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AFTER *Prem v. Cox*

AT FIRST BLUSH, the January 5, 1983 Ohio Supreme Court decision in *Prem v. Cox*,¹ may lead opponents of the interspousal immunity doctrine to believe that the doctrine has been abrogated in Ohio. But such an analysis might be too optimistic. *Prem* involved a wrongful death action brought by the deceased wife's estate against her husband and the driver of a second vehicle. The decedent's husband was driving the automobile in which the decedent was a passenger when it collided with another vehicle. The husband's motion for summary judgment based on the doctrine of interspousal immunity was granted by the trial court and affirmed by the court of appeals.²

In *Prem* the Ohio Supreme Court shifted from its prior position of total support for the interspousal immunity doctrine, holding that "the doctrine of interspousal immunity does not bar an action for wrongful death brought by the estate of a deceased spouse against the surviving spouse."³

The doctrine of interspousal immunity has its roots in the common law perception of the legal identity of the husband and wife as one person, that person being the husband.⁴ The wife had no personal or property rights. She could not contract for herself nor sue or be sued without joining the husband.⁵ In addition to the right of possession and use of the wife's property, the husband was entitled to collect money or obtain judgment in a suit related to the property since such property, in effect, would be in his name.⁶ The only exception to this single identity was under criminal law which regarded them as separate individuals.⁷

The unity of identity at common law extended beyond property rights into tort law. The husband became liable for all his wife's torts, regardless of whether they occurred prior to or after marriage or even if he was unaware of the tortious act.⁸ Because of this unity of legal identity, if a wife were to bring suit against her husband, in essence, he would be suing himself. Thus, such actions were

¹2 Ohio St. 3d 149, 443 N.E.2d 511 (1983).

²*Id.*

³*Id.* at 152, 443 N.E.2d at 514.

⁴See W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 122 (4th Ed. 1971); McCurdy, *Torts Between Persons in Domestic Relation*, 43 HARV. L. REV. 1030 (1930) [hereinafter cited as McCurdy, *Torts*]; McCurdy *Personal Injury Torts Between Spouses*, 4 VILL. L. REV. 303 (1959) [hereinafter cited as McCurdy, *Personal Injury*]; H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 9.1 (1968).

⁵H. CLARK, *supra* note 4, at § 9.1.

⁶W. PROSSER, *supra* note 4, at § 122.

⁷*Id.*

⁸*Id.* at 870.

impossible under the common law.⁹

Changes in the legal status of women started around 1844 with the enactment of statutes known as the Married Women's Acts.¹⁰ These statutes gave women the right to own and control their own property, to sue and be sued without joinder of the husband, and abolished a husband's legal responsibility for his wife's torts, thereby destroying the common law unity of husband and wife.¹¹

The primary objective of these statutes was to separate the wife's property from the husband's control.¹² Consequently, a wife could bring suit in tort for injury to personal property, against her husband, but the question remained whether or not an action for a personal tort between spouses would be allowed. This was precisely the issue addressed by the United States Supreme Court in *Thompson v. Thompson*,¹³ with the majority holding that a spouse could not bring suit against spouse for personal injuries.¹⁴ The Court narrowly interpreted the District of Columbia's Married Woman's statute and stated that if the legislature had wanted to allow suits for personal injuries between husband and wife it would have clearly stated so in the statute.¹⁵ The Court found that such a drastic departure from the common law should not be inferred but must be explicitly stated by the legislature.¹⁶

Similarly, many state courts upheld the doctrine of interspousal immunity in personal injury suits by narrowly construing the Married Women's statutes. The Ohio Supreme Court in *Damm v. Elyria Lodge No. 465*,¹⁷ stated that the major reason for supporting the interspousal immunity doctrine was "that personal tort actions between husband and wife would disrupt and destroy the peace and harmony of the home."¹⁸

Additional arguments in support of the doctrine included: 1) the spouse's ability to seek a remedy under criminal and divorce laws¹⁹; 2) suits between

⁹McCurdy, *Personal Injury*, *supra* note 4, at 305.

¹⁰McCurdy, *Torts*, *supra* note 4, at 1036-37.

