IN THE SUPREME COURT OF FLORIDA

HAROLD SNOWTEN, Petitioner, -vs- UNITED STATES FIDELITY AND GUARANTY COMPANY and WILLIE LEE SNOWTEN, Respondents.	CASE NO: 64,171 CERTIFIED QUESTION OF GREAT PUBLIC IMPORTANCE FIRST DISTRICT COURT OF APPEAL CASE NO: AQ-380

BRIEF FOR RESPONDENT

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TOPICAL INDEX

CITATION OF AUTHORITIES

PREFACE

For convenient reference the Parties will be referred to as they appeared before the Trial Court and the following abbreviations and symbols may also be used:

HAROLD SNOWTEN	Petitioner/Mr. SNOWTEN
WLLIE LEE SNOWTEN	Respondent/Mrs. SNOWTEN
UNITED STATES FIDELITY AND GUARANTY COMPANY	USF&G
Petitioner's Brief	(P/B-)
Respondents' Appendix	(R/A-)

This petition for writ of certiorari is from a decision of the First District Court of Appeal affirming a final summary judgment in favor of the Defendants entered by the Trial Court of the Eighth Judicial Circuit for Alachua County (The Honorable OSEE R. FAGAN presiding) upon the ground that the doctrine of interspousal immunity barred the action between spouses for a negligent tort. The First District Court certified (R/A-1) the following question as one 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?

STATEMENT OF THE CASE AND FACTS

Respondents adopt the Petitioner's Statement of the Case and of the Facts.

ARGUMENT

INTERSPOUSAL IMMUNITY SHOULD NOT BE WAIVED JUDICIALLY TO PERMIT RECOVERY BETWEEN SPOUSES FOR NEGLIGENT TORTS TO THE EXTENT OF AVAILABLE LIABILITY INSURANCE.

The First District Court of Appeal properly affirmed the Trial Court's action in entering summary judgment for the Defendants based upon the doctrine of interspousal immunity. This doctrine, which bars tort claims between spouses, originated in the English common law and has been a part of the law of Florida since 1829.[1] It continues to reflect the public policy of this state and should not be judicially abrogated or waived, particularly to the extent of available liability insurance.

Florida has consistently reaffirmed the doctrine and its underlying rationales.[2] Indeed, this Court was presented with virtually the identical issue in 1979 and refused to abrogate the immunity.[3] After a thorough analysis of this state's decisional law and of substantially the same arguments as those advanced here, this Court held:

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1. §2.01, Fla.Stat. (1977).

2. See e.g., Raisen v. Raisen, 379 So.2d 352 (Fla.1979) (R/A-2); Orefice v. Albert, 237 So.2d 142 (Fla.1970); Gaston v. Pittman, 224 So.2d 326 (Fla.1969); Bencomo v. Bencomo, 200 So.2d 171 (Fla.1967); Corren v. Corren, 47 So.2d 774 (Fla.1950).

3. Raisen v. Raisen, supra, n.2.

> "There have been many changes in Florida since 1829, but the policy reasons justifying interspousal tort immunity still exist.
>
> "Accordingly, we hold that the common law doctrine of interspousal tort immunity is still viable in Florida and that it precludes a tort action between husband and wife in all cases. The decision of the district court affirming the trial court's dismissal of the complaint is therefore approved."
>
> 379 So.2d at 355.

The initial question, here, as in Raisen, is whether abrogation of the interspousal immunity doctrine is a proper subject for judicial decision as opposed to legislative enactment. Mr. Chief Justice Alderman, writing for the majority[4] in Raisen reiterated the stringent criteria for judicial intervention:

> "Only in very few instances and with great hesitation has this Court modified or abrogated any part of the common law enacted by section 2.01, and then only where there was a compelling need for change and the reason for the law no longer existed. E.g., Hoffman v. Jones, 280 So.2d 431 (Fla.1973)."
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> (Emphasis supplied).
> 379 So.2d at 354.

Petitioner has failed to demonstrate from this record that a compelling need to abrogate interspousal immunity has arisen or that the reasons for the common law rule have

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4. Boyd, Overton and McDonald, J.J.

disappeared completely in the five years since Raisen was decided. In addition, any abrogation of the doctrine in this case would be ex post facto and result in an unconstitutional infringement of contract rights.[5] For all of these reasons, and based upon the arguments to follow, the certified question should be answered in the negative.

