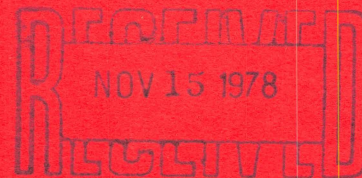


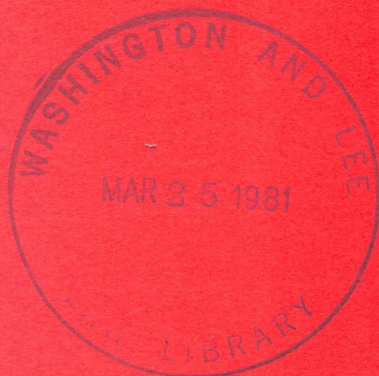
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CLERK
SUPREME COURT OF VIRGINIA



RICHMOND, VIRGINIA

IN THE
Supreme Court of Virginia
AT RICHMOND



RECORD NO. 780734

ROBERT C. COUNTS,

.....Appellant

v.

LILLIE D. COUNTS,

.....Appellee

JOINT APPENDIX

John J. Curry, Jr.
Post Office Box 225
106 West Main Street
Christiansburg, Virginia 24073

Counsel for Appellant

Henry A. Whitehurst
21 East Main Street
Christiansburg, Virginia
24073

Counsel for Appellee

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*Filed March 7, 1977
10:00*

TO THE HONORABLE R. WILLIAM ARTHUR, JUDGE OF SAID COURT:

Comes now the plaintiff, Robert C. Counts, and respectfully represents unto the Court as follows:

1. That on January 30, 1975 the plaintiff and defendant Lillie Counts were living together as husband and wife at 14 Orchard Road, Radford, in Pulaski County, Virginia.

2. That the plaintiff had the right to remain safe and unharmed in his person and free from injury by another; and that the defendants owed plaintiff the duty to respect the aforesaid right and to refrain from inflicting and conspiring to inflict, unlawful, unconsented, and unprovoked physical and mental injuries to the person of the plaintiff.

3. That on or before January 30, 1975, defendant Lillie Counts solicited defendant Miles Randolph Turner to unlawfully and maliciously inflict physical injury by the use of force and violence upon the plaintiff, and to kill the plaintiff; and that the defendants conspired and willingly entered into an agreement that defendant Miles Randolph Turner would unlawfully and maliciously inflict physical injury by the use of force and violence upon the plaintiff, and kill the plaintiff, for compensation paid to defendant Miles Randolph Turner by defendant Lillie Counts in the amount of Five Thousand Dollars (\$5,000.00).

4. That on January 30, 1975 defendant Miles Randolph Turner, pursuant to the aforesaid conspiracy and agreement with defendant Lillie Counts, did unlawfully, maliciously, willfully and wantonly, with the intent to maim, disfigure, disable, and kill the plaintiff, stab, cut and wound the plaintiff, causing severe mental and physical injury to the plaintiff's person; that the aforesaid wounding and injuries to the plaintiff occurred in Pulaski County at the residence of the plaintiff; and that defendant Lillie Counts caused and incited, encouraged, had knowledge of, was a co-conspirator of defendant Miles Randolph Turner, and directed defendant Miles Randolph Turner in the aforesaid wounding, and intended to cause the plaintiff to be physically and mentally injured and killed in the manner aforesaid.

5. That defendant Miles Randolph Turner was convicted, in the Circuit Court of Pulaski County, of the malicious wounding of Robert C. Counts with the intent to maim, disfigure, disable, and kill the aforesaid Robert C. Counts, and sentenced by the aforesaid Court to confinement in the penitentiary for a term of ten (10) years, nine (9) years to be suspended upon the express conditions that the defendant pay costs and make restitution to Robert C. Counts, on June 20, 1975; and defendant Lillie Counts was convicted by the aforesaid Court of conspiring to maliciously wound Robert C. Counts with the intent to maim, disfigure, disable, and kill the aforesaid Robert C. Counts, and sentenced to confinement in jail for twelve (12) months, and to pay a fine of One Thousand Dollars (\$1,000.00).

