3-1-1999


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Brinkman v. Brinkman: Where Res Judicata Has Gone too Far*

I. INTRODUCTION

Domestic violence is frequently a cause of divorce actions. According to one study, "up to 80% of wives suing for divorce cite physical abuse by their husbands." However, in domestic violence situations, very few women pursue any actions against their husbands beyond a divorce. There are several reasons that a woman may not want to pursue a legal claim against her husband. First, the wife may not even realize she is a victim of domestic violence. If she does realize her husband has been physically or emotionally abusive, she may not want to tell her attorney about the domestic violence for fear that her husband might harm her or her children if she tells her attorney. Thus, since the attorney does not know about the abuse they do not consider pursuing a tort claim. Second, if the wife does tell her attorney about the abuse, pursuing a tort claim may not be her top priority. She may be more concerned about ending the abuse and obtaining custody of her children, and she might feel that pursuing a tort claim will aggravate her husband and thus jeopardize her goals.

If the wife does overcome these concerns and is brave enough to pursue a tort claim, she may still face several legal barriers. Most women will not be prevented from bringing the claim because of interspousal tort immunity, although Georgia is "still hanging on stubbornly to [its] immunit[y]." More commonly, a spouse may have problems of proof especially if there are no other witnesses to the domestic violence, or she may be precluded from bringing her claims by the statute of limitations.

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2. See Clare Dalton, Domestic Violence, Domestic Torts and Divorce: Constraints and Possibilities, 31 NEW ENG. L. REV. 319 n.20 (1997). “Among approximately 2600 reported state cases of battery assault, or both, from 1981 through 1990, only fifty-three involved adult parties in domestic relationships.” Id. at n.20.


5. See id. at 364-69.

6. See Fines, supra note 3, at 301.

7. See Dalton, supra note 2, at 364-71.

Further, if the wife decides to pursue her tort claims after the divorce proceeding, her tort claim may be barred based on principles of res judicata. This is precisely what happened in \textit{Brinkman v. Brinkman}. This note first looks at the background of applying res judicata to tort claims after divorce proceedings and specifically looks at the standards set forth in \textit{Twyman v. Twyman}, the predecessor to \textit{Brinkman}. Second, it examines the facts and the reasoning of \textit{Brinkman}. Third, this note analyzes the reasoning of \textit{Brinkman} and the potential problems that will follow its decision. Fourth, this note discusses an alternative, and perhaps better holding than the one made in \textit{Brinkman}. Fifth, this note shows how this better holding could still further the policies of the \textit{Brinkman} decision.

\section*{II. BACKGROUND}

Courts have had a difficult time handling tort claims either during or after divorce. Some courts have held that tort and divorce claims must be tried separately because trying them together can both complicate and extend the litigation. However, many courts have been reluctant to allow a tort claim after a divorce proceeding and have dismissed tort claims based on principles of res judicata in order to end litigation, promote judicial economy, and prevent subjecting defendants to litigation on the same subject twice. Other courts have tried to give the plaintiff spouse a little more flexibility and have made joinder of the claims permissible. This is what the Texas Supreme Court tried to do in \textit{Twyman v. Twyman}, the predecessor to \textit{Brinkman}. In \textit{Twyman v. Twyman}, the plaintiff, Shelia Tyman filed for divorce in 1985. She later amended her petition and alleged that her husband "intentionally and cruelly attempted to engage her in deviate [sic] sexual acts." The trial court, after dividing the marital property, awarded Shelia

