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THE SUPREME COURT OF FLORIDA

JOHN C. THOM, III, as personal representative of the Estate of Charles Vincent McAdam, Sr., decedent,

Petitioner,

vs.

SYBIL McADAM,

Respondent.

CASE NO. 81378

APPLICATION FOR DISCRETIONARY REVIEW OF THE DECISION OF THE DISTRICT COURT OF APPEAL, THIRD DISTRICT OF FLORIDA

PETITIONER'S INITIAL BRIEF

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I. INTRODUCTION

Respondent, Sybil McAdam ("Mrs. McAdam"), appealed a partial summary judgment as to liability granted in favor of the Estate of Charles V. McAdam, Sr. ("Mr. McAdam, Sr.") in an action brought by Mr. John C. Thom, III, as personal representative for the Estate, alleging civil theft, common law conversion, and fraud. In this partial summary judgment, the trial court ruled that Mrs. McAdam was collaterally estopped from denying the findings of fact which established undue influence in an earlier conversion action brought against her by the children of Mr. McAdam, Sr. It also ruled that the defense of interspousal immunity was legally inadequate. The District Court of Appeal, Third District, reversed the trial court with instructions that summary judgment be entered in favor of Mrs. McAdam on the basis that the present action was barred by interspousal immunity. This Court granted review of the decision of the third district due to that decision's express and direct conflict with decisions of this Court and a decision of another district court of appeal in this state.

II. STATEMENT OF THE FACTS[1]

In 1978, at age 85, Mr. McAdam, Sr., placed most of his assets into a trust. A. 73, ¶ 4-5; A. 52, ¶ 2; A. 183-195. Under the trust terms, Mr. McAdam, Sr. received all trust income and was entitled to receive distributions of trust corpus. A. 73, ¶ 4; A. 52, ¶ 2; A. 184-85. Mr. McAdam, Sr. named his son, Charles V. McAdam, Jr. ("Mr. McAdam, Jr."), as trustee. Id. As beneficiaries of the trust remainder, he named his two daughters, Lois Cook and Patricia Thom, and their children (collectively the "remaindermen"). A. 72-73, ¶ 1 and 4, respectively; A. 52, ¶ 1-2.

Also in 1978, Mr. McAdam, Sr. executed a will bequeathing his entire estate to his two daughters. A. 72, ¶ 3. Nonetheless, prior to his marriage to Mrs. McAdam, Mr. McAdam, Sr. formed the intention to bequeath his stock in the McNaught Syndicate to his son. Id. at ¶ 2.

By 1979, Mr. McAdam, Sr., now age 86, was frail, in poor physical and mental health, and was despondent and lonely due to a pending divorce. A. 73, ¶ 5; A. 52, ¶ 4. At this time, he maintained a close relationship with his family, one characterized by love, affection, and frequent conversations and visits. A. 72, ¶ 1; A. 53, ¶ 6; A. 56, ¶ 17.

Mr. McAdam, Sr.'s loving relationship with his family changed dramatically after June 15, 1979. A. 72, ¶ 1; see A. 53, ¶ 6. On that

[1]Unless otherwise noted, all references to the record are to the Appendix to Brief of Appellant below, Sybil McAdam (Respondent before this Court), and shall be referred to by the designation "A." followed by the page number and, where appropriate, the paragraph number. For example, "A. 73, ¶ 4" refers to Appendix of Appellant below at page 73, paragraph number 4.

date, Mr. McAdam, Sr.'s divorce from his second wife became final, and he married Mrs. McAdam. A. 73, ¶ 6; A. 52, ¶ 5. He was pressured and rushed into marrying Mrs. McAdam after 10:00 p.m., after an hour-long high-pressure meeting at the office of Mrs. McAdam's attorney. A. 73, ¶ 6. The meeting was designed to force Mr. McAdam, Sr., while tired and hungry, to sign a prenuptial agreement purporting to give Mrs. McAdam a claim to Mr. McAdam, Sr.'s house, Id., A. 74, ¶ 7, A. 52, ¶ 4, even though the house was jointly owned by Mr. McAdam, Sr. and his second wife. A. 82, ¶ 11b. Otherwise, the prenuptial agreement provides that Mrs. McAdam would have no claim on Mr. McAdam, Sr.'s property. A. 74, ¶ 7; A. 52, ¶ 4.

Throughout their marriage, Mrs. McAdam was in a position to and did exert undue influence over Mr. McAdam, Sr. A. 77-80, ¶ 10a-10e (particularly ¶ 10c); A. 80-88, ¶ 11a-11b; A. 89, ¶ 15; A. 56, ¶ 17; A. 57-58, ¶ 21 and 24, respectively. Mrs. McAdam was twenty-six years younger than Mr. McAdam, Sr. A. 77, ¶ 10a. Mr. McAdam, Sr. suffered from senile dementia and a lack of competency throughout the marriage, and these conditions became progressively worse. A. 74, ¶ 9a; A. 76, ¶ 9e. As a result of his advanced age, poor medical and mental condition, dependency on prescription drugs, inability to care for himself, isolation, and close association with Mrs. McAdam, Mr. McAdam, Sr. became completely dependent upon Mrs. McAdam and was easily influenced and controlled by her during the marriage. A. 77, ¶ 10a-10b; A. 80, ¶ 10e; A. 89, ¶ 15; A. 53, ¶ 7-9; A. 57, ¶ 21. Mrs. McAdam took advantage of this situation to exert undue influence over Mr. McAdam, Sr.'s

financial affairs in order to obtain personal benefit for herself. A. 77-88, ¶ 10a-10e and 11a-11d; A. 53-54, ¶ 10; A. 55-56, ¶ 15 and 19; A. 57, ¶ 21.

The first element of Mrs. McAdam's scheme to obtain Mr. McAdam, Sr.'s wealth was her isolation of Mr. McAdam, Sr. from his family. A. 80, ¶ 11a; A. 53, ¶ 10. Mrs. McAdam would prevent Mr. McAdam, Sr. from speaking with his children and grandchildren, despite their numerous attempts to contact him by telephone. A. 79; A. 80-81, ¶ 11a. Mrs. McAdam would prevent Mr. McAdam, Sr.'s children and grandchildren from entering the house to visit Mr. McAdam, Sr. Id. At one point, Mrs. McAdam ordered one of Mr. McAdam, Sr.'s nurses not to answer the phone in order to prevent his children from trying to reach him. A. 79. Mrs. McAdam also isolated Mr. McAdam, Sr. from his friends and neighbors, and terminated the services of his long-time lawyer and doctor. A. 77, ¶ 10a; A. 80-82, ¶ 11a.

Mrs. McAdam intensified Mr. McAdam, Sr.'s isolation from his family by poisoning his mind against them. A. 78, ¶ 10c; A. 79, ¶ 10e; A. 53, ¶ 10. She constantly made derogatory remarks about his children and family members, told him his children only cared for his money, and referred to his family members as evil. Id.

