University of Miami Law Review

Volume 5 | Number 2 Article 14

2-1-1951

Federal Courts -- Effect of State Decisions in Non-Diversity Cases

of the consortium, other than that of material services, *are* injured in negligent invasions, nevertheless on one or more of several grounds have denied recovery to the wife.[15] None of these grounds have any real validity. Still other equally untenable grounds have been relied on by some courts[16] in these actions. The utter inconsistency of the courts is manifested by the position taken that the wife may recover for an intentional or so-called malicious injury to the consortium,[17] but may not recover for an identical injury caused by negligence. There is no good reason for allowing relief for an injury to a legally protected interest in the one case while denying it in the other, but courts have attempted to rationalize this departure from proper legal principles by an argument which is elementarily unsound.[18]

It may be too optimistic to hope that stare decisis will give way in the face of this court's exhaustive, albeit devastating, treatment of the universal rule and the policy behind it. Yet it is much to be desired that the prevailing view be discarded, since there is neither logic nor fairness to support it. Certainly other jurisdictions conceivably could profit by an awareness of an historic decision delivered by a court unafraid of its duty to dispense justice. The language of this court[19] may well be regarded as an important legal guidepost: ". . . we are not unaware of the unanimity of authority elsewhere denying the wife recovery under these circumstances . . . after piercing the thin veils of reasoning employed to sustain the rule, we have been unable to disclose any substantial rationale on which we would be willing to predicate a denial of a wife's action for loss of consortium due to a negligent injury to her husband."

FEDERAL COURTS — EFFECT OF STATE DECISIONS IN NON-DIVERSITY CASES

Action was started in the federal court to recover the balance due a widow from National Service Life Insurance covering deceased. Recovery depended on a determination of whether claimant was the legal widow of the deceased. Claimant-wife and deceased were divorced from their former

15. Wife's injury not direct, McDade v. West, 80 Ga.App. 481, 56 S.E.2d 299 (1949); Brown v. Kistleman, *supra* note 14; Goldman v. Cohen, 30 Misc. 336, 63 N.Y. Supp. 459 (Sup.Ct. 1900); Kosciolek v. Portland Ry., Light & Power Co., 81 Ore. 517, 160 Pac. 132 (1916). Wife's injuries too remote and consequential, Gambino v. Mfgrs'. Coal & Coke Co., *supra* note 11; Stout v. Kansas City Term. Ry. *supra* note 11. No recovery allowed at common law for sentimental elements of consortium, Feneff v. N.Y. Cent. & H. R.R., 203 Mass. 278, 89 N.E. 436 (1909). Wife cannot show loss of services, Boden v. Del-Mar Garage, *supra* note 14; Smith v. Nicholas Bldg. Co., 93 Ohio St. 101 112 N.E. 204 (1915).

16. Wife's interest in marital relation not a property right, Brown v. Kistleman, *supra* note 14; Goldman v. Cohen, *supra* note 15.

17. See *supra*, notes 6, 7, 8.

18. Wife's action allowed to punish defendant, Brown v. Kistleman, *supra* note 14; Goldman v. Cohen, *supra* note 15; Kosciolek v. Portland Ry., Light & Power Co., *supra* note 15. If cause of action based entirely on punitive damages, action fails, McCormick, Damages, § 83, (1935).

19. Hitaffer v. Argonne Co., 183 F.2d 811, 813 (D.C. Cir. 1950).

spouses under decrees prohibiting remarriage without the consent of court during the life of the former spouse. Without such consent, claimant and deceased were subsequently married in another state in which they continued to live until the death of the husband in military service. The court looked to the laws of the state where claimant and deceased were married, and discovered a single inferior state court reported decision which held such a marriage invalid. *Held*, that there was a valid marriage and the claimant may recover. In the absence of a state supreme court ruling, federal courts may differ with lower state court interpretations and decide according to their own criteria.[1] *Lembcke v. United States*, 181 F.2d 703 (2d Cir. 1950).

