ORIGINAL



IN THE SUPREME COURT

STATE OF FLORIDA

NO.: 95,054

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GARY HERZFELD,

Petitioner,

vs.

FRANK HERZFELD,

Respondent.

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APPEAL FROM THE THIRD DISTRICT COURT OF APPEAL OF FLORIDA

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# RESPONDENT'S ANSWER BRIEF ON THE MERITS

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## CERTIFICATE OF TYPESET

Undersigned counsel certifies that the typeset used in the printing of this brief is 12 point Courier, a font that is not proportionately spaced.

## STATEMENT OF THE CASE AND OF THE FACTS

### I. STATEMENT OF THE CASE:

On June 5, 1997, and arising out of the alleged sexual molestation and abuse of the Respondent/Plaintiff adopted-son, Frank Herzfeld, by the Petitioner/Defendant adoptive-father, Gary Herzfeld, the Respondent/Plaintiff, Frank Herzfeld, filed a four count Complaint for Damages against the Petitioner/Defendant adoptive-father, Gary Herzfeld, asserting claims for assault and battery (Count I), false imprisonment (Count II), intentional infliction of emotional distress (Count III) and negligence (Count IV). (R. 2-10).[1]

On July 17, 1997, the Petitioner filed a Motion to Dismiss the Respondent's Complaint for Damages, and on August 7, 1997, the Petitioner filed an Amended and Restated Motion to Dismiss the Respondent's Complaint for Damages. Both motions claimed that the parental immunity doctrine barred all the Respondent's claims. (R. 14-22).

On August 27, 1997, and citing "Godales v. Y.H. Investments, Inc. (Fla. 3 DCA 1996)," the trial court granted the Petitioner's Motion to Dismiss with prejudice as to the Respondent's intentional tort claims --- Counts I, II, and III. (R. 663). However, the trial court denied the Petitioner's Motion to Dismiss as to the Respondent's negligence claim --- Count IV. (R. 663).

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[1] The Respondent/Plaintiff, Frank Herzfeld, will hereinafter be referred to as "Respondent" and the Petitioner/Defendant, Gary Herzfeld, will hereinafter be referred to "Petitioner." References to the Record on Appeal will be cited as (R.).

On September 8, 1997, the Petitioner filed its Answer and Affirmative Defenses as to Count IV of the Respondent's Complaint for Damages, and on September 16, 1997, the Respondent filed a Denial of Affirmative Defenses and Motion to Strike the Petitioner's Affirmative Defenses. (R. 23-39).[2]

On October 7, 1997, the Petitioner filed a Motion for Summary Judgment as to the remaining claim for negligence, Count IV, of the Respondent's Complaint for Damages. (R. 41-81). On January 30, 1998, the trial court entered a Final Summary Judgment, stating as follows:

> 1. Defendant [Petitioner] maintained homeowners insurance with Liberty Mutual throughout the periods in question. The record contains liability policies for the years in question with specific exclusions precluding coverage claims arising out of intentional acts, sexual molestation, corporal punishment or physical or mental abuse. This Court finds that there is no liability coverage for Count IV of the Plaintiff's [Respondent's] Complaint for negligent sexual assault under the policies' exclusions. Landis v. Allstate Ins. Co., 546 So.2d 1051, 1053 (Fla. 1989).
>
> 2. As a result, this Court finds that Count IV for negligence is barred by the family immunity doctrine. Ard v. Ard, 414 So.2d 1066 (Fla. 1066); Godales v. Y.H. Investments Inc., 667 So.2d 871 (Fla. 3d DCA 1996), reversed on other grounds, Y.H. Investments Inc. v. Godales, 690 So.2d 1273 (Fla. 1997); Richards v. Richards, 599 So.2d 135 (Fla. 5th DCA 1992).

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[2] On October 1, 1997, the trial court granted in part and denied in part the Plaintiff's Motion to Strike the Defendant's Affirmative Defenses. Said ruling is neither part of, nor germane to this appeal.

> ORDERED AND ADJUDGED that Defendant's [Petitioner's] Motion for Summary Judgment is GRANTED with prejudice, although the family immunity doctrine should be revisited in light of the abrogation of spousal immunity by the Florida Supreme Court.

