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

original

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

PETITIONER'S REPLY BRIEF

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I. SUMMARY OF ARGUMENT

Respondent's answer brief, although it concedes that the decision below "cannot stand" due to this Court's recent decision in Waite v. Waite, 18 FLW S311 (Fla. May 27, 1993) which abrogated interspousal immunity, seeks an affirmance of the Third District's decision.

However, rather than address the issues raised in Petitioner's initial brief, Respondent raises new issues and attempts to resurrect issues implicitly rejected by the District court and from which no review has been sought here. Accordingly, those arguments may not be considered. Even if those issues are properly presented now, Respondent's arguments are without merit. Moreover, Respondent's brief fails to refute the arguments made in Petitioner's initial brief.

Respondent contends that, for purposes of collateral estoppel, the parties in the probate proceeding were different than the parties here. However, Respondent was a personal representative of the Estate, actively responding to the probate petition, personally represented by counsel, and the substantial beneficiary of the will at issue. Therefore, she was a party to the probate proceedings for purposes of collateral estoppel. Additionally, Mr. Thom is the same party because the petitioners before the probate court are now the estate beneficiaries, and Mr. Thom, as personal representative, acts as their fiduciary. Further, Mr. Thom is a successor in interest of MidAlantic Bank, the former corporate representative of the Estate and named respondent in the probate matter, as well as the Respondent, who is the former personal representative. As

such, Mr. Thom is in privy with them for purposes of applying collateral estoppel.

The trust findings were ruled to be null and void and of no preclusive effect by the court below. However, fundamental fairness requires that those findings collaterally estop the Respondent. Respondent conceded that those "claims were fully litigated, tried and determined." Appellee's Appendix at A.A. 189. The same parties and factual issues were involved as here, and there is no question as to the court's jurisdiction. The trust findings were made when the law recognized the remaindermen's causes of action and were, therefore, necessary and relevant. If collateral estoppel applies where facts are determined under an erroneous view or application of the law, then factual determinations made at a time when the law recognized the underlying causes of action should also act as collateral estoppel.

Respondent did not seek reconsideration or cross appeal of the unfavorable trust findings. Had she lost on the remaindermen's appeal, she would have been subject to a judgment in excess of half a million dollars. However, her decision not to cross appeal was calculated to keep the district court focused away from the details of her misconduct. Moreover, the same factual findings were later separately made against her in probate after yet another trial involving the same parties.

Respondent improperly attempts to resurrect the issue of <u>res judicata</u> as to the trust litigation. However, the threshold elements of identity of the thing sued for and capacity to sue are not present. The trust litigation involved an attempt to recover

trust assets, not estate assets. Until the probate litigation was concluded, the Estate could not seek to recover estate assets from Respondent.

Respondent argues that the Estate seeks recovery of trust assets for which it has no standing to sue. However, all trust distributions of income and corpus rightfully belonged in the possession of Mr. McAdam, Sr. As found in the probate and trust litigation, those funds were diverted from his possession as a result of Respondent's wrongful conduct. The Estate has standing to seek recovery of those assets.

II. ARGUMENT

A. INTERSPOUSAL IMMUNITY HAS BEEN ABROGATED.

In Waite v. Waite, 18 FLW S311, this Court held that the doctrine of interspousal immunity is abrogated in Florida. This decision is controlling in the present case and compels the quashing of the Third District decision. The Third District held that, under the doctrine of interspousal immunity, Respondent could not be held liable for conversion of her husband's property.

B. THIS COURT MAY REVIEW THE ENTIRE DECISION BELOW.

The District court also erred in overruling the trial court on the collateral estoppel issue. This Court may exercise its discretion to review the lower court's erroneous ruling on collateral estoppel.[1] The lower court reversibly erred by not affirming the trial court on the alternate basis that the probate findings collaterally estop Respondent.

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[1] Reed v. State of Florida, 470 So.2d 1382, 1383 (Fla. 1985); Savoie v. State of Florida, 422 So.2d 308, 310 (Fla. 1982); Zirin v. Charles Pfizer & Co., Inc., 128 So.2d 594, 596 (Fla. 1961).