Legislative Perogative

This is exactly the type of broad public policy issue that should be dealt with by the legislature. The doctrine of interspousal immunity has been an integral part of our law and its history for hundreds of years; to allow spouses to treat each other as complete strangers with regard to their legal rights has been categorized as nothing less than a "revolutionary change."[6] The longevity of the doctrine may be traced to its principal underlying purpose: to preserve and protect the family unit. The myriad ramifications of altering a doctrine so firmly rooted in public policy extend well beyond the single fact situation before this Court. Legislative review would permit all interested parties to be heard in a forum where the pros and cons of abrogation or the extent of modification could be thoroughly debated.

Furthermore, the legislature would be free to fashion a

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5. Art. I, §10, Fla.Const.

6. Corren v. Corren, supra, n.2.

statutory solution specifically designed to accomplish the goals of several interests.[7]

If, after investigation and debate, the legislature modified or abrogated the doctrine, such enactment could easily be made prospective and avoid the danger of unconstitutionally impairing existing contract rights. Finally, any such enactments and their application would be subject to scrutiny by the Courts according to the well-established precedent for statutory review.[8]

It is respectfully submitted that absent the exceptional circumstances justifying the exercise of this Court's authority to abrogate or alter the common law, the doctrine of interspousal tort immunity is more appropriately a matter for the legislative branch of government.

Marital Unity/Harmony/Fraud and Collusion

In an attempt to justify alteration by judicial decision, Petitioner argues that the reasons for the common law doctrine no longer exist and that a series of recent decisions of this Court "indicate" modification of the immunity would be appropriate (P/B-4).[9]

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7. See Ashby, "Interspousal Tort Immunity Courts Marital Harmony in Florida," Orange County Bar Briefs, Sept. 1983.

8. See e.g., Aldana v. Holub, 381 So.2d 231 (Fla.1980).

9. Petitioner does not even attempt to show the "compelling need" required in Raisen.

Traditionally, three policy reasons have been advanced by the courts in preserving the doctrine: (a) the unity of the marriage; (b) avoidance of marital disharmony; and (c) avoidance of fraud and collusion.[10]

It is true that one of the justifications for the common law doctrine of interspousal immunity was the fictional unity of husband and wife.[11] Contrary to Petitioner's assertions, however, the legal unity of the marriage relationship was not destroyed by passage of the Married Women's Property Acts;[12] that argument was specifically rejected in Corren.[13] The notion that a woman's legal existence is suspended during marriage, or at least is merged with that of her husband's to the extent that she cannot control her own property or contractual relationships certainly has no place in today's world. That does not mean that married persons are no different than other individuals. The intimacy of the relationship, its mutual financial interests, and societal significance create special circumstances which are not, cannot, and should not be ignored by our legal system.

"Marital unity" as a basis for retaining the immunity is

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10. See e.g., Bencomo v. Bencomo, Gaston v. Pittman, Orefice v. Albert, Raisen v. Raisen, supra, n.2; Shor v. Paoli, 353 So.2d 825 (Fla.1977); Hill v. Hill, 415 So.2d 20 (Fla.1982); Joseph v. Quest, 414 So.2d 1063 (Fla.1982).

11. See Hill v. Hill, 415 So.2d 20, 22 (Fla.1982) (discussion at n.2).

12. §§708.08, 708.09, Fla.Stat. (1981).

13. Corren v. Corren, supra, n.2.

more a reference to the distinctive legal attributes of that relationship than to a mystical legal union of beings. The concept of marital unity transcends the ability to sue and be be sued in one's own name; it is the foundation of the family unit, the cornerstone of society as we know it. As such, it carries special responsibilities and is afforded certain protections. For example, marriage contemplates the duty to support,[14] the right to inherit,[15] the ability to hold property by the entireties free from an individual spouse's creditors,[16] and protection of the family wages from garnishment.[17]

Interspousal tort immunity functions as yet another form of protection by shielding spouses from the inevitable conflict that arises in such litigation and thereby preserving marital peace, harmony and resources. Without the immunity, two types of lawsuits will arise: those in which one spouse is liable for the judgment and those in which an insurance company is liable for the judgment. Since husband and wife typically live from the same purse it is essentially a waste of judicial time and effort to achieve the result of ordering Peter to pay Pauline.[18]

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14. §§61.08, 61.09, 61.11, 61.13, Fla.Stat. (1981).