(R. 656-657; 664-665).

On February 18, 1998, the Respondent filed a Notice of Appeal to the Third District Court of Appeal seeking review of the trial court's August 27, 1997, Order dismissing with prejudice Counts I, II and III of the Respondent's Complaint for Damages, as well as the trial court's January 30, 1998, Final Summary Judgment for Petitioner as to Count IV of the Respondent's Complaint for Damages. (R. 658-662).

On February 10, 1999, the Third District Court of Appeal rendered its opinion in Herzfeld v. Herzfeld, 24 Fla. L. Weekly D386 (Fla. 3rd DCA 1999), reversing the trial court's decision holding "that the parental immunity doctrine does not bar the action by a minor child against his parent for damages arising from sexual abuse . . . ." Id. The Third District Court of Appeal certified conflict with Richards, supra.

On February 26, 1999, the Petitioner filed his Notice to Invoke Discretionary Jurisdiction to this Honorable Court.

**II. STATEMENT OF THE FACTS:**

Whether taking as true the allegations in the Respondent's Complaint for Damages, or whether viewing the record evidence[3] in

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[3] Besides the Petitioner having filed into the record the available homeowner's liability insurance policies, there is virtually no record evidence upon which to determine the facts other than the pleadings.

a light most favorable to the non-movant, the Respondent, the facts in this case establish the following:

1) The Respondent was first placed in the Petitioner's home as a foster child in approximately 1988 when the Respondent was thirteen years old. (R. 2-10);

2) In 1991, when he was sixteen years old, the Respondent was formally adopted by the Appellee. (R. 2-10);

3) The Petitioner regularly and repeatedly sexually molested the Respondent over the course of several years beginning in approximately 1988 when the Respondent was thirteen years old and first placed in the Petitioner's home as a foster child. (R. 2-10);

4) Over the course of several years beginning in approximately 1988 when the Respondent was thirteen years old and first placed in the Petitioner's home as a foster child, the Petitioner regularly and repeatedly forced, by physical, mental and/or psychological threats and intimidation, the Respondent to commit lewd and lascivious sexual acts on the Petitioner. (R. 2-10);

5) All acts committed by the Petitioner on the Respondent, or by the Respondent on the Petitioner, were committed against the Respondent's will and without the Respondent's consent. (R. 2-10);

6) As a direct and proximate result of the Petitioner's acts, the Respondent sustained permanent physical injuries and extreme permanent emotional, mental and psychological injuries in the past and that will continue in the future. (R. 2-10);

7) As a further direct and proximate result of the Petitioner's acts, the Respondent has lost income in the past and will in the future sustain loss of earnings and earning capacity. (R. 2-10); and,

8) All the Petitioner's available homeowner's liability insurance policies contain express exclusions for the insured's "intentional acts" and/or "sexual molestation." (R. 82-655).

## SUMMARY OF THE ARGUMENT

Public necessity and fundamental rights require the judicial abrogation of the doctrine of parental immunity. Like the interspousal immunity doctrine, there is simply no longer a sufficient reason for continued adherence to the doctrine of parental immunity.

Therefore, this Honorable Court should accept jurisdiction, reject the Fifth District Court of Appeal's decision in Richards, and adopt the Third District Court of Appeal's decision below permitting a tort claim by a child against his or her parent for damages arising out of sexual abuse.

Assuming, arguendo, that this Honorable Court does not abrogate the doctrine of parental immunity, it should nevertheless reverse the trial court because the doctrine only bars an "unemancipated" minor from suing his or her parent for damages.

Whether taking as true the allegations in the Respondent's Complaint for Damages or whether viewing the record evidence in a light most favorable to the non-movant Respondent, the Respondent filed the instant suit against his adoptive father, the Petitioner, when the Respondent was at least a twenty year old "emancipated" child. Therefore, this Honorable Court should reverse the trial court and remand for further proceedings.

## ARGUMENT

### I. THERE ARE NO APPRECIABLE DIFFERENCES IN THE RATIONALE BEHIND THE DOCTRINE OF PARENTAL IMMUNITY AND THE RATIONALE BEHIND THE DOCTRINE OF INTERSPOUSAL IMMUNITY.

