IN THE SUPREME COURT OF FLORIDA

FILED

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SID J. WHITE
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By ________
Chief Deputy Clerk

HAROLD SNOWTEN,

Petitioner,

vs.

UNITED STATES FIDELITY AND GUARANTY COMPANY and WILLIE LEE SNOWTEN,

Respondent.

Case No. 64,17[illegible]

ON PETITION FOR CERTIORARI
FROM THE DISTRICT COURT OF APPEAL,
FIRST DISTRICT OF FLORIDA

AMICUS CURIAE BRIEF OF FLORIDA DEFENSE LAWYERS ASSOCIATION

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INTRODUCTORY STATEMENT

On behalf of the FLORIDA DEFENSE LAWYER'S ASSOCIATION, we would like to express our appreciation to the Court for permitting us to appear as Amicus Curiae.

Citations to the Record on Appeal shall be preceded by the abbreviation "R".

POINT ON APPEAL

NO REVERSIBLE ERROR WAS COMMITTED BY THE TRIAL COURT IN UPHOLDING THE COMMON LAW DOCTRINE OF INTERSPOUSAL IMMUNITY.

Interspousal tort immunity is a viable common law doctrine in Florida which operates as an absolute bar to tort claims by one spouse against another from causes of action arising during the marriage. The First District Court of Appeal was correct in affirming the trial court which entered the summary judgment below in favor of the Petitioners/Defendants. Since its inception, the rationales for the continued existence of interspousal immunity have remained constant. Florida courts have consistently upheld the immunity when either spouse is still living at the time suit is brought. Compare Hill v. Hill, 415 So.2d 20 (Fla. 1982) (Interspousal immunity would not be modified to allow recovery for intentional torts between spouses); West v. West, 414 So.2d 189 (Fla. 1982); Roberts v. Roberts, 414 So.2d 190 (Fla. 1982); Burgess v. Burgess, 417 So.2d 1173 (Fla. 1st DCA 1982); Newby v. Newby, 403 So.2d 562 (Fla. 3d DCA 1981); Blanton v. Blanton, 354 So.2d 430 (Fla. 4th DCA 1978). with Dressler v. Tubbs, 435 So.2d 792 (Fla. 1983) (Interspousal immunity abrogated in a wrongful death action when both spouses deceased.) See also Shivers v. Sessions, 80 So.2d 905 (Fla. 1955).

Recently, in Dressler, this Court has reaffirmed its earlier position that interspousal immunity does not apply in wrongful

death actions brought by the estate of one deceased spouse against the estate of the other. See Shivers v. Sessions, 80 So.2d 905 (Fla. 1955). The policy considerations which support the immunity doctrine are not present when both spouses are deceased and there is no marital harmony to preserve. Nevertheless, immunity still exists in those cases where one or both spouses are living. The First District in the instant case, like the Fifth District in Dressler, has certified the following question to the Florida Supreme Court as being of great public importance:

> IS THE DOCTRINE OF INTERSPOUSAL IMMUNITY WAIVED, TO THE EXTENT OF AVAILABLE LIABILITY INSURANCE, WHEN THE ACTION IS FOR A NEGLIGENT TORT?

The certified question should be answered in the negative for the reasons recited below.

The unity of the marriage, potential for disruption of marital harmony, as well as the possibilities of fraud and collusion are genuine concerns which have caused Florida courts to leave the interspousal immunity doctrine intact. Additionally, this Honorable Court has indicated that any abrogation must come from the legislature. Raisen v. Raisen, 379 So.2d 352 (Fla. 1980); Bencomo v. Bencomo, 200 So.2d 171 (Fla. 1967); Corren v. Corren, 47 So.2d 774 (Fla. 1950). A final factor to be considered by this Court is the unconstitutional impact there would be on existing insurance contracts if there were an ex post facto abrogation of interspousal immunity. All of these considerations are

treated separately below.

A. MARITAL UNITY

With the passage of the Married Woman's Acts and sections 708.08 and 708.09, Florida Statutes (1941), it has been argued that the Florida Legislature intended to remove any bar to suit in tort by a married woman against her husband. Petitioner submits that the wife is no longer considered the husband's chattel and thus, the fictional unity between the two no longer exists.

This Court has addressed this argument since the enactment of these statutes and continued to endorse the immunity for torts between spouses. See Corren v. Corren. The concept of a unity between married persons does not presuppose that the wife becomes "merged" into the husband as a chattel for purposes of tortious causes of action. Instead, the two are merged together because of the intimate nature of the relationship and the bond of common pecuniary interest.