The second element of Mrs. McAdam's scheme involved her exercise of undue influence over Mr. McAdam, Sr. to obtain his personal non-trust assets, including cash and bank accounts, certificates of deposits, the marital home, and the Mcnaught Syndicate stock. A. 77, ¶ 10; A. 82, ¶ 11b; A. 54-56, ¶ 13-14 and 18. She used her undue influence to: (1)

force Mr. McAdam, Sr. to agree to open a joint checking account; (2) transfer all of the money in Mr. McAdam, Sr.'s personal accounts to their joint accounts; and (3) cash in Mr. McAdam, Sr.'s certificates of deposits and place the proceeds into the joint accounts. A. 82, ¶ 11b. She then intentionally depleted the joint accounts through lavish personal spending on herself and her own family members. Id.; A. 55, ¶ 14; A. 56, ¶ 19. To give a false appearance of legitimacy to the spending, she would write checks and force Mr. McAdam, Sr. to sign them, through cajolery and even physical abuse. Id.; A. 79, ¶ 10e. A large number of Mr. McAdam, Sr.'s checks benefited Mrs. McAdam personally. A. 82, ¶ 11b.

As a result of Mrs. McAdam's spending, Mr. McAdam, Sr. was personally destitute within a year. Id.; A. 55, ¶ 14. During that first year, Mr. McAdam, Sr.'s expenses were $123,600.00 in excess of what his expenditures would have been if they had continued at his prior level. Id.

Immediately after the dissipation of Mr. McAdam, Sr.'s personal funds, Mrs. McAdam caused the marital home to be sold in order to satisfy an alimony judgment to Mr. McAdam, Sr.'s second wife, A. 82, ¶ 11b, despite the fact that Mr. McAdam, Jr. offered to give $218,000.00 to his father's former wife in settlement of the divorce. A. 84-85, ¶ 11c; A. 54, ¶ 11. Mrs. McAdam caused Mr. McAdam, Sr. to reject this and other offers of financial assistance from his children, which were contrary to the assistance Mr. McAdam, Sr. allowed before the marriage. Id.; A. 54, ¶ 12.

Upon depletion of Mr. McAdam, Sr.'s personal funds, Mrs. McAdam embarked upon the third element of her scheme, her attempt to break the trust established by Mr. McAdam, Sr. A. 83-86, ¶ 11c; A. 54-55, ¶ 13. She declared this intention on one occasion in November 1979 when Mr. McAdam, Jr., was visiting his father. A. 84, Para. 11c. Mrs. McAdam stated that she would break the trust, id., and told Mr. McAdam, Sr. that he could have all the hugs and kisses he wanted when he obtained all of his money from the control of his children. A. 79, ¶ 10e. She wrongfully and fraudulently induced Mr. McAdam, Sr., by persuasion and intimidation, to unreasonably attempt to invade the trust in order for her to obtain the trust assets. A. 84, ¶ 11c; A. 53, ¶ 10.

Breaking the trust was an essential element in Mrs. McAdam's scheme to obtain control over Mr. McAdam, Sr.'s assets. Under the trust terms, the trust income went to Mr. McAdam, Sr. during his lifetime. A. 73, ¶ 4; A. 52, ¶ 2; A. 184-85. Upon Mr. McAdam, Sr.'s death, the trust assets went to Mr. McAdam, Sr.'s children and to other remaindermen. A. 73, ¶ 4; A.52, ¶ 1-2; A. 184-86. However, the trust corpus could be invaded during Mr. McAdam, Sr.'s lifetime, if necessary, for the maintenance of Mr. McAdam, Sr., but only upon the exercise of discretion vested in the trustee who served at the pleasure of the settlor, Mr. McAdam, Sr. A. 183 and 185.

Mrs. McAdam executed a carefully designed plan to obtain the trust corpus. After she depleted his personal assets, Mrs. McAdam used her undue influence over Mr. McAdam, Sr. to persuade him to request major invasions of trust principal, including $470,000, to purchase a

condominium residence. A. 84; A. 54, ¶ 13. She also caused Mr. McAdam, Sr. to barrage his son, the trustee, with letters demanding substantial other invasions of trust principal. Id. Mr. McAdam, Jr., realizing that such trust invasions would leave his father without sufficient trust income to live on, refused these demands to invade the trust principal. Id. Mrs. McAdam then convinced Mr. McAdam, Sr. to remove his son, Mr. McAdam, Jr., as trustee. Id. As a result, Mr. McAdam, Jr. sued his father in an attempt to prevent his removal as trustee, but was eventually removed by the court without cause. A. 84.

Once Mr. McAdam, Jr. was removed by the court, Mrs. McAdam caused Mr. McAdam, Sr. to repeatedly petition the court to approve substantial invasions of the trust corpus, most prominently a $422,500.00 request for funds to purchase a condominium with furnishings. A. 85; A. 54, ¶ 13; A. 56, ¶ 19. On another occasion, Mrs. McAdam caused Mr. McAdam, Sr. to petition the court for the payment of substantial capital gains taxes which would have been incurred as a result of a planned program to reinvest all trust assets to generate higher yield. A. 85-86; A. 55, ¶ 13; A. 56, ¶ 19. Each of these attempts was successfully challenged by Mr. McAdam, Sr.'s daughters on the basis that the invasions would have left their father without sufficient income upon which to live. Id.

Mrs. McAdam also caused Mr. McAdam, Sr. to default on his alimony payments to his former wife. A. 85; A. 55, ¶ 13. Because he was personally impoverished by Mrs. McAdam's spending, Mr. McAdam, Sr.'s former wife sued Mr. McAdam, Sr. to invalidate a portion of the trust sufficient to satisfy her claim for $38,000.00 in back alimony payments

plus legal fees. Id. Mrs. McAdam, however, caused Mr. McAdam, Sr. to take a default, thus "admitting" that the entire trust was a fraudulent conveyance so that the trust assets of almost $1 million dollars would revert to Mr. McAdam, Sr. and, thereby, under the control of Mrs. McAdam. Id.

As a result of Mrs. McAdam's actions, the trust principal was reduced by the payment of alimony to Mr. McAdam, Sr.'s second wife. A. 85. The trust principal was also reduced by over a half million dollars in legal fees resulting from the legal challenges Mr. McAdam, Sr.'s children had to bring to prevent Mrs. McAdam from asserting control over the trust assets and depleting the trust principal below the level at which the income could sustain Mr. McAdam, Sr. A. 85, ¶ 11c; 54, ¶ 13; A. 56, ¶ 16; A. 58, ¶ 23.

The fourth and final element of Mrs. McAdam's scheme was her exercise of undue influence over Mr. McAdam, Sr. to cause him to execute wills and codicils changing his testamentary dispositions to disinherit his children and to make Mrs. McAdam a substantial beneficiary of the will and a personal representative of the estate. A. 86-88, ¶ 11d.

III. STATEMENT OF THE CASE

Prior Litigation

In 1981 the remaindermen of Mr. McAdam, Sr.'s trust, Lois Cook and Patricia Thom and their children, commenced an action against Mrs. McAdam for interference with their expectancy interest in the trust. A. 51-52. After the trial of that action in 1984, the trial court found that Mrs. McAdam exerted undue influence over Mr. McAdam, Sr. in order

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to seek distributions from the trust corpus. Id.; A. 57, ¶ 21; A. 58, ¶ 24. Mrs. McAdam elected not to testify, A. 51, and the remaindermen's evidence of undue influence was "unrebutted" by Mrs. McAdam. A. 57, ¶ 21. However, shortly after trial, the Florida Supreme Court did away with the remaindermen's cause of action. See Florida National Bank v. Genova, 460 So. 2d 895 (Fla. 1984). As a result, the trial judge felt compelled to vacate the final judgment in favor of the remaindermen on purely legal grounds and a final judgment was entered in favor of Mrs. McAdam. A. 67-68. In so doing the trial judge expressly reaffirmed and did not recede from his factual findings. Id. The judgment in her favor was later affirmed in Cook v. McAdam, 479 So. 2d 156 (Fla. 3d DCA 1985). Mrs. McAdam never questioned or cross-appealed the trial court's factual findings.