¹¹See W. PROSSER, *supra* note 4, at 861.

¹²McCurdy, *Torts*, *supra* note 4, at 1036.

¹³218 U.S. 611 (1910).

¹⁴*Id.* at 619.

¹⁵*Id.* at 618.

¹⁶*Id.* Justice Harlan stated in his dissenting opinion that the Married Women's Act of the District of Columbia did permit personal injury suits between spouses. He declared such to be the will of the legislature and by the Court's refusal to accept the plain meaning of the statute, it was making law rather than declaring what the law was. *Id.* at 619 (Harland, J., dissenting).

¹⁷158 Ohio St. 107, 107 N.E.2d 337 (1952). For a discussion pertaining to the public policy reasons behind the doctrine of interspousal immunity see W. PROSSER, *supra* note 4, at § 122; H. Clark, *supra* note 4, at § 9.1; Moore, *The Case for Retention of Interspousal Tort Immunity*, 7 OHIO N.U.L. REV. 943 (1980).

¹⁸*Id.* at 118, 107 N.E.2d at 343.

¹⁹*Thompson*, 218 U.S. at 619.

spouses may encourage fraud and collusion²⁰; and, 3) the doctrine helps prevent trivial suits from being brought into court.²¹

An indication of the diminishing acceptance of these arguments is evidenced by the growing number of jurisdictions that have completely or partially abrogated the doctrine of interspousal immunity.²² This trend toward abolishing the doctrine gained momentum in the middle 1900's.²³ More and more courts looked to Justice Harlan's dissent in *Thompson* as a guide in rejecting the doctrine and allowing suits for personal injury between spouses, whether based on negligence or intentional tort.²⁴ Legal writers have unanimously rejected all arguments in support of the doctrine.²⁵

As was true with the vast majority of jurisdictions, when Ohio passed its Married Women's statute in 1877, nothing was specifically mentioned in regard to personal torts.²⁶ Like most jurisdictions at the time, Ohio continued to follow the common law rule recognizing interspousal immunity for personal injury suits between spouses.²⁷

The earliest Ohio Supreme Court case to deviate from the common law

²⁰Lyons v. Lyons, 2 Ohio St. 2d 243, 245, 208 N.E.2d 533, 535 (1965).

²¹*Thompson*, 218 U.S. at 618.

