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

JURISDICTIONAL BRIEF OF PETITIONERS

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STATEMENT OF THE CASE AND FACTS

A trust containing most of the property of Mr. Charles Vincent McAdam, Sr. was established in 1978. Under its terms, Mr. McAdam was to receive all trust income and was entitled to receive distributions of trust corpus. Upon Mr. McAdam's death, his two daughters were each to receive one-half of the trust remainder.

Mr. McAdam married Respondent Ms. Sybil Speiller McAdam in 1979. Shortly after the marriage, he began requesting distributions of trust corpus from his son, the trustee. His son was removed from his position as trustee, and Florida National Bank substituted, after the son refused to make the requested distributions. Mr. McAdam's children filed suit protesting attempted distributions of the trust corpus and other trust decisions. The trial judge ordered that all trust distributions be made with prior court approval. After that decision, $521,513 of distributions authorized by the trustee were approved by the court and paid under court order.

The McAdam children next filed suit against Ms. McAdam alleging that she unduly influenced Mr. McAdam to seek trust distributions reducing the trust corpus by $521,513. A second trial judge agreed and found that Ms. McAdam had unduly influenced Mr. McAdam to seek trust distributions and that these actions were the legal cause of the invasions of trust corpus. However, this judgment was vacated and the claims against Ms. McAdam dismissed after the Florida Supreme Court ruled in Florida

National Bank v. Genova, 460 So.2d 895 (Fla. 1984), that the concept of undue influence does not apply to the decision of a settlor of a revocable trust to seek distributions from trust corpus. The decision to dismiss the claims against Ms. McAdam was upheld in Cook v. McAdam, 479 So.2d 156 (Fla. 3d DCA 1985).

After Mr. McAdam died in 1985, his children filed a petition to revoke probate of a will executed by Mr. McAdam while married to Ms. McAdam. A third trial judge found that the will was the product of undue influence and granted the petition. As a consequence, an earlier will which left nothing to Ms. McAdam was admitted into probate. Petitioner Mr. Thom was appointed personal representative for the estate and instituted the present action against Respondent Ms. McAdam in 1989. On behalf of the Estate, Mr. Thom's suit seeks recovery from Ms. McAdam for civil theft, common law conversion, and fraud based upon allegations that Ms. McAdam, while married to Mr. McAdam, coerced her much older husband to transfer certain of his assets to the couple's joint ownership and then converted those assets to her own personal possession and use.

Mr. Thom moved for final summary judgment on behalf of the Estate, arguing that the findings of fact in the McAdam children's conversion action and the probate action described above were res judicata or collateral estoppel on the issue of Ms. McAdam's liability. The trial court ruled that Ms. McAdam was collaterally estopped from denying the findings of fact establishing undue influence in the children's earlier conversion

action. Thom v. McAdam, No. 89-19199 (CA 04), slip opinion p. 1-2 (Fla. 11th Cir. Ct., Dade Co., December 18, 1991). The trial court further ruled that Ms. McAdam's defense of interspousal immunity and other defenses were inadequate and granted summary judgment on the issue of liability to the personal representative Mr. Thom. Id. at slip opinion p. 2. On appeal, the third district reversed, ruling that "under the doctrine of interspousal immunity, Ms. McAdam is not liable for conversion of McAdam, Sr.'s property during the marriage." The court held this despite the fact that Mr. McAdam is now dead: "The fact that McAdam, Sr. is now deceased does not alone create a cause of action where one did not exist during his lifetime." McAdam v. Thom, 17 FLW D2600, D2601 (Fla. 3d DCA November 17, 1992).

After the third district denied Petitioner's Motion for Rehearing, Rehearing En Banc and/or Certification, Petitioner filed a timely Notice to Invoke this Court's jurisdiction.

SUMMARY OF ARGUMENT

This Court has discretionary review under Article V, Section 3(b)(3) of the Florida Constitution over any district court case that expressly and directly conflicts with the decision of this Court or of another district court on the same point of law. See also Fl.R.App.Pr. Rule 9.030(a)(2)(A)(iv). The decision of the third district in this case expressly and directly conflicts with decisions of this Court and a decision of another district court.

The third district has in effect ruled that the death of a spouse cannot affect the application of the doctrine of interspousal immunity. This creates express and direct conflict with the decisions of this Court in Sturiano v. Brooks, 523 So.2d 1126 (Fla. 1988), and Dressler v. Tubbs, 435 So.2d 792 (Fla. 1973). In both Sturiano and Dressler, this Court allowed an action to proceed after the death of a spouse which would have been blocked by the doctrine of interspousal immunity had both spouses been alive.

