IN THE SUPREME COURT OF FLORIDA

CASE NUMBER 79,463

BERES WAITE, :

Petitioner, :

vs. :

JOYCE WAITE, :

Respondent. :

DISCRETIONARY REVIEW OF A DECISION
OF THE THIRD DISTRICT COURT OF APPEAL

MAIN BRIEF OF PETITIONER, BERES WAITE

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INTRODUCTION

This brief is filed on behalf on the defendant appellee petitioner, Beres Waite, in support of the trial court's application of the doctrine of interspousal immunity and the entry of summary final judgment. The plaintiff appellant respondent is Joyce Waite, Beres Waite's former wife.

STATEMENT OF THE CASE AND FACTS

For purposes of the motion for summary judgment entered by the trial court, and this petition for review of the district court reversal, the undisputed material facts are as follows: The incident occurred on July 2, 1984. Joyce and Beres Waite were married before, on, and after the date of the incident. It was not until some time after the incident that Joyce Waite sought a dissolution of their marriage. On these undisputed facts, the trial court entered summary final judgment in favor of Beres Waite upon his affirmative defense of interspousal immunity.

The district court reversed, holding inter alia that 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, where the spouse is convicted of attempted first degree murder, and where the battery is egregious. The district court certified the question to this Court as one of great public importance.

Beres Waite petitions this Court for review of the certified question as well as review of the conflict with decisions of this Court and other district courts of appeal on the same question of law.

SUMMARY OF ARGUMENT

Entry of judgment was proper upon Snowten v. United States Fidelity and Guaranty Company, 475 So.2d 1211 (Fla. 1985); West v. West, 414 So.2d 189 (Fla. 1982); Hill v. Hill, 415 So.2d 20 (Fla. 1982); Krouse v. Krouse, 489 So.2d 106 (Fla. 3d DCA), rev. dism., 492 So.2d 1333 (Fla. 1986); Getz v. Getz, 475 So.2d 742 (Fla. 2d DCA 1985); Gordon v. Gordon, 443 So.2d 282 (Fla. 2d DCA 1983); and Heaton v. Heaton, 304 So.2d 516 (Fla. 4th DCA 1974).

Sturiano v. Brooks, 523 So.2d 1126 (Fla. 1988) did not overrule this longstanding precedent upon which summary judgment was entered. In a post Sturiano decision, the Fifth District in Treciak v. Treciak, 547 So.2d 169 (Fla. 5th DCA 1989), has held that the doctrine of interspousal immunity is still a viable defense to an intentional

tort action, even though the parties are separated at the time the tort occurred, and are eventually divorced. Cf. Hahn v. Hahn, 1992 WL 55237 (Fla. 4th DCA March 25, 1992).

As the incident complained of occurred on July 2, 1984, the rights of the parties were determined at that time. At that time, the parties were married. Any differences between them were resolved or resolvable in the subsequent dissolution proceeding. On July 2, 1984, Beres Waite was protected from suit by the common law doctrine of interspousal immunity. The dissolution of his marriage did not create a cause of action in favor of his wife or affect his entitlement to summary judgment.

ISSUE ON APPEAL

WHETHER A FORMER SPOUSE CAN MAINTAIN AN ACTION IN TORT AGAINST THE OTHER SPOUSE FOR A BATTERY ALLEGEDLY COMMITTED DURING MARRIAGE WHERE SUCH MARRIAGE HAS SINCE BEEN DISSOLVED BY DIVORCE.

ARGUMENT

Sturiano v. Brooks does not Deprive Beres Waite of Interspousal Immunity

In West v. West, 372 So.2d 170, 172 (Fla. 2d DCA 1979), the Second District certified to this Court substantially the same issue presented here. This Court answered the certified question in the negative. West v. West, 414 So.2d 189 (Fla. 1982). A former spouse cannot maintain an action for an intentional tort allegedly committed during the marriage, even though such marriage has since been dissolved.

West is not the first case in which this Court has addressed the issue. In Bencomo v. Bencomo, 200 So.2d 171 (Fla.), cert. den., 389 U.S. 970, 88 S.Ct. 466, 19 L.Ed.2d 461 (1967), the singular issue before this Court was "whether or not a former spouse can maintain an action in tort against the other spouse for a tort allegedly committed during marriage, where such marriage has been dissolved by divorce." 200 So.2d at 172. This Court held she could not maintain the action.

In Bencomo v. Bencomo, this Court explained its ruling with quotations from American Jurisprudence:

> At common law, a tort committed by one spouse against the person or character of the other does not give rise to a cause of action in favor of the injured spouse. A divorce does not change this rule so as to enable a suit to be maintained after the obtaining of an absolute divorce.
>
> * * *
>
> The divorce cannot in itself create a cause of action in favor of the wife upon which she may sue, when it was not a cause of action before the divorce. [200 So.2d at 173-4].

