IN THE SUPREME COURT

OF FLORIDA

CASE NO. 81,378

JOHN C. THOM, III,

Petitioner,

v.

SYBIL McADAM,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

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I.

STATEMENT OF THE CASE AND FACTS[1]

In 1978, Charles V. McAdam, Sr., ("McAdam Sr.") established an Irrevocable Trust, (the "Trust") and conveyed most of his property to it. Under the Trust Agreement, (A. 183) McAdam Sr. would receive all income generated from the Trust during his lifetime, and would be entitled to obtain liberal distributions of trust corpus. The Trust Agreement further provided that on McAdam Sr.'s death, Lois Cook and Patricia Thom, McAdam Sr.'s daughters from a prior marriage, were each entitled to one-half of the trust remainder. The Trust Agreement specifically provided that on McAdam Sr.'s death his estate would have no right to any assets of the Trust. (A. 184)

In 1979, McAdam Sr. married Sybil Speiller. Soon after the marriage, McAdam Sr. requested distributions of corpus from the Trustee, Charles V. McAdam Jr. ("McAdam Jr.") When McAdam Jr. refused, McAdam Sr. exercised his right to replace McAdam Jr. as Trustee, naming the Florida National Bank as successor Trustee. (A. 345)[2] Thereafter, the McAdam children brought suit and contested each and every attempted distribution of Trust corpus during the remainder of McAdam Sr.'s lifetime. The cases, entitled In Re: Charles V. McAdam 1978 Irrevocable Trust, Case Nos. 79-

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[1] Most of the facts stated in this section are taken from the opinion of the Third District Court of Appeals, McAdam v. Thom, 610 So.2d 510 (Fla. 3d DCA 1992), and are also referenced to the Appendix Respondent filed in the Third District, cited as "A. ____". Unless otherwise specified, all emphasis is added.

[2] McAdam Sr.'s decision was upheld by the Circuit Court which rejected McAdam Jr.'s challenge to it. (A. 230-38)

21553, 79-21586, included attacks on every subsequent corporate trustee, and every expenditure and disbursement from the Trust.

Judge Silver, the Circuit Court judge assigned to hear the cases, initially ordered that no distribution from the Trust could be made without his approval. (A. 342-44) Thereafter, he approved in advance each and every payment that was made from the Trust. (A. 345-98) During McAdam's lifetime, $521,513 authorized by the Trustee was paid under court orders authorizing invasion of trust corpus. (A. 726)

In spite of the court orders, the McAdam children initiated a separate complaint against Sybil McAdam, Cook v. McAdam, Case No. 81-20090 (A. 400), alleging that Sybil McAdam unduly influenced McAdam Sr. to seek funds from the Trust, thereby reducing the Trust corpus by the $521,513. Her actions, according to that complaint, constituted conversion, civil theft, and tortious interference with the McAdam children's vested expectancy interest in the Trust. The claims against Sybil McAdam in Cook v. McAdam were tried and determined by Judge Turner. Judge Turner initially made extensive findings that Sybil McAdam was guilty of unduly influencing McAdam Sr., and was the legal cause of the Trust corpus invasions. (A. 51-59)

Shortly before Judge Turner's decision would have become final, this Court decided Florida National Bank v. Genova, 460 So. 2d 895 (Fla. 1984). Genova held that the concept of undue influence does not apply where a settlor creates a revocable trust, thereby reserving control over the trust property. 460 So. 2d at

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897-98. In Genova, the Court specifically recognized that a decision to revoke a trust cannot be unduly influenced, since the settlor, at the time the Trust was established, reserved the absolute right to end the trust and distribute the property in any way desired.

On Sybil McAdam's rehearing motion, and based on Genova, Judge Turner vacated his initial Judgment and entered a second judgment dismissing the Complaint with prejudice. (A. 60) In so ruling, Judge Turner held the McAdam Trust was in effect a revocable trust because McAdam Sr. reserved for himself such broad powers to invade trust corpus. On the motion for rehearing, Judge Turner stated, in response to counsel's question, that he was not receding from his factual findings, but was entering judgment for Sybil McAdam based on the Genova decision. (A. 68) The McAdam children appealed the judgment in favor of Sybil McAdam to this Court, which affirmed per curiam, citing Genova. Cook v. McAdam, 479 So. 2d 156 (Fla. 3d DCA 1985).

