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FILED

SID J. WHITE

MAR 15 1993

CLERK, SUPREME COURT.

By _____
Chief Deputy Clerk

IN THE SUPREME COURT
OF FLORIDA

CASE NO. 81378

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

Petitioner,

vs.

SYBIL McADAM,

Respondent.

RESPONDENT'S JURISDICTIONAL BRIEF

Sam Daniels and Robert M. Sondak
PAUL, LANDY, BEILEY & HARPER, P.A.
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Miami, Florida 33131
(305) 358-9300

Attorneys for Respondent.

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I.

STATEMENT OF THE CASE AND FACTS

Petitioner seeks direct conflict review of the Third District's decision in McAdam v. Thom, 610 So. 2d 510 (Fla. 3d DCA 1992).¹ The facts are as follows:

Mr. McAdam married the respondent, Sybil Speiller in 1979. He died in 1985 while still married to respondent. In 1989 petitioner, the personal representative of Mr. McAdam, sued the respondent widow:

[F]or civil theft, common law conversion, and/or fraud, based upon a claim that Ms. McAdam, during her marriage to McAdam, Sr., coerced her elderly husband to transfer ownership of certain of his assets to the couple's joint ownership and thereafter, while the husband was still alive, converted these assets to her own personal possession and use.

610 So. 2d at 510.

A summary judgment on liability was entered against the widow in the trial court and she appealed to the Third District. The Third District reversed with directions to enter summary judgment for the respondent widow, holding:

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

¹ Actually, the notice to invoke discretionary jurisdiction seeks review of "the decision of this Court rendered February 2, 1993 denying Plaintiff/Respondent's motions for rehearing, rehearing en banc and/or certification concerning this Court's Opinion Filed November 17, 1992." The order referred to states no reasons and cites no authority. This fact alone may justify denial of the petition. Both the notice and order are attached as Exhibits A and B.

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)....

610 So. 2d at 511.

Petitioner now seeks review of the above decision contending that it is in express direct conflict with decisions of this Court and the decisions of other District Courts of Appeal.

II.

SUMMARY OF ARGUMENT

The decision below accords with a multitude of Florida decisions and conflicts with none. While certain exceptions to the marital immunity doctrine have developed over the years, none of those exceptions applies to the facts in the instant case.

Respondent was married to Mr. McAdam when he died and all the alleged wrongs sued for occurred during this marriage. This case does not involve an assault and battery; no liability insurance is available; and, the wrongful death act is not involved. Accordingly, the marital doctrine applies; the decision below conflicts with no other Florida appellate decision and the petition should be denied.

III.

ARGUMENT

For the reasons which follow, it is respectfully submitted that no express direct conflict exists, and that the petition should be denied.

This Court has recognized certain limited exceptions to the marital immunity doctrine. However, it has never abolished the doctrine itself. In addition, the Legislature created an exception when it provided in § 741.235, Fla. Stat., (1985) that:

The common law doctrine of interspousal tort immunity is hereby abrogated with regard to the intentional tort of battery, and the ability of a person to sue another person for the intentional tort of battery shall not be affected by any marital relationship between the persons.

In wrongful death actions where a new cause of action is created for beneficiaries, it has been held that the doctrine does not apply where one spouse kills the other. The immunity defense is treated as personal to the deceased spouse and not applicable to the beneficiaries. E.g., Dressler v. Tubbs, 435 So. 2d 792 (Fla. 1983); Shiver v. Sessions, 80 So. 2d 905 (Fla. 1955).

A second limited exception to the doctrine exists when liability insurance is available. In Sturiano v. Brooks, 523 So. 2d 1126, 1128 (Fla. 1988), this Court held, in a case where the negligent spouse was dead, that:

We note at this point that Snowten and the doctrine of interspousal tort immunity are 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. (emphasis supplied).

