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## DeCurtis v. Visconti, Boren & Campbell Ltd., 252 A.3d 765 (R.I. 2021)

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**Legal Malpractice.** *DeCurtis v. Visconti, Boren & Campbell Ltd.*, 252 A.3d 765 (R.I. 2021). Judgmental immunity—the doctrine that protects attorneys from liability, as a matter of law, for acts or omissions during the conduct of litigation, which are the result of an honest exercise of professional judgment—is not good law in Rhode Island. Therefore, judgmental immunity is not a valid defense in this state’s jurisprudence.

#### FACTS AND TRAVEL

On March 2, 2000, Mr. DeCurtis hired Visconti, Boren & Campbell, Ltd. (VBC), Attorney Boren’s employer at the time, to draft an antenuptial agreement for him and his then-fiancée, Michelle Tondreault.<sup>1</sup> On March 22, 2000, Mr. DeCurtis, and Ms. Tondreault, without making any changes to VBC’s draft, signed the antenuptial agreement and got married a few days later.<sup>2</sup> In 2005, Ms. Tondreault filed for divorce in Family Court.<sup>3</sup> However, she and Mr. DeCurtis ultimately negotiated a settlement and executed a postnuptial agreement, which Attorney Boren also drafted.<sup>4</sup> In June 2010, Ms. Tondreault again filed for divorce.<sup>5</sup> Ms. Tondreault also prepared a memorandum for that divorce proceeding stating that neither the antenuptial agreement nor the postnuptial agreement excluded from equitable distribution the parties’ earnings, income, or assets earned or acquired during the marriage.<sup>6</sup> Ms. Tondreault’s memo went on to argue that separate property, as defined in a valid antenuptial agreement, is not “forever frozen” as separate property.<sup>7</sup> Mr. DeCurtis responded by asserting that income and earnings received during the marriage retain their status as separate property.<sup>8</sup>

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1. *DeCurtis v. Visconti, Boren & Campbell Ltd.*, 252 A.3d 765, 766 (R.I. 2021).

2. *Id.*

3. *Id.*

4. *Id.* at 767.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

Before opening arguments in the trial for the second divorce, the Family Court justice informed the parties that, under his reading of the law and the two agreements, “income that was derived during the period of the marriage” was not excluded from the marital estate.<sup>9</sup> Mr. DeCurtis responded that he believed that his income would not become part of the marital estate that would be divided between him and Ms. Tondreault upon divorce.<sup>10</sup> The Family Court justice then explained to Mr. DeCurtis that his interpretation was the “opposite.”<sup>11</sup> Mr. DeCurtis and Ms. Tondreault agreed to settle the matter a few days later.<sup>12</sup>

On August 8, 2012, Mr. DeCurtis filed a three-count complaint in Superior Court for professional negligence and breach of fiduciary duty against Attorney Boren and vicarious liability against VBC for Attorney Boren’s acts.<sup>13</sup> Furthermore, the complaint alleged that Attorney Boren had failed to draft the antenuptial agreement in a way that would protect his assets and failed to advise him “of any risk associated with commingling his premarital assets” with marital property.<sup>14</sup> VBC answered and asserted various affirmative defenses, including voluntary payment and failure to mitigate damages.<sup>15</sup>

Upon remand to the Superior Court for further proceedings,<sup>16</sup> the parties filed a statement of agreed-upon facts with accompanying exhibits, as well as renewed motions for partial summary judgment.<sup>17</sup> Collectively, both parties asked the Superior Court justice to enter partial summary judgment on the Rhode Island Supreme Court’s interpretation of *Marsocci v. Marsocci*<sup>18</sup> and the effect of that opinion on their case.<sup>19</sup> Mr. DeCurtis also asked the Superior Court justice to deny the defendants’ motion for summary judgment

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9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* at 768.

16. This case had previously reached the Supreme Court on a different issue and was remanded to the Superior Court for further proceedings. *Id.*

17. *Id.* at 769.