When federal court jurisdiction rests on diversity of citizenship, the federal courts follow state supreme court rulings of substantive law as a result of *Erie R.R. v. Tompkins*.[2] This procedure is followed because the power of the state to determine its substantive law necessarily infers the prerogative to prescribe its extent and limitations.[3] Where the cases are concerned with unsettled state law, federal courts formulate the law from available data.[4] One case[5] has gone so far as to hold that when a state supreme court decision is lacking, and federal courts are convinced the state supreme court would decide otherwise,[6] they *must* depart from inferior state court decisions. This is so notwithstanding a decision of the United States Supreme Court which does in fact follow a lower state court decision.[7]

While matters of substantive law in diversity problems are ruled by the *Erie* case so that federal courts adhere to the principal of conformity with state rulings, the Federal Rules of Civil Procedure[8] were made to create uniformity in federal procedural law. Despite the dichotomy of conformity and uniformity, judicial determination of "substance" and "procedure" were

1. MacGregor v. State Mut. Life Assur. Co., 119 F.2d 148 (6th Cir. 1941), *aff'd*, 315 U.S. 280 (1944); Huss v. Prudential Ins. Co. of America, 37 F.Supp. 364 (D. Conn. 1941).

2. 304 U.S. 64 (1937).

3. Note, 48 COL. L. REV. 575 (1948).

4. See Wilmington Trust Co. v. Mutual Life Ins. Co. of N.Y., 68 F. Supp. 83 (D. Del. 1946), MacGregor v. State Mut. Life Assur. Co., *supra* note 1.

5. 320 U.S. 228 (1943). Other limitations are imposed when federally protected rights are affected. Butz v. City of Muscatine, 8 Wall. 575 (U.S. 1869). Where the state tribunal has applied the *lex fori* instead of the foreign rule so that conspicuous error results, federal courts insist on the application of the foreign rule. Order of United Commercial Travelers of America v. Wolfe, 331 U.S. 586 (1947); John Hancock Ins. Co. v. Yates, 229 U.S. 178 (1936); Home Ins. Co. v. Dick, 281 U.S. 397 (1930); Western Union Telegraph Co. v. Brown, 234 U.S. 542 (1914).

6. West v. American Tel. & Tel. Co., 311 U.S. 223 (1940); Cooper v. American Airlines, Inc., 149 F.2d 355 (2d Cir. 1945).

7. Huss v. Prudential Ins. Co. of America, 37 F. Supp. 364 (D. Conn. 1941) (only case).

8. 62 STAT. 961, c. 646 (1948), amended 63 STAT. 104, c. 139, § 103, 63 STAT. 446, c. 343, § 2 (1949), 28 U.S.C. § 2072 (Supp. 1950). Some Rules specifically apply state law. FED. R. OF CIV. P 17(b), 62(f), 64. In determining what the state law is under these sections of the Rules, the courts follow Erie R.R. v. Tompkins, *supra* note 1.

abandoned as a test for determining the application of *Erie* priciples.[9] In their place was put the standard of whether the result of the litigation is affected if the federal court disregards the substantive law in favor of federal procedural law.[10] If a conflict is found then state law is applied.[11] It would seem then that conformity in substantive law and uniformity in procedural law are principles that hold no guide for the litigant and the jurist, and that the principle of conformity in *Erie R.R. v. Tompkins* is extended to procedural matters in diversity cases.

In non-diversity problems, the Supreme Court to date has not *expressly* extended nor refused to extend the *Erie* doctrine so as to include subordinate questions of state law.[12] Rather, the court has said that the *Erie* case does not apply where rights are created or protected by federal law or involves federal policies, however persuasive the state law or decision may be.[13] *Erie* does not apply because the evils which it was to rectify, that of transgressing the state power to prescribe and limit its own substantive law, are not present. This doctrine has been reiterated[14] except when the court felt itself bound to follow state laws on questions incidental, preliminary or collateral to the federal questions involved.[15] The basis for these exceptions has not been expressed, the courts bing content to say that they were bound by the state decisions. This development of conformity with state law in non-diversity cases has generally been with reference to procedural matters, and to the degree that there is conformity the concept of the *Erie* doctrine has been extended to non-diversity cases. It has been extended *impliedly* by the courts[16] through the application of a diversity case ruling[17] that federal courts are bound to speculate as to the state supreme court's position in a field of unsettled law. Congress has *expressly* extended the principle of conformity by requiring the determination of state law in certain procedural matters in the Federal Rules of Civil Procedure.[18] Court application of these Rules[19] have been based on *Erie R.R. v. Tompkins*.[20]

The present case, as well as a similar National Life Insurance case,[21]

