No. 040804

IN THE SUPREME COURT OF VIRGINIA

MUGUET S. MARTIN,

Appellant,

v.

KRISTOPHER JOSEPH ZIHERL,

Appellee,

BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA, INC. IN SUPPORT OF APPELLANT

Rebecca K. Glenberg (VSB #44099)
American Civil Liberties Union of Virginia Foundation, Inc.
6 North Sixth Street, Suite 400
Richmond, Virginia 23219
(804) 644-8080
(804) 649-2733 (Fax)

Counsel for *Amicus Curiae*
American Civil Liberties Union of Virginia, Inc.

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ASSIGNMENTS OF ERROR

Amicus adopts and incorporates herein the Assignments of Error set forth in the Opening Brief of Appellant.

QUESTIONS PRESENTED

Amicus adopts and incorporates herein the Assignments of Error set forth in the Opening Brief of Appellant.

STATEMENT OF THE NATURE OF THE CASE

Amicus adopts and incorporates herein the Statement of the Nature of the Case set forth in the Opening Brief of Appellant.

STATEMENT OF FACTS

Amicus adopts and incorporates herein the Statement of Facts set forth in the Opening Brief of Appellant.

INTEREST OF *AMICUS CURIAE*

Amicus ACLU of Virginia is the Virginia affiliate of the American Civil Liberties Union, a nonprofit, nonpartisan corporation founded in 1920 for the purpose of maintaining and advancing civil liberties in the United States, which has over 300,000 members nationwide. The ACLU of Virginia has about 5,000 members who are residents of the Commonwealth of Virginia. It has appeared frequently, both as direct counsel and as *amicus*, in the state and federal courts of the Commonwealth, and has a long defending constitutional rights of Virginians under the United States and Virginia Constitutions. One of the issues of great importance to the

ACLU of Virginia is the right to privacy encompassed in the Due Process Clause of the Fourteenth Amendment.

ARGUMENT

In *Zysk v. Zysk*, 239 Va. 32, 404 S.E.2d 721 (1990), this Court considered a plaintiff's suit against her husband for infecting her with herpes before their marriage. The Court held that the wife's commission of fornication with the husband, in violation of Va. Code § 18.2-344, barred the action. As the Court explained, "Virginia follows the general rule that 'a party who consents to and participates in an immoral or illegal act cannot recover damages from other participants for the consequence of that act.'" 239 Va. at 34, 404 S.E.2d at 722 (quoting *Miller v. Bennett*, 190 Va. 162, 164-65, 56 S.E.2d 217, 218 (1949)).

The present case contains facts very similar to those in *Zysk*; the plaintiff sues the defendant – to whom she is not married -- for knowingly infecting her with herpes during the course of consensual sex. Accordingly, the Circuit Court held that the plaintiff's case was barred. In the years since *Zysk*, however, the United States Supreme Court has made clear that laws prohibiting private, consensual sexual conduct between adults are unconstitutional. The Court's reasoning applies directly to Virginia's fornication statute, which cannot survive the recent case law.

The Circuit Court found that, even if the fornication statute is unconstitutional, it articulates a "public policy" against extramarital sex. This holding cannot stand. An unconstitutional statute cannot be the basis for a valid "public policy." Any "public policy" arising from an unconstitutional statute must itself be unconstitutional. Moreover, this court has never applied the "immoral or illegal" bar to tort actions to amorphous "public policy." Rather,

this principle has only applied when the plaintiff has actually engaged in a criminal offense. If fornication is not a criminal offense, it cannot bar the plaintiff's recovery in tort.

I. VIRGINIA'S FORNICATION LAW IS UNCONSTITUITONAL.

A. The Fornication Law Violates the Due Process Clause.

Following the United States Supreme Court's decision in *Lawrence v. Texas*, 539 U.S. 558, 123 S.Ct. 2472 (2003), there can be no doubt but that Virginia's fornication statute is unconstitutional. In *Lawrence*, the Court invalidated a statute prohibiting "deviate sexual intercourse" (defined as oral or anal sex) between persons of the same sex. In so doing, it overruled the case of *Bowers v. Hardwick*, 478 U.S. 186 (1986), which had upheld such laws. There is no meaningful distinction between the statue struck down in *Lawrence* and Virginia Code § 18.2-334.

The *Lawrence* court made clear that private, consensual sexual relations between adults are an aspect of the "liberty" protected by the Due Process Clause of the Fourteenth Amendment. "Liberty presumes an autonomy of self that includes the freedom of thought, belief, expression, and certain intimate contact." *Lawrence*, 123 S. Ct. at 2475. Although statutes like Texas's "purport to do no more than prohibit a particular sexual act," they "have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is with in the liberty of persons to choose without being punished as criminals." 123 S. Ct. at 2478.

The *Lawrence* Court acknowledged that for centuries, many people condemned homosexual conduct based on deep moral convictions. "These considerations do not answer the

question before us, however, The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law." *Id.* at 2480.

Quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 404 U.S. 833 (1992), the *Lawrence* Court affirmed that sexual matters, "involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment." *Lawrence*, 123 S. Ct. at 2481. The Court concluded that "[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons might." *Id.* at 2482. It follows ineluctably that persons in a *heterosexual* relationship may seek autonomy for these purposes as well.

The reasoning of *Lawrence* compels a finding that Virginia's fornication statute is likewise unconstitutional. A the Court made clear, the holding of *Lawrence* does not apply only to same-sex conduct. The Court was invited to resolve the case on the basis that the statute discriminated against homosexuals in violation of the Equal Protection Clause. The Court declined the invitation, reasoning: "Were we to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct between same-sex and different-sex participants." By ruling instead that private sexual conduct is protected by the Due Process Clause, the Court deliberately foreclosed the question. Like the sexual conduct prohibited in the Texas sodomy statute, sexual relations between unmarried individuals are among the most private decisions human beings can make, and go to the heart of the personal autonomy protected by the Due Process Clause.

