse to avoid liability to another spouse for the commission of a battery simply because of the existence of a marriage.

Thus, if this Court feels it necessary to further modify the doctrine of interspousal immunity to permit Mrs. WAITE to recover against Mr. WAITE, no case would be better suited for concluding that the doctrine of interspousal immunity should not be permitted to act as a bar to an action for the tort of battery. The doctrine of interspousal tort immunity should not be permitted to bar Mrs. WAITE's action here.

B. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT WHERE THE DEFENDANT DID NOT PROVE CONCLUSIVELY THE ABSENCE OF ANY GENUINE ISSUE OF MATERIAL FACT.

At the very least, the Defendant failed to meet his burden of proof to establish a basis for summary judgment. The sole fact

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[11] Plaintiff again wishes to make clear that she does not believe that this court must modify the existing law, under Sturiano, to affirm the Third District Court's reversal of the summary judgment.

adduced by the Defendant was the existence of the marriage of the parties. The Defendant did not contradict or contest any of the facts presented by the Plaintiff in opposition to his motion for summary judgment. Under Sturiano, a case-by-case analysis of the facts and circumstances involving the various policy considerations is required. Certainly, here, there are sufficient facts and circumstances of record which create a genuine issue of material fact on the applicability of the doctrine. The Defendant was not entitled to summary judgment, and therefore, the Third District Court of Appeal correctly reversed the summary judgment entered by the trial court.

VI. CONCLUSION

For the foregoing reasons, the Respondent, JOYCE WAITE, respectfully requests that this Court affirm the opinion of the Third District Court of Appeals, reversing the summary final judgment entered in favor of Petitioner, BERES WAITE, and remand to the trial court for trial on the merits.

Respectfully submitted,

TOUBY SMITH DEMAHY & DRAKE
Attorneys for Respondent
141 Northeast Third Avenue
Penthouse
Bayside Office Center
Miami, FL 33132
(305) 375-0900

By: /s/ Kenneth R. Drake
KENNETH R. DRAKE

VII. CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 30th day of APRIL 1992 to: **NORMAN M. WAAS, ESQUIRE,** Attorneys for Beres Waite, 1150 Courthouse Tower, 44 W. Flagler ST., Miami, FL 33130; **JAMES BLECKE, ESQUIRE,** Attorneys for Beres Waite, 19 W. Flagler Street, Suite 705, Miami, FL 33130; **FRANK ABRAMS, ESQUIRE,** 9450 Sunset Drive, Suite 200D, Miami, FL 33173.

TOUBY SMITH DEMAHY & DRAKE
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Penthouse
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Miami, FL 33132
(305) 375-0900

By: _____
KENNETH R. DRAKE

IN THE SUPREME COURT

CASE NUMBER: 79,463
FLA. BAR NO. 375111

BERES WAITE,

Petitioner,

vs.

JOYCE WAITE,

Respondent.

APPENDIX TO
ANSWER BRIEF OF RESPONDENT,
JOYCE WAITE

Respectfully submitted,

Kenneth R. Drake, Esquire
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Table of Contents

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NUMBER 88-1562 CIV-SCOTT

SOUTHEASTERN FIRE INSURANCE COMPANY,

Plaintiff,

vs.

BERES R. WAITE, and JOYCE WAITE,

Defendants.
_____/

FINAL JUDGMENT FOR DEFENDANTS, BERES WAITE AND JOYCE WAITE

Pursuant to this Court's Memorandum Opinion dated June 2, 1989 granting Defendant's Motion for Summary Judgment

IT IS ADJUDGED that final judgment hereby is entered against Plaintiff, SOUTHEASTERN FIRE INSURANCE COMPANY, in favor of Defendants, BERES WAITE and JOYCE WAITE, and that Plaintiff, SOUTHEASTERN FIRE INSURANCE COMPANY, take nothing by this action and that Defendants, BERES WAITE and JOYCE WAITE, go hence without day.

This Court reserves jurisdiction to award costs and attorney's fees upon appropriate motion.

DONE AND ORDERED IN CHAMBERS at Miami, Florida on this 26 day of June, 1989.

THOMAS E. SCOTT
UNITED STATES DISTRICT JUDGE

Copies mailed to:

All Counsel of Record.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 88-1562-CIV-SCOTT

SOUTHERN FIRE INSURANCE COMPANY,

Plaintiff,

vs.

BERES R. WAITE, JOYCE WAITE, MARCIA MCKAY, by and through her guardian and next friend, JOY MCRAE,

Defendants.

MEMORANDUM OPINION

This case presents an attempt by an insurance company to avoid coverage under a homeowner's insurance policy. This action is plaintiff's third suit against defendant Beres Waite and Joyce Waite. By this motion, defendant seeks summary judgment based on the doctrines of res judicata, collateral estoppel, waiver and Federal Rule of Civil Procedure 41. The Court finds that collateral estoppel precludes relitigation of this action. Therefore, the Court need not address the doctrine of res judicata, waiver and Federal Rule of Civil Procedure 41.

I. Facts

On March 16, 1982 Plaintiff Southeastern Fire Insurance Company ("Southeastern") issued a homeowner's policy to defendant Beres Waite ("Beres"). The policy period was effective from April 12, 1982 through April 12, 1985, and provided limits in the amounts of $300,000 per occurrence. On July 2, 1984, Beres injured his wife Joyce Waite, his daughter Joy McRae, and his son-in-law James McRae with a machete.

II. Procedural History

On September 20, 1985, Joy and James McRae filed suit against Beres Waite in Dade County Circuit Court, Case No. 85-37307 CA 12, seeking damages for the injuries sustained as a result of the machete attack. On December 17, 1985, Southeastern filed a Motion for Intervention and Complaint for Declaratory Relief, naming as defendants Beres Waite, Joy McRae, and James McRae. Southeastern sought a declaratory judgment determining that no coverage existed for the injuries sustained by Joy and James McRae. Specifically, Southeastern claimed that Beres's actions were excluded under the policy. The Court granted Southeastern's Motion for Intervention and thereafter participated in discovery.