18. *Marsocci v. Marsocci*, 911 A.2d 690 (R.I. 2006).

19. *DeCurtis*, 252 A.3d at 769.

on the issue of Attorney Boren's entitlement to judgmental immunity.<sup>20</sup>

On April 8, 2019, the Superior Court justice denied Mr. DeCurtis' motion and granted VBC's motion based on judgmental immunity.<sup>21</sup> The Superior Court justice further clarified that his decision rested upon his interpretation of *Marsocci*.<sup>22</sup> Mr. DeCurtis then moved for entry of partial final judgment under Rule 54(b) of the Superior Court Rules of Civil Procedure.<sup>23</sup> The Superior Court justice granted VBC's motion on April 25, 2019, and Mr. DeCurtis filed a timely appeal.<sup>24</sup>

#### ANALYSIS AND HOLDING

On appeal, Mr. DeCurtis contended that the Superior Court justice erred in deciding that Attorney Boren did not have a duty to include additional language in the antenuptial agreement.<sup>25</sup> Next, Mr. DeCurtis argued that the Superior Court justice erred in granting judgmental immunity to VBC based on *Marsocci*.<sup>26</sup> The Court reviewed the Superior Court's grant of a motion for summary judgment *de novo*.<sup>27</sup>

The Court started its analysis by stating that the "existence of a duty is a question of law."<sup>28</sup> However, the Court continued by saying that the goal of Mr. DeCurtis' motion for partial summary judgment was not for the Superior Court to determine whether there was a duty owed to Mr. DeCurtis by Attorney Boren (and VBC).<sup>29</sup> Instead, according to the Court, the goal of Mr. DeCurtis' motion for partial summary judgment was for the Superior Court to determine "whether the antenuptial agreement contained the requisite language to protect Mr. DeCurtis' earnings as intended."<sup>30</sup>

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20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* at 770.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 771.

30. *Id.*

Additionally, the Court asserted that determination was grounded in contract law and contractual interpretation (again, a question of law.)<sup>31</sup> However, the Superior Court justice did not rely on this interpretation when making their determination.<sup>32</sup> Instead, the Superior Court justice analyzed Attorney Boren's duty under the factors discussed in *Woodruff v. Gitlow*<sup>33</sup> and determined that Attorney Boren had no obligation to include additional language in the agreements.<sup>34</sup> However, the Court determined that, by going through the *Woodruff*<sup>35</sup> factors, the trial justice undertook an analysis pertaining to the standard of care, which is a "question of fact for the jury and inappropriate for determination on summary judgment."<sup>36</sup> Thus, the Court deduced that the summary judgment granted in favor of VBC that was predicated on the notion that Attorney Boren had a duty to include additional language in the agreements "was in error and is hereby vacated."<sup>37</sup>

Next, the Court turned to Mr. DeCurtis' second contention pertaining to the Superior Court justice erring in granting judgmental immunity in favor of the defendants based on *Marsocci*.<sup>38</sup> The Court stated very plainly and powerfully, "[j]udgmental immunity has never been recognized in Rhode Island and is not the law in this jurisdiction."<sup>39</sup> The Court then distinguished the judgmental immunity doctrine from a previous case and stated that "we decline to address the question of judgmental immunity based on the facts before us."<sup>40</sup> Accordingly, the Court concluded by saying "[b]ecause to date we have not recognized judgmental immunity as a valid defense in the State of Rhode Island, and because Attorney Boren's alleged negligence remains an issue in the case after our decision today, the grant of summary judgment on the issue of judgmental immunity is also vacated."<sup>41</sup>

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31. *Id.*

32. *Id.*

33. *Woodruff v. Gitlow*, 91 A.3d 805 (R.I. 2014).

34. *Id.*

35. *Woodruff*, 91 A.3d at 815.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 772.