#### A. Brief History And Current State Of The Doctrine Of Parental Immunity.

Since its inception, courts and legal scholars have universally condemned the doctrine of parental immunity and the majority of jurisdictions --- ironically including the doctrine's founder, Mississippi --- have either completely abrogated or limited its application to such an extent that there is no clearly drawn picture of parent liability. See generally Glaskox v. Glaskox, 614 So.2d 906, 909-912, n. 5 (Miss. 1992); Restatement (Second) of Torts (1979) §895(G); Prosser, Law of Torts, §122 (4th ed. 1971); Comment, A Cry for Help: An Argument for Abrogation of the Parent-Child Tort Immunity Doctrine in Child Abuse and Incest Cases, 21 Fla. St. U. L. Rev. 617 (Fall 1993).

The reason being is that the doctrine is not rooted in English common law; rather, it was auspiciously created in 1891 by the Mississippi Supreme Court to maintain "peace of society," and "the families composing society." Hewellette v. George, 9 So. 885, 887 (Miss. 1891). Notably, the Hewellette Court rendered its controversial decision not on any precedent,[4] but on what it deemed to be "sound public policy." Hewellette, 9 So. at 887.

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[4] For a comprehensive historical review of the parental immunity doctrine, including references and citations to contrary pre-Hewellette cases and authorities, see Nocktonick v. Nocktonick, 611 P.2d 135 (Kan. 1980).

In 1961, nonetheless, the courts in this State adopted the doctrine of parental immunity thus denying Florida children redress of injuries whether caused by their parents intentionally or negligently. See Meehan v. Meehan, 133 So.2d 776 (Fla. 2d DCA 1961)(parent could not maintain an action in tort against son for wrongful death of another minor son); See also Orefice v. Albert, 237 So.2d 142 (Fla. 1970)(suits by children against parents not allowed); Richards, 599 So.2d 135 (Fla. 5th DCA 1992)(child could not maintain suit against father for damages arising out of sexual abuse).

Like the founding Mississippi court in 1891, Florida courts justify their application of the doctrine of parental immunity by claiming a public policy interest in maintaining family harmony and peace, preventing the depletion of family resources, preventing fraud and collusion between parent and child when insurance is involved, preventing interference with parental care and discipline, and preventing parents from inheriting the amounts recovered by the child. Orefice, 237 So.2d at 145; See also Ard, 414 So.2d at 1068; Richards, 599 So.2d at 136-137.

In 1982, however, this Honorable Court carved out the lone exception permitting children to sue their parents for negligence, but only to the extent of available liability coverage. Ard, 414 So.2d 1066, 1067 (Fla. 1982).

Therefore, except in instances when liability insurance is available to prevent the depletion of family assets, Florida's courts continue to rely on the doctrine of parental immunity to

prevent children intentionally injured by their parents from seeking redress in the courts. Ard, 414 So.2d at 1067; See also Richards, 599 So.2d at 136-137.

### B. Brief History And Florida's Abrogation Of The Doctrine Of Interspousal Immunity.

The long, established and common law rooted interspousal immunity initially prevented spouses from suing each other for damages whether caused intentionally or negligently. See Raisen v. Raisen, 379 So.2d 352 (Fla. 1979)(doctrine of interspousal immunity barred action by wife against husband for damages arising out of automobile accident); See also Hill v. Hill, 415 So.2d 20 (Fla. 1982)(doctrine of interspousal immunity barred recovery for intentional torts between spouses).

Just like the doctrine of parental immunity, the alleged justifications for the application of the doctrine of interspousal immunity were centered around the same public policies of maintaining "domestic tranquility, peace and harmony in the family unit, and the possibilities of fraud and collusion . . . ." Sturiano v. Brooks, 523 So.2d 1126, 1128 (Fla. 1988).

After being "debated strenuously in judicial opinions for many years," the Florida courts similarly developed exceptions to doctrine of interspousal immunity permitting claims by one spouse against another to the extent of available insurance coverage and for battery. See Sturiano, 523 So.2d 1126 (Fla. 1988)(policy reasons for upholding doctrine of interspousal immunity do not exists in case where negligent spouse died as a result of negligence and claim limited to the extent of liability insurance);

See also §741.235, Fla.Stat. (1991).