After Mr. McAdam, Sr.'s death, his wills and codicils, which made Mrs. McAdam a substantial beneficiary and one of several personal representatives of his estate, were challenged by Mr. McAdam, Sr.'s children. A. 71-90. In August, 1987 after a lengthy and fully litigated trial in which Mrs. McAdam testified and was personally represented by counsel, the court invalidated and revoked those wills and codicils. Id. In so doing, the court found that those testamentary instruments and all of Mr. McAdam, Sr.'s personal assets had been obtained by Mrs. McAdam through undue influence over Mr. McAdam, Sr. and his lack of capacity throughout their marriage. A. 77-88, ¶ 10-11; A. 89, ¶ 15. Mrs. McAdam did not appeal those factual or legal findings.

Current Litigation

The current action was brought by Petitioner, Mr. Thom, as personal representative of Mr. McAdam, Sr.'s estate, to recover those assets of Mr. McAdam, Sr. which Mrs. McAdam took through fraud, conversion, and civil theft during their marriage. Asserting that Mrs. McAdam is collaterally estopped from denying the factual findings made in the prior trust and probate proceedings[2] concerning Mrs. McAdam's actions, Mr. Thom moved for summary judgment on all counts. A. 34-90. Mrs. McAdam also moved for summary judgment on all claims, alleging, among other defenses, the affirmative defense of interspousal immunity. A. 91-93.

On December 18, 1991 the trial court entered an order which adopted as collateral estoppel against Mrs. McAdam factual findings made in the remaindermen's trust litigation, and thus granted summary judgment on the issue of liability in favor of Mr. Thom as the personal representative. A. 1-2. In so doing, the trial court found that $521,513.00, which originally belonged to the trust, "became Estate assets due to [Mrs. McAdam's] own actions causing the Trust to distribute those assets." Id. at 1. The trial court also ruled that Mrs. McAdam's affirmative defenses, including interspousal immunity, were legally insufficient, and denied Mrs. McAdam's motion for summary

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[2] The findings made in the probate litigation, which judgment still stands, are substantially the same as and in many instances even more detailed than the findings made in the vacated judgment from the earlier trust litigation. Compare A. 51-59, ¶ 2, 4-10, 13, 15-16, 19 with A. 71-89, ¶ 1, 4-6, 10(A)-(E), 11(A)-(C), 14-15.

judgment. Id. at 2.

The Court of Appeals, Third District, reversed and remanded for entry of summary judgment in Mrs. McAdam's favor, ruling that "under the doctrine of interspousal immunity, Mrs. McAdam is not liable for conversion of Mr. McAdam, Sr.'s property during the marriage." McAdam v. Thom, 610 So.2d 510, 512 (Fla. 3d DCA 1992) (per curiam). The court held this despite the fact that Mr. McAdam, Sr. is now dead:

> This conclusion is not altered by the holding in Sturiano v. Brooks, 523 So. 2d 1126 (Fla. 1988), which abrogated the doctrine of interspousal immunity to the limited extent of liability insurance where traditional policy consideration for maintaining the doctrine did not exist. The fact that McAdam, Sr. is now deceased does not alone create a cause of action where one did not exist during his lifetime. 610 So.2d at 512.

The Third District also reversed the trial court's finding of collateral estoppel, ruling that the factual determinations of the remaindermen's trust litigation could not be collateral estoppel after the judgment based upon those findings were vacated. Id. However, in making this determination, the Third District failed to address whether the factual determinations in the valid judgment entered in the probate proceedings were a sufficient alternative basis for affirming the trial court's rulings on collateral estoppel, see generally McAdam v. Thom, supra, despite the fact that Mr. Thom presented the probate findings as an alternate basis for granting summary judgment as to liability to the trial court and as grounds for affirmance to the Third District. A. 34-90; McAdam v. Thom, 610 So.2d at 512.

After the Third District denied Petitioner's Motion for Rehearing,

Rehearing En Banc and/or Certification, this Court accepted jurisdiction of this case.

IV. SUMMARY OF ARGUMENT

Very recently, in Waite v. Waite, 18 FLW S311 (Fla. May 27, 1993), this Court held that the doctrine of interspousal immunity is abrogated in Florida. This decision controls here and requires a reversal of the Third District decision.

Moreover, this Court's decision to abrogate the doctrine was correct. With the Woman's Emancipation Act, the doctrine of interspousal immunity was abolished to the extent of contractual and property claims between spouses. If promotion of domestic tranquility is insufficient to bar contractual and property actions between spouses, the policy of protecting domestic harmony is insufficient in matters of tort. The possibility of fraud or collusion exists in every case, but the judge and jury can assess such possibility.

This Court abrogated this doctrine in the areas of antenuptial torts, wrongful death actions, unlawful interception of electronic communications, and negligence. The legislature eliminated its application to assault and battery cases. An overwhelming majority of states abrogated this judicial doctrine and legal scholars repudiated it.

Even if this Court were not to completely abrogate this doctrine, the policy considerations justifying its application as still recognized in Sturiano v. Brooks, 523 So.2d 1126 (Fla. 1988), do not exist here. Mr. McAdam, Sr. is dead, thereby terminating the application of

interspousal immunity. There can be no marital discord and fraud between spouses cannot occur. There is no liability insurance, therefore, no risk of collusion. The relationship between Mrs. McAdam and Mr. McAdam, Sr.'s grown stepchildren has long been adversarial due to her intentional wrongdoing, abuse of the marital relationship, and deliberate destruction of their relationship with their father. Protecting Mrs. McAdam's actions would not promote family unity or domestic tranquility.

In this case, the Third District confused the distinction between a "cause of action" and a "right of action" when it concluded that Mr. McAdam, Sr.'s death does not create a "cause of action where one did not exist during his lifetime." McAdam v. Thom, 610 So. at 512. A "cause of action" is comprised of operative facts which give rise to a "right of action." A "right of action" is a remedial right affording redress for the infringement of a legal right. Here, the estate's "cause of action" arose during Mr. McAdam, Sr.'s lifetime. Therefore, the estate may now assert its remedial "right of action." This Court has recognized this distinction in cases lifting the bar of interspousal immunity.

Here, interspousal immunity should be waived completely and not to the limited extent of liability insurance. There is no liability insurance at issue. Moreover, the policy furthered by limiting it to insurance coverage has no application because such limitation would not protect the financial interests of innocent family members. To the contrary, lifting the bar would restore Mr. McAdam, Sr.'s assets to the estate and give its beneficiaries their rightful entitlement.

The Third District committed further reversible error when it failed to affirm the trial court ruling on the alternative basis, found in the record, that Mrs. McAdam is collaterally estopped by the factual findings made in the valid judgment entered in the earlier probate proceeding. The same parties or their privies were involved in the probate proceeding as here. Likewise, the same facts were involved. The probate proceeding was fully litigated through trial by a court of competent jurisdiction.