²²The following is a list of states which have totally or partially abolished interspousal immunity: Alabama: Penton v. Penton, 223 Ala. 282, 135 So. 481 (1983); Alaska: Cramer v. Cramer, 379 P.2d 95 (Alaska 1963); Arkansas: Leach v. Leach, 227 Ark. 599, 300 S.W.2d 15 (1957); California: Klein v. Klein, 58 Cal. 2d 692, 376 P.2d 70, 26 Cal. Rptr. 102 (1962); Colorado: Rains v. Rains, 97 Colo. 19, 46 P.2d 740 (1935); Connecticut: Bushnell v. Bushnell, 103 Conn. 583, 13 A. 432 (1925); Idaho: Lorang v. Hayes, 69 Idaho 440, 209 P.2d 733 (1949); Indiana: Brooks v. Robinson, 259 Ind. 16, 284 N.E.2d 794 (1972); Iowa: Shook v. Crabb, 281 N.W.2d 616 (Iowa 1979); Kansas: Ebert v. Ebert, 232 Kan. 502, 656 P.2d 766 (1983); Kentucky: Brown v. Gosser, 262 S.W.2d 480 (Ky. 1953); Maine: MacDonald v. MacDonald, 412 A.2d 71 (Me. 1980); Maryland: Lusby v. Lusby, 283 Md. 334, 390 A.2d 77 (1978); Massachusetts: Lewis v. Lewis, 370 Mass. 619, 351 N.E.2d 526 (1976); Michigan: Hosko v. Hosko, 385 Mich. 39, 187 N.W.2d 236 (1971); Minnesota: Beaudette v. Frana, 285 Minn. 366, 173 N.W.2d 416 (1969); Nebraska: Imig v. March, 203 Neb. 537, 279 N.W.2d 382 (1979); Nevada: Rupert v. Stienne, 90 Nev. 397, 528 P.2d 1013 (1974); New Hampshire: Morin v. LeTourneau, 102 N.H. 309, 156 A.2d 131 (1959); New Jersey: Immer v. Risko, 56 N.J. 482, 267 A.2d 481 (1970); New Mexico: Maestras v. Overton, 87 N.M. 213, 513 P.2d 947 (1975); New York: State Farm Mutual Auto Insurance v. Westlake, 35 N.Y.2d 587, 324 N.E.2d 137, 364 N.Y.S.2d 482 (1974); North Carolina: Roberts v. Roberts, 185 N.C. 566, 118 S.E. 9 (1923); North Dakota: Fitzmaurice v. Fitzmaurice, 62 N.D. 191, 42 N.W. 526 (1932); Oklahoma: Courtney v. Courtney, 184 Okla. 395, 87 P.2d 660 (1938); Oregon: Apitz v. Dames, 205 Or. 242, 287 P.2d 585 (1955); Pennsylvania: Hack v. Hack, 495 Pa. 300, 433 A.2d 859 (1981); Rhode Island: Digby v. Digby, 120 R.I. 299, 388 A.2d 1 (1978); South Carolina: Pardue v. Pardue, 167 S.C. 129, 166 S.E. 101 (1932); South Dakota: Scotvold v. Scotvold, 68 S. D. 53, 298 N.W. 266 (1941); Texas: Bounds v. Caudle, 560 S.W. 2d 925 (Tex. 1978); Vermont: Richard v. Richard, 131 Vt. 98, 300 A.2d 637 (1973); Virginia: Surrat v. Thompson, 212 Va. 191, 1983 S.E.2d 200 (1971); Washington: Freehe v. Freehe, 81 Wash. 2d 183, 500 P.2d 771 (1972); West Virginia: Coffindaffer v. Coffindaffer, 244 S.E.2d 338 (W.Va. 1978); Wisconsin: Wait v. Pierce, 191 Wis. 202, 209 N.W. 475 (1926).

²³See Note, *Law of Interspousal Immunity in Ohio*, 28 CLEV. ST. L. REV. 115, 116, n.14 (1979).

²⁴W. PROSSER, *supra* note 4, at § 122.

²⁵*Id.* See also Moore, *supra* note 4, at 980 (in support of the doctrine); Comment 8 N. KY. L. REV. 577 (1981); H. CLARK, *supra* note 4, at 253.

²⁶OHIO REV. CODE ANN. § 2307.09 (Baldwin 1982) provides: "A married woman shall sue and be sued as if she were unmarried, and her husband be joined with her only when the cause of action be in favor of or against both."

²⁷See *State v. Phillips*, 85 Ohio St. 317, 97 N.E. 976 (1912).

rule was *Damm v. Elyria Lodge No. 465* where a woman brought a negligence action against an unincorporated association of which her husband was a member.²⁸ The issue was whether a wife could recover for a tort commitment by her husband.²⁹ The court turned to the Ohio Constitution, article I, section 16 and concluded that “a married woman would have a right ‘in due course of law’ to maintain an action for her injuries against any tort-feasor.”³⁰ Justice Matthias explored the “modern tendency” of the courts in permitting personal injury suits between spouses³¹ and specifically referred to Justice Harlan’s dissent in *Thompson*.³²

The syllabus³³ in *Damm* specified that the common law doctrine of the legal identity of husband and wife has been abolished and that the wife of a member of an unincorporated association may bring suit for personal injury against that association.³⁴ The difference between the court’s precise holding in the *Damm* syllabus and the extensive discussion in the opinion on a wife’s right to bring a personal tort action against her husband allowed the Ohio Supreme Court to revert back into the old common law reasoning in *Lyons v. Lyons*.³⁵ In *Lyons*, a woman brought suit for personal injuries resulting from the negligent operation of a vehicle by her husband.³⁶ The court of appeals cited *Damm* as the controlling opinion and held for the wife. The Ohio Supreme Court reversed and Justice O’Neill, in his opinion for the majority, stated that the issue in *Damm* focused narrowly on whether a wife could sue an unincorporated association of which her husband was a member.³⁷ He argued that the holding of the syllabus in *Damm* did not determine the issue of interspousal immunity. He distinguished *Damm* on the basis that there was no danger of marital disharmony in that case since the husband did not control the defense.³⁸