15. §737.01 et seq., Fla.Stat. (1981)

16. Art. VIII, §6, Fla.Const.; Art. X, §4, Fla.Const.

17. §222.11, Fla.Stat. (1981).

18. Robeson v. International Company, 248 Ga.306, 282 S.E. 2d 896, 898 (Ga.1981).

Where, as here, liability insurance is involved, the potential for disrupting marital peace and harmony is juxtaposed with the danger of fraud and collusion. Even where insurance is involved, the lawsuit remains "spouse versus spouse." Insurers may no longer be joined until and unless a judgment is obtained against the insured.[19] Even under Shingleton,[20] which permitted joinder, no direct action existed against the insurer alone.[21]

Apart from the obvious difficulties of testifying against each other and calling children as witnesses, the entire pretrial investigation and discovery would permeate the home with conflict. Furthermore, if both spouses know insurance funds are available, and both spouses and their family will benefit from acquiring those monies, it is highly probable that the insured spouse will want to admit liability in every case or ensure that liability is found in every case. Especially where liability insurance is available, the threat of fraud and collusion is considerably greater than in litigation between unmarried parties.

Petitioner attempts to negate this argument by asserting that our legal system is equipped to handle such problems.

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19. §627.7262, Fla.Stat. (Supp.1982); Vanbibber v. Hartford Accident and Indemnity Insurance Company, __So. 2d__ (Fla.1983) (Case No. 63,584, 8 FLW 406)

20. Shingleton v. Bussey, 223 So.2d 713 (Fla.1969).

21. See Kephart v. Pickens, 271 So.2d 163 (Fla.4th DCA 1972); Roberts v. Nationwide Mutual Fire Insurance Company, 355 So.2d 219 (Fla.1st DCA 1978).

However, belief in our legal system need not give way to blind faith. Generally, the risk of financial loss encourages an avid defense, beginning at the pretrial investigation/discovery stage. This common sense safeguard simply is not present where the litigants are husband and wife. The essence of the problem, as expressed by Mr. Chief Justice Alderman, cannot be improved upon:

> "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."
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> 379 So.2d at 355.

Not only is the possibility of fraud and collusion vastly enhanced in these cases, but they would be virtually impossible to prove since, as here, torts between husband and wife are far more likely to occur out of the presence of any witnesses except the spouses, children or immediate family members.

Petitioner's argument implies that even if disharmony, depletion of family resourses, fraud and collusion are potential evils flowing from the lack of interspousal immunity, a greater threat to the marital relationship exists in the form of uncompensated injuries. Injuries such as those suffered herein need not go uncompensated, however, simply

because the spouses cannot sue each other. Medical, disability and casualty insurance are available to protect against injury, lost wages and property destruction.

Far more distrubing in theory and in practice is the concept of injecting the full panoply of tort litigation between two people who are married. Tort actions are potentially far more numerous and disruptive than actions for ejectment, contract or partition.[22]

Mr. and Mrs. SNOWTEN were married at the time of this accident and are entitled to all of the benefits of that relationship, just as they assumed all of the burdens. One of the benefits of marriage is that you need not fear that your spouse will sue you for leaving the garden hose uncoiled where it can be tripped over.

Respondents respectfully suggest that the benefits to the home and family unit far outweigh any burdens imposed by retaining the bar against interspousal torts.

Recent Case Law

Since Raisen, this Court has written several decisions dealing with interspousal immunity and the related, but

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22. Consider for example: Wife moves furniture and fails to warn husband who walks into table injuring himself and breaking wife's heirloom vase; husband "fixes" bathroom sink which nonetheless continues to leak causing water damage to floor and wife to slip and injure herself; wife's dog bites husband when husband tries to take his new shoes away from dog; etc.

different, parental immunity. All of these decisions have reaffirmed the public policy justifying retention of the interspousal immunity doctrine.

In Joseph[23] this Court held that contribution is available against a parent to the extent of existing liability insurance coverage for the parents' tort against the child. Joseph dealt solely with parental immunity, not with interspousal immunity. The difference between the husband/wife relationship and the parent/child relationship were carefully delineated:

> "[W]e recognize a legal difference between the husband and wife relationship and that of parent-child. In the former both are adults 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.
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> "The situation is completely different for a minor child, and we do not extend Shor [v. Paoli, 353 So.2d 825 (Fla.1977) (third party tortfeasor allowed contribution from co-tortfeasor spouse of plaintiff)] to cases involving parental/family immunity. Minors and infants must bring suits through a representative, next friend, or guardian ad litem. . . . Logically, an

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23. Joseph v. Quest, supra, n.10.