This Court should recognize the factual findings made in the earlier trust remaindermen's suit as collaterally estopping Mrs. McAdam. Doing so under the unique facts of this case would promote the policies of fundamental fairness, finality and judicial economy. If factual determinations made under an erroneous view or application of the law may act to collaterally estop a party, then findings made at a time when the law recognized the underlying cause of action should also act as collateral estoppel, especially where the other elements of collateral estoppel exist. The trust litigation findings were made after a full trial in which the same parties and issues were involved.

Other factors support the conclusion that the trust findings collaterally estop Mrs. McAdam from denying them. She did not rebut the evidence of undue influence in that proceeding. She did not seek a reconsideration of those findings. The trial court reaffirmed those findings even when it felt compelled to vacate the judgment solely on legal grounds which came down after trial. Moreover, the trust findings are substantially the same as the findings made in the valid probate

final judgment against her. Thirteen years and two full trials have passed since the commencement of the trust litigation. It would be a gross waste of judicial time and resources to relitigate those findings under the legal fiction that the trust findings do not exist.

V. ARGUMENT

A. THE DOCTRINE OF INTERSPOUSAL IMMUNITY SHOULD BE COMPLETELY OVERTURNED SO THAT FLORIDA MAY CONFORM TO THE OVERWHELMING MAJORITY RULE.

This Court in its most recent decision in Waite v. Waite, 18 FLW S311 (Fla. May 27, 1993), held that the doctrine of interspousal immunity is abrogated in Florida. This decision is controlling in the present case and compels a reversal of the Third District decision. Since the Waite decision is subject to the potential filing of a motion for reconsideration and is not yet final, Petitioner will address the correctness of this Court's decision to abrogate the doctrine.

The justifications for abolishing the doctrine have been compellingly stated in the dissents in Waite v. Waite, 593 So.2d 222, 224-232 (Gersten, J., dissenting), affirmed, 18 FLW S311 (decision not yet final) and Raisen v. Raisen, 379 So.2d 352, 356-359 (Fla.), cert. denied, 449 U.S. 886, 101 S.Ct. 240 (1980), modified, Sturiano, 523 So.2d 1126, 1128 (Fla. 1988). The doctrine is based on the common-law fiction of the unity of marriage. Sturiano, 523 So.2d at 1127; Raisen, 379 So. 2d at 356; Waite, 593 So. 2d at 224-225. This concept rendered the wife a chattel of her husband, but began to erode long ago with the passage of married women emancipation acts. Waite, 593 So.2d at 225; Raisen, 379 So. 2d at 356-357; see also Sturiano, 523 So. 2d 1127-28

(rejecting marital unity as a justification for interspousal immunity).

With the passage of the Married Women's Property Act, the doctrine of interspousal immunity was limited to torts; a married woman can contract with her husband, and can sue her husband to enforce contract and property claims. Waite, 593 So. 2d at 226; Raisen, 379 So. 2d at 356-357; § 708.09, Fla. Stat. (1991); Dodson v. National Title Insurance Co., 31 So. 2d 402 (1947). These acts also removed another basis for the doctrine, the promotion of domestic tranquility. If the promotion of domestic tranquility is not a sufficient reason to bar suits between spouses over matters of contract and property, it is insufficient to justify a bar to suits between spouses in matters of tort. The circumstances leading up to actions in tort are more likely to have already disrupted domestic tranquility than circumstances leading up to actions in contract and property. See 379 So. 2d at 357-358.

The final basis for the doctrine, the avoidance of fraud and collusion between spouses in lawsuits, cannot support the continued existence of the doctrine of interspousal immunity. The possibility of fraud and collusion exists in every lawsuit regardless of whether the parties are married. Where a lawsuit involves a husband and wife, an opportunity, as in other cases, to expose collusive or fraudulent conduct is present. Both judge and jury are capable of evaluating the possibility of bias, prejudice, fraud and collusion. Where the tort is intentional, the injured spouse can hardly be seen as likely to collude with the offending spouse. The fear of fraud or collusion cannot support a doctrine that bars the courthouse doors to a whole category of

legitimate claimants. See 379 So. 2d at 358-359.

Through the years, this Court receded from the doctrine of interspousal immunity in a number of areas: (1) antenuptial torts (see Gaston v. Pittman, 224 So.2d 326 (Fla. 1969)); (2) wrongful death actions (see Dressler v. Tubbs, 435 So.2d 792 (Fla. 1983)); (3) actions for unlawful interception of electronic communications (see Burgess v. Burgess, 447 So.2d 220 (Fla. 1984)); and, (4) negligence (see Sturiano v. Brooks, 523 So.2d 1126 (Fla. 1988). Waite, 593 So. 2d at 226-227. The legislature abrogated the doctrine for the intentional tort of battery. Waite, 593 So. 2d at 226; Fla. Stat. § 741.235 (1991).

Thirty two states totally abolished interspousal immunity and 15 states abrogated it for intentional and/or negligent torts. Waite, 593 So. 2d at 225.[3] The doctrine was repudiated in § 895F of the Restatement (Second) of Torts (1979). Id. at 225-226. It was rejected by the most respected authority on tort law. W. Page Keeton et al., Prosser and Keeton on the Law of Torts, § 122, at 902-04 (5th Ed. 1984). As evidenced by the fact that 11 states since 1980 have abrogated the doctrine through judicial, not legislative action,[4] and this Court's

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[3] 593 So.2d at 225 n. 4, Appendix at 229-231.

[4]See Burns v. Burns, 518 So. 2d 1205, 1208 (Miss. 1988) (modifications of judicially created common law immunities to suit may appropriately be made by the court which created the rule in the first place); Heino v. Harper, 759 P.2d 253, 271 (Ore. 1988) (the responsibility of a court to abolish a rule it created and which is no longer valid or appropriate is not diminished by the legislature's ability to take the same action); Tader v. Tader, 737 P.2d 1065, 1069 (Wyo. 1987) ("The nature of the common law requires that each time a rule of law is applied it be carefully scrutinized to make sure that the conditions and needs of the times have not so

prior modifications of the doctrine, interspousal immunity is a doctrine of the common law which may properly be modified or abrogated through judicial action.

This Court has previously acted upon its authority to modify common-law tort doctrines. See West v. Caterpillar Tractor Company, Inc., 336 So.2d 80 (Fla. 1976) (adopting strict liability theory in product liability cases); Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973) (repudiating doctrine of contributory negligence). In Hoffman, the Court noted that it may act to modify a judicially created common law rule "in light of current 'social and economic customs' and modern

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changed as to make further application of it the instrument of injustice" (quoting Rupert v. Stienne, 90 Nev. 397, 528 P.2d 1013, 1015 (Nev. 1974))); Flagg v. Loy, 734 P.2d 1183, 1188 (Kan. 1987) (court may make alterations in judicially created doctrine of interspousal immunity and need not defer to legislature for its abrogation); Price v. Price, 732 S.W.2d 316 (Tex. 1987); Miller v. Fallon County, 721 P.2d 342, 344 (Mont. 1986) ("[t]he doctrine of interspousal tort immunity is a creature of court decision and subject to change by the courts . . . [J]udicial modification of the common law is sometimes required to prevent great injustice or to insure that the common law is consonant with the changing needs of society"); S.A.V. v. K.G.V., 708 S.W.2d 651 (Mo. 1986) (en banc); Shearer v. Shearer, 480 N.E.2d 388, 394 (Ohio 1985) ("when feudal concepts of a marital unity evolve to the modern concept of the marital partnership, it is the court's duty to see that the law reflects the changing face of society"); Davis v. Davis, 657 S.W.2d 753, 758 (Tenn. 1983) (even if the legislature could act, court abdicates its own function when it refuses to overturn an old and unsatisfactory court-made rule); Boblitz v. Boblitz, 462 A.2d 506, 521 (Md. 1983) (common law rules established by judicial decision may be changed where the court finds "in light of changed conditions or increased knowledge that the rule has become unsound in the circumstances of modern life, a vestige of the past, no longer suitable to our people"); Hack v. Hack, 433 A.2d 859, (Pa. 1981) (court "has full authority, and the corresponding duty, to examine its precedents to assure that a rule previously developed is not perpetuated when the reason for the rule no longer exists and when application of the rule would cause injustice").