However, on February 3, 1987, Southeastern filed its first Notice of Voluntary Dismissal. Immediately thereafter, on February 4, 1987, Southeastern filed its second suit for declaratory relief arising from the same machete attack. This second case was filed in the United States District Court for the Southern District of Florida (Case No. 87-0190 Civ Hastings), and also named Beres Waite, Joy and James McRae as the defendants. As in the previous state action, Southeastern claimed that the coverage under the policy did not apply to defendants' injuries resulting from the machete attack on the basis that Beres's actions were intentional.

In response to Southeastern's complaint, defendants Joy and James McRae alleged that Beres was insane at the time of the attack. Accordingly, his acts on July 2, 1984 were not intentional; and defendants were entitled to payment under the

homeowner's policy. On the day of the trial, Southeastern and the defendants entered into a settlement agreement, whereby Southeastern agreed to settle Joy and James McRae's claims for $337,500. The parties jointly moved the Court for an order dismissing the federal action with prejudice. The order was granted on August 31, 1987.

On June 24, 1988, defendant Joyce Waite filed the present case against Beres Waite in Dade County Circuit Court, Case No. 88-26956 CA 26, seeking damages for her injuries. Additionally, on June 30, 1988, defendant Marcia McKay, filed suit against Beres Waite in Dade County Circuit Court, Case No. 88-27972 CA 05, seeking damages for her injuries.

On August 22, 1988, Southeastern filed suit against Beres Waite, Marcia McKay, and Joyce Waite alleging the same operative facts as in its prior federal action and seeking the same relief. This is the insurance carriers third action. Pursuant to 28 U.S.C. Sec. 2201, Southeastern seeks a declaration of rights under a homeowner's insurance policy. Specifically, Southeastern requests this court to find that no coverage exists for injuries sustained by defendants Joyce Waite and Marcia McKay. Thereafter Southeastern and Marcia McKay entered into a settlement agreement and release for $100,000. At the present time only Beres Waite and Joyce Waite remain as defendants. The defendants now move for adjudication of the presently pending motion for summary judgment.

III. Legal Analysis

A. An Overview of Preclusion A.5.

Collateral estoppel is a doctrine employed to prevent litigation of questions of fact and law previously adjudicated. Collateral estoppel or issue preclusion forecloses relitigation of issues of fact and law previously decided in a prior suit. Durbin v. Jefferson Nat. Bank, 793 F.2d 1541, 1549 (11th Cir. 1986). Collateral estoppel promotes the conservation of judicial resources by preventing needless litigation. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 58 L. Ed. 2d 522, 99 S. Ct. 645 (1979). Unlike res judicata, collateral estoppel is not limited to issue preclusion with respect to the same parties and their privies in the prior case. "A defendant who was not a party to the original action may invoke collateral estoppel." Hart v. Yahama, 787 F.2d 1468, 1473 (11th Cir. 1986).

The prerequisites to the application of collateral estoppel are as follows:

> A) The issue at stake must be identical to the one involved in the prior litigation;
>
> B) the issue must have been actually litigated in the prior litigation;
>
> C) the determination of the issues in the prior litigation must have been a critical and necessary part of the judgment in that action; and,
>
> D) the party against whom the earlier decision is asserted must have had a full and fair opportunity to litigate the issue in the earlier proceeding. Hart, 787 F.2d at 1473.

B. Application of Legal Standard to the Instant Case

After carefully applying criteria to the uncontested facts of

the instant case, the Court concludes that Southeastern is collaterally estopped from relitigating the issue presented in this case.

In the present case, Southeastern raises the identical issue as in the prior case, i.e., whether Beres's machete attack was an intentional act which was expected or intended such that the insurance policy did not provide coverage. As in the prior action, the defense to Southeastern's allegation is that Beres was insane at the time of the incident.

In the prior action, Southeastern settled the claims of Joy and James McRae for 337,500. Additionally, Southeastern and all defendants then entered into a stipulation for dismissal with prejudice. A stipulation of dismissal with prejudice constitutes a final judgment on the merits which bars a later suit on the same cause of action. Astron Industrial Associates, Inc. v. Chrysler Motors Corp., 405 F.2d 958 (5th Cir. 1968). Accordingly, this issue was actually litigated in the prior case; and, its determination in that litigation was a critical and necessary part of the judgment.

In the prior action, on the day of trial, Southeastern and the defendants entered into a settlement agreement. Additionally, Southeastern and the defendants moved and were granted an order dismissing the federal action with prejudice. Accordingly, Southeastern had a full and fair opportunity to litigate the issue at the earlier proceeding. Therefore, this action is precluded.

IV. Conclusion

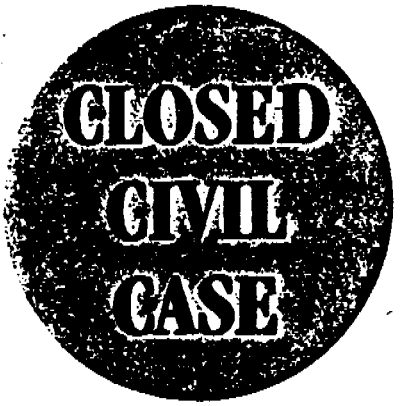
The Court will not permit Southeastern to abuse the judicial process by relitigating a claim which has been previously adjudicated in order to potentially avoid liability under one of its homeowner's insurance policies. Accordingly, based upon careful consideration of the record evidence, it is hereby, ORDERED and ADJUDGED as follows:

1. Defendant's Motion for Summary Judgment is GRANTED.
2. Plaintiff's Motion for Summary Judgment is DENIED.
3. Defendant shall submit a Final Judgment forthwith consistent with this order.

DONE and ORDERED in chambers at Miami, Florida on this 2nd ~~21st~~ day of June ~~May~~, 1989.