In 1985, McAdam Sr. died. His children immediately filed a petition to revoke probate of a will executed by McAdam Sr. during his marriage to Sybil McAdam. (A. 517) Judge Featherstone granted the petition, holding that the will was the product of undue influence. In re Estate of Charles Vincent McAdam. (A. 71) An earlier will which left nothing to Sybil McAdam was accepted for probate, which appointed John Thom, III, husband of one of the McAdam children, as personal representative.

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In 1989, Thom, as personal representative of the McAdam Sr. Estate, brought the present action against Sybil McAdam, claiming undue influence and conversion of funds distributed from the Trust. (A. 17) Later, Petitioner moved for summary judgment, arguing that the initial findings of fact in Cook v. McAdam and the findings of fact in the probate litigation, In re Estate of Charles Vincent McAdam were res judicata/collateral estoppel on the issue of Sybil McAdam's liability. (A. 34)

The lower court, on December 18, 1991, entered its Order Determining Liability and Granting Summary Judgment on Liability in favor of Petitioner. (A. 1) In that Order, the trial court made the following finding of fact:

> As to the $521,513.00 which is the subject matter of Plaintiff's Motion for Summary Judgment, that money, while originally assets belonging to the Charles V. McAdam, Sr. Irrevocable Trust, became Estate assets due to Defendant's own actions causing the Trust to distribute those assets. (A. 1)

The lower court then went on to adopt as collateral estoppel against respondent Judge Turner's initial Findings of Fact and Conclusions of Law in Cook v. McAdam. In addition, the lower court held that respondent's affirmative defenses including marital immunity and res judicata were insufficient as a matter of law. (A. 2) The trial court granted Petitioner's motion for summary judgment as to liability only, reserving ruling "pending further hearings" as to damages. (A. 2) Respondent then appealed to the Third District Court of Appeal.

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The Decision In The Third District Court of Appeal Below

The Third District reversed the summary judgment on liability for petitioner and directed entry of final judgment for respondent. McAdam v. Thom, 610 So.2d 510 (Fla. 3d DCA 1992). That court reasoned:

> We conclude that the factual determinations of the earlier action are in no way controlling as to the instant dispute. Clearly, where a judgment is vacated or set aside, it is as through 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 Adelhelm v. Dougherty, 129 Fla. 680, 176 So. 2d 775, 777 (1937); Zwakhals v. Senft, 206 So. 2d 62 (Fla. 4th DCA 1968). Thus, summary judgment as to liability was erroneously entered in the personal representative's favor.
>
> Having considered the actions alleged to have occurred during McAdam, Sr.'s lifetime, we conclude that under the doctrine of inter-spousal 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). 610 So.2d at 512.

Since the Third District found interspousal immunity to be a complete defense, it did not consider the other grounds advanced by respondent for reversal. Respondent had also contended below that petitioner, as personal representative, lacked standing to seek recovery of trust funds which were not assets of the decedent's estate. In addition, respondent contended below that the judgment

in Cook v. McAdam, supra, which incorporated Judge Silver's orders approving the Trust distribution, bars the instant action.

The Court's Grant of Certiorari

This Court granted certiorari and dispensed with oral argument on May 4, 1993. On May 27, 1993, the Court issued its opinion in Waite v. Waite, 18 Fla. L. Weekly S 311 (Fla. May 27, 1993).

II.

SUMMARY OF ARGUMENT

The Third District Court of Appeal held below that: (a) the findings of fact of a vacated judgment have no preclusive effect in subsequent litigation; and (b) the doctrine of marital immunity bars this action. While this Court's opinion in Waite requires alteration of the second holding, the first ground of the opinion below remains intact, namely, that fact findings made in a vacated judgment have no res judicata or collateral estoppel effect. Accordingly, the Third District's reversal of the summary judgment on liability in favor of Petitioner should remain undisturbed, no matter what this Court holds on marital immunity.

This case presents other issues as well. In the trial court, Respondent also moved for summary judgment, based on several grounds, which the Third District did not reach because of its marital immunity holding. These alternative grounds are: (1) that Petitioner has no standing to sue; and (2) that the amended final judgment in Cook v. McAdam precludes this action. This Court may

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now consider those issues or remand them to the Third District Court of Appeal.