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9. York v. Guaranty Trust Co. of N.Y., 326 U.S. 99 (1945).
10. *Ibid.*
11. *Ibid.*
12. Holmberg v. Armbrecht, 327 U.S. 392 (1946); *see* D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp., 315 U.S. 447, 467 (1941) (concurring opinion).
13. United States v. Standard Oil Co. of Calif., 332 U.S. 301 (1947); Holmberg v. Armbrecht, *supra* note 12.
14. Propper v. Clark, 337 U.S. 472 (1949); Irving Trust Co. v. Day, 314 U.S. 556 (1941); Higginbotham v. Baton Rouge, 306 U.S. 535 (1939); Commercial Credit Co. v. Davidson, 112 F.2d 54 (5th Cir. 1940); Florida Power & Light Co. v. Miami, 98 F.2d 180 (5th Cir. 1938).
15. Conway v. Bonner, 100 F.2d 786 (5th Cir. 1939); Dysart v. United States, 95 F.2d 652 (8th Cir. 1938).
16. United States v. Layton, 68 F. Supp. 247 (S.D. Fla. 1946).
17. Meredith v. Winterhaven, *supra* note 5.
18. Huss v. Prudential Ins. Co. of America, *supra* note 7.
19. Pullman Standard Car Mfg. Co. v. Local Union No. 2928, 152 F.2d 493 (7th Cir. 1945).
20. 304 U.S. 64 (1937).
21. Schurink v. United States, 177 F.2d 809 (5th Cir. 1949).

evidences further extension of *Erie R.R. v. Tompkins*[22] into non-diversity cases. The court found it necessary to look to the substantive law of the state in order to determine a question preliminary to the ultimate federal question. Whether to follow an inferior state court decision, was resolved in the negative by departing from the lower state court decision because the court in the instant case was convinced the state supreme court would hold *contra*. This departure was prompted only by a "belief" that the federal courts have the freedom in non-diversity cases to differ with an inferior state court. This reasoning is the one used in diversity cases with unsettled state law,[23] though the court does not recognize the parallel in as many words.

POST OFFICE—DISCRIMINATION IN POSTAL SERVICE FOUND WHERE SERVICE CUT IN ONLY ONE OF TWO CONTIGUOUS COMMUNITIES

Pursuant to a directive of the Postmaster General ordering nationwide reduction of postal service, a postmaster of two contiguous communities cut deliveries to the business district of one, while not disturbing those in the other. Plaintiff, a businessman in the district whose deliveries were cut, sought a temporary and permanent restraining order to compel the postmaster to continue the same mail delivery service to plaintiff as plaintiff had received prior to the issuance of the Postmaster General's directive. *Held*, injunction issuing, that there must be no discrimination in postal service between business districts of the two communities served by defendant's post office. *Fite v. Payne*, 91 F. Supp. 896 (N.D. Tex. 1950).

The power of Congress to establish the postal system[1] includes the regulation of the entire postal system,[2] all powers necessary to make the grant effective,[3] and all measures necessary to secure the safe, speedy and prompt delivery and transmission of the mails.[4] Since the Constitution does not guarantee unrestricted use of the mails,[5] the mere establishment of the postal system does not automatically confer rights upon individuals to receive its services free from either statutory restraints[6] or discrimination.[7]

Congress delegates to the Postmaster General power to make regula-

22. 304 U.S. 64 (1937).

23. Cooper v. American Airlines, Inc., *supra* note 6; MacGregor v. State Mut. Life Assur. Co., *supra* note 1; Huss v. Prudential Ins. Co. of America, *supra* note 7; West v. American Tel. & Tel. Co., *supra* note 6.

1. U. S. CONST. Art. I, § 8, cl. 7.
2. *Ex parte* Jackson, 96 U.S. 727 (1877).
3. *Ex parte* Rapier, 143 U.S. 110 (1892).
4. United States v. Musgrave, 160 Fed. 700 (E.D. Ark. 1908).
5. Warren v. United States, 183 Fed. 718 (8th Cir. 1910).
6. *Cf.* Acret v. Harwood, 41 F. Supp. 492 (S.D. Cal. 1941).
7. Lewis Publishing Co. v. Morgan, 229 U.S. 288 (1913)(Congress was permitted, in furtherance of the dissemination of knowledge, to so legislate as to favor publications, though this intrinsically discriminated against the general public).