THOMAS E. SCOTT
UNITED STATES DISTRICT JUDGE

Copies mailed to
Counsel of Record



Torts—Assault—Battery—Negligence—Action by wife against former husband arising out of husband's machete attack on wife while parties were still married—Doctrine of interspousal tort immunity is abrogated to extent of liability insurance where traditional policy considerations for maintaining doctrine do not exist—Intentional tort in instant case was so extreme that it eradicated policy considerations that might justify barring wife's claims—Common law bar to interspousal intentional tort claims superseded by statute abrogating doctrine with regard to intentional tort of battery

JOYCE WAITE, Appellant, vs. BERES WAITE, Appellee. 3rd District. Case No. 89-868. Opinion filed May 28, 1991. An Appeal from the Circuit Court for Dade County, Thomas Carney, Judge. Touby, Smith, DeMahy & Drake, and Kenneth R. Drake, for appellant. Parenti & Falk, and James C. Blecke, for appellee.

(Before BASKIN, LEVY and GERSTEN, JJ.)

(BASKIN, Judge.) Joyce Waite appeals a final summary judgment entered in favor of Beres Waite, her former husband, in an action she filed to recover damages for assault, battery, and negligence. We reverse.

At the time of the incident giving rise to Mrs. Waite's lawsuit against Mr. Waite, the parties were husband and wife. Without provocation, Mr. Waite attacked Mrs. Waite with a machete, striking her repeatedly, and causing severe and permanent injuries. In her affidavit, Mrs. Waite stated that she "suffered a compound fracture completely *through* [her] left tibia, a compound fracture of [her] left fibula, and a slicing fracture *through* [her] left ulna. The lower portion of [her] left leg was nearly hacked off." (Emphasis in original). During the episode Mr. Waite also attacked several members of Mrs. Waite's family with the machete. He was convicted of attempted murder, aggravated battery, and aggravated assault. Some time later, the parties were divorced. Subsequently, Mrs. Waite filed this action.

Mr. Waite, through his homeowner's insurer, filed a motion for summary judgment, arguing that his former wife's lawsuit was barred by the doctrine of interspousal tort immunity because the parties were married at the time of the attack. The trial court agreed and entered the judgment under review.

In *Sturiano v. Brooks*, 523 So.2d 1126 (Fla. 1988), the Florida Supreme Court receded from a long line of cases when it held that the doctrine of interspousal tort immunity is abrogated to the extent of liability insurance where traditional policy considerations for maintaining the doctrine do not exist. Mrs. Sturiano was injured when the car in which she was being driven by Mr. Sturiano struck a tree. Mr. Sturiano died as a consequence of the accident.[1] Mrs. Sturiano filed a lawsuit against her husband's estate to recover damages resulting from his negligence. In holding that the interspousal tort immunity doctrine did not bar Mrs. Sturiano's claim, the court stated that "[a]ctions between spouses must be barred when the policy reasons for maintaining the doctrine exist, such as the fear of disruption of the family or other marital discord, or the possibility of fraud or collusion." *Sturiano*, 523 So.2d at 1128. The court decided, however, that in the absence of such policy considerations the interspousal immunity doctrine is abrogated to the extent of available insurance. *Sturiano*.

When the Florida Supreme Court stated, "the common law unity concept is no longer a valid justification for the doctrine of interspousal immunity," *Sturiano*, 523 So.2d at 1128, it recognized marital partners' increased capacity to sue each other. The court's reasoning, in refusing to apply the doctrine of interspousal tort immunity as a bar to Mrs. Sturiano's suit, is applicable to the case before us.

Here, the claim would neither create disharmony nor support collusion. Barring Mrs. Waite's action will not preserve or promote Waite family harmony. Mr. Waite's egregious conduct[1] was so extreme that his victim would be unlikely to conspire with him for the purpose of defrauding an insurance company. Furthermore, there has been no suggestion of collusion in the record. Thus, the policy reasons in support of the doctrine do not exist.

Although we recognize that in the past an injured spouse was required to seek compensation in the dissolution proceeding, *Hill v. Hill*, 415 So.2d 20 (Fla. 1982); *Roberts v. Roberts*, 414 So.2d 190 (Fla. 1982), we question whether that rule remains viable after *Sturiano*.[2] Appellee argues that the earlier case of *West v. West*, 414 So.2d 189 (Fla. 1982), bars Mrs. Waite's action. Mrs. West alleged that she sustained a triple fracture of her left ankle when her husband intentionally threw her to the floor. *West*, 414 So.2d at 189. The *West* court held that a wife could not bring a post-dissolution suit against her former husband for personal injuries caused by his intentional tort on the ground that the lawsuit was barred by the doctrine of interspousal tort immunity. *West*, 414 So.2d at 190. The subsequent *Sturiano* decision abrogating immunity to the extent of insurance coverage undermines appellee's argument.

We find no legal impediment to holding that Mrs. Waite enjoys no lesser status before the court than do the other injured family members and may recover to the extent of available insurance.[3] The intentional tort was so extreme that it eradicated the policy considerations that might justify the barring of claims.[4] The *Sturiano* decision abrogated immunity to the extent of insurance coverage in cases lacking the policy considerations it set forth.

Finally, we note that the common law bar to interspousal intentional tort claims, reiterated in *West*, has been superseded by section 741.235, Florida Statutes (1985), in actions seeking damages for the intentional tort of battery.[5] A statutory enactment "supersedes the common law and, therefore, abrogates common-law defenses in situations covered by the statute." *Kilpatrick v. Sklar*, 548 So.2d 215, 216 (Fla. 1989); *Shands Teaching Hosp. & Clinics, Inc. v. Smith*, 497 So.2d 644 (Fla. 1986); *Belcher Yacht, Inc. v. Stickney*, 450 So.2d 1111 (Fla. 1984); *cf. Dressler v. Tubbs*, 435 So.2d 792 (Fla. 1983). The statute delineates Florida's public policy abrogating interspousal tort immunity in actions for battery. It is clear that *West* no longer bars actions predicated on battery claims in cases that post-date the statute. Because Mrs. Waite's claim predated the statute, she cannot enjoy its benefits. However, today the tort of battery is entirely outside the former bar of interspousal tort immunity.

Applying the Supreme Court's reasoning in *Sturiano*, we reverse the final summary judgment and remand for further proceedings.

Reversed and remanded. (LEVY, J., concurs.)