In Corren, this Court noted:

> It seems to us that we should not extend ourselves through judicial process to hold that (the Wife) could force the Husband to take from the family fortune an amount to compensate her for your injuries when, after all, the responsibility is upon the husband to see that she receives proper care and to discharge any obligations that such care may entail.

Clearly, the Court should not destroy the concept of marital unity merely because a married woman may now sue and be sued in her own home. One spouse has a moral obligation to care and provide for the other spouse, regardless of how a disability is

incurred. This marital responsibility is not lessened because one spouse is the tort-feasor.

Various immunities remain viable in Florida based on the overriding public policy favoring them. See, e.g., Fla. Stat. § 382.085 (tort and criminal immunity for physician determining brain death.) Fla. Stat. § 409.168 (immunity for state agents under Dependent Child Performance Agreements.); Fla. Stat. § 322.261 (immunity to personnel for blood alcohol test administration); Fla. Stat. § 232.275 (civil and criminal immunity for school personnel who discipline students); Fla. Stat. § 768.13 (Good Samaritan Act); Fla. Stat. 768.125 (Dramshop Immunity); Fla. Stat. § 768.135 (Volunteer Team Immunity). Fla. Stat. § 768.136(2) (Charitable Gift immunity). In addition to the foregoing, common law continues to recognize the immunity from defamation suits for those persons who testify in official court and legislative proceedings in the interest of the freest flowing communications. See Mueller v. The Florida Bar, 390 So.2d 449 (Fla. 4th DCA 1980).

The maxim that for every wrong there exists a remedy is overbroad in the face of overriding public policy. It has been argued that a spouse or child who is injured by a negligent spouse or parent is discriminated against because they cannot sue only because of their relationship with the tort-feasor. However, parents and spouses may insure against the possibility of injuries to their children and themselves in the form of hospitalization, casualty and disability insurance coverages.

Justice Boyd recognized that it would be "awkward and unnecessary" to seek liability insurance protection for the infinite range of possible accidents that could happen during the marriage or the child's minority. Ard v. Ard, 414 So.2d 1066, 1070-1071 (Fla. 1982). Realistically, the parent or spouse would be paying for protection and reimbursement for bodily injury through an insurance premium. Coverage under a hospitalization plan would be more easily determined and would eliminate the dissension generated by the litigation.

B. MARITAL HARMONY/FRAUD AND COLLUSION

As Justice Alderman recognized in Raisen, there is a reciprocal and antagonistic relationship between the promotion of marital harmony and avoidance of fraudulent and collusive claims. 379 So.2d at 355. These factors are only intensified in a suit for negligence brought against the spouse's liability carrier.

Litigation functions properly only when the parties assume their adversarial positions. Generally, if there exists insurance coverage, the insurance company has the duty to defend the insured which is coupled with the insured's concomitant duty to cooperate. In conducting the discovery, the liability carrier is obligated to inform the insured spouse of newly discovered evidence which may be used against the plaintiff spouse. If the plaintiff is believed to be a malingerer, surveillance may be considered. Having received work product information from defense counsel, the insured spouse is obligated not to divulge

anything to the plaintiff spouse. This Court in Raisen discussed the obvious conflict this would pose for the litigating spouses.

> Under such circumstances, it is unrealistic to think that the defendant spouse will do all within his or her power to defeat the claim of the plaintiff spouse. We expect too much of human nature if we believe that a husband and wife who sleep in the same bed, eat at the same table, and spend money from the same purse can be truly adversary to each other in a lawsuit when any judgment obtained by the plaintiff spouse will be paid by an insurance company and will ultimately benefit both spouses.

379 So.2d at 355.

It has been suggested that the potential for fraud and collusion exists in every lawsuit, that the legal system has safeguards to check such activities, and that causes of action should not be barred because of the possibility of collusive behavior of the litigants. However, such arguments overlook the damage which is already done by putting the defendant spouse in the conflicting position in the first place.

Petitioner suggests that immunity should only be abrogated to the extent of applicable liability insurance. Again, as Justice Boyd pointed out in his dissent in Ard, liability and immunity should not be treated as privileges which can be waived. Ard, 414 So.2d at 1070. Acts of negligence by a spouse have heretofore not been considered legal wrongs. Intentional wrongs committed by a parent or spouse are otherwise reprimanded in the law, and thus interspousal immunity should remain intact. Raisen.

