IN THE

SUPREME COURT OF FLORIDA

NO.: 95,054

GARY HERZFELD,

Appellant,

v.

FRANK HERZFELD,

Appellee.

APPEAL FROM THE THIRD DISTRICT COURT OF APPEALS OF FLORIDA

REPLY BRIEF FOR APPELLANT GARY HERZFELD

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CERTIFICATE OF TYPESET

Undersigned counsel certifies that the typeset used in the printing of this brief is 14 point Times New Roman, which is proportionately spaced.

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ARGUMENT

I. PUBLIC POLICY SUPPORTS PARENTAL IMMUNITY

The strong public policy favoring the doctrine of parental immunity remains in force. The Third District Court of Appeals concluded erroneously and without support that there is "no valid justification for the parental immunity doctrine where a parent is accused of sexually abusing his or her child." Herzfeld v. Herzfeld, 24 Fla. L. Weekly D386 (Fla. 3d DCA 1999). To the contrary, the policy reasons underlying parental immunity should apply without respect to the type of tort of which a parent is accused.

It is impossible to carve out an exception to parental immunity only for sexual abuse cases, as the Third District attempts to do, without re-writing the law of tort. Sexual abuse is not a separate tort action, but can be a form of many different torts such as battery, assault or even intentional infliction of emotional distress. If this Court abolishes parental immunity, children will consequently be able to sue their parents for any intentional tort. That expansion of tort liability will have a significant economic impact on families and on society.

For example, one could apply the Third District's holding to a case where a child is physically abused by a parent or where a parent refuses to provide a safe and healthy home environment to his child. Also, a parent could be liable for battery for spanking

his child. Indeed, a child could sue a parent for intentional torts under a host of factual scenarios. A court, therefore, could not determine when to apply the parental immunity exception for sexual abuse or other types of bodily injury without the benefit of a full-fledged factual inquiry that could only be conducted through a trial on the merits. Here, the Third Districts decision exemplifies a classic case of the slippery slope.

One of the most important public policy concerns barring suits by children against their parents it to preserve family assets available for the support, education and protection of the family unit as a whole. See Richards v. Richards, 599 So. 2d 135, 137 (Fla. 5th DCA 1992); Ard v. Ard, 414 So. 2d 1066, 1067 (Fla. 1982). This Court strongly advanced this public policy view in Ard v. Ard, 414 So. 2d at 1067 (citing Orefice v. Albert, 237 So. 2d 142, 145 (Fla. 1970) (It is established policy, as evidenced by many decisions, that suits will not be allowed in this state among family members of a family unit for tort. . . . The purpose of this policy is to protect family harmony and resources.). This rationale applies particularly to this case where Appellee has other siblings who are entitled to a fair share of the familys assets.

The Third District rationalized that if a non-family member sues a parent for intentional torts based on sexual abuse, the family assets are depleted in any event. See Herzfeld, 24 Fla. L. Weekly D386. A key difference exists, however, between a non-

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family member and a child who sues a parent; the financial resources of the family are affected as a whole in the former circumstance, while in the latter, the family's financial resources are disproportionately shifted to the child suing and away from other family members.

If changes have occurred in Florida regarding the public policy supporting parental immunity, as Appellee and the Third District contend, those alleged changes should be addressed by the legislature, which is constituted of representatives elected to analyze social and economic issues and their impact on a broader scale than a court, which can only analyze issues based on the facts before it case by case. See Richards, 599 So. 2d at 137. See also State v. Arango, 400 So. 2d 765 (Fla. 1981) ("The legislature has broad discretion in determining necessary measures for the protection of the public health, safety, and welfare, and . . . [courts] may not substitute . . . [their] judgment for that of the legislature as to the wisdom or policy of a legislative act."); University of Miami v. Echarte, 618 So. 2d 189 (Fla. 1993) ("The Legislature has the final word on declarations on public policy, and the courts are bound to give great weight to legislative determinations of facts.").

In fact, the Florida legislature has already taken measures to protect the interests of children without abrogating parental immunity. Children have recourse against

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sexually abusive parents under the criminal laws as parents may be held criminally liable for such conduct. See Richards, 599 So. 2d at 137; Section 827.04, Fla. Stat. Parents may also have their rights terminated for sexually abusing their children. See Section 39.806(1), Fla. Stat. Certainly, the criminal system is better equipped to handle inquiries into facts of a sensitive nature as in cases of sexual abuse. See Richards, 599 So. 2d at 137.