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[1]In her complaint Mrs. Waite describes the conduct as "abusive, malicious and committed with wreckless [sic] abandon[,]" and as having been "attributed to mental delusion, insanity or incompetency."

[2]We are unable to subscribe to the interpretation of post-*Sturiano* cases in the dissent: Mosbarger v. Mosbarger, 547 So.2d 188, 191 (Fla. 2d DCA 1989); Treciak v. Treciak, 547 So.2d 169, 169 (Fla. 5th DCA 1989); Government Employees Ins. Co. v. Fitzgibbon, 568 So.2d 113 (Fla. 5th DCA 1990); Lambert v. Indian River Elec., Inc., 551 So.2d 518 (Fla. 4th DCA), *review denied*, 563 So.2d 632 (Fla. 1990). Those cases are not persuasive. The *Mosbarger* court merely found that the wife's criminal activities did not justify inequitable property and alimony awards. In *Treciak*, 547 So.2d at 169, "the possibility of further disruption of the family unit," a policy reason enunciated in *Sturiano*, existed. Family harmony does not exist for the Waites; they have no dependents or children, unlike the parties in Roberts v. Roberts, 414 So.2d 190, 191 (Fla. 1982), where the court held that a tort claim was barred because the claim "could adversely affect the dependent family beneficiaries, particularly minor children."

In *Fitzgibbon*, the court did not permit the spouse to recover from her deceased husband's insurer because the policy contained a family exclusion clause. In *Lambert*, the court permitted the wife to recover damages from the owner of the vehicle negligently driven by her husband. The court did not address *Sturiano*. In neither *Fitzgibbon* nor *Lambert* did the complainant recover from the spouse.

[3]The other injured persons entered settlement agreements in their lawsuits against Mr. Waite.

[4]The Supreme Court has already distinguished these types of cases on their facts. In *Sturiano*, the estate's guardian ad litem argued that under the holding of Snowten v. United States Fidelity & Guar. Co., 475 So.2d 1211 (Fla. 1985), Mrs. Sturiano's claim should be barred. The Supreme Court rejected the contention, distinguishing *Snowten*, on its facts. *Sturiano*, 523 So.2d at 1128.

[5]In 1985, the Florida legislature adopted Section 741.235, Florida Statutes. Laws 1985, ch. 85-328, §1. That section provides: "The common law doctrine of interspousal tort immunity is hereby abrogated with regard to the intentional tort of battery, and the ability of a person to sue another person for the intentional tort of battery shall not be affected by any marital relationship between the persons." The attack on Mrs. Waite occurred prior to the effective date of the statute.

(GERSTEN, Judge.) I respectfully dissent.

I.
BASIS FOR DISSENT

Fealty fuels the passion of this dissent. The majority, supplanting its opinion for that of the Florida Supreme Court, reverses a summary judgment which was, as a matter of law, correct. Therefore, because in my heart I am committed to the law, I submit that this court should follow the law, affirm the summary judgment, and certify the question to the Florida Supreme Court.

The central issue of this appeal concerns the doctrine of interspousal immunity. The facts in this case compel the abrogation of this doctrine. However, it is not within the power, province, or purview of this appellate court to reverse the Florida Supreme Court. *Hoffman v. Jones*, 280 So.2d 431 (Fla. 1973).

In applying the inflexible doctrine of interspousal immunity to the facts of this case, one is left with a sense of dismay; a lingering feeling that our basic concepts of fairness and what is right have been stricken by the fetid touch of an archaic doctrine. In spite of multiple attacks, this doctrine exists.

II.
HISTORICAL ANALYSIS OF THE DOCTRINE OF INTERSPOUSAL IMMUNITY

A.
BRIEF ORIGIN

The concept that a husband and wife are immune from claims against each other can be said to have its origins in the ancient biblical concept that, upon marriage, the husband and wife became one.[1] This concept was incorporated into English common law where the wife was considered to have merged into the husband, and, as part of him, could not contract with him or bring an action against him:

> By marriage, the husband and wife are one person in law: that is, the very being or existence of the woman is suspended during marriage, or at least is incorporated and consolidated into that of the husband....

1 W. Blackstone, Commentaries *442.

This fiction of marital unity was considered to outlive the marriage and to exist even after divorce. See *Phillips v. Barnet*, 1 Q.B.D. 436 (1876) (where a former wife brought an action against her former husband for assault and battery which occurred during the period of coverture).

Like many other common law rules, the doctrine of interspousal immunity was also incorporated into American case law. In one of the earliest cases, the Supreme Judicial Court of Maine ruled that the doctrine of interspousal immunity barred a former wife from suing her former husband for an assault and battery, which occurred during the marriage. The court stated:

> Divorce cannot make that cause of action which was not a cause of action before divorce. The legal character of an act of violence caused by husband upon wife and of the consequences that flow from it, is fixed by the condition of the parties at the time the act is done. If there be no cause of action at the time, there never can be any.

Abbott v. Abbott, 67 Me. 304, 306 (1877).

Interspousal immunity was incorporated into Florida law in 1829, by the adoption of all common and statutory law of England. *See* § 2.01, Fla. Stat. (1989).

B.
THE EMANCIPATION ACTS

Through a series of legislative acts, commonly referred to as emancipation acts, the rights of married women increased significantly. These acts[2] legalized the individual, separate holding of property by married women. By liberally construing these emancipation acts, courts in a number of states chipped away at the interspousal immunity doctrine.[3]

In 1950, the Florida Supreme Court considered the effect of Florida's emancipation act on the interspousal immunity doctrine. In *Corren v. Corren*, 47 So.2d 774 (Fla. 1950), the court rejected the argument that Florida's emancipation act destroyed the fictional unity of marriage and explained:

> [T]he so-called emancipation act did not so affect the marriage relationship that the husband and wife were thenceforward permitted to go their separate ways, but instead were still mates residing in a common home, each making in his own way a contribution to the marriage venture.
>
> As we have already commented, this fundamental relationship does not seem directly affected by the provisions of organic and statutory law with reference to the woman's dominion over her own property....