The third district's ruling also creates express and direct conflict with the ruling of the fifth district in Dykstra-Gulick v. Gulick, 604 So.2d 1282 (Fla. 5th DCA 1992). In Dykstra-Gulick, the fifth district ruled that an action between spouses currently blocked by the doctrine of interspousal immunity would not be so blocked after the dissolution of the marriage or the death of one spouse.

ARGUMENT

I. IN RULING THAT THE APPLICATION OF THE DOCTRINE OF INTERSPOUSAL IMMUNITY COULD NOT BE AFFECTED BY THE FACT THAT MR. McADAM WAS NOW DECEASED, THE THIRD DISTRICT COURT OF APPEALS CREATED EXPRESS AND DIRECT CONFLICT WITH DECISIONS OF THIS COURT AND A DECISION OF ANOTHER DISTRICT COURT CONCERNING THE CONDITIONS IN WHICH THE DOCTRINE OF INTERSPOUSAL IMMUNITY MAY APPLY

Article V, Section 3(b)(3), Florida Constitution invests this Court with discretionary jurisdiction to review decisions of district courts expressly and directly conflicting with prior decisions of this Court or with decisions of other district courts. See also Fla.R.App.Pr. Rule 9.030(a)(2)(A)(iv). The

decision of the third district court expressly and directly conflicts with prior decisions of this Court and a decision of another district court.

The third district ruled that, because of the doctrine of interspousal immunity, Ms. McAdam could not be liable during her marriage to Mr. McAdam for the conversion of Mr. McAdam's property. McAdam v. Thom, 17 FLW D2600, D2601 (Fla. 3d DCA November 22, 1992). The third district further ruled that the death of Mr. McAdam would not create a cause of action where one was blocked while Mr. McAdam was alive. Id. In effect, the third district ruled that once conditions have arisen under which interspousal immunity would block a cause of action against a spouse, the death of a spouse cannot remove this block. This is in express and direct conflict with decisions of this Court and a decision of another district court of appeal.

In Sturiano v. Brooks, 523 So.2d 1126 (Fla. 1988), this Court 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 its prior statements justifying interspousal immunity on this basis:

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

This Court 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 apply where both spouses are still living. Sturiano, 523 So.2d at 1128. However, this Court then clearly indicated that the death of a spouse can wipe out these policy justifications for interspousal immunity and allow an action:

> 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].

This Court's ruling in Sturiano clearly provides that there are situations in which the doctrine of interspousal immunity will no longer apply to block actions after the death of a spouse. Accordingly, the third district court's ruling that the death of a spouse cannot affect the application of the doctrine of interspousal immunity is in direct and express conflict with this Court's decision in Sturiano.

In Sturiano, this Court referenced 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 block a wrongful death suit by the personal representative of the wife's estate against the husband's estate. Id. at 794.

In Dressler, as in Sturiano, the death of a spouse--or in Dressler the death of both spouses--affected the application of the doctrine of interspousal immunity. Accordingly, the ruling of the third district court of appeals that the death of a spouse cannot affect the application of the doctrine of interspousal

immunity is also in direct and express conflict with this Court's decision in Dressler.

The possible effect upon the application of the doctrine of interspousal immunity of subsequent events terminating a marriage has also been recognized by the second circuit court of appeals in Dykstra-Gulick v. Gulick, 604 So.2d 1282 (Fla. 5th DCA 1992) (under review, Fla. No. 80,486, oral argument scheduled for June 1, 1993). In Dykstra-Gulick, a wife brought a negligence action against her husband for injuries incurred in an accident occurring prior to their marriage. Id. at 1283. The court recognized that the doctrine of interspousal immunity barred the action while the wife and husband were married, but held that "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.

As with this Court's decisions in Sturiano and Dressler, the second district's decision in Dykstra-Gulick clearly indicates that the death of a spouse can affect the application of the doctrine of interspousal immunity. Accordingly, the ruling of the third district that the death of a spouse cannot affect the application of interspousal immunity is in direct and express

conflict with the decision of the second district in Dykstra-Gulick.

While it cannot form the basis for this Court's discretionary conflict jurisdiction, it is worth noting that the third district itself has in another case applied this Court's logic in Sturiano to allow a wife to bring an action against her former husband for assault, battery and negligence post-dissolution of the couple's marriage. Waite v. Waite, 593 So.2d 222 (Fla. 3d DCA 1991). Waite v. Waite is currently under review by this Court (Case No. 79,463, oral argument held January 8, 1993, decision pending), as is Dykstra-Gulick v. Gulick, supra.

By accepting the present case, this Court will be able to assure a disposition consistent with its eventual disposition of the interspousal immunity issues in Waite v. Waite and Dykstra-Gulick v. Gulick and will be able to further clarify the status and boundaries of the doctrine of interspousal immunity in Florida.