In Snowten v. United States Fidelity and Guaranty Company, 475 So.2d 1211 (Fla. 1985), this Court held that the defense of interspousal immunity is not waived with the existence of insurance coverage. In an opinion written over one year after the incident between Beres Waite and Joyce Waite, this Court concluded, "The policy reasons traditionally advanced for preserving the doctrine of interspousal immunity . . . . have not lost their vitality since we last visited this issue." 475 So.2d at 1212. The district court majority opinion below does not discuss or distinguish Snowten on its facts or issues decided.

Sturiano v. Brooks, 523 So.2d 1126 (Fla. 1988) did not overrule Snowten or its predecessors. "We note at this point that Snowten and the doctrine of interspousal tort immunity are still good law." 523 So.2d at 1128. In Snowten, "because both spouses were alive, the policy reasons for barring the action were strong." 523 So.2d at 1128. Snowten is still good law on the irrelevancy of insurance coverage, and still good law on the vitality of interspousal immunity when both spouses are alive.

A fair reading of Sturiano v. Brooks compels the conclusion that the doctrine of interspousal tort immunity is a viable defense where both spouses are still alive. A subsequent dissolution of the marriage cannot create a new cause of action in the former spouse. The contrary district court majority opinion below conflicts with the Fifth District in Treciak v. Treciak, 547 So.2d 169 (Fla. 5th DCA 1989), interpreting Sturiano and holding that the doctrine of interspousal immunity is still a viable defense to an intentional tort action, even though the parties are separated at the time the tort occurred, and are eventually divorced.

> The Florida Supreme Court has clearly held that a direct action between spouses, even for an intentional tort committed in the midst of a divorce is barred by the doctrine of interspousal immunity. [547 So.2d at 169].

The Possibility of Insurance Coverage

The availability of insurance coverage is irrelevant to the applicability of interspousal immunity. This aspect of the district court's reason for reversal is governed by and defeated by Snowten v. United States Fidelity and Guaranty Company, 475 So.2d 1211 (Fla. 1985). Snowten is "still good law." Sturiano v. Brooks, 523 So.2d at 1128.

The question of insurance coverage for interspousal torts should not be a consideration in this case. First, interspousal torts are generally excluded from coverage under standard family exclusions, Fitzgibbon v. Government Employees Insurance Company, 583 So.2d 1020 (Fla. 1991), and, "Nowhere in Sturiano did [this Court] suggest that a family exclusion policy is void for being against public policy," 583 So.2d at 1021. Also, intentional torts are generally excluded from coverage, Landis v. Allstate Insurance Company, 546 So.2d 1051 (Fla. 1989), and diminished capacity will not vitiate the intentional act exclusion, 546 So.2d at 1053. As referenced in the certified question, Beres Waite was convicted of attempted first degree murder. Attempted first degree murder is not an insurable accident or occurrence.

Insurance coverage is being litigated in a separate federal action presently on appeal. Joyce Waite established coverage at the trial court level by arguing collateral estoppel in the settlement of other claims, and Beres Waite's insanity as overcoming the intentional act exclusion. Here, inconsistent with her claim of coverage, Joyce Waite argues Beres Waite's intentional and egregious misconduct as the justification for imposing liability. His conduct cannot be benign for purposes of providing coverage and overwhelmingly egregious for purposes of avoiding interspousal tort immunity.

Retrospective Analysis of the Marriage does not Abrogate Interspousal Immunity

In Krouse v. Krouse, 489 So.2d 106 (Fla. 3d DCA), rev. dism., 492 So.2d 1333 (Fla. 1986), the district court held it is the marital status at the time the cause of action arose that is relevant to the question of whether interspousal immunity should bar

the claim. 489 So.2d at 108. The district court in Krouse also exposed the fallacy in a retrospective analysis of an irretrievably broken marriage as avoiding the bar of inter-spousal immunity to claims within the marriage.

> Since the public policy of saving foundering marriages is thus the rationale of Hill, it would be paradoxical indeed if one could avoid the bar of interspousal immunity merely by divorcing one's spouse before bringing the suit. [489 So.2d at 108].

It begs the question to say that an intentional battery overcomes interspousal immunity, because of the failure of the marriage resulting from the battery. The more egregious the battery, the more likely the marriage will fail as a result. It is a difference in degree, not kind. The defense of interspousal immunity is predicated upon the existence of the marital relationship, not upon the quality of the marriage.