Although not relied upon by the trial court for its ruling because it favorably resolved the case for Petitioner without the need to reach this issue, collateral estoppel as to the probate findings was raised before both courts below. This Court may review this issue as "properly preserved and properly presented." Tillman v. State of Florida, 471 So.2d 32, 34 (Fla. 1985). If the probate findings provided the trial court with an alternative basis to collaterally estop Respondent, the Third District should be required to affirm the trial court's order. See Cohen v. Mohawk, Inc., 137 So.2d 222, 225 (Fla. 1962).

1. The probate findings collaterally estop Respondent.

Respondent argues, for the first time, that the parties in the probate proceeding were different than the parties here for purposes of collateral estoppel.

This issue should not even be considered by this Court because Respondent did not raise it below. See Initial and Reply Brief of Appellant before the Third District. An appellate court may only review questions presented before the lower tribunal.[2] Therefore, an appellate court will not consider an issue not presented to the lower court. Steinhorst v. State of Florida, 412 So.2d 332 (Fla. 1982). In order to be reviewable here, this issue had to be "properly preserved" and "properly presented" below. Tillman, 471 So.2d 32 (Fla. 1985). Because it was not, it was waived, Mizner Land Corp. v. Abbott, 128 Fla. 489, 175 So. 507 (Fla. 1937); Black,

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[2] Green v. Parmelee, 134 Fla. 212, 212, 183 So. 726, 726 (Fla. 1938); Cabral v. Diversified Services, Inc., 560 So.2d 246, 247 (Fla. 3d DCA 1990); Sparta State Bank v. Pape, 477 So.2d 3, 3 (Fla. 5th DCA 1985); Black v. State of Florida, 367 So.2d 656, 657 (Fla. 3d DCA 1979), cert. denied, 378 So.2d 342 (Fla. 1979).

367 So.2d at 657.

Furthermore, this contention is without merit. For purposes of collateral estoppel, the "same parties" include persons in either of the following two categories:

> (1) "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); or,
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> (2) 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 ... succession ...", Rhyne v. Miami-Dade Water and Sewer Authority, 402 So.2d 54, 55 (Fla. 3d DCA 1981).

As to the former, Respondent was the personal representative of the Estate responding to the challenge made to the will admitted to probate. She was the substantial beneficiary, personally represented by counsel in the probate matter, and a testifying witness on behalf of the Estate. Consequently, Respondent was a party for purposes of collateral estoppel. Seaboard Coast Line, 260 So.2d at 862-63. Further, Mr. Thom is a party because the probate petitioners are the estate beneficiaries, and Mr. Thom, as personal representative, acts as their fiduciary. Dacus v. Blackwell, 90 So.2d 324, 327 (Fla. 1956).[3]

As to the latter category, Respondent argues that, because Mr. Thom was not a party to the probate proceeding, he is not the same

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

party for purposes of collateral estoppel. However, Mr. Thom is the present successor in interest of the Estate. He is a successor in interest of MidAlantic Bank, the former corporate representative of the Estate and the named responding party in the probate action. Therefore, Mr. Thom is a privy of MidAlantic Bank for purposes of collateral estoppel. See Rhyne v. Miami-Dade Water, 402 So.2d at 55. Also by succession, Mr. Thom is a privy of Respondent, the former personal representative. Id.

Respondent also argues that the probate proceedings did not determine that she converted any of Mr. McAdam, Sr.'s assets.[4] However, this argument is misdirected. The query is not whether the probate court determined the legal issue of conversion or how much Respondent wrongfully took from Mr. McAdam, Sr. Rather, the issue is whether the probate findings fully and fairly determined, as between the same parties, that Respondent exerted undue influence over all of Mr. McAdam, Sr.'s financial affairs. The answer is unequivocally, "yes." A. at 77. The probate findings conclusively establish all of the factual elements for conversion. The amount of damages is an issue which the trial court expressly reserved jurisdiction to determine. A. at 2.