The standing to sue issue is dispositive. All of the $521,513 sought in this case was distributed from the McAdam Sr. Trust. The McAdam Sr. Trust instrument specifically provides that under no circumstances could any trust assets become assets of McAdam Sr.'s estate. Consequently, the personal representative of the estate has no standing to sue to "recover" money wrongfully distributed from the Trust. As the record shows, funds were used to pay court awarded attorney's fees, taxes to the Internal Revenue Service, rent owed to the landlord of the McAdam apartment, medical bills, utilities, department stores, and other vendors of goods and services. If any of those payments were wrongful, the legal consequence is that the money should be "restored" to the McAdam Trust. This Plaintiff, however, has no standing to bring this action, and it should be dismissed.

More fundamentally, this action is barred, because the distributions in question were twice the subject of lawsuits by the McAdam children, and both times the court rejected claims that the distributions were wrongful. First, no distributions were made from the Trust until after the circuit court approved those distributions. From 1979-85, the court entered scores of orders authorizing these distributions, (A. 342-98) including all of the $521,513 now challenged in this lawsuit.

The McAdam children then attempted to challenge the distributions a second time, in a separate action against

Respondent, Cook v. McAdam. That suit alleged that Sybil McAdam unduly influenced McAdam Sr. to seek funds from the McAdam trust, thereby reducing the trust corpus by the same $521,513. That lawsuit claimed conversion, civil theft, and tortious interference with the McAdam children's vested expectancy interest in the Trust. Ultimately, that action was dismissed with prejudice, in an Amended Final Judgment which reiterated that:

> "a trustee, upon the request of a settlor, notices an invasion of corpus pursuant to a trust agreement providing the trustee with discretion to invade corpus, and such invasions of corpus are made after court approval ...." (A. 60)

The findings in the Amended Final Judgment collaterally estop Petitioner from asserting the claims here. Additionally, the dismissal with prejudice constitutes a binding adjudication on the merits of those claims, and on principles of res judicata this case should be dismissed.

Assuming, however, that these defenses were not dispositive, there is a third reason for rejecting Petitioner's claims. The abrogation of marital immunity in this Court's Waite opinion does not resolve the tort issues raised by the complaint in this case. Waite dealt with severe personal injuries intentionally inflected by one spouse on the other. Nothing in that opinion addresses the question of when, if ever, one spouse can be guilty of converting the other spouse's funds. As the Third District correctly observed, this case involves accusations of conversion during the marriage. 610 So.2d at 511. In other states which have abolished the doctrine of marital immunity, courts have recognized that there

is a wide variety of conduct which, if engaged in between strangers, would be tortious, but if engaged in between spouses or other family members, creates no cause of action in tort. Some courts view the issue as one of either privilege, or consent. Other courts have suggested that the conduct between spouses is not tortious at all.

There are, of course, no cases in this state which have examined these issues other than in the context of the doctrine of marital immunity. With that doctrine abrogated, this Court may wish to begin the process of defining the parameters of property tort actions between spouses. It is submitted that McAdam, Sr. could not have sued Respondent to recover these expenses during his lifetime, and his death did not place his personal representative in any better position.

III.

ARGUMENT

For the reasons that follow, it is respectfully submitted that the Third District's Order should be affirmed. Admittedly, the Third District's decision as written cannot stand. Waite has now been decided. Be that as it may, the record still discloses a number of reasons why respondent was entitled to a summary judgment and why the Third District was completely correct in reversing the trial court's Summary Judgment on Liability.

We recognize that the Court may simply vacate and remand on the authority of Waite. However, since the Court has the power to

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decide the entire cause, we shall address all the remaining issues in this brief.[3]

A. Petitioner Lacks Standing To Seek Recovery of Trust Assets

Petitioner has no standing to sue in this case because the $521,513 he seeks to recover was money belonging to the McAdam Trust. These monies were disbursed directly from the Trust to pay rent, court ordered attorneys fees, taxes due to the Internal Revenue Service, and various vendors of goods and services. (See A. 97-98, 197-224, 726). If, as petitioner contended below, those payments were improperly disbursed from the trust, only the trustee could seek their recovery. The money never became an asset of the decedent's estate, and therefore petitioner, the personal representative of the Estate, could not sue for its recovery.[4] Respondent could not have converted funds from her husband which her husband never received or possessed. Only the Trustee of the McAdam Trust, and not the deceased husband's personal representative, could seek recovery of the funds. This is not a distinction without a difference because the trustee, the Southeast Bank, N.A., actually sued to recover these funds from respondent. However, the trustee allowed its suit to be dismissed for want of prosecution. (A. 528)

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[3] E.g., Zirin v. Charles Pfizer & Co., 128 So.2d 594 (Fla. 1961).