6. That after defendant Lillie Counts was arrested and charged with aiding and abetting in a malicious and felonious

assault with intent, etc., upon her husband, the defendant willfully concealed from the plaintiff the fact of her unlawful and felonious conspiracy by denying her part in said conspiracy, even though the plaintiff and Lillie Counts continued to live together as husband and wife for some time thereafter; that the plaintiff first knew of her part in the said conspiracy or of the existence of any conspiracy subsequent to March 13, 1975, the date of Lillie Counts' Preliminary Hearing, from sources other than defendant Lillie Counts; that the said fraud by concealment of Lillie Counts prevented the plaintiff from knowing of any possible cause of action against Lillie Counts; and that the marriage between the plaintiff and Lillie Counts was terminated and dissolved by Decree dated February 23, 1977.

7. That in the premises aforesaid the defendants conspired, caused, and did intentionally inflict grievous physical injury to the plaintiff's person in the manner and with the intent aforesaid; and in these premises did intentionally inflict severe emotional distress, anguish, and mental injury upon the plaintiff; that the defendants intentionally, willfully, unlawfully and maliciously breached their duty owed to plaintiff as alleged in paragraph two (2), and that the aforesaid mental and physical injuries were the direct and proximate result of the said breach of duty; that the physical and mental injuries to the plaintiff resulted in the need for medical treatment, hospitalization, physical therapy, psychiatric treatment, and have caused the plaintiff pain and suffering, mental and emotional distress and injury, which injuries are continuing, and loss of work; and that the plaintiff has suffered actual damages in the amount of Twenty-Five Thousand Dollars (\$25,000.00).

8. That the Order of the Court entered in the case of Commonwealth v. Miles Randolph Turner, for defendant Miles Randolph Turner to make restitution to the plaintiff, as set forth in paragraph five (5), constitutes a judgment for the benefit of the plaintiff.

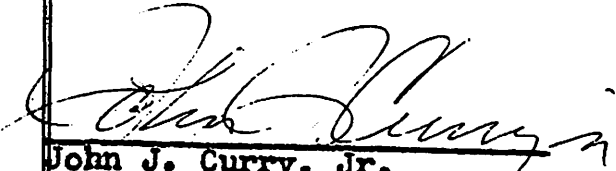
9. That defendant Miles Randolph Turner is now a resident and domiciliary of the State of Texas; that he has in the premises aforesaid caused tortious injury to the plaintiff by an act or omission in the State of Virginia, and in Pulaski County.

WHEREFORE, plaintiff prays that proper process may issue on Lillie Counts; that process may be served on the nonresident defendant Miles Randolph Turner in the manner described in paragraph (b) of Virginia Code Section 8-81.3, through the Secretary of the Commonwealth; Plaintiff moves the Court for judgment against defendant Miles Randolph Turner in the amount of TWENTY-FIVE THOUSAND DOLLARS (\$25,000.00), the amount necessary to place the plaintiff in the position and condition he was in prior to the aforesaid malicious wounding; and plaintiff moves for judgment against defendant Lillie Counts, in the premises aforesaid, in the amount of TWENTY-FIVE THOUSAND DOLLARS (\$25,000.00) as actual damages, and in the amount of SEVENTY-FIVE THOUSAND DOLLARS (\$75,000.00) as punitive damages.

Respectfully,

ROBERT C. COUNTS

By Robert C. Counts
OF COUNSEL


John J. Curry, Jr.
Attorney At Law
106 West Main Street
Post Office Box 246
Christiansburg, Virginia 24073

IN THE CIRCUIT COURT OF PULASKI COUNTY

ROBERT C. COUNTS)
Plaintiff)
v.)
RANDOLPH TURNER)
and)
LILLIE DREW COUNTS)
Defendants)

DEMURRER

TO THE HONORABLE R. WILLIAM ARTHUR, JUDGE OF SAID COURT:

Comes now the defendant, Lillie Drew Counts, and pursuant to authority granted by this Court on the 25th of November, 1977, and files this, her second demurrer to the plaintiff's Motion for Judgment which is as follows:

At the time of the alleged injuries suffered by the plaintiff allegedly occasioned by the defendant, Lillie Drew Counts', conspiracy, the defendant, Lillie Drew Counts, and Robert C. Counts were lawfully married and living together as husband and wife and such coverture constitutes a bar by virtue of the doctrine of inter-spousal immunity.