By distinguishing the *Damm* case, the court in *Lyons* was able to articulate its own reasoning and conclusion regarding the status of interspousal immunity in Ohio. It held that a spouse could not bring an action for personal injuries resulting from the negligence of the other spouse when the two were living together as husband and wife at the time of the alleged injury.³⁹

²⁸158 Ohio St. at 107, 107 N.E.2d at 338.

²⁹*Id.* at 133, 107 N.E.2d at 341.

³⁰*Id.* at 116, 107 N.E.2d at 342.

³¹*Id.* at 118, 107 N.E.2d at 343.

³²*Id.* at 120, 107 N.E.2d at 344.

³³*See Lyons v. Lyons*, 2 Ohio St. 2d at 246, 208 N.E.2d at 534 where the Ohio Supreme Court stated that the syllabus is the law in Ohio.

³⁴158 Ohio St. at 107; 107 N.E.2d at 338.

³⁵2 Ohio St. 2d at 243, 208 N.E.2d at 533.

³⁶*Id.*

³⁷*Id.* at 246, 208 N.E.2d at 536.

³⁸*Id.* at 245, 208 N.E.2d at 536.

³⁹*Lyons*, 2 Ohio St. 2d at 243, 208 N.E.2d at 543. The court reasoned that the public policy of Ohio was to promote marital harmony and suits between spouses would place a burden on the marriage that might divide the home due to the adversarial nature of law suits. The court concluded the opinion by placing the burden of changing public policy on the general assembly. *Id.* at 247, 208 N.E.2d at 545.

Thirteen years later in *Varholla v. Varholla*,⁴⁰ the Ohio Supreme Court again faced the issue presented in *Lyons*, and once again declared interspousal immunity to be a valid doctrine in Ohio. The dissent written by Justice William B. Brown, however, was somewhat reminiscent of Justice Harlan's dissent in *Thompson*.⁴¹

Justice Brown attacked each of the majority's arguments for retaining the doctrine. First he reasoned that since interspousal immunity originated in common law as a judicially created doctrine, it could be judicially abolished.⁴² Second, he argued that there were many safeguards against fraudulent claims built into the judicial process and that it was unlikely that, out of love, a wife would be more likely to bring a false suit against her husband.⁴³ The majority's claim for promoting marital harmony via interspousal immunity is a non sequitur according to Justice Brown. "The harmonious marriage will not be hurt by allowing one spouse to benefit from the insurance coverage of the other."⁴⁴ Justice Brown concluded his argument finding interspousal immunity unconstitutional and a denial of equal protection and due process to both spouses. He relied on the court's prior ruling that Ohio's guest statute was unconstitutional.⁴⁵ The majority distinguished the two situations, finding that the different treatment between spouses and non-spouses had a reasonable relationship to a legitimate state interest, namely fostering marital harmony and preventing fraud and collusion.⁴⁶

At the time the *Varholla* decision was handed down, the majority of jurisdictions had partially or totally abolished the interspousal immunity doctrine.⁴⁷ In 1978, Ohio was in the minority with only one justice advocating abolishing the doctrine.

In *Bonkowsky v. Bonkowsky*,⁴⁸ the Ohio Supreme Court found itself faced once again with a negligence action by a wife against her husband for injuries sustained in an accident involving a vehicle driven by the husband in which she was a passenger.⁴⁹ Once again the court stuck to its support of the inter-

⁴⁰56 Ohio St. 2d 269, 383 N.E.2d 888 (1978).

⁴¹*Id.* at 271, 383 N.E.2d at 890 (Brown, J., dissenting).

⁴²*Id.* at 272, 383 N.E.2d at 890 (Brown, J., dissenting).