\begin{itemize}
\item 10. 966 S.W.2d 780 (Tex. Ct. App. 1998).
\item 11. 855 S.W.2d 619 (Tex. 1993).
\item 15. \textit{See Twyman}, 855 S.W.2d at 619.
\item 16. \textit{Id}.
\item 17. 966 S.W.2d 780, 782 (Tex. Ct. App. 1998).
\item 18. \textit{See Twyman} 855 S.W.2d at 620.
\item 19. \textit{Id}.
\end{itemize}
$15,000 in damages for emotional distress. On appeal, one of the issues the Texas Supreme Court considered was whether an action for intentional emotional distress could be brought in a divorce proceeding. Some courts have held that the tort issues and divorce issues must be litigated separately while other courts have required joinder of all of the causes of action. The Texas Supreme Court then stated that "the best approach lies between these two extremes." It held that joinder of tort and divorce actions were permitted, but that if the actions were not joined, the later action could be barred on principles of res judicata. The court speculated that most tort actions and divorce petitions would be joined together and that only in certain cases would the facts supporting a tort action be different than the facts supporting a divorce petition. Although Twyman's holding seemed to help the victim of domestic violence by making joinder of tort and divorce claims permissive and not mandatory, its holding was severely limited. Brinkman exposed just how limited the holding was.

III. Brinkman v. Brinkman

A. The Facts


Approximately one year later, Mr. Brinkman filed for divorce. Ms. Brinkman countersued for divorce and alleged fraud, breach of fiduciary duty, and constructive trust relating to Mr. Brinkman's actions involving their community property. Ms. Brinkman also alleged that the "marriage was insupportable because of . . . cruel treatment toward Ms. Brinkman by Mr. Brinkman." Because Ms. Brinkman was still suffering from injuries inflicted by Mr. Brinkman in 1993, she also made a motion for temporary spousal support to help cover the costs of her medical and physical therapy.

20. See id.
21. See id. at 624.
22. See id.
23. Id.
24. See id.
25. See id. at 624-625 n.17.
27. See id.
28. See id.
29. See id.
30. See id. at 781.
31. Id. at 782.
treatments. Mr. Brinkman then "moved to sever the divorce and property division issues from Ms. Brinkman's tort causes of action" for fraud, breach of fiduciary duty, and constructive trust. Mr. Brinkman claimed that the tort claims were not necessary to the divorce, and the court granted his motion. The trial court then "entered judgment on the divorce and property division issues based upon a prenuptial agreement ... signed by both parties." After the judgment, both Mr. and Mrs. Brinkman filed a joint Motion to Set Aside the Order of Severance and Decree of Divorce. The divorce action was then joined with the fraud, breach of fiduciary duty, and constructive trust claims. Finally, the parties entered into an Agreed Amended Decree of Divorce, resolving both the divorce and the fraud, breach of fiduciary duty, and constructive trust claims.

Ms. Brinkman later filed a personal injury claim against Mr. Brinkman for the assault in 1993. The trial court granted summary judgment holding that Ms. Brinkman's claims were barred based on principles of res judicata. The Texas Court of Appeals affirmed the trial court's judgment.

B. The Court's Reasoning

The Texas Court of Appeals cited Twyman which held that joinder of tort claims and divorce claims were not mandatory. However, the appeals court also noted that the Twyman court stated that where tort claims were brought after the resolution of the divorce matter, the principles of res judicata would remain applicable. The appeals court applied Texas' res judicata standard to determine whether Ms. Brinkman could bring her tort claims against Mr. Brinkman. The standard the Texas Supreme Court

32. See id. at 780.
33. See id. at 781.
34. Id. at 782.
35. See id.
36. Id.
37. See id.
38. See id.
39. See id.
40. Ms. Brinkman also sued Mr. Brinkman's employer, Mr. Gatti's Inc. under the theory that Mr. Brinkman was "acting in the court and scope of his employment with Mr. Gatti's, Inc. when the assault occurred." Id. at 781 n.2. However, since this is not relevant to this casenote, the two parties will be collectively referred to as Mr. Brinkman.
41. See id. at 783.
42. Twyman, 855 S.W.2d 619.
43. Brinkman, 966 S.W.2d at 782.
44. See id.
45. See id.
had previously adopted was similar to the Restatement [Second] of Judgments, which required that a final judgment in an action extinguish the right to bring suit on "the transaction, or series of connected transactions, out of which the action arose." The court reasoned that this standard was necessary to "prevent vexatious litigation, maintain stability of court decisions, prevent double recovery, and promote judicial economy."