'conceptions of right and justice.'" Id. at 436. In such a situation, the Court held that it would be shirking its duty if it failed to adopt the better doctrine. Id. at 438.

This state has long adhered to the policy that for every wrong there is a remedy. See, e.g., Florida Public Utilities Company v. Wester, 7 So.2d 788 (Fla. 1942); see generally, 55 Fla.Jur.2d, Torts, Sections 1-2. The fact that a particular set of litigants are married cannot justify barring a spouse's assertion of a remedial right against his or her spouse.

B. THE DOCTRINE OF INTERSPOUSAL IMMUNITY AS MODIFIED BY THIS COURT IN STURIANO V. BROOKS DOES NOT PREVENT MR. McADAM'S ESTATE FROM RECOVERING FROM MRS. McADAM.[5]

The Third District erred in holding that the doctrine of interspousal immunity barred the action brought by the personal representative of the estate of Charles V. McAdam, Sr. because the policy considerations previously supporting the doctrine under Sturiano v. Brooks, 523 So.2d 1126, 1128 (Fla. 1988), do not exist here.

In Sturiano, this Court held that the doctrine of interspousal immunity no longer bars interspousal actions, except where its policy considerations, i.e. prevention of fraud or collusion and protection of the family unit, would apply. The Court noted that earlier cases did

[5]Because the decision of this Court in Waite v. Waite is not yet final, Petitioner addresses the issue of whether the Third District erred in holding that the doctrine of interspousal immunity barred the action brought by Mr. Thom on behalf of the Estate.

away with the doctrine where its policy grounds did not exist:

> . . . Inroads have been made eroding the traditional basis for upholding the doctrine.[6] The policy reasons for upholding the doctrine in these instances either do not exist or cannot justify immunity from liability.

This Court further noted that interspousal immunity was originally based upon the common-law fiction of the unity of marriage:

> 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. The reason was that a person or entity cannot sue itself. Id. at 1127 [footnote omitted].

This Court rejected marital unity as a basis for justifying this doctrine:

> 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. A married woman now has power to control her separate property and enter into contracts with her husband. With these expansions of individual freedom, legal status, and power, it can no longer be said that a woman becomes part of an entity represented by the husband. Id. at 1127-28 [footnote omitted].

This Court then specified the policy considerations that must now be met for the doctrine of interspousal immunity to apply:

> 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

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[6]Citing Dressler v. Tubbs, 435 So. 2d 792 (Fla. 1983) (wrongful death action by wife's estate against husband's estate not barred by interspousal immunity); Ard v. Ard, 414 So.2d 1066 (Fla. 1982) (abolishing interfamily, but not interspousal, immunity to the extent of liability insurance).

> cases where these considerations apply, the doctrine of interspousal immunity shall continue to bar actions between spouses. Id. at 1128.

This Court then cited to Snowten v. United States Fidelity and Guaranty Co., 475 So.2d 1211 (Fla. 1985) to demonstrate that these concerns of collusion, domestic tranquility, and family peace and harmony can apply where both spouses are still living. Sturiano, 523 So.2d at 1128. However, this Court clearly indicated that the death of a spouse eliminates these policy justifications and allows an action previously barred to be brought when it held:

> In this case, however, there is no fear of disharmony or collusion. Sadly, Vito Sturiano is dead, leaving only Mrs. Sturiano as the sole remaining member of the family. While this tragedy works a great loss on Mrs. Sturiano, it also clears the way for an action against the estate. Because the family unit died with Vito Sturiano, there is no marital harmony to disrupt, no domestic tranquility to destroy. Moreover, we cannot presume any possibility of collusion or fraud when there is nobody with whom she could conspire. [Respondent] . . . contends that Snowten must control and interspousal tort immunity must apply in all cases involving actions between spouses to maintain consistency in law. We disagree. Snowten is clearly distinguishable on the facts. In that case, because both spouses were alive, the policy reasons for barring the action were strong. Here, because the defendant spouse is deceased, the policy reasons for barring the action do not exist. Sturiano, 523 So.2d at 1128 [emphasis added].

Thus, after this Court's ruling in Sturiano, the doctrine of interspousal immunity is abrogated where the policy considerations for the doctrine do not exist, such as when a spouse is deceased. Sturiano, 523 So.2d at 1128.

In Sturiano, this Court bolstered its decision by reference to its

prior decision in Dressler v. Tubbs, 435 So.2d 792 (Fla. 1973). Sturiano, 523 So.2d at 1127 n. 2. In Dressler, a husband and wife were both killed in the crash of a private airplane being piloted by the husband. Dressler, 435 So.2d at 792. This Court ruled that the doctrine of interspousal immunity would not bar a wrongful death suit by the personal representative of the wife's estate against the husband's estate. Id. at 794. As in Sturiano, the Court ruled that the death of a spouse terminates the application of interspousal immunity. As stated by the Dressler Court:

> Husband and wife are dead. There is no suit between spouses, just as their is no marital unity to preserve.

435 So.2d at 794. Similarly, here there is no suit between spouses. Mr. McAdam, Sr. is dead, and there is no marital unity to preserve.

In Dressler, 435 So.2d at 793, this Court quoted from Shiver v. Sessions, 80 So.2d 905, 907 (Fla. 1955):

> [I]t is settled law in this jurisdiction that the wife's disability to sue her husband for his tort is personal to her, and does not inhere in the tort itself . . . .

Likewise, a husband's disability to sue his wife is personal to him and does not inhere to his estate. See Dressler, 435 So.2d at 794 (distinguishing Roberts v. Roberts, 414 So. 2d 190 (Fla. 1982), in which the Court barred a suit by a living spouse against her husband's estate because Roberts involved an action by the living spouse, the very person in whom the disability to sue engendered by interspousal immunity was inherent, and because permitting the suit could adversely affect

dependent minor children).

Here, the policy considerations which this Court recognized in Sturiano as still supporting the application of interspousal immunity do not exist. No fraud or collusion can occur because Mr. McAdam, Sr. is dead. Sturiano, 593 So.2d at 1128; Dressler, 435 So.2d at 794. There is no liability insurance, and the relationship between Mrs. McAdam and Mr. McAdam, Sr.'s family has long been adversarial. Obviously, there is no risk of marital discord. Id. Nor is there a risk of disruption of the family unit as Mr. McAdam, Sr.'s children are fully grown, Mrs. McAdam is not their natural mother, and the adversarial relationship caused by Mrs. McAdam's actions effectively prevented any family affection from arising in the step-family relationships between Mrs. McAdam and Mr. McAdam, Sr.'s family members.