Corren, 47 So.2d at 775.

The court refused to modify or abrogate the common law doctrine, reasoning that any change should be accomplished through legislative enactment. *Corren*, 47 So.2d at 776.

III.
MOVEMENT TOWARD ABROGATION OF INTERSPOUSAL IMMUNITY AND ITS IMPACT IN FLORIDA

Thirty-two states have totally abolished interspousal immunity and fifteen states have abrogated it for intentional and/or negligent torts.[4] Further, section 895F of the *Restatement (Second) of Torts* (1979), repudiates the doctrine.

In Florida, section 708.08(1), Florida Statutes (1989), originally passed in 1943, empowered a married woman to:

> [T]ake charge of and manage and control her separate property, to contract and to be contracted with, to sue and be sued, to sell, convey, transfer, mortgage, use, and pledge her real and personal property and to make, execute, and deliver instruments of every character without the joinder or consent of her husband in all respects as fully as if she were unmarried.

A married woman in Florida cannot only contract; she can even contract with her husband. § 708.09, Fla. Stat. (1989). A married woman can also sue her husband to enforce contract and property claims. *Dodson v. National Title Insurance Co.*, 159 Fla. 371, 31 So.2d 402 (1947).

Further, since October 1, 1985, the doctrine no longer applied to the intentional tort of battery.[5] § 741.235, Fla. Stat. (1989).

Nevertheless, Florida continues to apply the doctrine.[6] *Raisen v. Raisen*, 379 So.2d 352 (Fla. 1979), *cert. denied*, 449 U.S. 886, 101 S.Ct. 240, 66 L.Ed.2d 111 (1980). The doctrine exists because of policy considerations of preserving family harmony and preventing collusive claims.

In spite of Florida's adherence to these policy considerations, many other jurisdictions have rejected them as illusory and ineffectual. In one of the latest cases abrogating the doctrine, the Mississippi Supreme Court considered the case of a wife who was assaulted and battered by her husband. *Burns v. Burns*, 518 So.2d 1205 (Miss. 1988). In abrogating the doctrine, that court

rejected the policy grounded in domestic tranquility:

> The idea that maintenance of interspousal immunity will promote the public interest in domestic tranquility is wholly illusory. If one spouse commits against the other an act which, but for the immunity, would constitute a tort, the desired state of matrimonial tranquility is necessarily destroyed. But common sense suggests the peace is destroyed by the act of the offending spouse, not the lawsuit filed by the other. Beyond that, maintenance of the immunity surely cannot prevent injured spouses from harboring ill will and anger. Seen in this light, our traditional rule of interspousal immunity appears incapable of achieving the end claimed for it. Instead it leaves injured spouses without adequate or complete remedies. It is also noted that remedies incident to divorce and criminal prosecution are not adequate for the protection sought in this type of intentional tort.

Burns, 518 So.2d at 1210. Similarly, the Mississippi Supreme Court also rejected the argument that the doctrine somehow prevents suits founded in fraud and collusion:

> It would be a sad commentary on the law if we were to admit that the judicial processes are so ineffective that we must deny relief to a person otherwise entitled simply because in some future case a litigant may be guilty of fraud or collusion. Once that concept were accepted, then all causes of action should be abolished. Our legal system is not that ineffectual.

Burns, 518 So.2d at 1210 (quoting *Klein v. Klein*, 26 Cal. Rptr. 102, 376 P.2d 70 (1962)).

In Florida, the doctrine has not always precluded recovery. In *Gaston v. Pittman*, 224 So.2d 326 (Fla. 1969), the Florida Supreme Court permitted recovery in a case involving a divorced woman's claim against her ex-husband for an antenuptial tort. The court abrogated the common law principle that the wife had lost her right of action upon marriage to the tortfeasor.

Similarly, in other actions between spouses, the Florida Supreme Court has receded from the common law rule and permitted the action to proceed. *See Dressler v. Tubbs*, 435 So.2d 792 (Fla. 1983) (where heirs of wife were permitted to recover from husband's aircraft liability insurer in a wrongful death action, after husband and wife perished in crash of airplane piloted by husband); *Burgess v. Burgess*, 447 So.2d 220 (Fla. 1984) (where interspousal tort immunity was found not to bar an action for money damages by wife for her husband's unlawful electronic interception of her telephone conversations).

Although grounded on a statutory exception to the doctrine, *Burgess v. Burgess*, 447 So.2d at 220, can be said to support an important policy, to permit recovery by a spouse who is the object of outrageous and egregious intentional behavior by the other spouse:

> [The spouse's behavior,] by nature, undermines the faith and trust upon which the institution of marriage is founded. A rule of law which leaves such repugnant behavior unsanctioned can hardly be said to preserve the marital unit.

Burgess, 447 So.2d at 223.

The facts of this case are more repugnant than the facts in *Burgess*. How much more can an intentional life-threatening attack upon the wife undermine the faith and trust of marriage?

IV.
FLAWS IN THE MAJORITY OPINION

Because the protection of the new statute is unavailable to appellant, this court must follow the law as it existed at the time of the incident. The law at that time precludes recovery by appellant now.

The case law addressing interspousal immunity has developed along two distinct lines. One line deals with negligence. In these cases, i.e. automobile accident cases, the Florida Supreme Court has receded from interspousal immunity and permitted one spouse to recover for another spouse's negligence.

The other line of cases concerns intentional torts. In intentional tort cases, the Florida Supreme Court has steadfastly maintained interspousal immunity, holding that proper recourse is recovery through dissolution proceedings.

The majority relies on *Sturiano v. Brooks*, 523 So.2d 1126 (Fla. 1988). In *Sturiano*, the Florida Supreme Court considered the application of interspousal immunity in an action brought by a widow against her husband's estate. The widow's action was for personal injuries she suffered while a passenger in an automobile driven by her late husband.