The court then examined the facts alleged in both the tort claim and the divorce claims of Ms. Brinkman. It concluded that because Ms. Brinkman had alleged cruel treatment by Mr. Brinkman in the divorce action, because Ms. Brinkman had requested a disproportionate share of the community property in the divorce, and because Mrs. Brinkman had made a motion for temporary orders for spousal support and was later cross-examined about the medical treatment she received as a result of Mr. Brinkman's assault, "she was bound to assert all of her claims for cruel treatment arising out of the divorce at the time of the divorce." She could not now use the facts related with Mr. Brinkman's assault and her injuries resulting from it to support a tort claim because she had used the same facts in the divorce proceeding. The court further reasoned that if it allowed Ms. Brinkman's tort claim, it would enable a spouse to get double recovery. A spouse could receive a disproportionate share of property in the divorce proceeding by alleging spousal abuse and then recover compensatory and punitive damages through a tort claim for spousal abuse.

The Brinkman court concludes stating that "requiring joinder under these facts is consistent with the purposes of res judicata." The court finally stated that if joinder would have been too difficult, then "the proper remedy would have been severance, not the filing of a second suit after the first had been resolved."

IV. ANALYSIS OF BRINKMAN V. BRINKMAN

The court suggested a few other alternatives that would have prevented Ms. Brinkman's tort claim from being barred based on principles of res judicata. First, it implied that if Ms. Brinkman had not brought

47. Brinkman, 966 S.W.2d at 782.
48. See id.
49. See id. at 782-783.
50. See id. at 783.
51. Id.
52. See id.
53. See id.
54. See id.
55. Id.
56. Id.
up Mr. Brinkman's physical assault in the divorce proceeding, then she would have been able to bring her tort claim. Second, the court suggested that Ms. Brinkman could have joined the claims. Third, and finally, the court suggested that if joinder of the claims would be too complicated, the claims could be severed. However, none of these suggestions are very realistic alternatives in that each has a definite shortcoming.

To the suggestion made by the court that the claim be severed, res judicata will still bar the tort action if the divorce proceedings are settled before the tort claim. Given the legal and extended nature of a tort claim, this result is quite likely. The standard that the Restatement (Second) of Judgments sets out is that "final judgment on an action extinguishes the right to bring suit on the transaction, or series of connected transactions, out of which the action arose." Thus, Ms. Brinkman would lose her right to proceed with her tort claim as soon as the divorce proceedings were finalized even if she brought the tort claim at the same time as she brought the divorce claim.

The first implied suggestion, that if Ms. Brinkman had not brought up physical assault in the divorce proceeding, then she would have been able to bring her tort claim, is also problematic. In cases of domestic violence or spousal abuse, this may not be a very realistic option. In the Brinkman case, the court was concerned that Mr. Brinkman would have to pay Ms. Brinkman twice for the same injury he caused her. However, in many cases, the wife may have motives other than pecuniary advantage for bringing up her husband's abusive history.

First, in Brinkman, Ms. Brinkman needed temporary spousal support during the divorce proceedings to help pay for her medical and physical therapy expenses. It seems unfair that if she brings up the spousal abuse in the divorce to cover her necessary medical expenses during the divorce, she must bring up all of her possible tort claims simultaneously.

Second, Ms. Brinkman needed to seek an injunction preventing her spouse from further injuring her. Ms. Brinkman probably felt that this injunction was necessary for her safety and protection. Again it does not seem fair that if a wife's primary purpose in bringing up spousal abuse is to protect herself, she must bring up all of her possible tort claims simultaneously.