Moreover, Mrs. McAdam long ago abused the marital unity and destroyed the harmony of Mr. McAdam, Sr.'s family. Throughout her marriage to Mr. McAdam, Sr., she exerted undue influence over an incapacitated spouse in order to obtain his wealth. In so doing, she deliberately isolated Mr. McAdam, Sr. from his children and grandchildren, even during the last months of his life. Her extreme conduct embittered and disrupted the family and led to interfamily lawsuits. Protecting her actions through the doctrine of interspousal immunity would in no way promote the goals of family unity and domestic tranquility. Rather, applying the doctrine would, in this instance, promote the abuse of elderly, frail, and incapacitated senior citizens by significantly younger spouses who, through the exercise of undue

influence, would steal from them and intentionally destroy loving and affectionate family relationships.

Lifting the bar of interspousal immunity here is also supported by the decision in Waite v. Waite, 593 So.2d 222 (Fla. 3d DCA 1991), affirmed, 18 FLW S311 (Fla. May 27, 1993) (decision not yet final). In Waite, the defendant ex-husband assaulted his wife and other members of her family. Thus, his actions, like the actions of Mrs. McAdam, were intentional torts that disrupted marital and domestic tranquility and family unity. Like the marriage between Mr. McAdam, Sr. and Mrs. McAdam, and the marriage in Sturiano, the marriage in Waite had been terminated, albeit by divorce not death. The Third District in Waite logically applied Sturiano because the defendant's intentional torts and the termination of the marriage eradicated the policy considerations of family unity.

Similarly, in Dykstra-Gulick v. Gulick, 604 So.2d 1282 (Fla. 5th DCA 1992) (review granted, Fla. No. 80,486, oral argument scheduled for June 1, 1993), a wife brought a negligence action against her husband for injuries incurred in an accident occurring prior to their marriage. Id. at 1283. Recognizing that the termination of a marriage, whether by death or divorce, abrogates the doctrine of interspousal immunity, the court stated:

> The doctrine of interspousal immunity bars an action between a husband and wife based upon negligence. . . . However, if the parties' marriage should terminate by death or dissolution, appellant could then maintain her action for negligence. Id.

Accordingly, the court reversed the trial court's final judgment to the extent that it dismissed the wife's action with prejudice, and remanded for the entry of a final judgment "abating this action until such time as the doctrine of interspousal immunity is no longer applicable." Id.

The Third District below missed the mark when it stated, "the fact that McAdam, Sr. is now deceased does not alone create a cause of action where one did not exist during his lifetime." Thom v. McAdam, 610 So.2d at 512. The reason why it missed the mark is that the operative facts creating the "cause of action" arose during Mr. McAdam, Sr.'s lifetime. The Third District confused the distinction between a "cause of action" and a "right of action." In another case where the application of interspousal immunity did not bar a suit after the death of a spouse, Shivers v. Sessions, 80 So. 2d 905 (Fla. 1955), this Court recognized this important distinction:

> A right of action is a remedial right affording redress for the infringement of a legal right belonging to some definite person, whereas a cause of action is the operative facts which give rise to such right of action. When a legal right is infringed, there accrues, ipso facto, to the injured party a right to pursue the appropriate legal remedy against the wrongdoer. This remedial right is called a right of action. Id. at 908 (quoting from Fielder v. Ohio Edison Co., 158 Ohio St. 375, 109 N.E.2d 855 (Ohio 1952)).

See also C.J.S. "Actions" § 3b (a "cause of action" in most specific sense refers only to the existence of a primary right, a primary duty, and a breach of the primary right and duty, and does not encompass a remedial right, remedial duty, and remedy); § 10 ("remedy" means those judicial means or methods by which a "cause of action" may be enforced;

"cause of action" precedes and merely gives rise to the "remedy"); and § 21 (most accurate definition of the term "cause of action" is "the primary right and duty and the delict or wrong, combined"; together, "they are the legal cause or foundation whence the right of action springs"). Here, the operative facts giving rise to the estate's action against Mrs. McAdam arose during his lifetime. The estate can now assert its remedial right against her.

This distinction between a "cause of action" and a "right of action" has been recognized by this Court's cases which hold that marriage only abates the "right of action" in regard to antenuptial torts between married parties, and does not destroy the underlying "cause of action"; therefore, the death of one party or the dissolution of the marriage would restore the "right of action." Webster v. Snyder, 138 So. 755, 755 (Fla. 1932); Gaston v. Pittman, 224 So. 2d 326, 328-329 (Fla. 1969); see also Amendola v. Amendola, 121 So. 2d 805 (Fla. 2d DCA 1960); Chatmon v. Woodard, 492 So. 2d 1115, 1116 (Fla. 3d DCA 1986); Shoemaker v. Shoemaker, 523 So.2d 178, 178 (Fla. 3d DCA 1988).

It could be argued that, while the doctrine of interspousal immunity abates the "right of action" for antenuptial torts, it operates to prevent any "cause of action" from arising for torts committed during marriage. Such appears to have been this Court's logic in Bencomo v. Bencomo, 200 So.2d 171, 173-174 (Fla.), cert. denied, 389 U.S. 970, 88 S.Ct. 466 (1967), where the Court, still adhering to the common-law

notion of the "unity of marriage," quoted from 27 Am.Jur., Husband and Wife, Section 589:

> Where husband and wife are not liable to each other for torts committed by one against the other during coverture, they do not, upon being divorced, become liable to each other for torts committed prior to the divorce, by one spouse on the person or character of the other during coverture. * * * The divorce cannot in itself create a cause of action in favor of the wife upon which she may sue, where it was not a cause of action before the divorce. [ellipsis in original]

However, Bencomo and other cases with similar holdings were overruled sub silentio by this Court's holding in Sturiano, which rejected marital unity as a justification for interspousal immunity and allowed an action for a tort committed during marriage after one spouse died and the policy justifications for the doctrine did not exist. 523 So.2d at 1128.

A "cause of action" either arises at the time a wrong (in Sturiano, the negligent driving of the car) is committed or not; it cannot be predicated upon an event (in Sturiano, the death of the husband) which was contingent at the time of the wrongful act. If, therefore, the death of a spouse plays a factor in abrogating the application of the doctrine of interspousal immunity, as it did in Sturiano, the doctrine must be seen as abating only the "right of action" and not as preventing a "cause of action" from arising.

The exercise of undue influence by one spouse over a frail, elderly, and incapacitated spouse and the deliberate destruction of that spouse's family in order to misappropriate that spouse's separate wealth is an example of a wrong between spouses for which there should be legal

redress. Because this case represents the only possible legal remedy for Mrs. McAdam's wrongful conduct, applying interspousal immunity here would only frustrate this State's policy which declares that "for every wrong there is a remedy."

C. STURIANO V. BROOKS SHOULD NOT BE INTERPRETED AS WAIVING INTERSPOUSAL IMMUNITY ONLY TO THE LIMITED EXTENT OF LIABILITY INSURANCE UNDER THE CIRCUMSTANCES OF THIS CASE.

In Sturiano, this Court held that the doctrine of interspousal immunity no longer is applicable when the public policy reasons for applying it do not exist. 523 So.2d at 1128. However, this Court concluded its discussion of interspousal immunity by stating:

> . . . the doctrine of interspousal tort immunity [is] still good law. Actions 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. However, under 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.
> 523 So.2d at 1128.

