University of Baltimore Law Forum

Volume 17
Number 1 *Fall, 1986*

Article 6

1986

Recent Developments: Unkle v. Unkle: Maryland Defines Marital Property in Personal Injury Suit

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returned a verdict against Flynt and *Hustler* but not Flynt Distributing Co. *Falwell*, ____ F.2d at ____.

On appeal, the defendants made the constitutional argument that since Falwell is a public figure, the "actual malice" standard of *New York Times v. Sullivan*, 376 U.S. 254 (1964), must be met before he can recover for emotional distress. In *New York Times*, the Supreme Court determined that libel actions brought by public officials against the press can have a chilling effect on the press, inconsistent with the first amendment. Therefore, when a public official sues for libel based upon a tortious publication, the defendant is entitled to a degree of first amendment protection. *Falwell*, ____ F.2d at ____. This protection was extended to cases in which the plaintiff is a public figure. *Curtis Publishing Company v. Butts*, 388 U.S. 130 (1967). The court of appeals determined that "since Falwell is a public figure and the gravamen of the suit is a tortious publication, the defendants are entitled to the same level of first amendment protection in the claim for intentional infliction of emotional distress that they received in Falwell's claim for libel." *Falwell*, ____ F.2d at ____. The court of appeals reasoned that "to hold otherwise would frustrate the intent of *New York Times* and encourage the type of self censorship which the Supreme Court sought to abolish." *Id.* at ____.

The court of appeals determined that the issue then becomes what form the first amendment protection should take in an action for intentional infliction of emotional distress. Flynt and *Hustler* argued that Falwell must prove that the advertisement was published with ". . . knowing falsity or reckless disregard for the truth," which is the "actual malice" standard of *New York Times v. Sullivan. Id.* at ____.

Although the court agreed that the same level of protection is due the defendants, it did not believe that the literal application of the "actual malice" standard is appropriate in an action for intentional infliction of emotional distress. *Id.* at ____. The court rationalized that when the "actual malice" standard is applied to a defamation action, no elements of the tort are altered. Therefore, the "actual malice" standard merely increases the level of fault the plaintiff must prove in order to recover in an action based upon a publication. *Id.* at ____. If the plaintiff was required to prove the defendant's knowledge of falsity or reckless disregard of the truth in an action for intentional infliction of emotional distress, it would add a new element to this tort and significantly alter its nature. *Id.* at ____.

The court of appeals found that the *New York Times* standard was misread by the defendants because their argument emphasized the language "falsity or disregard for the truth." Properly read, *New York Times* focused on culpability, and the emphasis of the "actual malice" standard is "knowing . . . or reckless." *Id.* at ____.

The court of appeals analyzed the first of the four elements of intentional infliction of emotional distress under Virginia law, which requires that the defendant's misconduct be intentional or reckless. This element is precisely the level of fault that *New York Times* requires in an action for defamation. *Id.* at ____. The court found that "the first amendment will not shield intentional or reckless misconduct resulting in damage to reputation, and neither should it shield such misconduct which results in severe emotional distress." *Id.* at ____.

The court of appeals further held that when the first amendment requires the application of the "actual malice" standard, the standard is met when the jury finds that the defendant's "intentional or reckless misconduct" has proximately caused the alleged injury. Here, the jury made such a finding and thus the constitutional standard was satisfied. *Id.* at ____.

The *Falwell* decision clearly distinguishes recovery for emotional distress from recovery for defamation under the *New York Times* standard and emphasizes that the "actual malice" standard focuses on the defendant's alleged "intentional or reckless" conduct, not whether the plaintiff can prove the defendant's "knowledge of falsity or reckless disregard for the truth."

–J. Russell Fentress IV

Unkle v. Unkle: MARYLAND DEFINES MARITAL PROPERTY IN PERSONAL INJURY SUIT

In *Unkle v. Unkle*, 305 Md. 587, 505 A.2d 849 (1985), the Maryland Court of Appeals for the first time considered the issue of whether a spouse's inchoate personal injury claim which accrued during marriage was marital property within the contemplation of the Maryland Family Law Article's definition of marital property.

The facts of the case are uncontroverted. Gypsy Jo and William Edward Unkle were divorced a vinculo matrimonio on November 11, 1984, by the Circuit Court for Carroll County. In awarding marital property to Gypsy Jo, the court also awarded her 20% of any monies received by William from a pending personal injury case stemming from an injury received in August of 1983. The court awarded the money on an "if, as and when paid basis."

The parties were separated at the time of the accident. William resided with his parents and received no assistance from Gypsy. Although William had retained counsel to represent him in the personal injury case, no suit had been filed prior to the issuance of the divorce decree.

William appealed the circuit court's decision to the court of special appeals and the court of appeals granted certiorari prior to that courts consideration of the issue.

The court first undertook to define the meaning of the word property, noting that the Maryland cases have generally given the word a very broad definition. Specifically, the court quoted *Deering v. Deering*, 292 Md. 115, 437 A.2d 883 (1981), wherein the court defined property as "everything which has exchangeable value or goes to make up a man's wealth–every interest or estate which the law regards of sufficient value for judicial recognition." *Unkle*, 305 Md. at 590.

In *Deering*, the court recognized that a spouse's unmatured, fully vested pension rights were a form of marital property subject to equitable distribution under the Maryland statute. The court concluded that a spouse's pension right, "to the extent accumulated during the marriage", was a form of marital property and subject to distribution. The court specifically noted that a pension right was a contract right, derived from the terms of an employment contract. The court noted that a contract right is "Not an expectancy but a chose in action, a form of property." *Id.* at 591.

In addition, the court noted that in *Archer v. Archer*, 303 Md. 347, 493 A.2d 1074 (1985), it held that a professional de-

gree did not constitute marital property under § 8-201(e) of the Maryland Marital Property Act since it had "no exchange value on the open market." *Id.* at 591.