It was for the trial court in the dissolution proceeding to first determine whether Joyce and Beres Waite's differences could be reconciled. If the marriage was irretrievably broken, then dissolution was appropriate. It is presumed that the court considered all aspects of the Waite's relationship, including the events of July 2, 1984, when directing the distribution of marital assets, the recognition of liabilities, and the allowance of alimony.

The Remedy for Injury Sustained During Marriage

Joyce Waite was not without a remedy for any injury she may have sustained during her marriage. Prior to this incident and prior to initiation of the dissolution action, the case law clearly established that Joyce Waite's right of redress for marital injuries was

within her dissolution action. In Hill v. Hill, 415 So.2d 20, 22 (Fla. 1982), this Court reaffirmed the doctrine of interspousal immunity as a defense to claims for intentional torts, citing with approval Bencomo v. Bencomo. Hill also held that the proper forum for litigating marital injuries was the dissolution action.

> In our view, it makes no sense to have different courts and separate proceedings determine inter-related issues between spouses. We find that the use of two court proceedings to resolve essentially one matter is neither efficient nor beneficial to the family, its resources, or possible reconciliation. [415 So.2d at 24].

The trial judge in the Waite's dissolution action had both the authority and the responsibility to direct payment of medical expenses and to consider any permanent injury, disfigurement, or loss of earning capacity caused by this incident, in establishing appropriate alimony. Hill, 415 So.2d at 24. See, also, West v. West, 414 So.2d 189 (Fla. 1982); Krouse v. Krouse, 489 So.2d 106 (Fla. 3d DCA), rev. dism., 492 So.2d 1333 (Fla. 1986); Getz v. Getz, 475 So.2d 742 (Fla. 2d DCA 1985); and Gordon v. Gordon, 443 So.2d 282 (Fla. 2d DCA 1983).

Joyce Waite had her day in court when she sought and obtained a dissolution of her marriage to Beres Waite. If Joyce Waite was treated unfairly in the dissolution proceeding, her remedy was in an appeal from the dissolution, not the instigation of another action. She is not entitled to relitigate in this action issues which were litigated or should have been litigated in the dissolution proceeding.

In Hahn v. Hahn, 1992 WL 55237 (Fla. 4th DCA March 25, 1992), a dissolution action, the district court reversed the dismissal of the associated claim for

battery and allowed the claim for battery to proceed as part of the dissolution action. The district court recognized that interspousal immunity is still a viable defense, but found applicable the current statutory exception for the intentional tort of battery, "the only applicable exception sanctioned by the legislature."

If Joyce Waite has a claim for battery that is not barred by interspousal immunity, then she should have brought her claim for battery in her dissolution action. If insurance coverage avoids interspousal immunity, then it should have been brought to the court's attention in the dissolution action. If Beres Waite's conviction avoids interspousal immunity, then it should have been brought to the court's attention in the dissolution action. If the egregiousness of the battery avoids interspousal immunity, then it should have been brought to the court's attention in the dissolution action.

Statutory Abrogation of Interspousal Immunity for Battery

Section 741.235, Florida Statutes (1985), which abrogates interspousal immunity for the intentional tort of battery, did not take effect until October 1, 1985. Chapter 85-328, Section 2, Laws of Florida. As this incident predates the statute, it does not apply. Cf. Anderson v. Anderson, 468 So.2d 528, 530 (Fla. 3d DCA), rev. den., 476 So.2d 672 (Fla. 1985):

> It is well settled that in the absence of an express legislative declaration that a statute have retroactive effect, the statute will be deemed to operate prospectively only, and that even a clear legislative expression of retroactivity will be ignored by the courts if the statute impairs vested rights, creates new obligations, or imposes new penalties.

Section 741.235 has no application to this case, except insofar as it confirms the existence of immunity in those cases that precede its enactment. It also confirms the necessity for legislation to abrogate common law doctrine and defenses. Cf. Corren v. Corren, 47 So.2d 774, 776 (Fla. 1950). Beres Waite is entitled to his defense of interspousal immunity. Bencomo v. Bencomo; Hill v. Hill; West v. West; Snowten v. United States Fidelity and Guaranty Company; Heaton v. Heaton; Gordon v. Gordon; Getz v. Getz; Krouse v. Krouse.

CONCLUSION

The summary judgment should be reinstated.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was served upon NORMAN M. WAAS, ESQ., Parenti, Falk & Waas, P.A., 1150 Courthouse Tower, 44 West Flagler Street, Miami, Florida 33130; KENNETH R. DRAKE, ESQ., Touby, Smith, DeMahy & Drake, P.A., Penthouse, Bayside Office Center, 141 Northeast Third Avenue, Miami,

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