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Recent Developments: Frye v. Frye: Maryland Reaffirms the Parent-Child Immunity Rule

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748 (1976). However, the Court stated that the proper analysis is guided by the four-prong test found in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980). 54 U.S.L.W. at 4960.

Applying the first prong of the *Central Hudson* test, the Court held that "[t]he particular kind of commercial speech at issue here . . . concerns a lawful activity and is not misleading or fraudulent." *Id.* Moving on to the next prong, the Court found that regulatory scheme passed muster as "the Puerto Rico Legislature's interest in the health, safety, and welfare of its citizens constitutes a 'substantial' governmental interest." *Id.* The third prong was also found to be met as the restrictions on commercial speech "directly advance" the government's asserted substantial interest by attempting to reduce the demand for casino gambling. Finally, the Court found that the restrictions on commercial speech, as narrowly construed by the lower court, are no more extensive than necessary to serve the government's interest since they "will not affect advertising of casino gambling aimed at tourists, but will apply only to such advertising when aimed at the residents of Puerto Rico." *Id.* at 4961. Thus, the Court concluded that the regulations, as construed by the lower court, were facially constitutional under the *Central Hudson* test.

The Court then addressed the appellant's second argument that the advertising restrictions were constitutionally defective under the holdings in *Carey v. Population Services Int'l*, 431 U.S. 678 (1977), (striking down a ban on any "advertisement or display" of contraceptives); and *Bigelow v. Virginia*, 421 U.S. 809 (1975), (reversing criminal conviction based on advertisement of an abortion clinic). However, the Court found those cases where "the underlying conduct that was the subject of the advertising restrictions was constitutionally protected and could not have been prohibited by the State" distinguishable from casino gambling which the Puerto Rico Legislature could have prohibited altogether. 54 U.S.L.W. at 4961. Thus, the Court arrived at the conclusion that "the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling." *Id.* The Court restated this new first amendment analysis more generally as "it is precisely because the government could have enacted a wholesale prohibition of the underlying conduct that it is permissible for the government to take the less intrusive step of allowing the conduct, but reducing the demand through restriction of advertising." *Id.* (emphasis in original). Con-
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tinuing on, the Court observed that "[l]egislative regulation of products or activities deemed harmful, such as cigarettes, alcoholic beverages, and prostitution has varied from outright prohibition on the one hand . . . to legalization of the product or activity with restrictions on stimulation of its demand on the other hand." *Id.* "To rule out the latter intermediate kind of response would require more than we find in the First Amendment," the Court concluded. Thus, the restrictions on advertising were upheld as constitutional.

Justice Brennan dissented, stating that "I see no reason why commercial speech should be afforded less protection than other types of speech where, as here, the government seeks to suppress commercial speech in order to deprive consumers of accurate information concerning lawful activity." *Id.* at 4962. Justice Brennan also disagreed with the majority's deferral "to what it perceives to be the determination by Puerto Rico's legislature that a ban on casino advertising aimed at residents is reasonable." *Id.* at 4963.

Justice Stevens also dissented, finding that "Puerto Rico blatantly discriminates in its punishment of speech depending on the publication, audience, and words employed." *Id.* at 4965.

The first part of the Court's holding simply represents an extended application of the *Central Hudson*, first amendment analysis for commercial speech. However, it is the Court's introduction of "the greater power necessarily includes the lesser power" language into first amendment constitutional analysis which gives this case special significance. Expansion of this new analysis, even beyond that alluded to by the Court in its opinion, could eventually permit further erosion of the various analysis under the freedom of speech. For example, a content-based restriction could possibly be disguised by the "greater includes the lesser" analysis. It remains to be seen whether this is the direction the new Court, possibly under Justice Rehnquist, will take.

—Eric P. Macdonell

***Frye v. Frye*: MARYLAND REAFFIRMS THE PARENT-CHILD IMMUNITY RULE**

In *Frye v. Frye*, 305 Md. 542 (1986), the Court of Appeals of Maryland declined to overturn the parent-child immunity rule which has existed in Maryland for fifty-six years. The court also declined to create an exception to the rule for cases involving

the negligent operation of a motor vehicle.

In *Frye*, the plaintiffs, George L. Frye III, a minor, and his mother, Barbara Frye, received injuries when the automobile in which they were passengers went off the road and collided with a culvert. At the time of the occurrence, the automobile was being operated by George L. Frye, Jr., who was the father and husband of the passengers.