41. *Id.*

Lastly, there were two concurring opinions from Justice Goldberg and Justice Robinson, respectively.<sup>42</sup> Justice Goldberg's concurrence focused on the principle that the Court should "avoid placing our thumb on the scale of justice" and that the Court "will not entertain an abstract question or render an advisory opinion."<sup>43</sup> However, Justice Robinson's opinion focused on how the majority opinion was correct in vacating the decision of the Superior Court but displayed a different view on the judgmental immunity issue and was much more open to the possibility of entertaining a judgmental immunity analysis in the future.<sup>44</sup>

#### COMMENTARY

This case was best described by Justice Robinson when he stated, "this case is similar to what Winston Churchill characterized as 'a riddle wrapped in a mystery inside an enigma.'"<sup>45</sup> This case had already come before the Court for a different issue and had been remanded back to the Superior Court only to be appealed again on another issue. Not only was it appealed twice, but on the second appeal, it potentially could have contained a doctrine—judgmental immunity—that would have been an issue of first impression for the Court. Furthermore, this case was interesting not only because of the potential issues it presented but also because of the responses it elicited from the Court.

The two concurring opinions were very telling in different ways and could quite possibly hint at differing judicial philosophies amongst the justices of the Court. On the one hand, you have Justice Goldberg and her potent language, "[the Court] will not entertain an abstract question or render an advisory opinion," which hints at a judicial restraint approach.<sup>46</sup> Justice Goldberg's concurrence was very concise and stated plainly that "I simply note that the concept of judgmental immunity for lawyers has not been recognized as a valid defense in Rhode Island and is not properly before us."<sup>47</sup> This concurrence signifies Justice Goldberg's resistance

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42. *See id.* at 772-5.

43. *Id.* at 772.

44. *Id.* at 774. (Robinson, W., concurring.).

45. *Id.*

46. *Id.* at 772. (Goldberg, M., concurring).

47. *Id.*

to entangle the Court in legal issues that have not developed fully or political issues that are not legal issues that fall under the Court's interpretation discretion. However, on the other hand, Justice Robison's concurrence almost welcomes the judgmental immunity doctrine and points at precedent from other states to support the admittance of judgmental immunity into Rhode Island Jurisprudence.<sup>48</sup>

These two different judicial philosophies and differing yet concurring opinions are very symbolic of America today. On one hand, the Republican party and their conservative ideology usually nominate individuals who believe in judicial restraint and *stare decisis* to judicial seats. Those ideals of judicial restraint and *stare decisis* are present in Justice Goldberg's concurrence, which was focused on stating that the Court should focus only on the case at hand and not deal with hypotheticals. On the other hand, America also has the Democratic Party and their liberal ideology, which usually nominates individuals who believe in judicial activism and make the law work for society to judicial seats. Those ideals of judicial activism and molding laws around society are present in Justice Robison's concurrence, which focused more on how judgmental immunity doctrine fit in Rhode Island than its applicability in the present case. Justices at all levels need to take in aspects of both judicial philosophies. Thus, there are good ideals apparent in both concurrences. Namely, justices should not "hint" at welcomed outcomes, nor should they avoid new doctrines simply because they are not yet established in that jurisdiction. However, the judicial activist principles of Justice Robison's concurrence are a welcomed sight. America has become far too complex to "not entertain an abstract question or render an advisory opinion."<sup>49</sup>

#### CONCLUSION

The Rhode Island Supreme Court held that the Superior Court justice erred by granting the defendant's motion for partial summary judgment because not only did the trial justice wrongly conduct an analysis which should have been conducted by the jury but also because the judgmental immunity doctrine is not recognized

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48. *Id.* at 774.

49. *Id.* at 772.

under Rhode Island law, and thus cannot be used as a defense. Thus, the Court vacated the Superior Court justice's determination granting VBC's motion for partial summary judgment and remanded it back to the Superior Court for further proceedings.

Alexus Bonilla