[4] As the Court will recall, the Trust expressly provided that its assets could never become assets of the decedent trustor's estate. (A. 184)

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In holding that the personal representative had standing, the trial court made a finding of fact that the money, "while originally assets belonging to the . . . Trust, became estate assets due to Defendant's own actions causing the Trust to distribute those assets." (A.1) It was, of course, improper to make a finding on disputed facts on a Summary Judgment Motion. The facts in the record show that money was paid from the Trust directly to vendors of goods and services, as well as to the IRS and for rent, and never came into McAdam Sr.'s possession.[5]

Faced with this obvious error in the trial court's Order, Petitioner tries to fill the void by calling respondent "evil" as often as possible, and denouncing her effort to "disprove her guilt" for a "third" time. This sort of emotional appeal is not a substitute for reasoned argument. As a matter of law and fact, the petitioner has no standing to sue.

B. Preclusive Effect of Prior Litigation Bars Petitioner's Claim Rather Than Respondent's Defense

In Cook v. McAdam, supra, Judge Turner first found the facts and ruled against respondent. Then, on rehearing, he ruled for respondent in an Amended Final Judgment stating:

> Upon rehearing of this cause, the Court finds that when, as here, a Trustee, upon the request of a Settlor, notices an invasion of corpus pursuant to a Trust Agreement providing the Trustee with discretion to invade corpus, and such invasions of corpus are made after

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[5] It is interesting to note that the trial court's order is internally inconsistent since one of the findings which the trial court incorporated from Cook v. McAdam specifically was that the $521,513 at issue here was money belonging to the Trust, and not to McAdam Sr. (A. 56,58)

> Court approval, the concept of undue influence does not apply. See Florida National Bank of Palm Beach County v. Genova, 9 FLW 466 (Fla. 1984).
>
> It is thereupon ordered and adjudged that:
>
> 1. The final judgment heretofore entered by this court on September 4, 1984 is set aside and held for naught.
>
> 2. Plaintiffs' Complaint be and the same is hereby dismissed, with prejudice, at the cost of Plaintiffs. (A. 60).

The above judgment was affirmed by the Third District in the decision reported at 479 So. 2d 156.

As Judge Turner correctly found, each and every distribution from the Trust here contested was court approved in litigation involving McAdam Sr., his trustee, and the McAdam children. In every instance, Judge Silver approved the distribution. Those rulings were incorporated into Judge Turner's Amended Final Judgment. They collaterally estop any claim here.

Judge Turner's Amended Final Judgment dismissing the complaint in Cook v. McAdam "with prejudice" is also binding here under principles of res judicata and precludes re-litigation of the same causes of action by the same parties. Gordon v. Gordon, 59 So.2d 40, 44 (Fla.), cert. denied, 344 U.S. 878 (1952). In the trial court, Petitioner conceded the identity of parties in Cook v. McAdam and this case. (A.41) The similarity of causes of action (conversion, fraud, and undue influence) is apparent and the assets in controversy, $521,513, are the same. Under principles of res judicata, this action is barred.

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There is no merit to petitioner's claim that the facts found in the original Cook v. McAdam judgment still bind respondent even though that judgment was vacated. As the Third District correctly held below:

> We conclude that the factual determinations of the earlier 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 Adelhelm v. Dougherty, 129 Fla. 680, 176 So. 2d 775, 777 (1937); Zwakhals v. Senft, 206 So. 2d 62 (Fla. 4th DCA 1968). 610 So.2d at 512.

Accord: Restatement (Second) of Judgments § 27 cmt. h (1982).

Equally devoid of merit is petitioner's claim that respondent should have appealed from Judge Turner's prior findings. Respondent received a final judgment in her favor. It is axiomatic that one may not appeal from a favorable judgment. E.g., Morgan v. Morgan, 404 So. 2d 1101 (Fla. 3d DCA 1981); Restatement (Second) of Judgments, § 28 (1982); R & S Partnership v. Martin Schaffel Enterprises, Inc., 529 So. 2d 794, 795 (Fla. 3d DCA 1988).

Findings in Will Contest Not Relevant Here

Petitioner asks this Court to determine that findings made in a separate lawsuit, In Re: Estate of Charles Vincent McAdam, Case No. 87-1371 (Dade County Circuit Court) in which Judge Featherstone revoked probate of a will executed by McAdam Sr. during his

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marriage to respondent, collaterally estop her in this case. The holding of the Featherstone case was that the will was the product of undue influence. There are at least three reasons why neither the trial court nor the Third District utilized Judge Featherstone's ruling as collateral estoppel in this case.