⁴³*Id.*

⁴⁴*Id.* at 273, 383 N.E.2d at 891.

⁴⁵*Id.* at 271, 383 N.E.2d at 891.

⁴⁶*Id.* at 270, 383 N.E.2d at 889. Within days of the *Varholla* decision, the Court of Appeals of Cuyahoga County decided *Kobe v. Kobe*, 61 Ohio App. 2d 67, 399 N.E.2d 124 (1974). In *Kobe*, a woman had sued her former husband for permanent the injuries intentional inflicted by him during their marriage. The court distinguished this case from *Lyons* in that the parties were divorced when the suit was filed so that marital harmony had been irrevocably lost. *Id.* at 70, 399 N.E.2d at 126. The court was very careful to limit the holding to the facts, and, therefore, made no comment on the status of interspousal immunity in Ohio. *Id.* at 71, 399 N.E.2d at 126-27.

⁴⁷See cases cited *supra* note 24. See also Casey, *The Trend of Interspousal and Parental Immunity-Cakewalk Liability*, 45 INS. COUNS. J. 321 (1978).

⁴⁸69 Ohio St. 2d 152, 431 N.E.2d 998, cert. denied, 457 U.S. 1135 (1982).

⁴⁹*Id.* at 154, 431 N.E.2d at 99.

spousal immunity doctrine. This time, however, three justices dissented with Justice William B. Brown delivering the highly critical dissenting opinion.⁵⁰

Less than a year later, the issue of interspousal immunity was again in the Ohio Supreme Court but this time in a wrongful death action. The facts in *Prem v. Cox* were similar in many ways with *Lyons*, *Varholla* and *Bonkowsky*. The difference in *Prem* that discourages comparison among the four cases is that in *Prem* there was no spouse bringing suit against spouse, but rather, the deceased spouse's estate brought a wrongful death action on behalf of the estate.

The issue facing the court in *Prem* was whether the doctrine of interspousal immunity applies in a wrongful death action under Ohio Revised Code Section 2125.01.⁵¹ The court held that it did not.⁵² The rationale used in reaching the holding differed among the members of the majority. Chief Justice Celebrezze wrote the court's opinion on the basis that wrongful death is a completely new and separate cause of action from that which the injured person may have had.⁵³ From such reasoning it follows that, regardless of whether a wife could have brought a negligence action against her husband, the action on behalf of her estate was "maintained under separate and independent rights."⁵⁴

The specific portion of Ohio Revised Code Section 2125.01 at issue in *Prem* reads: "When the death of a person is caused by wrongful act, neglect, or default which would have entitled the party injured to maintain an action and recover damages if death had not ensued"⁵⁵ In her dissenting opinion, Justice Krupansky looked to the plain meaning of the statute and reasoned that the estate of the deceased may maintain a wrongful death action *only* if the deceased could have recovered damages if death had not occurred.⁵⁶ Therefore, since according to *Bonkowsky*, *Varholla* and *Lyons* interspousal immunity bars one spouse from suing the other for personal injuries, the estate likewise could not bring a wrongful death action.⁵⁷

⁵⁰*Id.* at 155, 431 N.E.2d at 1000 (Brown, J., dissenting).

⁵¹OHIO REV. CODE ANN. § 2125.09 (Baldwin 1982) which states:

When the death of a person is caused by wrongful act, neglect, or default which would have entitled the party injured to maintain an action and recover damages if death had not ensued, the corporation which or the person who would have been liable if death had not ensued, or the administrator or executor of the estate of such person, as such administrator or executor, shall be liable to an action for damages, notwithstanding the death of the person injured and although the death was caused under circumstances which make it murder in the first or second degree, or manslaughter.

⁵²*Prem*, 2 Ohio St. 3d at 152, 443 N.E.2d at 514. It is interesting to note that Chief Justice Celebrezze voted with the majority in *Bonkowsky*, which included Justices Locher, Holmes and Krupansky. By voting with the majority in *Prem*, which included Justices W. Brown, Sweeney and C. Brown, Chief Justice Celebrezze left the remaining *Bonkowsky* majority in the minority.