The last sentence of this quote engenders ambiguity. Does it mean that the doctrine of interspousal immunity can never be waived beyond the extent of applicable liability insurance? Or does it mean that the Court would not waive it beyond the extent of applicable liability insurance under the circumstances inherent in Sturiano? Furthermore, does the abrogation of the doctrine of interspousal immunity in Sturiano extend to intentional as well as to negligent torts?

If this Court's abrogation of the doctrine of interspousal immunity in Waite, 18 FLW S311, does not become final, this Court should take

this opportunity to clarify these ambiguities. These ambiguities should be resolved in favor of waiving the application of the doctrine, regardless of the presence or absence of liability insurance,[7] in situations like the one at issue here. A judgment against Mrs. McAdam will bring to justice an intentional tortfeasor[8] and will not injure any innocent family members. With an intentional tort committed by one spouse upon the other, the intentional tortfeasor's actions have already destroyed marital and family unity and have rendered the family relationships adversarial rather than collusive; thus the Sturiano concerns of marital unity and the prevention of fraud or collusion do not apply.

In Sturiano there may have been a policy justification for limiting the recovery to the amount of applicable liability insurance. There, the tortfeasor, Mr. Sturiano, was guilty merely of negligence and was already dead. A recovery by Mrs. Sturiano against his estate for more than the amount of applicable liability insurance could have depleted the assets of the estate at the expense of other estate beneficiaries.

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[7]In Sturiano, Justice Ehrlich, in his partial concurrence and dissent, stated, "I agree with the Court that there are no policy considerations in this case for maintaining the doctrine of interspousal immunity for the reasons well articulated in the opinion, and, in my view, where this is the case, the doctrine should not exist. The existence vel non of liability insurance should play no part." 523 So.2d at 1131 (Ehrlich, J. concurring in part and dissenting in part)(footnote omitted).

[8]As early as 1967, Justice Ervin in his dissenting opinion in Bencomo v. Bencomo, 200 So.2d at 174-75, advocated the abolition of interspousal immunity for intentional torts committed during coverture upon the termination of the marriage.

Likewise, in Ard v. Ard, 414 So. 2d 1066 (Fla. 1982), where this Court abolished interfamily immunity to the extent of applicable liability insurance, such a limitation made sense; any broader waiver would result in one family member benefitting at the expense of other family members.

Here, however, such a limitation has no application. Mr. Thom, as personal representative of the estate of Mr. McAdam, Sr., is seeking to force Mrs. McAdam to restore to the estate funds that she intentionally and tortiously misappropriated during her marriage to Mr. McAdam, Sr. Here, to apply interspousal immunity would not protect innocent family members. Instead, it would deny these innocent family members their rightful entitlement as beneficiaries of Mr. McAdam, Sr.'s estate. This Court should not apply interspousal immunity to the limited extent of liability insurance because there is no such insurance here. Such a limitation would effectively disinherit innocent estate beneficiaries to the extent of Mrs. McAdam's misappropriation of estate assets.

D. THE DISTRICT COURT WAS OBLIGATED TO AFFIRM THE TRIAL COURT ON THE ALTERNATE BASIS THAT THE PROBATE FINDINGS COLLATERALLY ESTOP MRS. McADAM AND IT REVERSIBLY ERRED IN NOT DOING SO.

The Third District Court further erred in failing to affirm the trial court's ruling on the alternative basis that the factual determinations made in the probate proceeding collaterally estop Mrs. McAdam.[9] This issue was raised and argued to the trial court and to the

[9]Although the Petitioner is urging this alternative basis for affirmance, the Petitioner is nonetheless maintaining the position that the factual findings made in the remaindermen's trust litigation should also collaterally estop Mrs. McAdam. See § V.(E) below.

district court; the findings of fact in the prior probate action are part of the record in this case. Because the trial court determined that Mrs. McAdam was estopped from denying the findings of fact in the remaindermen's trust litigation it was not necessary for the trial court to rule on the alternative collateral estoppel issue.

This Court has long maintained that:

> ... [T]he judgment of the trial court reach[es] the district court clothed with a presumption in favor of its validity. Accordingly, if upon the pleadings and evidence before the trial court, there [i]s <u>any</u> theory or principle of law which would support the trial court's judgment in favor of the plaintiffs, the district court [i]s obliged to affirm that judgment.

<u>Cohen v. Mohawk, Inc.</u>, 137 So.2d 222, 225 (Fla. 1962) (emphasis in original) (citation omitted); <u>see also City of Coral Gables v. Puiggros</u>, 376 So.2d 281, 284 (Fla. 3d DCA 1979) (where it was held that a "judgment may be affirmed on any ground appearing in the record"). Here, the trial court's partial summary judgment in favor of the estate was supported by the valid factual determinations made in the probate proceedings on the theory of collateral estoppel, known also as estoppel by judgment.

"[T]he ultimate purpose of estoppel by judgment is to bring litigation to an end." <u>Gordon v. Gordon</u>, 59 So.2d 40, 44 (Fla.), <u>cert. denied</u>, 344 U.S. 878, 73 S.Ct. 165 (1952). That is, "[c]ollateral estoppel or estoppel by judgment ... serves to limit litigation by determining for all time an issue fully and fairly litigated between parties." <u>Trucking Employees of North Jersey Welfare Fund, Inc. v.</u>

Romano, 450 So.2d 843, 845 (Fla. 1984). This doctrine applies "where the two causes of action are different, in which case the judgment in the first suit only estops the parties from litigating in the second suit issues - that is to say points and questions - common to both causes of action and which were actually adjudicated in the prior litigation." Gordon v. Gordon, 59 So.2d at 44. "The essential elements of the doctrine are that the parties and issues be identical, and that the particular matter be fully litigated and determined in a contest which results in a final decision of a court of competent jurisdiction." Mobil Oil Corp. v.Shevin, 354 So.2d 372, 374 (Fla. 1977) (footnote omitted).

Collateral estoppel may be asserted only by "the same parties or their privies." Trucking Employees of North Jersey Welfare Fund, Inc. v. Romano, 450 So.2d at 845. In this context, it has been held that "parties or their privies" include persons in either of the following two categories:

> (1) as to the same parties, "a person who, though not an actual party to the record in that action, prosecuted the action or the defense thereto, on behalf of a party, or assisted the latter or participated with him in the prosecution of such action or its defense." Seaboard Coast Line Railway Company v. Industrial Contracting Co., 260 So.2d 860, 862-63 (Fla. 4th DCA 1972) (quoting 139 A.L.R. 9, 12); or,
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> (2) as to being a privy of a party, this refers to a person "who, after the commencement of the action, has acquired an interest in the subject matter affected by the judgment through or under one of the parties, as by inheritance, succession, purchase, or assignment ...", Rhyne v. Miami-Dade Water and Sewer Authority, 402 So.2d 54, 55 (Fla.

3d DCA 1981) (quoting 46 Am.Jur.2d Judgments, § 532, PP. 684-85).