> 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."
>
> (Citations Omitted). 414 So.2d at 1064.

It is precisely because of these differences in the underlying relationship that the doctrine of interspousal immunity should not be waived to the extent of available liability insurance as was parental immunity.[24]

In Hill,[25] this Court refused to abrogate interspousal immunity as to intentional torts and again emphasized the significant public policy favoring protection of the family unit, including children and the family resources:

> "We choose not to place lawyers, judges, litigation costs, and the full trappings of an adversary tort system into a family dispute while the parties remain married. The ramification of that type of action are not in any way conducive to a reconciliation."
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> 415 So.2d at 23.

In reaffirming the doctrine with respect to intentional torts this Court noted that relief was available through the trial court's authority to award medical expenses and alimony in dissolution proceedings. Permitting a separate action to

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24. Ard v. Ard, 414 So.2d 1066 (Fla.1982).

25. Hill v. Hill, supra, n.10,11.

determine a tort claim was considered inadvisable because it would necessarily inject contingent fee arrangements into domestic disputes and could be used as leverage to achieve better settlement in the dissolution.[26]

These concerns are equally applicable if a separate negligence action is permitted between spouses. Although it is a little less likely that the parties will seek divorce in the case of a negligent tort the duty of support continues to exist and the potential for dealing with a contingent fee is present as is the possibility of using the tort lawsuit as leverage in the marriage.

The latest pronouncement with regard to interspousal immunity was in Dressler[27] in which the Court held the doctrine inapplicable to wrongful death suits between the estates of deceased spouses. Raisen did not control to bar the suit because the public policy reasons simply did not exist where the spouses were deceased and there was no marriage left to preserve.

Respondents submit that the decisions of this Court since Raisen consistently acknowledge and reaffirm the continued validity of the public policy reasons supporting the interspousal tort immunity doctrine. In fact, they constitute precedent for retaining the doctrine.

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26. Id., at 24.

27. Dressler v. Tubbs, 435 So.2d 792 (Fla.1983).

Impairment of Contract

At the time Mrs. SNOWTEN and USF&G contracted for the insurance involved in this litigation, the doctrine of interspousal immunity as adopted by statute from the common law clearly and absolutely barred tort actions between spouses. As such, it became an integral part of the contract inasmuch as those parties are presumed to have contracted with the immunity in mind.[28] Obviously, the insurer had no reason to insert a family exclusion clause or adjust its premium to reflect the potential risks flowing from the possibility of interspousal tort suits. Similarly, Mrs. SNOWTEN had no reason to believe she was purchasing coverage for the negligent acts of her husband against her, and did not bargain for such. Absent consent, it is constitutionally impermissible to apply subsequent modifications of the law which affect significant contract rights.[29]

Any abrogation of the interspousal immunity doctrine should operate prospectively as to contracts entered into after the parties are put on notice of such a material change in the law. Reversal of the Trial Court's decision in this case would unconstitutionally impair the contract of insurance.

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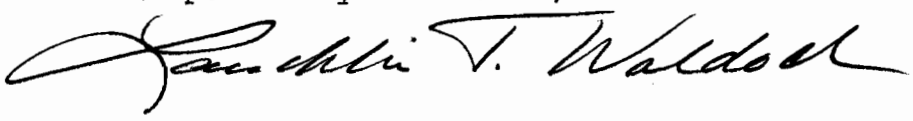
28. Department of Insurance, State of Florida v. Teachers Insurance Company, 404 So.2d 735 (Fla.1981).

29. Pomponio v. Claridge of Pompano Condominium, Inc., 378 So.2d 774 (Fla.1979); Carter v. Government Employees Insurance Company, 377 So.2d 242 (Fla.1st DCA 1979).

CONCLUSION

Based on the foregoing, and arguments submitted by the FLORIDA DEFENSE LAWYERS ASSOCIATION, Amicus Curiae, Respondents respectfully submit that the certified question be answered in the negative and the decision of the First District Court of Appeal be approved.

Respectfully submitted,



LAUCHLIN T. WALDOCH

TOBY S. MONACO

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief for Respondents has been furnished to the following addressees by mail this 27th day of October, 1983:

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