Finally, the Fifth District has held that the doctrine does not apply if the injuries occur before the parties marry and death or dissolution of the marriage occurs thereafter. Dykstra-Gulick v. Gulick, 604 So. 2d 1282 (Fla. 5th DCA 1992). The Court has granted review of that decision and the facts there have no application to the facts of the instant case. The same is equally true as to Waite v. Waite, 593 So. 2d 222 (Fla. 3d DCA 1991). In that case the Third District held that, where a husband attacked² his wife with a machete and she subsequently divorced him, the doctrine did not apply.

There is no exception which applies to the facts of this case. Mr. McAdam was married to respondent when he died and no liability insurance is applicable. Likewise, § 741.235, Fla. Stat. does not apply. Moreover, all of the alleged events sued for occurred while the McAdams were married.

The decision below is in complete accord with a long line of Florida decisions upholding the marital immunity doctrine. E.g., 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).

² The attack occurred before § 741.235, Fla. Stat. became effective.

Finally, petitioner suggests that the petitioner should be granted to insure no conflict with the Court's decisions in Waite and Dykstra-Gulick since they have been set for oral argument. Those cases involve the applicability of the doctrine after divorce -- an issue which does not exist in the case sub judice.

IV.

CONCLUSION

It is respectfully submitted that no express direct conflict exists, and that the petition should be denied.

Respectfully submitted,

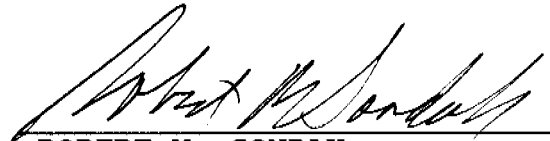
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BY:



SAM DANIELS
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BY:



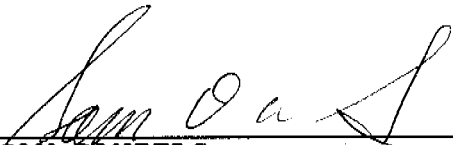
ROBERT M. SONDAK
Florida Bar No. 223875

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Respondent's Brief on Jurisdiction was mailed this 12th day of March 1993 to:

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SAM DANIELS

IN THE DISTRICT
COURT OF APPEAL OF
FLORIDA, THIRD
DISTRICT
CASE NO. 92-109

L/C CASE NO. 89-19199
CA 04

SYBIL McADAM,

Defendant, Petitioner,

v.

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

Plaintiff, Respondent.

NOTICE TO INVOKE DISCRETIONARY JURISDICTION

NOTICE IS GIVEN that John C. Thom, III, as the personal representative of the Estate of Charles V. McAdam, Sr., Plaintiff, Respondent, invokes the discretionary jurisdiction of the Supreme Court to review the decision of this Court rendered February 2, 1993 denying Plaintiff/Respondent's motions for rehearing, rehearing en banc and/or certification concerning this Court's Opinion Filed November 17, 1992. The decision expressly and

EXHIBIT "A"

directly conflicts with a decision of another district court of appeal or of the Florida Supreme Court on the same question of law.

Hector Rivera

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Notice to Invoke Discretionary Jurisdiction was served by mail this 1st day of March 1993, to: Robert M. Sondak, Esquire, and Sam Daniels, Esquire, Paul, Landy, Beiley & Harper, P.A., Penthouse, 200 Southeast First Ave., Miami, Florida, 33131.

Hector Rivera

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT
JANUARY TERM, A.D. 1993
FEBRUARY 2, 1993

SYBIL McADAM,

**

Appellant,

**

vs.

**

CASE NO. 92-109

JOHN C. THOM, III, etc.,

**

Appellee.

**

Upon consideration, appellee's motions for rehearing,
rehearing en banc and/or certification are hereby denied.

A True Copy

ATTEST:

LOUIS J. SPALLONE

Clerk District Court of
Appeal, Third District

By


Deputy Clerk

cc: Hector Rivera
Sam Daniels

Robert M. Sondak
Terry S. Beinstock

/nbc

EXHIBIT "B"