However, in a landmark decision in 1993, despite recognizing the doctrine of interspousal immunity's long and established common law history similar to the doctrine of parental immunity, this Honorable Court abrogated the interspousal immunity doctrine stating:

> . . . this Court and its advisory commissions have had an opportunity to review legal issues relevant to the doctrine of interspousal immunity. As a result of that review, we now find that there no longer is a sufficient reason warranting a continued adherence to the doctrine of interspousal immunity. As we have previously held, the common law will not be altered or expanded by this Court unless demanded by public necessity or to vindicate fundamental rights. . . . [citations omitted]. Here, we find that both public necessity and fundamental rights require judicial abrogation of the doctrine.

Waite v. Waite, 618 So.2d 1360, 1361 (Fla. 1993).

Therefore, Florida has rejected the long-standing public policies allegedly justifying the doctrine of interspousal immunity thereby permitting one spouse to sue the other for damages whether caused intentionally or negligently.

## II. LIKE THE DOCTRINE OF INTERSPOUSAL IMMUNITY, THERE IS NO LONGER ANY SUFFICIENT REASON WARRANTING CONTINUED ADHERENCE TO THE DOCTRINE OF PARENTAL IMMUNITY AND PUBLIC NECESSITY AND FUNDAMENTAL RIGHTS REQUIRE JUDICIAL ABROGATION OF THE DOCTRINE.

It is well-established in Florida that the common law will not be judicially altered or expanded "unless demanded by public necessity or to vindicate fundamental rights." Waite, 618 So.2d at 1361(citing In re T.A.C.P., 609 So.2d 588, 594 (Fla. 1992)).

In the instant case, this Honorable Court should affirm the Third District Court of Appeal's decision below rejecting the "Procrustean precedent" and finding that indeed public policy and fundamental rights demand the abrogation of the doctrine of parental immunity so that a child sexually abused by his or her parent to sue for damages. Herzfeld, 24 Fla. L. Weekly D386 at D387 (Fla. 3d DCA 1999).

When a parent sexually abuses their child, the obvious already existing family disharmony would surely not be increased merely because of a lawsuit. Second, preventing the deletion of family assets or preventing the possible inheritance by the parent of the child's recovered amount equally fail to justify the continued adherence to the parental immunity doctrine because when any person, not just a sexually abusive parent, is sued for actions not covered by liability insurance, his or her family assets are threatened and anytime a child makes a recovery for injuries the parent stands to inherit the proceeds.

Third, there is simply no evidence to show that permitting a sexually abused child to sue his or her parent would result in fraud and collusion between parent and child when insurance in involved.[5]

Finally, to permit a tort claim by a child against his or her parent for damages arising out of sexual abuse would not result in an unnecessary government interference with parental care and

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[5] In this case, as with most intentional tort cases, there would not even be any liability insurance coverage thus making the fraud and collusion argument that much weaker.

discipline. Indeed, to the Respondent's knowledge, no court in this State has ever espoused that a parent's right to discipline their child takes precedence over the State's interest in protecting its children from harmful if not deadly sexual abuse.

Like the doctrine of interspousal immunity, there is no longer a sufficient reason warranting continued adherence to the doctrine of parental immunity. Therefore, this Honorable Court should abrogate the doctrine and reject the antiquated public policies allegedly justify it.

**III. WHETHER TAKING THE ALLEGATIONS OF THE COMPLAINT AS TRUE OR VIEWING THE RECORD EVIDENCE IN A LIGHT MOST FAVORABLE TO THE NON-MOVANT RESPONDENT, THE RESPONDENT WAS "UNEMANCIPATED" WHEN HE FILED HIS CLAIM AND THE DOCTRINE OF PARENTAL IMMUNITY DOES NOT APPLY.**

Technically, the parental immunity doctrine seems to only preclude an "unemancipated minor child" from suing a parent for injuries caused by a parent's intentional or negligent act except to the extent of available liability insurance coverage. Ard, 414 So.2d at 1067; Richards, 599 So.2d at 136-137; §95.11(7), Fla. Stat. (Supp. 1992); Cf. Torres v. Allstate Insurance Co., 345 So.2d 381 (Fla. 3d DCA 1977)(parent cannot sue child for tort committed during child's minority).