⁵³*See* Klema v. St. Elizabeth's Hospital of Youngstown, 170 Ohio St. 519, 166 N.E.2d 765 (1960); and *Karr v. Sixt*, 146 Ohio St. 527, 67 N.E.2d 331 (1946).

⁵⁴*See* Gorman v. Columbus & Southern Ohio Electric, 144 Ohio St. 593, 60 N.E.2d 700 (1945).

⁵⁵OHIO REV. CODE ANN. § 2125.01 (Baldwin 1978).

⁵⁶*Prem*, 2 Ohio St. 3d at 153, 443 N.E.2d at 515 (Krupansky, J., dissenting).

The focus of the Chief Justice's opinion of the court and Justice Krupansky's dissenting opinion centers on the interpretation of the language in Ohio Revised Code Section 2125.01. The Chief Justice does not abrogate the doctrine nor even criticize its application in interspousal personal injury suits. His only reason for refusing to apply it in this case is that he sees the wrongful death action as separate and distinct from any action which the deceased might have brought had she lived. Her disabilities as party to a suit do not adhere to the wrongful death action.⁵⁸ Unlike the Chief Justice, the remaining three members of the majority base their decisions on the belief that the doctrine of interspousal immunity should be abolished in every instance.⁵⁹

What does the *Prem* decision mean for interspousal immunity in Ohio? As far as setting a new precedent, *Prem* has a very narrow application. The case, however, may prove to be valuable to opponents of the court's old way of thinking. Nevertheless, it should be noted that the Chief Justice clearly stated that he perceived interspousal immunity as still valid in "cases supported by the traditional justifications,"⁶⁰ those being marital harmony and prevention of fraud and collusion.⁶¹

The syllabus of the case abolishes the doctrine only in an action for wrongful death. The Chief Justice did not reverse the holdings in *Lyons*, *Varholla* or *Bonkowsky*. His rejection of interspousal immunity in *Prem* was based solely on a definition of wrongful death as an action distinct from any right of action which the decedent might have had.⁶² He does not concur with the other majority members who support the total abolishment of the doctrine. The narrow holding of the case applies only to that small portion of tort cases involving wrongful death actions between spouses.

While the increasing majority of jurisdictions abolishing interspousal immunity is impressive, that alone is not reason enough for Ohio to follow suit. It is enough, however, to analyze the public policy reasons used by the Ohio Supreme Court in its supporting arguments for the doctrine and to expose their obvious weaknesses. When the old common law justification for creation of the doctrine, namely unity of husband and wife, was no longer viable, the courts turned to the public policy arguments. With those arguments continually losing their persuasiveness they may once had had, there seems no reason to continue the application of an antiquated doctrine. Even the argument for stare decisis is not persuasive in light of the overwhelming justifica-

⁵⁸*Id.* at 151, 443 N.E.2d at 513.

⁵⁹*Id.* at 152-53, 443 N.E.2d at 514-15. Justices concur in the syllabus and judgment only. *Id.*

⁶⁰*Id.* at 151, 443 N.E.2d at 513.

⁶¹According to legal writers, and the majority of jurisdictions, there are no valid justifications for retaining interspousal immunity. See *supra* note 17.

⁶²*Prem*, 2 Ohio St. 3d at 150, 443 N.E.2d at 513.

tion for abolishing interspousal immunity.⁶³ By enforcing the doctrine, Ohio is shutting out an entire class of victims from the just compensation that tort law provides to them. Since *Prem v. Cox* is only a slight departure from the total acceptance of the interspousal immunity doctrine in Ohio, it is too early to predict if it signifies a movement toward abolishing the doctrine.

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⁶³For material analyzing the validity of the public policies behind the doctrine see *supra* notes 4, 16 and 17. See also Note, The Law of Interspousal Immunity in Ohio, 28 CLEVE. ST. L. REV. 115 (1979). It is significant that since *Prem*, the members of the Ohio Supreme Court have changed. Justice Krupansky, a strong supporter of the doctrine, has been replaced by Justice James P. Celebrezze. Whether or not the new Justice will be supportive of the doctrine is yet to be seen.