The court then turned its attention to the instant issue, noting first that various courts have considered the same issue with varying results. The court undertook a case by case analysis of the question. The court noted that while some courts have completely rejected the argument that a personal injury award or settlement is marital property, other courts have concluded that a personal injury case which is pending at the time of divorce cannot be marital property because of its speculative nature.

While the court was obviously swayed by this argument, and relied heavily on it, it is specious. The court has already allowed a nonvested pension right to be divided on a percentage basis, see *Deering v. Deering*, supra at 891, and there is no reason why the same argument could not be applied here.

The court then turned its attention to a series of New Jersey cases which have addressed the issue. In *DiTolvo v. DiTolvo*, 131 N.J. Super. 72, 328 A.2d 625 (1974), the court held that potential damages in a personal injury case which occurred during marriage was a chose in action and, as such, constituted marital property acquired by the spouse during marriage and was subject to equitable distribution upon dissolution of the marriage. *DiTolvo* was affirmed in *Landwehr v. Landwehr*, 200 N.J. Super. 56, 490 A.2d 342 (1985).

Reaching a contrary decision was *Amato v. Amato*, 180 N.J. Super. 210, 434 A.2d 639 (1981), another New Jersey intermediate appellate court case. *Amato* involved a spouse's unliquidated claim for damages stemming from a medical malpractice case. The court concluded that the damages were "peculiar to the injured person, to seek to be restored or made whole as he was before the injury." 434 A.2d at 642. Therefore, the court concluded that the monies "represent personal property of the injured spouse, not distributable under the New Jersey Marital Property Statute." Id. at 643. The court carved out an exception, however, for losses which diminish the size of the marital estate, i.e. lost wages and medical expenses, holding that such monies were "distributable when recovered." Id. at 644.

The Supreme Court of Washington, in *Brown v. Brown*, 100 Wash. 2d 729, 675 P. 2d 1207 (1984), gave a more concise explanation of the above rationale when it stated:

> The physical injury to the spouse, and the pain and suffering of the spouse therefrom is an injury to the spouse as an individual . . . but on the other hand, if the injury deprives the marital community of the earnings or services of the spouse, that is an injury to the marital community.

The court of appeals noted that Washington, unlike Maryland, is a community property state, but stated that the basic premise is the same: the focus is on the costs incurred by the couple and whether they reduced the size of the marital estate.

The court of appeals then turned its attention to the Maryland case law analyzing the Marital Property Statute, as well as the Report of the Governor's Commission on Domestic Relations Law (1978). After noting that the statute and case law call for the court to consider both the monetary and nonmonetary contributions when distributing property in a divorce, and that the property rights of the spouses' be adjusted fairly and equitably, the court noted that the commission report explicitly noted that the theory of equitable distribution is that each spouse has a duty "to contribute his or her best efforts to the marriage for the benefit of the family unit." 305 Md. at 587.

Given the above language, the court goes on to announce its holding in the instant case. In one paragraph the court states that since the claim was not "acquired" during the marriage, and arose by

> purely fortuitous circumstances . . . the claim is simply not the type of resource contemplated by the statutory definition of marital property even though, in part at least, payment of the claim would produce monies which would replenish marital assets previously diminished through payment of medical expenses and the loss of wages. *Id.* at 587

In announcing such a broad reaching decision the court of appeals has gone further than most courts which have come down on the same side of the issue. In Maryland, according to the court, not even lost wages or medical expenses which were originally paid out of the marital estate may be replenished by an award from a personal injury case.

Given the facts of the instant case, i.e. that the parties were separated at the time of the accident, and that the wife incurred none of the expenses of the accident, the court probably reached an equitable decision. However, the court could have accomplished this without dealing with the more complex issue presented here by ruling that under § 8-205 (8) of the Maryland Family Law Article that Gypsy had not contributed to this specific piece of marital property. In addition, § 8-205 (10) allows the court to consider "any other factor that the court considers necessary or appropriate to consider in order to arrive at a fair and equitable monetary award."

The court has left us with what may be a classic example of bad facts making bad law. By expanding its decision as far as it did, the court may have reached a decision that will be difficult to reconcile given different facts. One can picture a scenario wherein a spouse is injured while living with his/her husband/wife and expends great sums of otherwise marital property during the recovery process. By delaying settlement in the personal injury case, the injured spouse could conceivably deplete marital funds and later receive a windfall. Given the previous case law in the area, this does not appear to be a result the court of appeals would desire.

– William Cassara

Sharrow v. State Farm Mutual Automobile Insurance Co.: INSURANCE COMPANIES' TORTIOUS INTERFERENCE WITH ATTORNEY CONTINGENCY FEE CONTRACTS: A BROADER RULE

In *Sharrow v. State Farm Mutual Automobile Insurance Co.*, 306 Md. 754, 511 A.2d 492 (1986) the Maryland Court of Appeals, reversing the court of special appeals, held, in a case of first impression, that an attorney stated a cause of action against an insurer for tortious interference with contract by alleging that the insurer had capitalized on his client's need for money by involving the client in settlement negotiations.

The client, Donald Zorbach, was involved in an automobile accident with another automobile insured by State Farm and suffered personal injuries. Zorbach retained Ronald M. Sharrow as his attorney where, pursuant to a written agreement, Sharrow was to receive a specified percentage upon settlement or a slightly greater percentage if suit was filed. During his representation by Sharrow, Zorbach ran into serious financial difficulties and requested that Sharrow advance him money. Sharrow declined stating that it is unethical for an attorney to advance money to his client and also stated that it would be unwise to approach State Farm with a similar request. Against his attorney's advice and without his knowledge, Zorbach contacted State Farm and requested an advance on