The majority cites *Sturiano* for the proposition that the doctrine is no longer valid. However, in *Sturiano*, the Florida Supreme Court merely did away with the application of the long-standing concept of the fiction of marital unity, and ruled that the doctrine of interspousal immunity did not bar the action. The court stated:

> The doctrine of interspousal tort immunity has its origins in the fiction that the marriage of two people creates a unified entity of one singular person [footnote omitted]. The reasoning was that a person or entity cannot sue itself. Despite dicta to the contrary in prior opinions of this Court, we believe that this outdated policy consideration can no longer be regarded as a valid reason to bar actions. We no longer live in an age where the wife is subservient to her husband.
>
> . . . .
>
> Thus "the common law unity concept is no longer a valid justification for the doctrine of interspousal immunity."

Sturiano, 523 So.2d at 1127-1128 (quoting *Raisen v. Raisen*, 379 So.2d at 357). The court still found that interspousal immunity barred those actions where the other policy considerations remained:

> Several other reasons to bar interspousal actions, however, still exist under certain conditions. Domestic tranquility, peace and harmony in the family unit, and the possibilities of fraud or collusion are the most frequently cited policy reasons for maintaining interspousal immunity. In cases where these considerations apply, the doctrine of interspousal immunity shall continue to bar actions between spouses.

Sturiano, 523 So.2d at 1128.

Like *Sturiano*, 523 So.2d at 1126, the policy reasons that would support the doctrine are not present in this case: (1) there is no fear of disharmony or collusion; (2) there are no lineal descendants of Joyce and Beres Waite and thus no family unit to be disrupted; (3) the egregiousness of the injuries preclude any collusion or fraud; and (4) the family unit could not possibly be more disrupted after the attempted murder of one spouse by the other and the subsequent criminal trial, in which the spouse was the accusatory witness.

In *Sturiano*, the Florida Supreme Court held:

> [U]nder the circumstances of this case, we hold that when no such policy considerations exist, the doctrine of interspousal tort immunity is waived to the extent of applicable liability insurance.

Sturiano, 523 So.2d at 1128.

I would like to reach the same result as the majority in this case. However, precedent, directly on point, precludes that result. *Hill v. Hill*, 415 So.2d 20 (Fla. 1982) (interspousal immunity doctrine should not be modified to permit recovery by a wife for damages from her husband for malicious prosecution, false imprisonment, and abuse of process); *West v. West*, 414 So.2d 189 (Fla. 1982) (proper remedy for former wife who suffered an injury when her former husband threw her to the floor was in dissolution action, and therefore, wife could not maintain an action for an intentional tort against the former husband); *Roberts v. Roberts*, 414 So.2d 191 (Fla. 1982) (interspousal immunity barred action by widow against deceased husband's estate for intentional tort committed by husband).

The majority questions the viability of these cases after the decision in *Sturiano*. Yet, *Sturiano* did not address *Hill*, *West*, and *Roberts*. Nothing in *Sturiano* abrogates the holdings of these cases. *Sturiano* involved an automobile negligence case. *Hill*, *West*, and *Roberts* involved intentional torts committed by one

spouse against the other. Like in this case, the former wife in *West* was seriously injured by the former husband.

In *West*, 414 So.2d at 189, the Florida Supreme Court considered the claim of a wife who sought recovery from her former husband, for intentionally throwing her to the floor, causing a triple fracture of her ankle. The question certified to the court was:

> Whether a former spouse can maintain an action in tort against the other spouse for an intentional tort allegedly committed during marriage where such marriage has since been dissolved by divorce.

Citing *Hill*, 415 So.2d at 20, the court answered the question in the negative. As in *Hill*, the court held that the only recovery the former spouse could have for such an intentional tort was under the dissolution proceeding.[7] Nothing in *Sturiano* rejects or abrogates the holdings in *West*, *Roberts*, or *Hill*.

Sturiano did not abrogate the interspousal immunity doctrine for intentional torts. The court, in *Sturiano*, reasoned that upon the death of a spouse, all policy considerations regarding marital disharmony and collusion no longer existed in an automobile personal injury action.

A simple analysis of post-*Sturiano* cases furnishes further proof that *Sturiano* does not mandate the majority's result. Four cases decided after *Sturiano v. Brooks* considered whether to apply the doctrine. In those cases dealing with negligent torts, the spouse was permitted recovery. *See Government Employees Insurance Company v. Fitzgibbon*, 568 So.2d 113 (Fla. 5th DCA 1990); *Lambert v. Indian River Electric, Inc.*, 551 So.2d 518 (Fla. 4th DCA 1989). Thus, in the area of negligence, the appellate courts followed *Sturiano* and permitted recovery.

However, the line of cases that addresses recovery by, or from, a spouse, former spouse, or deceased spouse, based on a claim of intentional tort, unequivocally applied the doctrine. Thus, in *Treciak v. Treciak*, 547 So.2d 169 (Fla. 5th DCA 1989) and *Mosbarger v. Mosbarger*, 547 So.2d 188 (Fla. 2d DCA 1989), the other two post-*Sturiano* cases, interspousal immunity barred recovery.

I agree with our sister court's conclusion in *Treciak*, a post-*Sturiano* case:

> Initially, the application of the doctrine of interspousal immunity to the facts of this case may seem to render a harsh and unjust result. However we recognize that the Florida Supreme Court has consistently refused to chip away at this doctrine even in hard cases. We leave to them, as we must, the decision of when to adopt a [sic] overall change in philosophy and substantial modification of this difficult area of the law.

Treciak v. Treciak, 547 So.2d at 169.

V.
CONCLUSION

Because no facts can be more compelling than the facts in this case, because the doctrine has been eroded, because the legislature has expressly shown its intent to diminish the doctrine by permitting actions for the intentional tort of battery, and, finally, because I believe we would be usurping the power of the Florida Supreme Court and the Florida legislature to reach the majority's result, I would certify the following question as one of great public importance:

> WHETHER A FORMER SPOUSE CAN MAINTAIN AN ACTION AGAINST THE OTHER FORMER SPOUSE FOR AN INTENTIONAL TORT COMMITTED DURING THE MARRIAGE WHERE SUCH MARRIAGE HAS SINCE BEEN DISSOLVED BY DIVORCE AND NO OTHER POLICY REASONS WOULD PREVENT RECOVERY?