In effect, the Third District has created a new judicial remedy for child abuse rather than to leave such social and political issues to the legislature which was elected to debate and discuss such issues and to weigh all possible ramifications including social and economic impact. See Kahn v. Shevin, 416 U.S. 351 (1974); Bankston v. Brennan, 507 So. 2d 1385 (Fla. 1987). This Court should not adopt this form of judicial legislation, but instead should reverse the Third District's holding and reinstate the decisions of the trial court dismissing Appellee's intentional tort claims and entering summary judgment on the negligence claim.

II. THE ABROGATION OF SPOUSAL IMMUNITY DOES NOT JUSTIFY THE ABROGATION OF PARENTAL IMMUNITY

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Contrary to Appellee's assertions, the policies which once supported spousal immunity are entirely different from those supporting parental immunity. See Appellant's Initial Brief at 13-14. Spousal immunity was originally based upon the outdated common law notion that a husband and wife were thought of as a single unit. Since that legal presumption had long been abolished, spousal immunity became a legal anachronism. See Waite v. Waite, 618 So. 2d, 1360, 1361 (Fla. 1993) . See also Sturiano v. Brooks, 523 So. 2d 1126, 1128 (Fla. 1988) ("[I]t can no longer be said that a woman becomes part of an entity represented by the husband.").

Similarly, while a marriage may cease to exist once one spouse has committed a tort against the other, a family may remain intact despite torts between one child and a parent. Once a spouse has sued the other for intentional tort, the marital union is already broken thus eliminating the need to avoid marital discord. See Waite, 618 So. 2d at 1361. In contrast, a family continues to exist among the other non-suing children and their parents. Indeed, unless a child seeks legal emancipation, he remains part of the family unit despite whatever tort claims he or she may wish to raise against the parent. A strong societal interest exists in encouraging families to work out minor disputes between parents and children within the family itself rather than in the courts. See Ard, 414 So. 2d at 1067. If conduct by a parent against a child is so serious as to

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pose injury to the child, the criminal laws are available to protect the child. See Richards, 599 So. 2d at 137.

In abrogating spousal immunity, this Court followed the lead of the legislature which had already favored the abolition of spousal immunity by specific legislation. By the time this Court rendered its opinion in Waite, 618 So. 2d at 1360 in 1993, the Florida legislature had already upheld the right of a woman to bring suit against her husband for the intentional tort of battery in 1985. See Section 741.235, Fla. Stat. See also Richards, 599 So. 2d at 136 n.1. The Florida legislature, however, has never altered the parent-child immunity doctrine. See Richards, 599 So. 2d at 136 n.1.

In sum, parental immunity is based upon wholly separate policies than spousal immunity. The abrogation of spousal immunity has simply no relevance to the continued viability of parental immunity.

III. APPELLEE CANNOT CONTEND THAT THE PARENTAL IMMUNITY DOCTRINE DOES NOT APPLY BECAUSE HE WAS AN EMANCIPATED CHILD WHEN HE BROUGHT HIS CLAIMS AGAINST APPELLANT

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In his answer brief, Appellee contends that because he was "emancipated" when he filed his lawsuit against Appellant, parental immunity does not apply.[1] As such, Appellee contends that even if this Court does not abrogate parental immunity, the doctrine does not bar his action against the Appellant because Appellee filed suit when he was a twenty year old emancipated child. Appellee's contention fails for two fundamental reasons.

First, it is of no consequence that Appellee was emancipated when he brought his claims, parental immunity applies as long as the claims arose while the child was an unemancipated minor or during the existence of the parent-child relationship. See Fiori v. McFadden, 405 So. 2d 737, 738 (Fla. 5th DCA 1981) (family immunity doctrine does not apply to claims which occur after a child is married because child is no longer a member of the nuclear family); cf. Torres v. Allstate Ins. Co., 345 So. 2d 381, 382 (Fla. 3d DCA 1977) (parent cannot sue her son after he reached the age of majority for alleged negligent acts he committed while he was still a minor).[1]