WHEREFORE, the defendant, Lillie Drew Counts, respectfully moves the Court to dismiss the Motion for Judgment filed against her with her costs expended in this matter.

LILLIE DREW COUNTS


Henry A. Whitehurst, Of Counsel

Henry A. Whitehurst
Attorney at law
21 East Main Street
Christiansburg, Virginia 24073

EXCERPTS FROM DEPOSITION OF MILES RANDOLPH TURNER

(Dep. 2)

MR. CURRY: This is the deposition of Miles Randolph Turner, which is being taken this day pursuant to agreement by Counsel. Mr. Whitehurst, do you agree to waive notice?

MR. WHITEHURST: Yes, Chip, lets go.

MR. CURRY: Mr. Whitehurst has agreed to waive notice and by stipulation of Counsel we have agreed that this deposition will be in the nature of a discovery deposition and also since Mr. Turner has to come up from Texas to perpetuate Mr. Turner's testimony to be read as evidence of the trial of this civil case. Is that correct Mr. Whitehurst?

MR. WHITEHURST: Yes, Chip, and since we have only fifteen minutes could I have the last five please?

MR. CURRY: Yes.

MILES RANDOLPH TURNER, after first being duly sworn, deposed as follows:

QUESTIONS BY MR. CURRY

Q. Please state your name for the record.

A. Miles Randolph Turner.

Q. You've been duly sworn by Mrs. Eley?

A. Yes.

Q. Did you inflict multiple stab wounds on a person known as Robert C. Counts on January 30, 1975?

A. Yessir, I did.

(Dep. 3)

Q. Were you acting alone?

A. Yessir, I was doing this myself.

Q. Did you conceive the idea of stabbing Mr. Counts by yourself?

A. No sir, his wife, Lillie Counts, it was her idea. She was looking for someone to do this and I gained knowledge of it through Fred Lukens. I was living in Dublin, Virginia at the time and he was living in an apartment below me. I was going to New River Community College and I was with Fred Lukens one day and we were talking about that all of us could use some money and he said he knew where I could come up with some. At this point we went to Leggetts Department Store in Radford, Virginia where Mrs. Counts worked.

Q. This is Lillie Counts?

A. Yessir.

Q. All right.

A. I talked to her and she told me that she was looking for someone to kill her husband. She said those exact words, "to kill her husband".

MR. WHITEHURST: All this testimony is incorporated in the criminal transcript, is it not Mr. Ballard?

MR. CURRY: I don't believe we have the criminal transcript transcribed.

MR. WHITEHURST: Well, I'd be willing to share the cost of it.

MR. CURRY: Well, this will take just a few minutes.

MR. WHITEHURST: All right.

Q. What occurred at Leggett Department Store when you talked to Mrs. Counts?

A. I confronted her and asked her if this was what she wanted done and she said yes. At that point she asked me if I would be satisfied with \$100. I did not reply. I just looked at her and she said, "well, how does \$5000 sound?" This was in the latter part of December of 1974 and I told her I would get back with her, that I wanted to think about it and I would get back with her later. Two to three weeks later in mid January of 1975 I contacted her again and I cannot remember if it was by phone or in person, but...

Q. Do you remember if any of the meetings between you and Mrs. Lillie Counts or telephone conversations between you and Mrs. Counts occurred while either or both of you were in Pulaski County, Virginia?

A. Yessir, they did.

Q. All right. Go ahead.

A. The second time I called her and told her I had decided to do it she explained to me what she wanted done and I told her when I was ready I would call her. On the night this took place I called her and she said she would leave the house and take her children with her and he would be alone.

