IN THE SUPREME COURT OF FLORIDA

CASE NO.: 64,171

HAROLD SNOWTEN,

Petitioner,

vs.

UNITED STATES FIDELITY and GUARANTY COMPANY and WILLIE LEE SNOWTEN,

Respondents.

REPLY BRIEF OF PETITIONER

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ISSUE

THE DOCTRINE OF INTERSPOUSAL IMMUNITY HAS BEEN MODIFIED BY THE COURTS OF THIS STATE SO THAT SUITS BETWEEN SPOUSES SHOULD BE PERMITTED TO THE EXTENT OF AVAILABLE LIABILITY INSURANCE, AND THE DECISION OF THE LOWER COURTS SHOULD BE REVERSED.

The doctrine of interspousal immunity should be waived, to the extent of available liability insurance, when the action is for a negligent tort. The doctrine is archaic and has outlived its usefulness. It is supported by mistaken axioms and ill-founded reasons. At least 28 jurisdictions have recognized the need to make a change in permitting one spouse to maintain an action against the other. See, dissenting opinion in Raisen v. Raisen, 379 So.2d 352, 356 (Fla. 1979).

An analysis of the cases cited by both Petitioner and Respondents shows that the underlying basis for the establishment of the immunity lies in public policy. But over the years, public policy changes. The policies behind the Interspousal Immunity Doctrine have lost their viability. The policy reasons cited by Respondents are identical to those rejected by this Court in Ard v Ard, 414 So.2d 1066 (Fla. 1982), although that case dealt with parental/ interfamily immunity. The widespread use of liability insurance, the modern social problems caused by the dangerous instrumentality known as the automobile were not apparent when the immunity was developed. See, Ard v. Ard, supra at 1068; Hoffman v. Jones, 280 So.2d 431, 436 (Fla. 1973). As this Court stated in Ard: "Allowing a waiver of immunity where

there is liability insurance is a recognized policy in this state" (414 So.2d at 1069).

Rules of law change. Our system of law is not stagnant. As the Court stated in Vinci v. Gensler, 269 So.2d 20 (Fla. 2d DCA 1972): "[I]f stare decisis is applied so as to obscure reality our system of jurisprudence would be rendered forever impotent."

Respondents suggest that this Court should not change a common law rule and that such change is more properly within the province of the legislature and not of the courts. This last argument was rejected by this court in Hoffman v. Jones:

> It has been suggested that such a change in the common law of Florida is properly within the province only of the legislature, and not of the courts. We cannot agree. (280 So.2d at 434).

If the Courts did not modify long-standing doctrines where there have been great changes in public policy, Florida would still have contributory negligence (Hoffman v. Jones, supra), municipal corporations would still have a common law immunity for the torts of its employee police officers (Hargrove v. Town of Cocoa Beach, 96 So.2d 130 (Fla. 1957), and there would be no strict liability in products cases. (West v. Caterpillar Tractor Company, 336. So.2d 80 (Fla. 1976). As this court said in Hoffman v. Jones:

> All rules of the common law are designed for application to new conditions and circumstances as they may be developed by enlightened commercial and business intercourse and are intended to be vitalized by practical application in advanced society. (280 So.2d at 436).

It is also a part of the common law that "when the reason for any rule of law ceases, the rule should be discarded." Ripley v. Ewell, 61 So.2d 420 (Fla. 1952); Randdph v. Randolph, 1 So.2d 480, 481 (Fla. 1941).

Petitioner submits that there is no rational basis to deny an injured person the right to recover insurance proceeds simply because of marriage to the tortfeasor. Where the wife negligently operates her automobile so that it strikes the husband, as in the instant case, the liability does not arise out of the marital relationship. The injury has nothing to do with the marriage. If the injured party was anyone other than a spouse, no immunities would come into play and the injured party could recover his damages from the tort-feasor. The marriage of the parties should not bar such recovery.

Respondents argue that allowing tort claims between spouses would destroy domestic tranquillity saying that tort actions are more "disruptive than actions for ejectment, contract or partition" which are currently allowed. This reasoning is absurd. An action where one spouse seeks to throw the other off a parcel of land or to forcibly divide up property is much more disruptive to marital tranquillity than an action against an insurance company to compensate for the devastating effects of a personal injury. It is much more likely that the marriage will stay intact after such a tort action rather than after a hotly contested ejectment or partition action.

Respondents' arguments regarding fraud are just as invalid. Chances of

collusion are not as great as Respondents would like the Court to believe. Under most insurance policies, the defense would be conducted by an insurance company attorney also representing the interests of the insurance company. Discovery and cross-examination would be under the control of the insurance company. Under the law, a plaintiff would still have to meet certain thresholds which are subject to objective testing. Every insurance policy has a cooperation clause which would allow an insurance company to deny coverage should its insured fail to cooperate in the defense of a claim. To suggest that an entire class of persons be denied access to the courts because of the possibility of fraud makes a mockery of our judicial system. In many cases, as in the instant case, liability and the extent of damages are not in issue, yet under the Doctrine as it now stands, such spouses would be denied recovery.