Suit was brought in the Circuit Court for Prince Georges County by Barbara Frye, individually and as guardian and next friend of George L. Frye, III, against George L. Frye, Jr. for damages incurred as a result of the defendant's negligence. The court granted a motion to dismiss the action as to Barbara Frye, individually, on the ground that the doctrine of interspousal immunity had been in effect upon the accrual of her cause of action and thus, relief could not be granted. The court also dismissed the action brought on behalf of George L. Frye, III on the ground that no relief could be granted under the parent-child immunity rule.

Barbara Frye appealed to the court of special appeals. In the meantime, the court of appeals granted Mrs. Frye's request for the court to certify the records and proceedings before a decision was rendered by the court of special appeals.

On appeal, the plaintiff contended that the parent-child immunity rule should be abrogated as to torts sounding in negligence in light of the court's recent abrogation of interspousal immunity. *See Boblitz v. Boblitz*, 296 Md. 242, 462 A.2d 506 (1983). In the alternative, the plaintiff contended that an exception should be carved from the parent-child immunity rule for motor vehicle torts. The court refused to create the exception.

Parent-child immunity, a creation of the American judicial system, was adopted by the court of appeals in *Schneider v. Schneider*, 160 Md. 18, 152 A. 498 (1930). As construed in Maryland, the rule bars suits by a child against his or her parent and by a parent against his or her child for personal injury arising from a tort. The court of appeals has recognized two exceptions to the rule. First, the court has held that a minor child has a right to maintain a cause of action against his or her parent for "cruel and inhuman treatment or for malicious and wanton wrongs." *Mahnke v. Moore*, 197 Md. 61, 68, 77 A.2d 923, 926 (1951). Secondly, the court has declined to extend the parent-child immunity rule to encompass a suit between an emancipated child and a parent. *Waltzinger v. Birsner*, 212 Md. 107, 128 A.2d 617 (1957).

Frye is the first case, since the adoption of parent-child immunity in Maryland, in

which the court of appeals has examined the viability of the rule as it applies to suits sounding in negligence between an unemancipated child and a parent. In its examination of the rule, the court advanced several reasons for its refusal to reverse the parent-child immunity rule in light of the reversal of the interspousal immunity rule. The court stated that the reasons for which interspousal immunity was abrogated are inapplicable with respect to parent-child immunity. The doctrine of interspousal immunity arose from the legal fiction that a husband and a wife were one person at common law. Thus, husbands and wives were incapable of suing each other since, in effect, they would be suing themselves. However, no such unity has existed between parent and child. Additionally, the court held that the abrogation of interspousal immunity was premised on changes which have occurred in the relationship of husband and wife since the adoption of the immunity. The court then examined whether the nature of the parent-child relationship has changed so as to compel a re-examination of parent-child immunity.

Parent-child immunity is premised on the responsibility of the parent for the training and education of the child. As a result, the parent has been given the right to exercise control and discipline over the child as is necessary to fulfill his or her parental duties. The immunity enhances the parent's authority to use his or her discretion to discipline and care for the child. Additionally, the court of appeals has declared it to be the public policy of Maryland to preserve the peace and harmony of the home and to preserve discipline within the family.

The court held that the parent-child immunity rule continues to further this policy. The court found that the parent-child relationship has not changed so drastically as to require abrogation of parent-child immunity. Thus, the rule remains viable today.

The court refused to decide whether, in light of Maryland's compulsory insurance laws, an exception to the parent-child immunity rule should be created for injuries resulting from the negligent operation of a motor vehicle. Instead, the court stated that compulsory motor vehicle liability insurance is a creation of the legislature. The court recognized that such an exception would have a significant impact on the insurance scheme and the public policy behind it. Thus, the court held that the creation of such an exception is within the province of the legislature.

The parent-child immunity rule evolved in the United States as a means of ensuring the existence of family harmony and pa-

rental authority and discretion in the discipline and care of children. Since its adoption, the rule has been criticized as not fulfilling its functions. Evidence of disillusionment with the parent-child immunity rule is indicated by the trend in the United States toward *abrogation* of the rule. The majority of states have vacated the parent-child immunity rule, either totally or partially. Most of the states which retain the rule in part have carved out an exception for suits based on the negligent operation of an automobile. Cognizant of this trend, the Maryland court of appeals refused to change the parent-child immunity rule.

In light of the *Frye* decision, it appears that the parent-child immunity rule will remain embodied in the law of Maryland for some time to come. The court of appeals has reaffirmed the position of the Maryland judiciary that a child is completely barred from maintaining a tort action against his or her parent based upon negligence.

—Sharon Gamble



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