Q. January 30, 1975?

A. Yessir.

Q. Where did you telephone from?

A. From a pay telephone in Dublin. I did not have a telephone in my apartment.

Q. Did you telephone her at her residence or place of abode?

A. At the residence where this took place.

Q. Do you know where that residence is?

A. Fairlawn, Virginia.

Q. In Pulaski County, Virginia?

A. Yes.

Q. Go forward and tell what, if anything, occurred subsequent to the telephone conversation.

A. When I talked to her she said, I told her I was ready to do this and no money or nothing was discussed at that time. She just said she would take her children and she would leave and that's the last contact I had with her.

Q. So you all discussed killing Robert Counts. This was done at the request of Lillie Counts?

A. Yes.

Q. And you were acting under her direction?

A. Yessir.

Q. The last conversation you had with Lillie Counts concerning this was on January 30, 1975?

A. This was the night on which it took place.

Q. From that conversation did she admit to you that she knew of this conspiracy and agreed to it?

A. It was her idea. She was in full agreement with it. She wanted me to do it. I called her, I contacted her on January 30th and she said she would take the children, she would leave and the second contact I had with her in mid January she told me how she wanted it done and I told her we'd do it that way and that's the last time I talked to her.

Q. She gave you directions as to how to kill her husband?

A. Yessir.

Q. And you attempted to carry those directions out?

A. Yessir.

Q. And you were subsequently arrested?

A. Yessir.

Q. Did you make any statements to law enforcement officers involved concerning this subsequent to your arrest?

A. Yessir, I made a full confession.

Q. Do you have a copy of that confession with you?

A. I have a copy of the report that the officer sent in. I do not have a copy of what I stated.

Q. You have a copy of the report of the officers?

A. Yes.

Q. In substance this document you're producing states what happened on that night and that a report made by Lt. Frank Conner. This does not actually contain a copy of your confession.

A. No sir.

Q. Let me show you a copy of the pleading which is attached to a brief which is filed by your attorney, Mr. Ballard. Do you recognize that?

A. Yessir. This is the statement I made to Bobby Hall and Lt. Conners on my arrest.

Q. Is that a copy of the confession or statement you made?

A. Yessir, it is.

Q. Enter that as EXHIBIT I. Any objection Mr. Whitehurst?

MR. WHITEHURST: Yes. No, go ahead and submit it.

Q. Did you testify at the trial of Lillie Counts?

A. Yessir, I did. I believe I took the fifth amendment.

Q. Do you know whether your confession was introduced at the trial of Lillie Counts?

A. Yessir, it was.

Q. Do you know whether Lillie Counts was at your trial on June 20, 1975?

A. I believe she was.

Q. Do you recall her sitting in the gallery?

A. Yessir.

Q. No further questions.

TWENTY SEVENTH JUDICIAL CIRCUIT

JUDGES:

JACK M. MATTHEWS
Galax, Virginia

KENNETH I. DEVORE
Christiansburg, Virginia

R. WILLIAM ARTHUR
Wytheville, Virginia



P. O. BOX 380
WYTHEVILLE, VIRGINIA 24382

COUNTIES:

Carroll
Floyd
Grayson
Montgomery
Pulaski
Wythe

CITIES:

Galax
Radford

February 13, 1978

John J. Curry, Jr., Esq.
Attorney at Law
P.O. Box 246
Christiansburg, Virginia 24073

Henry A. Whitehurst, Esq.
Attorney at Law
P.O. Box 179
Christiansburg, Virginia 24073

Wade H. Ballard, III, Esq.
Attorney at Law
P.O. Box 295
Peterstown, West Virginia 24963

Re: Robert C. Counts
v.
Miles Randolph Turner and
Lillie Counts

Gentlemen:

I have carefully studied the briefs of counsel on the question of interspousal immunity and I am of the opinion that the demurrer of Lillie Counts should be sustained.

I must say that Mr. Curry's brief is very persuasive but it appears to me that except for the exceptions carved out of the Virginia interspousal immunity doctrine by our Supreme Court, the doctrine still obtains in this jurisdiction.