In *Lawrence*, the Court adopted two principles from Justice Stevens' dissent in *Bowers*:

> First, the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice

> . . . . Second, individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of 'liberty' protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons.

Lawrence, 123 S. Ct. at 3483, quoting *Bowers*, 478 U.S. at 216. These principles make clear that Virginia's fornication statute cannot stand.

B. The Fornication Law Violates the Equal Protection Clause.

The Virginia fornication statute discriminates between married and unmarried persons in matters pertaining to highly personal, private conduct. Even before *Lawrence*, it was clear that such discrimination violates the Equal Protection Clause.

In *Griswold v. Connecticut*, 381 U.S. 479 (1965), the United States Supreme Court struck down a statute that prohibited the use of contraceptives. The Court found that the Constitution created a "zone of privacy" that protected intimate decisions within the marital relationship. Seven years later, in *Eisenstadt v. Baird*, 405 U.S. 438 (1972), the Court invalidated a law prohibiting the distribution of contraceptives to unmarried persons. The statute violated the Equal Protection Clause by discriminating between married and unmarried individuals. "[W]hatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike." *Eisenstadt*, 405 U.S. at 453. The Court went on to explain that the right to privacy recognized in *Griswold* was not limited to married couples:

> It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

Id. As the Court later explained in *Lawrence*, *Griswold* "was decided under the Equal Protection Clause; but with respect to unmarried persons, the Court went on to state the fundamental proposition that the law impaired the exercise of their personal rights."

Lawrence made clear that consenting adults have a constitutional privacy interest in sexual conduct of the same kind and order as the right to contraception. Such conduct cannot be barred with respect to unmarried persons. Like the statute overturned in *Eisenstadt*, the Virginia fornication statute unconstitutionally imposes criminal sanctions on private conduct between unmarried adults that is perfectly lawful between married persons. It therefore violates the Equal Protection Clause.

II. BECAUSE THE FORNICATION LAW IS VOID, IT CANNOT BE A BASIS FOR BARRING PLAINTIFF'S LAWSUIT.

Since the fornication statute is unconstitutional, Virginia courts may not give effect to that statute – whether by criminal convictions for violations of the statute or by rules of tort. The courts are as much "state actors" as the other branches of government, and they may not enforce rules of tort law that violate constitutional guarantees. Thus, for example, courts may not entertain libel actions that infringe on the First Amendment guarantee of freedom of the press:

> Although this is a civil lawsuit between private parties, the . . . courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute. . . . The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised.

New York Times Co. v. Sullivan, 376 U.S. 254, 265 (1964). Similarly, courts may not enforce racially discriminatory restrictive covenants, even though the covenants themselves represent an agreement between private actors. *Shelley v. Kraemer*, 334 U.S. 1 (1948).

This Court has implicitly recognized that an unconstitutional statute cannot bar a tort action by one who has violated that statute. Thus, in *Miller v. Bennett*, 190 Va. 162, 56 S.E.2d 217 (1949), the Court applied the illegality defense to a wrongful death suit against an abortionist. Later, after abortion was found to be constitutionally protected in *Roe v. Wade*, 410 U.S. 113 (1973), malpractice actions based on negligently performed abortions were permitted. *See Lake v. Northern Virginia Women's Medical Center, Inc*., 253 Va. 255, 483 S.E.2d 220 (1997); *Miller v. Johnson*. 231 Va. 177, 183, 343 S.E.2d 301, 304 (1986) ("Where the patient can establish failure to perform the [abortion] procedure with reasonable care and damages proximately resulting from breach of the duty, she is entitled to recover as in any other medical malpractice action.")

This Court has never applied the "immoral or illegal" bar in any case in the absence of an enforceable criminal statute of which the plaintiff consented to the violation or herself violated, nor has it ever suggested that the bar could be supported solely by a nebulous "public policy." Indeed, this Court has referred to the "immoral or illegal" interchangeably as the "illegality defense." *See Johnson v. Campbell*, 258 Va. 453, 456, 521 S.E.2d 764, 766 (1999) ("Virginia permits the employment of the so-called 'illegality' defense, which is based on the principle that a party who consents to and participates in an *illegal* act cannot recover damages from other participants for the consequences of that act") (emphasis added). By definition, the "illegality" defense cannot apply to an act that is not illegal. Since the fornication statute is unconstitutional, fornication is not illegal, and cannot be a bar to a tort action.

CONCLUSION

For the foregoing reasons, *amicus* respectfully urges that the judgment of the Circuit Court be reversed and that the case be remanded for further proceedings.

Respectfully submitted:

AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA, INC.

By counsel:_____

Rebecca K. Glenberg (VSB #44099)
American Civil Liberties Union Foundation of Virginia, Inc.
6 North Sixth Street, Suite 400
Richmond, Virginia 23219
(804) 644-8080
FAX: (804) 649-2733

Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I do hereby certify that on this 30th day of August, 2004, I have complied with the provisions of Rule 5:26 of this Court by filing 20 copies of this brief with the Clerk of the Supreme Court of Virginia and by serving 3 copies of this brief by first class mail, postage prepaid to the following counsel of record:

Robert A. Canfield
Canfield, Shapiro, Baer, Heller & Johnston, L.L.P.
2201 Libbie Ave., Suite 200
Richmond, Virginia 23230

Neil Kuchinsky
Melvin E. Yeamans, Jr.
200 Lakeview Avenue
Colonial Heights, Virginia 23834

_____
Rebecca K. Glenberg