C. ABROGATION OF IMMUNITY AS LEGISLATIVE FUNCTION

It is unquestioned that interspousal immunity was born under English common law and adopted into the jurisprudence of Florida in 1829 by the enactment of what is now section 2.01, Florida Statutes (1977). As the doctrine has now been codified and elevated by statute, any abrogation or amendment to the doctrine should come from subsequent legislation and not by judicial fiat. Clearly, Florida courts are empowered to abrogate the common law, or dispose of law when it becomes unconstitutional or fails to serve the purposes for which it was formed. However, the Raisin Court admonished against such behavior by the Florida judiciary, stating that such action should only be taken when there is a compelling need for change and the reason for the law no longer exists. 379 So.2d at 354. There has been no substantial change in circumstances since the Raisin opinion in 1980 to require a judicial abrogation of the interspousal immunity doctrine.

Extinguishing a doctrine which has been effective in Florida for over 150 years requires careful and thorough consideration of all of the possible ramifications from such action. Such an analysis cannot adequately be made by a court dealing with one set of adverse parties in an individual fact situation. A forum should be afforded to all interested and affected parties so that they may voice their views through their elected representatives. Legislative action, if any were taken, could be comprehensive, taking into account the varying situations in which one spouse could sue another.

Other State Supreme Courts agree that the public policy considerations involved in the retention of interspousal and interfamily immunity are so pervasive only the state's legislature may alter it. See, e.g., State Farm Mutual Automobile Insurance Co. v. Leary, 544 P.2d 444 (Mont. 1975) (Interfamily immunity does not violate public policy.) In Ensminger v. Ensminger, 222 Mis. 706, 77 So.2d 308, 310 (1955), the Court held:

> The consensus of opinion of the judges is that the right of a wife to sue her husband in a tort is fraught with such far-reaching results that the grant thereof should not be made by judicial fiat should only be granted by the sovereign through legislative processes.

See also Stewart v. Harris, 434 P.2d 902, 904-905 (Okla. 1967).

In some of the jurisdictions which have chosen to abrogate the interspousal immunity doctrine, the common law of the state was not codified by statute requiring legislative action to amend or abrogate. See, e.g., Brooks v. Robinson, 284 N.E.2d 794 (Ind. 1972); Immer v. Risko, 56 N.J. 482, 267 P.2d 481, 483 (1970) (Interspousal immunity abrogated based on a prenuptial tort.)

At least one ligislative body devised a scheme which portects all parties involved by requiring by statute that any insurance coverage for interspousal torts must be specifically contracted for by the married couple. Compare N.Y. [Gen. Oblig] Law § 3-313, subd. 2 (Cosol. 1974) with N.Y. [Ins.] § 167, subd. 3 (Consol. 1974) and State Farm Mutual Automotive Insurance Co. v. Westlake, 35 N.Y. 2d 587, 324 N.E.2d 137 (N.Y. App. Div. 1974).

This Court should reaffirm the holding in Raisen and leave any reconsideration of interspousal immunity to the Legislature.

D. DISTINGUISHING ARD v. ARD

While it is true that parental immunity has been abrogated to the extent of liability insurance, there are numerous, material differences between the parent-child relationship and the marriage between the husband and wife. See Ard v. Ard, 414 So.2d 1066 (Fla. 1982). A minor child may only sue and be sued through a representative, next friend or guardian ad litem. Fla.R.Civ.P. 1.210(b). There are no disabilities for a competent adult to sue in his or her own behalf, allowing them to make the ultimate decision of whether to file suit. Additionally, husband and wife enter into their relationship voluntarily. Dissolution of marriage is much more likely to occur, practically speaking, due to a rift from the threat of litigation than will emancipation of the minor.

In Joseph v. Quest, 414 So.2d 1063 (Fla. 1982), the Court compared the husband-wife with the parent-child relationship and discovered essential contrasts when applying the respective immunities:

> However, we recognize the legal difference between the husband and wife relationship and that of parent-child. In the former, both are capable of bringing suit independently and with full knowledge of the financial relationship. Prior to the institution of any suit either or both spouses can examine the relative strength of their financial positions, including insurance coverage and other

> assets. They can also evaluate the likelihood of success in the litigation process. With all this, they can decide together or as individuals whether or not to bring suit with the possibility of contribution by the other spouse. The situation is completely different for a minor child. Minors and infants must bring suit through a representative, next friend, or guardian ad litem. Fla.R.Civ.P. 1.210(B). See Youngblood v. Taylor, 89 So.2d 503 (Fla. 1956). Logically, an infant injured through the combined negligence of a parent and a third party would in most cases bring suit through his parents. If the parents feared possible liability through contribution then it would be their decision and not the child's to withhold suit. Id. at 1065.

Notably, the doctrine of parental immunity did not have its origin in English common law, which was later codified into the Florida Statutes. See Ard, 414 So.2d at 1067. See also Hewellette v. George, 68 Miss. 703, 711, 9 So. 85, 887 (1891).

