1981

George O. Bishop, Jr. v. Charles Hollis Nielsen : Appellant's Reply Brief

Utah Supreme Court

R. Scott Williams; Strong & Hanni; Attorneys fo Plaintiff-Appellant and Third-Party Defendant-Appellant;
Thomas A. Duffin; Attorneys for Defendant-Respondent;

IN THE SUPREME COURT

OF THE STATE OF UTAH

GEORGE O. BISHOP, JR., Plaintiff-Appellant vs. CHARLES HOLLIS NIELSEN, Defendant and Third-Party Plaintiff-Respondent, vs. GENICE GAY BISHOP, Third-Party Defendant-Appellant.	Case No. 17082

APPELLANT'S REPLY BRIEF

Appeal From The Verdict Of The
Third Judicial District Court
of Salt Lake County, State of Utah,
Honorable G. Hal Taylor, Presiding

R. SCOTT WILLIAMS
STRONG & HANNI
Sixth Floor Boston Building
Salt Lake City, Utah 84111

Attorneys for Plaintiff-Appellant
and Third-Party Defendant-Appellant

THOMAS A. DUFFIN
ATTORNEY AT LAW
10 Broadway Building, No. 510
Salt Lake City, Utah 84101

Attorneys for Defendant-Respondent

IN THE SUPREME COURT

OF THE STATE OF UTAH

GEORGE O. BISHOP, JR., Plaintiff-Appellant vs. CHARLES HOLLIS NIELSEN, Defendant and Third-Party Plaintiff-Respondent, vs. GENICE GAY BISHOP, Third-Party Defendant-Appellant.	Case No. 17082

APPELLANT'S REPLY BRIEF

Appeal From The Verdict Of The
Third Judicial District Court
of Salt Lake County, State of Utah,
Honorable G. Hal Taylor, Presiding

R. SCOTT WILLIAMS
STRONG & HANNI
Sixth Floor Boston Building
Salt Lake City, Utah 84111

Attorneys for Plaintiff-Appellant
and Third-Party Defendant-Appellant

THOMAS A. DUFFIN
ATTORNEY AT LAW
10 Broadway Building, No. 510
Salt Lake City, Utah 84101

Attorneys for Defendant-Respondent

TABLE OF CONTENTS

	PAGE
POINT I.	
THE SUPREME COURT'S RECENT DECISIONS DO NOT PRECLUDE THE USE OF THE INTRA-FAMILY IMMUNITY DOCTRINE IN A CASE INVOLVING NEGLIGENCE	1
POINT II.	
THE FACT THAT A PARTY IS COVERED BY INSURANCE IS IMMATERIAL AND OTHERWISE INADMISSIBLE.	5

CASES CITED

Elkington v. Foust, 618 P.2d 37 (1980).	2,4
Robinson v. Hreinson, 17 Utah 2d 261, 409 P.2d 121 (1965).	5
Rubalcava v. Gisseman, 14 Utah 2d 344, 384 P.2d 389 (1963).	5
Stoker v. Stoker, 616 P.2d 590 (1980).	1,2
Tjas v. Proctor, 591 P.2d 438 (1979)	5

OTHER AUTHORITIES CITED

U.C.A. §30-2-4 (1953).	1,2

IN THE SUPREME COURT

OF THE STATE OF UTAH

GEORGE O. BISHOP, JR., Plaintiff-Appellant vs. CHARLES HOLLIS NIELSEN, Defendant and Third-Party Plaintiff-Respondent, vs. GENICE GAY BISHOP, Third-Party Defendant-Appellant.	Case No. 17082

APPELLANT'S REPLY BRIEF

POINT I.

THE SUPREME COURT'S RECENT DECISIONS DO NOT PRECLUDE THE USE OF THE INTRA-FAMILY IMMUNITY DOCTRINE IN A CASE INVOLVING NEGLIGENCE.

In Stoker v. Stoker, 616 P.2d 590 (1980), the Utah Supreme Court abrogated intra-spousal immunity for intentional torts. In Stoker, the wife, after obtaining a divorce, brought suit against her former husband for intentionally inflicted torts committed during their marriage. The lower court dismissed the action based on intra-spousal immunity. The Utah Supreme Court reversed and held that §30-2-4 of the Utah Married Women's Act, Utah Code Ann., authorized a married woman to "prosecute and

defend all actions for the preservation and protection of her . . . right to be free of an intentional tort of her husband." Id. at 5. The court reasoned that the main objective of the Utah Married Women's Act was to eliminate all of the disabilities imposed on married women under the common law unity theory. Therefore, the common law intra-spousal immunity was in direct opposition to the statute.

Although one can argue persuasively that the Utah Married Women's Act as found in §30-2-4, U.C.A. (1953), does not really create a right in the wife to sue her husband in tort or vice versa, in the Stoker setting, however, abrogation of intra-spousal immunity is undoubtedly reasonable. The policy most frequently invoked for retaining the immunity is the preservation of domestic tranquility and family solidarity. In the case of intentional torts, however, the argument does not make as much sense because the tranquility has already been shattered by the tortfeasor's spouse. The argument is especially weak in Stoker because the marriage sought to be preserved had already been dissolved at the time of the suit.