Respondent speculates that the trial and district court did not rely on the probate findings - made by Judge Featherstone - because "counsel unequivocally renounced any contention that Judge Featherstone's ruling had any preclusive effect." Answer Brief at

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[4] Both parties submitted proposed findings to the probate court. It is irrelevant that Petitioner's counsel drafted the probate findings adopted by the court. What matters is that those findings were entered by the court after a full trial between the same parties and that they are valid.

14.[5] However, this argument is inaccurate and takes counsel's remarks out of context. On the next page of the transcript of the very same hearing, Petitioner's counsel expressly relied on the probate findings in support of the Petitioner's motion for partial summary judgment:

> We're saying **we're entitled to partial summary judgment** for what has already been found to be improperly diverted funds because Judge Turner found they were improperly diverted. **Judge Featherstone found that these funds were improperly diverted.** We should not have to try that again. (A. 759).

Further, the remarks of counsel quoted in the answer brief were expressly limited to damages. As counsel stated, "[i]f 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.** ... We are relying solely upon Judge Turner's finding of fact **on that $521,000.**" Answer Brief at 14 (emphasis added).

Respondent also maintains that "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." Answer Brief at 15. However, this argument is fatally flawed for two reasons.

First, this argument was waived because Respondent did not raise this issue below. See Initial and Reply Brief of Appellant before the Third District. While this argument was made as to the trust findings, it was not made in the context of the probate findings.

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[5] Citing to transcript of second hearing on motions for summary judgment at A. 758.

Second, she bases this argument on the assumption that the probate court adjudicated the legal issue of "conversion of trust assets" and that the Estate is seeking to restore trust assets. However, this is not the case. **Under the terms of the trust and the prenuptial agreement, all trust distributions of principal and income made during Mr. McAdam, Sr.'s lifetime rightfully belonged to Mr. McAdam, Sr. upon distribution.** The probate findings determined that Respondent exercised undue influence over Mr. McAdam, Sr. to divert those distributions for her own purposes. These facts establish conversion. The Estate seeks to restore those assets.

C. THE FACTUAL DETERMINATIONS MADE IN THE REMAINDERMEN'S TRUST LITIGATION SHOULD ALSO COLLATERALLY ESTOP RESPONDENT

1. Fundamental fairness requires that the trust findings should collaterally estop Respondent.

The court below ruled that the legal effect of vacating the findings in the trust litigation was to make them a nullity, unnecessary, and irrelevant, thereby having no preclusive effect.

However, fundamental fairness requires that the trust findings collaterally estop Respondent. She conceded before the trial court that "[t]he claims against [her] in Cook v. McAdam [the trust litigation] were fully litigated, tried and determined ..." Appellee's Appendix at A.A. 189. She admits that the same parties were involved. Answer Brief at 12. The same factual issues tried in the trust litigation are before the Court here. The trust findings were made at a time when the law recognized the remaindermen's causes of action, thereby making them necessary and relevant. If collateral estoppel applies where facts are

determined under an erroneous view or application of the law, Shearson Hayden Stone, Inc. v. Seymour, 356 So.2d 834, 836 (Fla. 1st DCA 1978), then findings made at a time when the law recognized the underlying causes of action should also act as collateral estoppel, especially where, as here, the elements of estoppel by judgment are otherwise met.

Respondent did not seek reconsideration or cross appeal of the unfavorable trust findings although the case went on appeal. Had she lost on the remaindermen's appeal, she would have been subject to a judgment in excess of half a million dollars. However, her decision not to cross appeal was calculated to keep the district court from focusing on the details of her misconduct. Moreover, the substantially same facts were later separately made against her in the probate matter after yet another trial, involving the same parties, thereby creating an underlying confidence that the trust findings were substantially correct. See Standefer v. United States, 447 U.S. 10, 23 n. 18, 100 S.Ct. 1999, 2007 n. 18 (1980).

2. Res judicata is legally insufficient because there is no identity of the thing sued for or identity of capacity to sue.

Respondent argues that the legal effect of the trust litigation is to preclude the causes of action in the case at bar under principles of res judicata. This contention should not be addressed and, in any event, overlooks certain material facts.