Finally, a potential problem not even addressed in the Brinkman facts occurs when the couple has children. Tort issues will most likely be very relevant in divorce cases where child custody issues are involved. If the

58. See Brinkman, 966 S.W.2d at 783.
59. See id. at 780.
60. See id. at 781.
wife or children have been victims of sexual or physical abuse by the husband, then the wife may want to bring up these facts in the divorce proceeding to help her gain custody of the children. The wife may also need to further protect her children if the husband has visitation rights either during or after the divorce proceeding. By bringing up his past abuse, she may be able to insure that the visits are supervised and preclude any further injury to her children.

Thus, if any of these reasons are the spouse's primary motives for bringing up past abuse, it would seem unfair to force joinder of her divorce proceedings and any potential tort claims. In different situations a wife may want to pursue her tort claims during the divorce proceeding, but in many instances she may choose not to pursue the claim at all if she must do it during the divorce.

The final suggestion that the court makes is that Ms. Brinkman could have joined the tort and divorce claims. However, this will not be a good option for potential plaintiffs who want to bring tort actions against their husbands.

There are many reasons why a woman may not want to bring up tort claims in a divorce proceeding. First, the wife, who may not have sufficient funds to pay an attorney, may want to pay a contingency fee to her lawyer to pursue her tort claim.\(^6^1\) Because spousal abuse is very "acute among poor women,"\(^6^2\) contingency fees may play a crucial role in even allowing many women to pursue tort claims. However, the same lawyer may run into ethical problems if she represents her client in both the tort and domestic issues. The Model Rules do not allow a lawyer to charge a fee in a domestic relations matter that is "contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; . . ."\(^6^3\) Practically, however, separating the claims may be difficult for the attorney if both cases are interrelated. Due to the potential ethical problems, it's likely that the attorney will prefer charging for all of her work on a per hour basis which could disadvantage a client that is indigent. Even if the client chooses to hire separate attorneys for her divorce and tort actions, things could get tricky if she decides to settle on both claims as the tort attorney may have a hard time determining his contingency fee. This may prevent tort attorneys from accepting a case if the divorce is not yet final.

\(^{61}\) See Fines, supra note 3 at 299-300.
\(^{62}\) Brennan v. Orban, 678 A.2d 667, 675 (N.J. 1996) (stating that in Washington, 60% of women on public assistance reported sexual and physical abuse as adults, usually by a spouse or boyfriend). See also Fines, supra note 3 at 299 (citing Martha F. Davis & Susan J. Krahm, Protecting Women's Welfare in the Face of Violence, 22 FORDHAM URB. L.J. 1141, 1145 (1995)).
\(^{63}\) MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5 (d)(1) (1997).
The second reason why a woman may not want to bring up a tort claim after a divorce proceeding, a reason not mentioned by the Brinkman court, is what will be done if a woman demands a jury trial for her tort claim. Under the Seventh Amendment to the United States Constitution, the right to a jury trial is preserved “as it existed at common law in 1791.” 64 Although the Seventh Amendment does not apply to the states, most states have adopted a state constitutional guarantee analogous to the Seventh Amendment. 65 However, because divorce actions are equitable, a judge typically hears the matter. 66 Thus, if both the divorce claims and tort claims are joined and the wife demands a jury trial for her tort claim, the question arises, “Who should hear the claims: a jury or a judge?” Two different solutions have been suggested for this scenario: “(1) Try the tort claim before a jury first, then incorporate its factual findings and damage award in the judge’s divorce decree; (2) have both the tort and divorce claims decided by a judge.” 67 Neither one of these, however, are very hopeful solutions. The first solution requires the parties to wait until the tort claim is adjudicated before they can settle the divorce. This may not be a very realistic option since tort claims can have a long adjudication period and more pressing issues, such as child custody issues may have to wait. It may also be economically infeasible for the dependent spouse to wait for the tort claim to be adjudicated. The second solution, having a judge decide both matters, may raise some state constitutional issues if the parties do not have the right to a jury trial. A possible third solution, letting the jury decide both claims, is also unrealistic because distributing marital property “often requires complex accounting of the parties’ mutual claims against each other.”