The recent decision of Elkington v. Foust, 618 P.2d 37 (1980), also bears upon the present problem. In Elkington, the defendant, in a jury trial, was found guilty of "sexually assaulting and abusing his adopted daughter." Id. at 38. The defendant claimed error because the trial court refused to instruct the jury that consent of the daughter constituted a

defense, and because punitive damages awarded by the jury were excessive, and defendant also raised the defense of intra-family immunity.

The Supreme court summarily dismissed defendant's intra-family immunity argument by noting that intra-family immunity is an affirmative defense which defendant failed to plead at his earlier trial. However, the court went on to say:

> There is a clear majority trend toward limiting or abolishing the immunity which the common law conferred on parents as to actions brought by their children. We think it is sufficient here to say that there is no foundation in our own law, statutory or decisional, upon which to base parental immunity against a suit such as the instant one; and we don't think there should be. Id. at 40.
>
> (Citations omitted, emphasis added)

Thus, the court notes that the trend is either toward limiting or abolishing intra-family immunity. In the context of intentional sexual abuse, the court finds the invocation of the intra-family immunity doctrine particularly objectionable.

There are, however, many situations in which intra-family immunity would serve the purposes for which it was originally promulgated. These purposes include danger of fraud or collusion, and preservation of family tranquility and parental discipline. For example, where a child is accidentally injured when he picks up a sharp object that his mother had been using, it is clear that family tranquilty and parental discipline will be diminished, if not destroyed, if the child were to sub-

sequently sue his mother. Family tranquility would also be destroyed if a parent were allowed to sue his child for injuries sustained when the parent stepped on the child's roller skate left on the front porch stairs. Many other situations could be imagined where a suit between a parent and child is to be discouraged. There is a tremendous difference between injuries negligently inflicted, wherein family tranquilty and parental discipline has not been affected, and injuries intentionally inflicted, wherein family tranquility and parental discipline has effectively been destroyed.

Thus in the present case, where the damage sustained by the plaintiff was negligently inflicted by the plaintiff's minor daughter, this court should recognize the intra-family immunity doctrine and refuse to allow such a suit. The present case is easily distinguishable from Elkington and in view of the unintentional nature of the injury here, it is clear that family tranquility could be disturbed by such a suit. Therefore, although this court has refused to recognize intra-family immunity as a defense to an intentionally inflicted tort, there is a need for such an immunity in the context of negligently inflicted injuries. The trial court's action in granting a judgment in contribution against third-party defendant Genice Gay Bishop should be reversed.

POINT II.

THE FACT THAT A PARTY IS COVERED BY INSURANCE IS IMMATERIAL AND OTHERWISE INADMISSIBLE.

Defendant states in his brief that the real party in interest in this case is the insurance company, not Genice Bishop, Charles Nielsen or George Bishop. Thus, defendant notes ". . . the suit here does not bog itself down on an inter-family (sic) immunity problem, but it is an inter-family (sic)insurance company . . . problem." (Respondent's brief, p. 3) The fact that the parties injured are covered by insurance, however, is not a matter to be considered in this case.

Rule 54 of the Utah Rules of Evidence provides that:

> Evidence that a person was, at the time a harm was suffered by another, insured wholly or partially against loss arising from liability for that harm is inadmissible as tending to prove negligence or other wrongdoing.

In Robinson v. Hreinson, 17 Utah 2d 261, 409 P.2d 121 (1965), the Utah Supreme Court recognized the general rule:

> That the question of insurance is immaterial and should not be injected into the trial; and that it is the duty of both counsel and the court to guard against it. Id. at 123.

The Utah Supreme Court reasserted that position recently in Tjas v. Proctor, 591 P.2d 438 (1979). Consequently third-party defendant objects to any reference in this case to the fact of insurance coverage.

Further, the Utah Supreme Court in Rubalcava v.

Gisseman, 14 Utah 2d 344, 384 P.2d 389 (1963), emphasized the immateriality of insurance coverage in the context of an intra-spousal immunity defense, except as to demonstrate a further need for the defendant to protect against collusion. The court stated:

> The answer to the argument for marital harmony: that discord will not be engendered when the insurance company is to pay, is neither sound nor entirely realistic. The question of liability can be ascertained justly only upon its own merits. Whether there is insurance or not is immaterial to this determination. However, the fact cannot be ignored that where there is insurance, and this is known to both parties, the temptation to collusion exists; and this is increased when the supposedly adverse parties are in the symbiotic relationship of husband and wife. (Emphasis added) 384 P.2d at 391.

It should also be noted that there are many instances in which intra-family immunity may be at issue and the parties would not be covered by insurance. Hence insurance coverage cannot be a reason for abrogation of intra-family immunity in a neglgience setting. Thus, the respondent's argument that this is an intra-family insurance problem rather than intra-family immunity problem is not a proper argument.

Respectfully submitted this 9th day of March, 1981.

STRONG & HANNI

By _____
R. Scott Williams

Attorneys for Plaintiff-Appellant
and Third-Party Defendant-Appellant

MAILING CERTIFICATE

I hereby certify that on the 2nd day of March, 1981, two copies of the foregoing Reply Brief were mailed, postage prepaid, to the following counsel:

THOMAS A. DUFFIN
Attorney for Defendant-Respondent
10 Broadway Building, No. 510
Salt Lake City, Utah 84101