CONCLUSION

This Court should accept jurisdiction because the third district's decision expressly and directly conflicts with decisions of this Court and a decision of another district court. This case addresses a matter of great importance to the jurisprudence of Florida, namely the status and boundaries of the doctrine of interspousal immunity. The importance of this doctrine is further evidenced by the fact that this Court has been asked to revisit interspousal immunity in two recent

district court opinions, and has accepted both cases for review. Dykstra-Gulick v. Gulick, 604 So.2d 1282, 1283 (Fla. 5th DCA 1992) (per curiam, certifying question to this Court as to whether interspousal immunity should be abolished for negligent torts committed prior to marriage; and Dauksch, J., concurring specially, imploring this Court to abolish completely the doctrine of interspousal immunity) (under review, Fla. No. 80,486, oral argument scheduled for June 1, 1993); Waite v. Waite, 593 So.2d 224, 231-233 (Fla. 3d DCA 1991) (per curiam denial of motions for rehearing and rehearing en banc, certifying question to this Court regarding the effect of Sturiano on intentional torts; and Gersten, J., dissenting, imploring this Court to abolish "this insidious doctrine" of interspousal immunity) (under review, Fla. No. 79,463, oral argument held on January 8, 1993, decision pending).

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing and appendix hereto have been furnished by United States Mail this 4th day of March, 1993, to the following: Robert M. Sondak, Esq., and Sam Daniels, Esq., Paul, Landy, Beiley & Harper, P.A., Penthouse, 200 Southeast First Avenue, Miami, Florida 33131.

Appendix A

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1992

SYBIL McADAM, **

Appellant, **

vs. ** CASE NO. 92-109

JOHN C. THOM III, as Personal Representative of the Estate of CHARLES VINCENT McADAM, SR., deceased, **

**

Appellee. **

Opinion filed November 17, 1992.

An Appeal from a non-final order of the Circuit Court for Dade County, Joseph P. Farina, Judge.

Paul, Landy, Beily & Harper and Sam Daniels and Robert M. Sondak, for appellant.

Bienstock & Associates and Hector R. Rivera, for appellee.

Before SCHWARTZ, C. J., and HUBBART and NESBITT, JJ.

PER CURIAM.

Sybil Speiller McAdam appeals an order of summary judgment entered in favor of the personal representative of the estate of

attempted distribution of trust corpus, including subsequent corporate trustees and expenditures and disbursements from the trust. The circuit court judge assigned to the case ordered that any distribution from the trust be made with prior court approval. During that time, $521,513 authorized by the trustee was paid under court order from the trust corpus.

The McAdam children then filed a separate complaint against Ms. McAdam alleging she unduly influenced McAdam, Sr. to seek funds from the trust, thereby reducing the McAdam trust corpus by the $521,513. Their complaint alleged conversion, civil theft, and tortious interference with their vested expectancy interest in the trust. A second trial judge made extensive findings and determined that Ms. McAdam had used undue influence to coerce McAdam, Sr.'s withdrawals from the trust and that her actions were the legal cause of the trust corpus invasions. However, before that decision became final, the Florida Supreme Court in Florida Nat'l Bank v. Genova, 460 So.2d 895 (Fla. 1984), held that the concept of undue influence did not apply where a settlor creates a revocable trust, which reserves control over the trust property. On rehearing, the trial judge hearing the McAdam children's claims vacated his initial judgment and entered a dismissal of their complaint with prejudice based on Genova, but also announced that he was not receding from any factual findings that he had made previously. The children appealed the dismissal and the decision was affirmed. Cook v. McAdam, 479 So.2d 156 (Fla. 3d DCA 1985).

In 1985, McAdam, Sr. died and his children filed a petition to revoke probate of a will executed by McAdam, Sr. during his

Having considered the actions alleged to have occurred during McAdam, Sr.'s lifetime, we conclude that under the doctrine of interspousal immunity, Ms. McAdam is not liable for conversion of McAdam, Sr.'s property during the marriage. See Hill v. Hill, 415 So.2d 20 (Fla. 1982); Cook v. Cook, 602 So.2d 644 (Fla. 2d DCA 1992); Gordon v. Gordon, 443 So.2d 282 (Fla. 2d DCA 1983).

This conclusion is not altered by the holding in Sturiano v. Brooks, 523 So.2d 1126 (Fla. 1988), which abrogated the doctrine of interspousal tort 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. See Roberts v. Roberts, 414 So.2d 190, 191 (Fla. 1982); but see Waite v. Waite, 593 So.2d 222 (Fla. 3d DCA 1991) (holding doctrine of interspousal tort immunity did not bar wife's post-dissolution suit against her former husband). Both the nature of the personal representative's claims and Ms. McAdam's affidavit below show the validity of the defense of marital immunity to the personal representative's claims of misconduct by Ms. McAdam.

Accordingly, we reverse the summary judgment ordered, and remand for entry of summary judgment in Ms. McAdam's favor.