The abused spouse also may not have a fair opportunity of pursuing her tort claim to the fullest extent if her spouse still has considerable leverage during the divorce proceeding. Her spouse could threaten to fight for full custody of the children or perhaps even threaten her with physical harm. 68 He may also threaten to fight more aggressively for the marital assets. Whether or not these threats are reasonable, the spouse, just coming out of an abusive relationship, may feel sufficiently intimidated to decide not to pursue the action.

Even if the husband does not threaten his spouse, it is unlikely that the wife will be able to pursue her tort claim to the fullest extent during the divorce proceeding. Negotiations for settlement might be protracted or

65. See id.
66. See id. at 149-150.
67. See id. at 150.
68. See Dalton, supra note 4, at 364-371.
more strained. The wife may feel pressure to back down on her claim in order to receive more custody of the children or more marital assets. In dropping her claim, she may not realize how potentially valuable it is.

Additionally, divorce can be a very emotionally draining time for the battered wife, and she may not be able to see her opportunities clearly. She may not be fully aware how extensively her spouse has abused her and what remedies she has against him. She may blame her experience on her own inadequacies, rather than his behavior, the psychological and emotional damage from her spouse may temporarily prevent her understanding how egregious her spouse’s behavior was. Although some of the abuse may arise in the divorce proceeding, her full awareness of the extent of the abuse may not come until after the divorce proceeding. If her tort claims are barred, she will never get the remedy she deserves for her spouse’s behavior.

Finally the tort claim may be minimized in the divorce proceeding. Although spousal abuse is one of the factors the Texas court takes into account in determining the distribution of marital assets, the abuse allegation may get lost in other factors that determine how property is to be divided. This is because the “distribution and support decisions may legitimately be made on the basis of such an array of ‘factors,’ that the abuser never pays the bill associated with his abuse.”

V. A BETTER ALTERNATIVE

Before states started to adopt the Restatement (Second) of Judgments, states focused more on the nature of the claims in determining where the second claim would be barred based on principles of res judicata. Thus divorce claims and tort actions could easily be distinguished: tort actions are legal in nature while divorce claims are equitable. Thus, because the nature of the claims are different, res judicata could not bar the second tort claim. Many states still use this reasoning in allowing a tort claim.

69. See Fines, supra note 3, at 301-302.
70. See Twyman v. Twyman, 855 S.W.2d 619, 625 (Tex. 1993), it is easy to see how the abuse may not be given full attention when considered with all these other factors which are: “the spouses’ capacities and abilities, benefits which the party not at fault would have derived from continuance of the marriage, business opportunities, education, relative physical conditions, relative financial condition and obligations, disparity of ages, size of separate estates, and the nature to the property.” Id. at 625.
71. See Dalton, supra note 4, at 389.
72. See generally, Schepard, supra note 64.
73. See, e.g., Lord v. Shaw, 665 P.2d 1288, 1291 (Utah 1983).
However, as more and more states adopt the Restatement [Second] of Judgments, the preclusive effect is broadening. Thus, as more states adopt the Restatement, we may expect to see a trend towards barring tort claims. However, a few states have managed to adopt the Restatement and still allow tort claims after divorce proceedings. Alaska has successfully reconciled the two competing principles in the case, *Nelson v. Jones*. The analysis of this court could have easily been used by the Texas Court of Appeals to allow Ms. Brinkman her tort claim.