**A. The Trial Court Erred In This Case By Applying The Parental Immunity Doctrine In Dismissing With Prejudice The Respondent's Intentional Tort Claims Against The Petitioner.**

In ruling on a motion to dismiss, the trial court is confined to the four corners of the well-pleaded complaint and is required

accept all allegations therein as true. Dee v. Sea Ray Boats, Inc., 702 So.2d 1349 (Fla. 3d DCA 1997).

On or about June 5, 1997, the Respondent filed a four count Complaint for Damages against the Petitioner asserting claims for assault and battery (Count I), false imprisonment (Count II), intentional infliction of emotional distress (Count III) and negligence (Count IV) arising out of the alleged sexual molestation of the Respondent by the Petitioner. (R. 2-10).

The Respondent specifically alleges in his Complaint for Damages that the Petitioner regularly and repeatedly sexually molested him beginning from approximately 1988, when he was thirteen years old and first placed in the Petitioner's home as a foster child, and "continuing over the course of several years." (R. 2-10).

The Respondent also specifically alleges that the Petitioner regularly and repeatedly forced, by physical, mental and/or psychological threats and intimidation, the Respondent to commit lewd and lascivious sexual acts on the Petitioner beginning from approximately 1988, when he was thirteen years old and first placed in the Petitioner's home as a foster child, and "continuing over the course of several years." (R. 2-10).

Taking as true the well-pleaded allegations in the Respondent's Complaint for Damages, the Respondent obviously brought suit against his adoptive father, the Petitioner, as an at least twenty year old emancipated child since he was thirteen in approximately 1988 and the suit was filed in 1997. See Thorne v.

Ramirez, 346 So.2d 121 (Fla. 3d DCA 1977)(twenty year old not a minor).

Because the parental immunity doctrine does not bar twenty year old emancipated children from suing their parents for intentional torts, the trial court clearly erred by applying the doctrine in dismissing with prejudice the Respondent's intentional tort claims, Counts I, II and III, of the Respondent's Complaint for Damages. Therefore, this Honorable Court should reverse the trial court order and remand for further proceedings.

**B. The Trial Court Erred In This Case By Applying The Parental Immunity Doctrine In Granting Final Summary Judgment In Favor Of The Petitioner On The Petitioner's Negligence Claim.**

Summary judgment should only be granted when there is no genuine issue of material fact, and the movant is entitled to judgment as a matter of law. Wills v. Sears, Roebuck & Co., 351 So.2d 29, 30 (Fla. 1977).

Further, the moving party has the burden of conclusively proving that there is no genuine issue of material fact when all evidence is viewed in the light most favorable to the non-movant. Id.

In this case, the moving party, the Petitioner, failed to sustain his burden of conclusively proving that the Respondent was an "unemancipated minor child" as required by the parental immunity doctrine. In fact, the Petitioner presented no evidence whatsoever to contradict the Respondent's allegations in his Complaint for Damages that he was sexually molested from age thirteen over the

course of several years after which he brought the suit against the Petitioner in 1997 for intentional torts and negligence.

Like the error committed by the trial court in granting the Petitioner's Motion to Dismiss with prejudice as to the Respondent's intentional tort claims, the trial court also erred in granting Final Summary Judgment in favor of the Petitioner as to the Respondent's negligence claim. Therefore, this Honorable Court should reverse the trial court's Final Summary Judgment and remand for further proceedings.

## CONCLUSION

In order to protect Florida's children, this Honorable Court should abrogate the doctrine of parental immunity --- public policy and fundamental rights demand it ---especially in cases of abuse and incest. There is simply no longer any sufficient reason warranting continued adherence to the doctrine.

Even so, the parental immunity doctrine does not apply to this case because the Respondent was at least a twenty year old emancipated child who brought suit against his adoptive-father, the Petitioner, after having been sexually molested over the course of several years beginning at the age of thirteen. Therefore, this Honorable Court should reverse the trial court's Final Summary Judgment and remand for further proceedings.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing was served by U.S. mail this 21st day of June, 1999, to: Sharon Kegerreis, Esquire, Hughes Hubbard & Reed, 201 South Biscayne Boulevard, Suite 2400, Miami, Florida 33131-4326.

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