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[1]. Appellee also cites to Section 95.11(7) of the Florida Statutes in support of his contention that the parental immunity doctrine only precludes an unemanicipated child from suing a parent. Section 95.11(7), Fla. Stat, a limitations statute, however, just extends the time for bringing certain causes of action based on abuse. Section 95.11(7), Fla. Stat. did not create a new cause of action. See Zlotogura v. Geller, 681 So. 2d 778, 779 (Fla. 3d DCA 1996). Certainly, section 95.11(7), Fla. Stat. does not prohibit the application of the family

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Second, Appellee does not state anywhere in the complaint that he was an emancipated child when the alleged acts occurred. (R. 1-10). In Florida, a child reaches the age of majority or becomes "emancipated" when he reaches the age of eighteen. See Section 743.07, Fla. Stat. Significantly, Appellee states in his complaint that the alleged sexual molestation giving rise to the alleged intentional torts occurred "from 1988 when the Plaintiff was approximately thirteen years (13) of age, and continuing over the course of several years." (R. 1-10). Appellee does not allege anywhere in the complaint that any of the alleged acts occurred after Appellee reached the age of eighteen years old. (R-10).

Even though a child may become emancipated prior to reaching the age of majority, see Ison v. Florida Sanitarium and Benevolent Ass'n, 203 So. 2d 200 (Fla. 4th DCA 1974), Appellee also did not state any facts to support a claim of emancipation. (R. 1-10). Thus, the allegations in the complaint plainly show that at all material times Appellee was an unemancipated child.

(..continued)

immunity doctrine to bar actions brought by adult children against their parents for claims allegedly occurring while the child was a minor.

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Moreover, to the extent that Appellee now attempts to claim that he was "emancipated" at the time of the acts alleged, such claims were not properly preserved on appeal. Not once during the trial court proceedings did Appellee raise this argument nor did he present any evidence to the trial court to support this contention. Appellee raised his "emancipated" child argument for the first time in his initial brief to the Third District. An appellate court, however, will not consider arguments raised for the first time on appeal which do not even appear in the complaint. See Lipe v. City of Miami, 141 So. 2d 738 (Fla. 1962). This Court can only review the issues the Appellee raised in the trial court and as a result have become part of the record below. See Allen v. City of Beverly Hills, 911 F.2d 367 (9th Cir. 1990); Thomason v. Nachtrieb, 888 F.2d 1202, 1205 (7th Cir. 1989).

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Significantly, Appellee also does not state in his answer brief that he made any allegations in the complaint that the alleged sexual molestation giving rise to his intentional tort claims occurred when he was emancipated. All he states is the erroneous contention that the doctrine of parental immunity does not apply because he began the lawsuit when he was emancipated. To adopt Appellee's illogical contention would defeat the purpose of parental immunity because all unemancipated or minor children could bring suits against their parents as long as they wait until reaching the age of majority or becoming emancipated. The parental immunity doctrine would then have absolutely no effect except to postpone the filing of a lawsuit.

In sum, this Court should not consider Appellee's contention that the parental immunity doctrine does not apply because he filed the lawsuit when he was an emancipated 20 year old child since (1) the contention is clearly wrong since the parental immunity doctrine applies to all causes that a child brings against a parent arising when the child was a minor or unemancipated and (2) to the extent the Appellee now claims the alleged acts occurred when he was emancipated, he waived that contention by not raising it during the trial court proceedings.

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CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court enter an order that (1) reverses the Third District's ruling in Herzfeld, (2) sustains the Appellant's Motion to Dismiss on counts I through III of the complaint, and the Motion for Summary Judgment on count IV of the complaint based on the parent-child immunity doctrine, (3) affirms that the parental immunity doctrine bars intentional tort actions commenced by unemancipated children against a parent; and (4) grants such other and further relief as the Court deems necessary.

Dated: July 14, 1999

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By:_____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent via U.S. Mail on this 14th day of July, 1999 to David C. Rash, Esq., Law Office of Douglas P. Johnson, 1509 N.E. 4th Avenue, Ft. Lauderdale, Florida 33304.

_____

Mayda Prego

In heading III of his answer brief, Appellee states in relevant part as follows: THE RESPONDENT W UNEMANCIPATED WHEN HE FILED HIS CLAIM . . . Certainly, Appellant agrees with t statement. Appellant, however, must assume that the Appellee made a typographical error and really me to state that the reason the parental immunity doctrine allegedly does not apply is because he v emancipated when he filed his claims against Appellant. The rule remains in Florida t unemancipated children cannot sue their parents for intentional torts. See Ard, 414 So. 2d at 1069.

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