VI.
EPILOGUE

The concept that a husband should not be permitted to abuse his wife is, by far, not a novel one. As early as the thirteenth-century, Jewish law stated:

> A man is forbidden to beat his wife; and is liable, moreover, for any injuries suffered by her.[8]

My hope is that by responding in the affirmative to the question, the Florida Supreme Court would allow us to return to the more enlightened attitudes of thirteenth-century Talmudic law, regarding this issue, and permit this woman recovery.

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[1] "Therefore shall a man leave his father and his mother, and shall cleave unto his wife, and they shall be one flesh." Genesis 2:24.

[2] *See, e.g.*, Ch. 708, Fla. Stat. (1989)

[3] Alabama: Johnson v. Johnson, 201 Ala. 41, 77 So. 335 (1917) (abrogated immunity as to assault and battery); California: Self v. Self, 26 Cal. Rptr. 97, 376 P.2d 65 (1962) (abrogated immunity as to assault and battery); Colorado: Rains v. Rains, 97 Colo. 19, 46 P.2d 740 (1935) (abrogated immunity as to automobile negligence); Kentucky: Brown v. Gosser, 262 S.W.2d 480 (Ky. 1953) (abrogated immunity as to automobile negligence); Michigan: Hosko v. Hosko, 385 Mich. 39, 187 N.W.2d 236 (1971) (abrogated immunity as to automobile negligence); South Carolina: Prosser v. Prosser, 114 S.C. 45, 102 S.E. 787 (1920) (abrogated immunity as to willful battery); South Dakota: Scotvold v. Scotvold, 68 S.D. 53, 298 N.W. 266 (1941) (abrogated immunity as to automobile negligence).

[4] *See* appendix.

[5] Recovery under this statute is unavailable to appellant because the attack occurred in 1984.

[6] Other jurisdictions where interspousal immunity is still applied are: Delaware: Alfree v. Alfree, 410 A.2d 161 (Del. 1979), dismissed, 446 U.S. 931, 100 S.Ct. 2145, 64 L.Ed.2d 783 (1980); Georgia: Ga. Code Ann. §19-3-8 (Michie Supp. 1985); Hawaii: Peters v. Peters, 63 Haw. 653, 634 P.2d 586 (1981); Louisiana: La. Rev. Stat. Ann. § 9:291 (West Supp. 1985) (immunity not available as a defense where the couple is judicially separated); District of Columbia: Thompson v. Thompson, 218 U.S. 611, 31 S.Ct. 111, 54 L.Ed. 1180 (1910).

[7] In Roberts v. Roberts, 414 So.2d 190 (Fla. 1982), the court even precluded recovery from a deceased spouse when the claim was based on an intentional tort.

[8] Horowitz, G., *The Spirit of Jewish Law* (1973) (quoting Rabbi Israel of Krems interpreting Talmudic law based on the rabbinical conferences of the Rhine countries held between 1200 and 1223).

APPENDIX

STATES TOTALLY ABROGATING INTERSPOUSAL IMMUNITY OR PARTIALLY ABROGATING IT AS TO INTENTIONAL AND/OR NEGLIGENT TORTS

Rule fully abrogated:

Alabama	1931	*Penton v. Penton*	223 Al. 282, 135 So. 481
Alaska	1963	*Cramer v. Cramer*	379 P.2d 95
Arkansas	1957	*Leach v. Leach*	227 Ark. 9, 300 S.W.2d 15
California	1962	*Klein v. Klein*	26 Cal.Rptr. 102, 376 P.2d 70
Connecticut	1914	*Brown v. Brown*	89 Conn. 42, 89 A. 889
Indiana	1972	*Brooks v. Robinson*	259 Ind. 16, 284 N.E.2d 794
Kansas	1987	*Flagg v. Lay*	241 Kan. 216, 734 P.2d 1183
Kentucky	1953	*Brown v. Gosser*	262 S.W.2d 480
Maine	1980	*MacDonald v. MacDonald*	412 A.2d 71
Michigan	1971	*Hosko v. Hosko*	385 Mich. 39, 187 N.W.2d 236
Minnesota	1969	*Beaudette v. Frana*	285 Minn. 366, 173 N.W.2d 416
Mississippi	1988	*Burns v. Burns*	518 So.2d 1205
Montana	1986	*Noone v. Fink*	721 P.2d 1275
Nebraska	1979	*Imig v. March*	203 Neb. 537, 279 N.W.2d 382
New Hampshire	1915	*Gilman v. Gilman*	78 N.H. 4, 95 A. 657
New Jersey	1978	*Merenoff v. Merenoff*	76 N.J. 535, 388 A.2d 951
New Mexico	1975	*Maestas v. Overton*	87 N.M. 213, 531 P.2d 947

New York	1974	*State Farm Mut. Auto Ins. Co. v. Westlake*	35 N.Y.2d 587, 364 N.Y.S.2d 482, 324 N.E.2d 137
North Carolina	1920	*Crowell v. Crowell*	180 N.C. 516, 105 S.E. 206
North Dakota	1932	*Fitzmaurice v. Fitzmaurice*	62 N.D. 191, 242 N.W. 526
Ohio	1985	*Shearer v. Shearer*	18 Ohio St.3d 94, 480 N.E.2d 388
Oklahoma	1938	*Courtney v. Courtney*	184 Okla. 395, 87 P.2d 660
Pennsylvania	1981	*Hack v. Hack*	495 Pa. 300, 433 A.2d 859
South Carolina	1932	*Pardue v. Pardue*	167 S.C. 129, 166 S.E. 101
South Dakota	1941	*Scotvold v. Scotvold*	68 S.D. 53, 298 N.W. 266
Tennessee	1983	*Davis v. Davis*	657 S.W.2d 753
Texas	1987	*Price v. Price*	732 S.W.2d 316
Utah	1980	*Stoker v. Stoker*	616 P.2d 590
Washington	1972	*Freehe v. Freehe*	81 Wash.2d 183, 500 P.2d 771
West Virginia	1978	*Coffindaffer v. Coffindaffer*	161 W.Va. 557, 244 S.E.2d 338
Wisconsin	1926	*Wait v. Pierce*	191 Wis. 202, 209 N.W. 475
Wyoming	1987	*Tader v. Tader*	737 P.2d 1065

Rule abrogated as to intentional torts:

Idaho	1949	*Lorang v. Hays*	69 Idaho 440, 209 P.2d 733
Kansas	1982	*Stevens v. Stevens*	231 Kan. 726, 647 P.2d 1346
Missouri	1986	*Townsend v. Townsend*	708 S.W.2d 646
Oregon	1955	*Apitz v. Dames*	205 Or. 242, 287 P.2d 585

Rule of immunity imposed by statute, but not applicable to intentional torts resulting in physical harm:

Illinois	Ch. 40, § 1001, Ill. Ann. Stat.		(1987 Supp.)