The present case involves the same "parties or their privies" as those in the probate litigation. First, during the probate proceedings, Mrs. McAdam was one of the personal representatives of the estate defending and responding to the challenge made to the validity of the will and codicils admitted to probate. At the time, Mrs. McAdam was a substantial beneficiary of the estate, personally represented by counsel in the matter, and a witness who testified in defense of the action. Plainly, she was a driving force involved in the defense. On the other side, Mr. Thom, as the personal representative of the estate, is a privy of Mrs. McAdam by virtue of the fact that he became the successor in interest of the estate. He is also a party for purposes of collateral estoppel because, as personal representative of the estate, he acts as a fiduciary of the beneficiaries, Dacus v. Blackwell, 90 So.2d 324, 327 (Fla. 1956),[10] which in this case includes the petitioners who prosecuted the probate proceeding, namely Lois Cook and Patricia Thom, who ultimately inherited Mr. McAdam, Sr.'s estate.

As to the identical issues requirement, the doctrine of collateral estoppel applies to questions of fact adjudged in the original action. United States v. Moser, 266 U.S. 236, 242, 45 S.Ct. 66 (1924); Shearson Hayden Stone, Inc. v. Seymour, 356 So.2d 834, 836 (Fla. 1st DCA 1978) (collateral estoppel applies even if fact is determined on an erroneous

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[10]See also In re Corbin's Estate, 391 So.2d 731 (Fla. 3rd DCA 1980).

view or erroneous application of the law); see Gordon v. Gordon, 59 So.2d at 44 ("the first suit ... estops the parties from litigating in the second suit issues - that is to say points and questions - common to both causes of action ... and which were actually adjudicated in the prior litigation").

In the case at bar, the same factual issues being litigated here, namely the motives and conduct of Mrs. McAdam between 1979 and the time of his death in 1985 with respect to the separate assets of Mr. McAdam, Sr., are the same factual issues which were determined in the probate proceeding. See A. 51-90; A. 17-28 (in particular A. 21, ¶ 24). A comparison between the factual findings made in the probate litigation with the Complaint and the facts asserted as collateral estop plainly bears this out. Id.; A. 34-50.

As to the requirement of being fully litigated and determined in prior litigation by a court of competent jurisdiction, this element is also met. The probate litigation was fully adjudged and concluded after a lengthy trial. The probate litigation fully decided and determined the very facts at issue here. Mrs. McAdam neither sought the trial court's reconsideration of the probate findings nor appealed them. Further, there is an underlying confidence that the probate findings were substantially correct because the factual findings made in the earlier trust litigation are substantially similar to the findings made in the probate litigation. See Standefer v. United States, 447 U.S. 10, 23 n. 18, 100 S.Ct. 1999, 2007 n. 18, (1980). Lastly, there is no dispute as to whether the probate court had jurisdiction.

Collateral estoppel and fundamental fairness require that where a court makes detailed findings of fact, those findings are dispositive and may not be questioned or relitigated by an inquiry into the evidence. O'Brien v. Brickell Townhouse, Inc., 439 So.2d 982, 983 (Fla. 3rd DCA 1983) (extensive findings of fact which form the basis of the final judgment of the prior court disposed of all of the factual issues asserted in both complaints); West Point Construction Co. v. Fidelity and Deposit Co. of Maryland, 515 So.2d 1374 (Fla. 3rd DCA 1987), appeal dismissed, 523 So.2d 579 (findings rendered by courts in a prior case precludes relitigation of the same issues); Roth v. Rosa Brothers, Inc., 513 So.2d 709 (Fla. 3rd DCA 1987) (findings in a declaratory judgment action as to parties' intent precludes relitigation of that issue).

Consequently, the district court erred in not affirming the trial court's grant of final summary judgment as to liability in favor of the estate on the alternative basis that the factual findings made in the probate proceeding collateral estop Mrs. McAdam.

E. THE FACTUAL DETERMINATIONS MADE IN THE REMAINDERMEN'S TRUST LITIGATION SHOULD COLLATERALLY ESTOP MRS. McADAM.

The district court below concluded:

> ... that the factual determinations of the earlier [remaindermen's conversion] action are in no way controlling as to the instant dispute. Clearly, where a judgment is vacated or set aside, it is as though no judgment had ever been entered. Shields v. Flinn, 528 So.2d 967, 968 (Fla. 3d DCA 1988). Thus, factual determinations made prior to dismissal of the earlier conversion action could have no preclusive effect in the instant case. Those findings were a nullity once the judge set aside his original order. They were totally unnecessary and irrelevant to the final judgment

> which relied in total on Genova, and could not be utilized to collaterally estop Ms. McAdam. See Adelheim v. Dougherty, 129 Fla. 680, 176 So.2d 775, 777 (1937); Zwakhals v. Senft, 206 So.2d 62 (Fla. 4th DCA 1968). ...

However, fundamental fairness and the policy of finality and of economizing judicial resources and time, counsel this Court to recognize the earlier trust litigation findings as collateral estoppel against Mrs. McAdam under the facts of this case.

It has been held that collateral estoppel applies even if facts are determined under an erroneous view or erroneous application of the law. Shearson Hayden Stone, Inc. v. Seymour, 356 So.2d 834, 836 (Fla. 1st DCA 1978). Here, at the time the trust litigation findings were made, the law recognized the remaindermen's cause of action. If facts made under an erroneous view or application of the law can act to collaterally estop a party, then factual determinations made at a time when the law recognized the underlying cause of action should also act as collateral estoppel as long as the elements of estoppel by judgment are also met. Here, the trust litigation involved the same parties and issues as in the instant case. Those findings were made after a full trial. Furthermore, there is no question as to the trial court's jurisdiction in the trust litigation.

Other factors uniquely present in this case lend support to the conclusion that Mrs. McAdam should be collaterally estopped from denying the factual determinations made in the trust proceeding. Mrs. McAdam did not rebut the evidence of undue influence presented against her in the trust litigation. As the trial judge noted, the evidence presented

of undue influence was "unrebutted by the defendant [Mrs. McAdam]." A. 57, ¶ 21. At the time, Mrs. McAdam did not seek reconsideration of the trial court's factual findings. The trial judge expressly reaffirmed those factual findings even though he felt compelled to vacate them on purely legal grounds, which were created by this Court after the trial had been concluded.

Moreover, the substantially same facts were later separately made against her in the probate matter by another judge after yet another trial involving the same parties and issues, thereby creating an underlying confidence that the trust findings were substantially correct. See Standefer, 447 U.S. 10, 23 n. 18, 100 S.Ct. 1999, 2007 n. 18. In that later proceeding, Mrs. McAdam testified. Again, she did not seek reconsideration of those substantially similar findings. Nor did she seek appellate review of them.

Thirteen years have passed since the commencement of the trust litigation. Mrs. McAdam's conduct engendered numerous other legal proceedings involving various members of Mr. McAdam, Sr.'s family, many of which proceedings were the subject of the trust and probate litigation. Since collateral estoppel is an equitable doctrine and its ultimate purpose is to bring litigation to an end, it would not serve justice to engage in the legal fiction that the trust findings do not exist and do not collaterally estop Mrs. McAdam under the circumstances of this case.

IV. CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Third District with instructions to affirm the partial summary judgment as to liability entered by the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to: Sam Daniels, Esq., and Robert M. Sondak, Esq., Paul, Landy, Beiley & Harper, P.A., Penthouse, Atico Financial Center, 200 S.E. First Street, Miami, Florida 33131 on the 1st day of June, 1993.

Hector Rivera