In Korman v. Carpenter, 216 Va. 86 the Court was invited to eliminate the interspousal immunity doctrine in its entirety. This invitation the Court declined to accept but instead defined a very narrow exception to the doctrine as follows:

"We, therefore, hold that an action for wrongful death may be maintained, predicated upon injuries to one's spouse during marriage arising out of a wrongful act by the other

John J. Curry, Jr., Esq., et al
February 13, 1978
Page 2

spouse, when such act results in the termination of the marriage by death, and when the deceased spouse is survived by no living child or grand-child."

The Court then went on to carefully point out that only the narrow question presented by the facts of that case was decided and that the precedential scope of its opinion was so limited.

Therefore, except for the exceptions carved out of the doctrine by the Court in automobile cases and under the actual facts of Korman, the doctrine of interspousal immunity still is the law of Virginia, in my opinion. If another exception is to be made to the rule, that must be done either by the Supreme Court of Virginia or by the General Assembly.

I request counsel to prepare an order covering the following points:

- 1) Permit the late filing of the demurrer by defendant, Lillie Counts.
- 2) Sustain that demurrer for the reasons herein stated.
- 3) Sustain the plea of the Statute of Limitations as to defendant, Turner.

For your information, I have requested the probation officer to report to the Court on the opening day of this term what the status of restitution is as between Miles Randolph Turner and Robert C. Counts. I expect restitution to be paid as ordered in the case of Commonwealth v. Miles Randolph Turner.

Very truly yours,



R. William Arthur, Judge

RWA:ew

ORDER SUSTAINING PLEA
TO STATUTE OF LIMITATIONS
AND DEMURRER
AND DISMISSING SUIT

This action at law came on the 25th day of November 1977 to be heard upon the following:

Motion for Judgment personally served upon both of the defendants; and,

The defendants' respective pleas to the Statute of Limitations; and,

The defendants' respective Answers to the Motion for Judgment; and,

Lillie Drew Count's Motion requesting leave to file a late Demurrer pursuant to Rule 1:9, Rules of The Supreme Court of Virginia, which is herewith granted and to which the plaintiff, by counsel, objects; and,

The briefs filed by counsel; and,

The Court's memorandum opinion dated 13 February 1978 filed herein and was argued by counsel.

The Court, having maturely considered the record of this action at law, and having filed its memorandum opinion, finds as follows:

That this action at law was instituted more than two years after injuries to the plaintiff, Robert C. Counts; and,

That the demurrer filed by Lillie Drew Counts with respect to the Doctrine of Interspousal Immunity is well taken; and,

That the Court having found the demurrer of Lillie Drew Counts well taken finds her plea to the Statute of Limitations moot.

In consideration of the findings of the Court, it is
ADJUDGED and ORDERED as follows:

That the plea to the Statute of Limitations filed by
Miles Randolph Turner be, and the same hereby is, sustained;
and,

That the demurrer of Lillie Drew Counts with respect to the
Doctrine of Interspousal Immunity be, and the same hereby is,
sustained; and,

That the defendants hereto be, and they hereby are,
dismissed; and,

There being nothing remaining to be done in this action at
law, it is accordingly stricken from the docket of this Court.

ENTER: This Order this 6th day
of March, 1978.

5/ R. William Arthur
JUDGE

I ask for this Decree.

Wade H. H. Turner
Of Counsel to Miles Randolph Turner

Henry D. Whitehead
Of Counsel to Lillie Drew Counts

I have seen this Decree and object to it's entry.

John C. Counts
Of Counsel to Robert C. Counts

A TRUE COPY—

TESTE:

GERRY J. ATKINSON, CLERK

BY: *James B. O'Quinn, Jr.*

ASSIGNMENT OF ERROR

The petitioner, Robert C. Counts, is aggrieved by the judgment of the Circuit Court of Pulaski County on March 6, 1978, in sustaining Lillie Counts' demurrer and dismissing the petitioner's action and assigns the following as error:

That the Court erred in sustaining Lillie Counts' demurrer in the determination and judgment of the Court that the common law as it exists in Virginia in 1978 will bar an action subsequent to termination of the marriage for damages for a purely personal and malicious tort committed by one spouse against the other, during coverture, the nature of which tort could destroy the unity of marriage.

Signed: _____

" DEFENDANT'S "

EXHIBIT #1