First, this issue was finally and absolutely determined by the lower courts. The trial court ruled that this defense was legally insufficient. A. 2. Although raised before the District court, this issue was not addressed in the opinion under review, was not

utilized as a basis for the decision, and was not appealed. Accordingly, this issue was permanently decided in favor of the Estate and should not be reviewed here. As this Court stated, "review by the district courts in most instances [are] final and absolute." Ansin v. Thurston, 101 So.2d 808, 810 (Fla. 1958). The only issues properly preserved, presented, and appealed for determination by this Court are the issues of interspousal immunity and collateral estoppel as against Respondent.

In any event, the res judicata defense is legally insufficient. Res judicata "applies only when [certain] identities are present [such as], identity of the thing sued for, [and] ... identity of the quality or capacity of persons for or against whom the claim is made." Cole v. First Development Corp., 339 So.2d 1130, 1131 (Fla. 2d DCA 1976).

The trust litigation sought recovery for damages to the remaindermen's interests in the trust. By contrast, the instant litigation seeks recovery for damages to the assets of the Estate. The distinction is that the causes of action in the former suit were to remedy damage to the trust corpus, while in the present case recovery is sought to remedy damage to the personal assets of Mr. McAdam, Sr.[6]

Furthermore, the trust remaindermen did not have standing to sue Respondent for damages to the personal assets of Mr. McAdam, Sr. while he was alive. The remaindermen only had standing to sue

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[6] Also, some of the conduct at issue occurred after final judgment was entered in the trust litigation up to the time of death of Mr. McAdam Sr. That conduct could not have been adjudicated in the trust litigation.

to protect their interest in the trust. Mr. Thom, as personal representative, could not sue for the damages Respondent caused to the Estate until after the probate litigation established an entitlement to probate the will which gave the Estate to Mr. McAdam, Sr.'s children and that the will bequesting the Estate to Respondent was invalid. Thus, the claims asserted herein did not become ripe until that time.[7]

D. OTHER ISSUES NEVER BEFORE RAISED BELOW MAY NOT BE CONSIDERED.

The answer brief raises for the first time the issues of whether a tort was committed and whether the Estate is collaterally estopped by the findings made in the final trust judgment. A review of Respondent's summary judgment papers and appellate briefs below shows that she did not previously raise these issues.[8] It bears repeating that these issues, raised for the first time here, may not be reviewed, may not be considered, and are deemed to be waived. Yet, even if they had been properly raised, which they were not, they have no merit.

1. Conversion and undue influence are intentional torts.

Respondent argues that no tort was committed at all. This contention is absurd. The probate and trust litigation findings established all of the elements for the intentional tort of conversion and that Respondent exercised "undue influence" over all of Mr. McAdam, Sr.'s financial affairs. "[U]ndue influence has

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[7] In addition, in a will contest one cannot recover damages - such relief is only available through an independent suit brought by the personal representative. See e.g. DeWitt v. Bruce, 408 So.2d 216, 219-220 (Fla. 1981).

[8] See Appellee's Appendix at A.A. 146-155 and 184-203 and Appellant's Initial and Reply Briefs before the Third District.

been classified as either a species of fraud or a kind of duress and in either instance is treated as fraud in general." Fla.Jur. 2d, Words and Phrases. Fraud is also an intentional tort.[9] It would not only be ironic, but tragic, for Respondent to be found guilty of exercising undue influence over her former husband in probate court and to have performed all of the predicate acts for conversion, yet not be held liable in tort. Her conduct was intentional and wrongful. Her acts cannot be considered nontortious.

Nor could Mrs. McAdam's acts be viewed as reasonable. She was found to have exercised undue influence over the very elderly and incapacitated Mr. McAdam, Sr. to isolate and alienate him from his family, make him impecunious, unreasonably reject offers of financial assistance from his children, and petition the court for substantial distributions of trust corpus. The successful challenges made to the petitions were granted because the distributions would have left Mr. McAdam, Sr. without sufficient income to live on.