First, in the trial court, petitioner specifically and unequivocally renounced any contention that Judge Featherstone's ruling had any preclusive effect. At the hearing on the Motion for Partial Summary Judgment (A. 751-88) petitioner's counsel specifically advised that he was only relying on Judge Turner's findings, and that if they were not binding, Summary Judgment would be inappropriate:

> And our argument on summary judgment is with this finding by Judge Turner, his finding of fact that that should be collateral estoppel as to that $521,000, that's simply our argument.
>
> If we're wrong, Judge, then I concede they've raised the question of fact that a jury or the court will have to eventually decide on how much the estate has been damaged. There are issues of fact. We are relying solely upon Judge Turner's finding of fact on that $521,000. (A. 758)

Also see A.753 in which counsel reiterated the same admission. As the transcript makes clear, this concession was a calculated decision by counsel to enhance his changes of prevailing on liability and damages. (A. 753-55) It is hardly appropriate after making such a concession, to ask this Court to conclude the contrary.

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Second, in the will contest, Judge Featherstone made no findings that respondent converted any or all of the $521,000 sought in this case. The nineteen pages of findings drafted by counsel and signed by the court (A. 71-89) are broad, general, and gratuitous, but do not cover the issues raised here.[6] In order to be binding in later litigation, findings of fact must be "essential to the judgment." See Restatement (Second) of Judgments § 27 (1982):

> When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.

See also Moore v. Musa, 198 So.2d 843, 846 (Fla. 1967); Shearson Hayden Stone, Inc. v. Seymour, 356 So.2d 834, 836 (Fla. 1st DCA 1978). Any findings of conversion of trust assets in the will contest would obviously not be "essential" to a judgment as to the validity of the will, but rather would be extraneous to that inquiry. Such irrelevant findings could not be collateral estoppel in this case.

Third, as we successfully urged below, an examination of the will contest shows that the normal requirements of collateral estoppel are not met here. The parties are different. Thom was not a party at all, and the MidAtlantic National Bank, the named

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[6] Contrary to the suggestions in Petitioner's brief (at 5), there is nothing about either "joint accounts" or "lavish personal spending" in the findings of fact at issue.

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personal representative in the later will, had offered it for probate.

C. **Even With Immunity Gone, There Still Was No Tort**

This Court's Waite opinion abolishes marital immunity in the context of a personal injury suit between spouses where one spouse almost killed the other. Nothing in either the majority opinion or Justice Harding's concurring opinion addresses an interspousal suit for purely economic loss with no accompanying physical injury. The concurring and dissenting opinion of Justice Grimes expresses fears of the "spate of lawsuits between spouses covering a wide range of torts, including defamation, conversion, fraud and property damage, and perhaps more creatively the negligent infliction of a disease, such as AIDS." The concurring opinion of Justice McDonald expresses concern as to the "unfettered ability of one spouse to sue the other ...."

In states which have abolished interspousal immunity, courts are still prohibiting claims such as those made against respondent in this case. The fundamental issue, not considered below by the Third District, is whether a tort has been committed at all. Conduct between members of a family is, necessarily, judged differently than conduct between those who are not related by blood or marriage or do not live in the same home. This concept is expressly recognized in the Restatement (Second) of Torts, § 895F ("Husband and Wife") which states, in pertinent part:

> (2)Repudiation of general tort immunity does not establish liability for an act or omission that, because of the marital relationship, is otherwise privileged or is not tortious.

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In agreement is W. Page Keeton, et al., Prosser and Keeton on The Law of Torts §122 at 910 (5th Ed. 1984), which states:

> although there are few decisions, it is probably also a good guess at this point that in the absence of intended harm, little protection would be given in the case of purely economical or other intangible loss where the Plaintiff/spouse suffers no accompanying physical injury. (Footnotes omitted.)

Whether conduct between family members is tortious has been considered in a few jurisdictions which have abolished marital immunity. For instance, in Garrity v. Garrity, 504 N.E.2d 617, 619 (Mass. 1987), the court observed:

> [C]onduct which may be tortious between strangers, 'may not be tortious between spouses because of the mutual concessions implied in the marital relationship.' 'Acts that are reasonable in view of the close relation and carelessness in the operation of the home or in common activities should be distinguished from conduct not so referable and which would be actionable if the parties were not husband and wife.' The concept of consent has a broad application when a tort is alleged in the marriage context. (Citations omitted.)