Contrary to Respondents' assertions, Petitioner submits that Raisen v. Raisen, supra is not the most recent pronouncement by this court on the viability of these immunities. The Fifth District Court in Tubbs v. Dressler, 419 So.2d 1151 (Fla. 5th DCA 1982), approved on other grounds, 435 So.2d 792 (Fla. 1983), found that the authority of Raisen has been modified by the more recent decisions of this court in Ard v. Ard, supra, and Hill v. Hill, 415 So.2d 20 (Fla. 1982). In these decisions, this court has held that the same policy arguments relied upon by Respondents no longer exist. Also, while Respondents rely on Joseph v. Quest, 414 So.2d 1063 (Fla. 1982), that

decision allowed contribution recovery against a parent to the extent of existing liability insurance for the parent's tort against a child.

Petitioner concedes that spouses have been precluded from bringing tort actions against each other in the past. Such holdings cited by Respondents all predate the recent pronouncements by this Court. The remaining cases cited by Respondents are also distinguishable. Most of these decisions involve intentional torts which the Court limited to that circumstance and for which injuries there is recourse in a separate divorce action. Where a negligent tort is involved, no such separate action may ever exist. See West v. West, 414 So.2d 189 (Fla. 1982); Hill v. Hill, supra, Roberts v. Roberts, 414 So.2d 190 (Fla. 1982); Newby v. Newby, 403 So.2d 562 (Fla. 3d DCA 1981). In Burgess v. Burgess, 417 So.2d 1173 (Fla. 1st DCA 1982), the court questioned the viability of the doctrine of interspousal immunity in the situation involved in that case. Petitioner submits that the doctrine is just as invalid in the instant case.

Respondents attempt to distinguish the Fifth District Court's decision in Tubbs v. Dressler, supra, on the basis that the case involved a situation where both spouses were deceased. The District Court did not limit its abrogation of interspousal immunity solely to that situation nor did it rely on the deaths to justify its abrogation of the immunity. While that decision was approved on other grounds, this Court did not overrule the Fifth District Court regarding the Court's interspousal immunity decision.

Respondents also suggest that this court has indicated a recent intention to uphold interspousal immunity because it had an opportunity to alter its opinion in Hill v. Hill, supra and did not do so. As Hill involved an intentional tort, that decision would be the wrong vehicle to discuss abrogating immunity for negligent torts. This court did, however, point out that it was unable to modify the immunity doctrine as it did in Ard because insurance coverage was not available for intentional torts. (415 So.2d at 21.)

Respondents suggest that other insurance could be purchased to compensate injured persons. The insurance suggested, however, only pays for medical bills and lost wages. Liability insurance compensates for pain, suffering, incapacity and loss of enjoyment of life.

Respondents also raise the issue of impairment of contracts as a reason to affirm the trial court's ruling. Contrary to Respondents' assertions, there is nothing to suggest that Mrs. Snowten knew prior to this action that such a situation would not be covered. The policy as written extends such coverage. By the clear language of the policy, Mrs. Snowten bargained for and bought coverage for the instant accident. Petitioner submits that the contract of insurance has already been impaired by not allowing recovery for his injuries. The underlying concept of all insurance is to remove the heavy financial burden of an injury from both the injured party and the tortfeasor, and spread that loss over a much larger group. In the case of liability insurance for negligent torts, the policyholders of the insurance company

make up the larger group. This very basic concept is not offended by an abrogation of the interspousal immunity doctrine. No impairment of contract was found when parental immunity was abrogated nor would there be any in the instant circumstance.

More compelling is the argument against retention of the Interspousal Immunity Doctrine on the basis that it violates the rights guaranteed by Sections 2, 9 and 21 of the Declaration of Rights, Florida Constitution which hold that all natural persons are equal before the law, that no persons should be deprived of due process of law, and that the Courts are open to every person for redress of any injury.

CONCLUSION

The Interspousal Tort Immunity Doctrine is antiquated and should be changed. The Doctrine should be abrogated at the very least by the extent of available liability insurance. The lower Courts' orders should be reversed and the certified question should be answered in the affirmative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a ture and correct copy of the foregoing has been furnished by regular mail this 9th day of November, 1983, to Kimberly A. Ashby, Post Office Box 633, Orlando, Florida 32802, Toby Monaco, Post Office Box J, Gainesville, Florida 32602, Jane Kreusler-Walsh and Larry Klein, 501 South Flagler Drive, Flagler Center, Suite 201, West Palm Beach, Florida 33401.

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