Rule abrogated for outrageous intentional torts:

Maryland	1978	*Lusby v. Lusby*	283 Md. 334, 390 A.2d 77

Rule abrogated for intentional tort of battery:

Florida	§ 741.235, Fla. Stat.		(1989)

Rule abrogated for cases sounding in negligence:

Maryland	1983	*Boblitz v. Boblitz*	296 Md. 242, 462 A.2d 506
Missouri	1986	*S.A.V. v. K.G.V.*	708 S.W.2d 651
Oregon	1988	*Heino v. Halper*	306 Or. 347, 759 P.2d 253

Rule abrogated for all personal injury actions:

Iowa	1979	*Shook v. Crabb*	281 N.W.2d 616

Rule abrogated for vehicular torts:

Arizona	1982	*Fernandez v. Romo*	132 Ariz. 447, 646 P.2d 878
Colorado	1935	*Rains v. Rains*	97 Colo. 19, 46 P.2d 740
Idaho	1975	*Rogers v. Yellowstone Park Co.*	97 Idaho 14, 539 P.2d 566
Massachusetts	1976	*Lewis v. Lewis*	370 Mass. 619, 351 N.E.2d 526
Nevada	1974	*Rupert v. Stienne*	90 Nev. 397, 528 P.2d 1013
Rhode Island	1978	*Digby v. Digby*	120 R.I. 299, 388 A.2d 1
Vermont	1973	*Richard v. Richard*	131 Vt. 98, 300 A.2d 637
Virginia	1971	*Surratt v. Thompson*	212 Va. 191, 183 S.E.2d 200

* * *

Torts—Product liability—Action against painting company and paint manufacturer by plaintiff who suffered severe asthmatic attack at place of employment while painters were at office to paint metal equipment and who allegedly sustained permanent injuries to respiratory system, laryngeal structure, and vocal cords—Trial court properly found that any inadequacy in warning label on paint can could not have been proximate cause of plaintiff's injuries where painter and painter's employer both testified that they had not read warning label—Whether painter had mixed paint and catalyst or begun painting when plaintiff fell ill is disputed issue of material fact precluding summary judgment on claims of negligence and strict liability based upon alleged defect in paint

VIVIAN LOPEZ, Appellant, vs. SOUTHERN COATINGS, INC., Appellee. 3rd District. Case No. 90-1854. Opinion filed May 28, 1991. An Appeal from the Circuit Court for Dade County, Harvey Goldstein, Judge. Weinstein & Garvin and Andres A. Quintero and Philip Weinstein, for appellant. Adorno & Zeder and Raoul G. Cantero, III, and William S. Berk, for appellee.

(Before SCHWARTZ, C.J., JORGENSON, and GERSTEN, JJ.)

(PER CURIAM.) Vivian Lopez appeals from an order of final summary judgment in a products liability action. For the following reasons, we affirm in part, reverse in part, and remand for further proceedings.

In January, 1986, Vivian Lopez suffered a severe asthmatic attack at her place of employment while painters from Steeltech Electroplating, Inc., were at her office to paint certain metal equipment with a paint manufactured by Southern Coatings, Inc. At some point during the morning, Lopez and various other employees were overcome by fumes. Lopez was transported by ambulance to a hospital where she remained for ten days.

Lopez sued the painting company and the paint manufacturer on various theories.[1] Lopez alleged that the paint manufacturer, Southern Coatings, was both negligent and strictly liable in tort for placing a defective product into the stream of commerce and that Southern Coatings' warning label on the paint was inadequate. Lopez alleged permanent injuries to her respiratory system, laryngeal structure, and vocal cords. Following extensive discovery, the trial court granted Southern Coatings' motion for summary judgment, finding that Lopez offered no proof of proximate cause. Specifically, the trial court found that any alleged defect in the paint could not have caused Lopez' injuries because there was no evidence that the painter had mixed the paint or had begun painting when Lopez fell ill. The trial court further found that, because the painter himself had not read the warning label on the can of paint, any inadequacy in the warning could not be the proximate cause of the injuries.

We affirm that portion of the order of summary judgment that finds that an inadequate warning label, if indeed it was inadequate, could not have been the proximate cause of Lopez' injuries. Both the painter and his employer testified in depositions that they had not read the warning label on the paint can. Where the person to whom the manufacturer owed a duty to warn—in this case, the painter[2]—has not read the label, an inadequate warning cannot be the proximate cause of the plaintiff's injuries. *See Ashby Div. of Consol. Aluminum v. Dobkin*, 458 So. 2d 335, 337 (Fla. 3d DCA 1984) ("Although plaintiff insists that the jury could have determined that defendants were negligent in failing to warn or instruct, the undisputed evidence shows that plaintiff did not read the instructions on the ladder and therefore any failure to warn could not, as a matter of law, be the proximate cause of plaintiff's injuries."); *see also Felice v. Valleylab, Inc.*, 520 So. 2d 920 (La. Ct. App. 1987) (same), *writ denied*, 522 So. 2d 562 (La. 1988).

We reverse that portion of the order of summary judgment that finds that Lopez offered no proof that the painter had mixed the paint and the catalyst or that he had begun painting when she fell ill. A review of the record reveals that there remain disputes over issues of material fact regarding when the paint can was opened, when the paint was mixed with the catalyst, and whe