In *Nelson v. Jones*, Jones accused Nelson of sexually abusing their daughter. Nelson was arrested and charged with second-degree sexual abuse of a minor. All charges were dropped. The parties then divorced. Nelson then sued Jones for abuse of process, malicious prosecution, and defamation based on the sexual abuse charges she had filed. The issue before the court was whether Nelson was barred from bringing these tort claims against his ex-wife when they were not brought up in the divorce proceeding. Supreme Court quoted the second Restatement stating, "The claims extinguished by the first judgment include ‘all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction . . . out of which the action arose.’" However, the court then decided that it would be "inappropriate to require tort actions between married persons to be litigated in the divorce proceeding." The court did not directly reconcile their decision with the Restatement (Second) of Judgments but simply stated, "There are considerations unique to cases such as this which compel us to acknowledge a narrow exception to our traditional interpretation of the doctrine of res judicata."

The court then cited to a Wisconsin case for justifying its exception:

Divorce actions will become unduly complicated if tort claims must be litigated in the same action . . . . Resolution of tort claims may necessarily involve numerous witnesses and other parties such as joint tortfeasors and insurance carriers whose interests are at stake. Consequently, requiring joinder of tort claims in a divorce action could unduly lengthen the period of time before a

75. See Aubert v. Aubert, 529 A.2d 909 (N.H. 1987).
77. See id at 1032.
78. See id.
79. Id.
80. See id at 1033.
81. Id. (citing State v. Smith, 720 P.2d 40, 41 (Alaska 1986)).
82. Id. at 1034.
83. Id. (citing Stuart v. Stuart, 421 N.W.2d 505 (Wis. 1988)).
spouse could obtain a divorce and result in such adverse consequences as delayed child custody and support determinations.\(^84\)

VI. FURTHERING THE POLICIES OF THE BRINKMAN DECISION

*Brinkman* seemed especially concerned that if it allowed Ms. Brinkman to pursue her tort claim, she might be doubly compensated. Perhaps one of the best solutions to this potential problem is illustrated in *Noble v. Noble*.\(^85\) In this case, the Mr. Noble shot his wife in the head at close range with a .22 caliber rifle.\(^86\) Seven months later Mr. Noble filed a divorce action.\(^87\) Ms. Noble counterclaimed for divorce alleging that Mr. Noble had left her unable to work because he had physically abused her.\(^88\) She later filed a personal injury claim against her husband.\(^89\) After the divorce decree, Ms. Noble’s tort claims were dismissed based upon principles of res judicata.\(^90\) On appeal, the Supreme Court of Utah reversed the summary judgment that had dismissed Ms. Noble’s tort claims.\(^91\) The court stated, “Tort claims *qua* tort claims should not be tried as a part of a divorce action.”\(^92\) However, in determining the allocation of the Noble property, the trial court judge properly took into account Ms. Noble’s medical expenses incurred as a result of the shooting.\(^93\) The court further stated that it did not matter that some of the facts considered in the divorce proceeding would also be considered in the tort proceeding.\(^94\) In order to avoid the problem of double recovery, the Supreme Court came up with a simple solution. It remanded the divorce case to the trial judge so that he could determine “to what precise extent the alimony and property awards are based on needs or disabilities arising from the shooting which could also be the basis for special damages in tort, such as lost earning ability and medical expenses.”\(^95\) That amount would then be deducted from the damages she might later receive in her tort claim.\(^96\)

\(^{84}\) *Id.* at 1034.
\(^{85}\) 761 P.2d 1369 (Utah 1988).
\(^{86}\) *Id.* at 1370.
\(^{87}\) *Id.*
\(^{88}\) *Id.*
\(^{89}\) *Id.*
\(^{90}\) *Id.*
\(^{91}\) *Id.* at 1375.
\(^{92}\) *Id.* at 1374.
\(^{93}\) *Id.*
\(^{94}\) *Id.* at 1371.
\(^{95}\) *Id.* at 1373.
\(^{96}\) *Id.* at 1375.
VII. CONCLUSION

Res judicata has increasingly broadened and with that broadening we may expect to see more tort actions barred after divorce proceedings. However, because the policies behind letting a spouse pursue her action after a divorce are so powerful, the *Brinkman* court, like the *Nelson* court should allow an exception to the res judicata rule.

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