Mr. McAdam, Sr. did not consent and could not have consented to Mrs. McAdam's actions. The prenuptial agreement between them negates such consent, and the probate findings establishing his

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[9] Mrs. McAdam's accompanying argument that there is no body of law which addresses questions raised when spouses dispute property transactions also fails. For example, Florida law recognizes the validity of prenuptial agreements, North v. Ringling, 149 Fla. 739, 7 So.2d 476 (Fla. 1940); Johnson v. Johnson, 140 So.2d 358 (Fla. 2d DCA 1962), the breach of which raises questions concerning property disputes between spouses.

incapacity preclude any subsequent approval of her conduct.[10]

Mrs. McAdam's arguments as to how estate funds were spent are irrelevant. If certain sums were legitimately spent, then such considerations are appropriately factored into a determination of damages. However, **the focus on this appeal is liability, not damages.**

2. Judge Silver did not approve of Respondent's exercise of undue influence over Mr. McAdam, Sr.

Respondent's other waived argument, is that of collateral estoppel against the Estate. She contends that, in the trust litigation, the court's finding that each distribution was court approved collaterally estops the Estate here. However, this argument is misleading.

Judge Silver approved some but not all of the trust distributions. More importantly, he did not rule on the issue of whether Respondent exerted undue influence over Mr. McAdam, Sr.'s financial affairs. To suggest that Judge Silver approved of such conduct is absurd. Any approvals which he made were limited in scope to whether the trust permitted the particular distribution under review. His rulings did not encompass Respondent's motives and conduct with regard to Mr. McAdam, Sr.'s finances. The probate and trust findings of undue influence did.

E. THE ESTATE HAS STANDING TO SEEK RECOVERY OF ESTATE ASSETS.

Respondent's other fatally flawed contention is that the Estate seeks to recover trust assets. From this premise, she

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[10] In any event, Mrs. McAdam raised this affirmative defense where she pled that, "[a]s a matter of law, a wife cannot be guilty of conversion or civil theft of assets of her husband." A. at 31.

argues that the Estate has no standing to sue for trust assets.

First, although argued to the district court, the Third District did not rely on standing as a basis for its decision. If the District court was of the opinion that there was no standing, it would not have reached the issue of collateral estoppel or interspousal immunity. The court below, therefore, implicitly and conclusively determined that the Estate had standing. This ruling was not cross-appealed by Respondent.

Second, Respondent's premise is incorrect. The Estate seeks to recover estate assets. While in the trust, the assets belonged to the trust. However, under the terms of the trust, Mr. McAdam, Sr. was the sole income and corpus distributee. Appellee's Appendix at A.A. 2-3, ¶ 5. Therefore, once the income and trust corpus were distributed, the funds ceased to be the property of the trust and became the rightful personal property of Mr. McAdam, Sr. In order to bring an action for conversion, a plaintiff must have a right to possession.[11] Respondent had no right to those funds by virtue of the prenuptial agreement.

However, she subverted Mr. McAdam, Sr.'s right to possession. She isolated and alienated him from his family and spent all of his personal assets, thereby making him impecunious. This created the only recognized basis for requesting the trust distributions under the terms of the trust. She exerted undue influence over Mr. McAdam, Sr. to get him to remove his son as trustee and to repeatedly petition the Court for substantial trust distributions.

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[11] Shelby Mutual Insurance Co. of Shelby, Ohio v. Crain Press, 481 So.2d 501, 503 (Fla. 2d DCA 1985), review denied, 491 So.2d 278; see Paige v. Mathews, 386 So.2d 815, 816 (Fla. 5th DCA 1980).

Upon receiving notice of the requested distributions, his daughters realized that their father would be left without sufficient income upon which to live, and they were forced to challenge those petitions. The challenges proved successful, but the irony is that the trust was then required to pay legal and other fees incurred in making the challenges in the interest of the trust, thereby achieving Respondent's expressed goal of breaking the trust. If not for her diverting those funds from Mr. McAdam, Sr.'s rightful possession, the Estate would have been whole. See A. 1.

III. CONCLUSION

For the foregoing reasons, this Court should quash the decision of the Third District in its entirety 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 28th day of July, 1993.

Hector Rivera