For these reasons, the Court should not abrogate interspousal immunity merely because parental immunity has been waived to some extent.

E. DRESSLER v. TUBBS DISTINGUISHED

This Court recently readdressed the issue of whether interspousal tort immunity should be abrogated to the extent of liability insurance when both spouses are deceased due to the negligence of one spouse. Dressler v. Tubbs, 435 So.2d 792 (Fla. 1983). See Shivers v. Sessions, 80 So.2d 905 (Fla. 1955).

Unlike Dressler, both the husband and wife in the instant case are living, and neither plans divorce or separation according to facts presented in the record. The conflicts outlined

above will affect Mr. and Mrs. Snowten, which was not a concern in the Dressler case. Preservation of marital harmony and prevention of fraud or collusion are not present in a negligence suit between spouses when one or both are deceased. However, there are other concerns which arise, especially when one or both spouses survives.

F. UNCONSTITUTIONAL IMPAIRMENT OF EXISTING CONTRACTS

If this Court were to reverse the summary judgment entered below, such a decision would constitute an unconstitutional infringement on the insurance contract between the wife and USF&G prior to the instigation of this lawsuit.

It is elementary that the laws of Florida existing at the time the contract is entered into from an integral part of any Florida contract. See Board of Public Instruction v. Town of Bay Harbor Islands, 81 So.2d 637 (Fla. 1955). In many situations the parties are in fact relying on the state of the law in bargaining. For example, usury rates may determine in which state a contract may be executed. In the absence of consent by the contracting parties, subsequent modification of law which would potentially affect the contract is intolerable when significant contract rights are unreasonably impaired by the contract's operation. See Pomponio v. Claridge of Pompano Condominium, Inc., 378 So.2d 774 (Fla. 1980). See also Allied Structural Steel Co. v. Spanaus, 438 U.S. 234 (1978).

This Court has determined that it is not against public

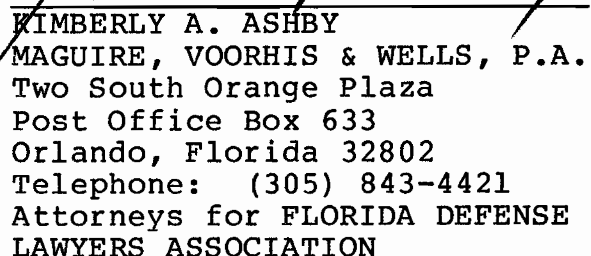
policy for automobile insurance coverage to contain an exclusion clause as to family members. Florida Farm Bureau Insurance Co. v. Governmental Employees Insurance Co., 378 So.2d 932, 934 (Fla. 1980). See Ard, 414 So.2d at 1069-70. However, carriers who have executed thousands of policies in Florida were not on notice that the parties should separately contract on liability to family members. Any abrogation of immunity should not be ex post facto, but can only operate after notice of a change in the law, and should not apply at all to existing contracts. Again, the Legislature could easily make such provisions in a statute, and the task of any modification whatsoever should be left to the state senators and representatives.

CONCLUSION

Florida law provides for interspousal tort immunity, and as applied, bars the Petitioner from suit against the Respondents. The policy considerations which have existed to support this doctrine continue to be viable. Marital unity, harmony, and the possibilities of fraud and collusion make the issue before this Court a pervasive one which is best addressed by the Florida Legislature. Further, any abrogation of the doctrine as applied to existing insurance contracts would be an unconstitutional infringement and impairment of those insurance policies covering spouses in Florida.

The trial court's Order should be affirmed and the certified question should be answered in the negative.

Respectfully submitted,



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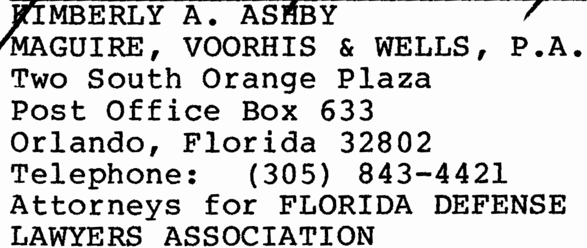
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by regular mail this 14th day of October, 1983, to TOBY MONACO, ESQUIRE, Post Office Box J. Gainesville, Florida 32602; ANTHONY J. SALZMAN, ESQUIRE, Post Office Box 1254, Gainesville, Florida 32602; and to JANE KREUSLER-WALSH, ESQUIRE, and LARRY KLEIN, ESQUIRE, 501 South Flagler Drive, Flagler Center, Suite 201, West Palm Beach, Florida 33401.



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