See, e.g. Heino v. Harper, 759 P.2d 253, 271 (Or. 1988):

> Because of the nature of the marital relationship, conduct that would be tortious as against a stranger might not be tortious as against one's spouse; considerations similar to such doctrines as consent and privilege may render conduct between spouses nontortious.

Any number of examples come to mind. A spouse taking money from the other's wallet or purse, without prior express permission, surely cannot be sued for "conversion" or "civil theft." When a spouse spends the rent money on lottery tickets, or the grocery

money on personal luxuries, that conduct should not become the subject of a tort suit. Similarly, when one spouse talks the other spouse into investing the family savings in a foolish scheme, it is hardly appropriate that such conduct will be deemed securities fraud. Charges of "undue influence" in a marital relationship, until now limited to will contests, should not be available where one spouse "pressures" the other into buying a car, taking a trip, or otherwise spending money improvidently. Likewise, where does the duty to support end and the right to sue begin?

The money disbursed from the McAdam Trust was spent for the couple's ordinary living expenses. Pursuant to Judge Silver's Order authorizing the payment of $4,000 per month for rent (A. 362-363), the McAdam Trust disbursed a total of $192,627 for rent payments from 1981-85. Taxes incurred during that time consumed an additional $103,321.00 from the Trust. The court-awarded attorney's fees, primarily to counsel for the McAdam children, consumed $170,508.[7] We doubt this Court's opinion in Waite intended that such payments will now be the subject of a tort claim for conversion or civil theft.

The corporate trustee of the McAdam Trust also disbursed a large portion of the funds at issue to pay bills. For instance, in a letter dated July 16, 1980, the Florida National Bank Trust Department advised that it had paid prior charges of Burdines, the

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[7] While initially claiming conversion in the payment of those attorney's fees, counsel for Plaintiff conceded at the hearing on the Summary Judgment Motion that he had no claim for those expenditures. (A. 774-775)

Center for Orthopedic Care, Amoco, Master Charge, American Express, Sun Bank and Acme Air Conditioning. (A. 202) Two weeks later, the bank paid the Bal Harbour Club, the La Gorce Country Club, Shell's City Liquors, Gordon and Company, P.A. (accountants), Bal Harbour Village Water & Service, Bay Harbour Drugs, Orkin Exterminating Co., Inc., Visa, Southern Bell, Surfside Gulf Service Station, Surfside Cleaners & Tailors, Lewis R. Elias, M.D., and Prestige Eyewear. (A. 203) There is a collection of letters showing how Trust assets were spent, found in the record at A. 197-224.

There is no body of existing law which addresses the questions raised when spouses dispute property transactions. Comment k to §895 G ("Parent and Child") of the Restatement (Second) of Torts explains that:

> these problems are comparatively new to the courts as a result of the recent abrogation of immunity, and the courts have not yet worked out a full analysis of the proper legal treatment.

See Merenoff v. Merenoff, 76 N.J. 535, 555-56, 388 A.2d 951, 960-61 (1978) (Courts in New Jersey to evaluate these issues on a case by case basis). No Florida court has yet faced these issues, as marital immunity was abrogated by this Court in May. It is apparent, however, that the claims made against respondent do not rise to the level of tortious misconduct, and the abrogation of the doctrine of marital immunity has not changed that result.

No matter what direction the law of interspousal property torts takes, the summary judgment below for respondent should be reversed. Even if Waite is held to create a new interspousal

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property tort, at a minimum respondent should be allowed to plead below to the newly created Florida tort. Respondent has never had a chance to raise issue concerning privilege, consent, and lack of tortious conduct in the context of the new tort.

CONCLUSION

For the above reasons, it is respectfully submitted that the Third District was correct in reversing the summary final judgment and in directing the trial court to enter judgment for Respondent. In the alternative, Respondent submits that the Third District reversal of the summary judgment should be affirmed with directions, and the cause should be remanded for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Respondent's Brief on the Merits has been furnished to Terry Bienstock, Esq., Bienstock & Clark, P.A., First Union Financial Center, 200 South Biscayne Boulevard, Suite 3160, Miami, Florida 33131 and Marguerite H. Davis, Katz, Kutner, Haigler, Alderman, Davis & Marks, P.A. 106 East College Avenue, Suite 1200, Tallahassee, Florida 32301 by mail this 9th day of July, 1993.

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