IN THE SUPREME COURT OF FLORIDA

CASE NO. 65,261

SHARYN ZIMMERMAN,

Petitioner,

vs.

JEFFREY ZIMMERMAN and NATIONWIDE MUTUAL INSURANCE COMPANY, as Insuror,

Respondents.

RESPONDENTS' ANSWER BRIEF ON THE MERITS

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INTRODUCTION

The petitioner, Sharyn Zimmerman, was the appellant in the District Court of Appeal of Florida, Third District, and the Plaintiff in the Dade Circuit Court. Respondents, Jeffrey Zimmerman and Nationwide Mutual Insurance Company, were the appellees in the Third District and Defendants in the trial court. The parties are referred to in the position they occupy in this Court and in their proper name.

STATEMENT OF THE CASE AND FACTS

The respondents accept the statement of the case and facts set forth in petitioner's initial brief on the merits.

SUMMARY OF ARGUMENT

This Court, as recently as 1979, in Raisen v. Raisen, 379 So.2d 352 (Fla. 1979), thoroughly and painstakingly considered all of the reasons and authorities from Florida and from every jurisdiction for either adhering to the doctrine of interspousal immunity or to abdicate from the doctrine of interspousal immunity. Certainly, no additional reasons can be assigned for abrogating the doctrine than were considered by this Court in 1979.

The interspousal immunity doctrine is part of the common law codified by Section 2.01, Florida Statutes. In this regard, a change in the common law so codified should be made through legislative enactment and not by judicial decision. This is especially so where the public policy considerations involved in the retention of the interspousal immunity doctrine are so pervasive that only the State Legislature should alter the doctrine if it is to be modified or abrogated. These public policy considerations involve the effect, if the doctrine is abrogated, on the harmony of the marriage, the possibility of collusive and fraudulent claims, and the increased cost in liability insurance.

This Court in Raisen embraced the sounder policy reasons for adhering to the doctrine than in abrogating the doctrine. Other jurisdictions, for example, have stated that fraud and

collusion should not be a valid jusitification for not abrogating the doctrine, inasmuch as, fraud and collusion could exist in every lawsuit. This latter reasoning falls far short of the real word or far short of the realities of life when one spouse sues the other spouse for a negligent tort where there is insurance coverage. For as warned by this Court in Raisen there is a great possibility of fraudulent and collusive claims where the defendant spouse is insured and both spouses will benefit if the plaintiff spouse wins the lawsuit and enforces the claim against the insurance company.

No jurisdiction that has abolished the interspousal immunity doctrine has explained away the reasoning of this Court that 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 law suit where both would profit by the insurance company payment to the plaintiff spouse.

Valid policy reasons set forth in Raisen are more than sufficient for this Court to adhere to the doctrine of interspousal immunity. Again, if the doctrine is to be abrogated, the change must emanate from the legislature due to the questions of great public policy inherent in determining whether the doctrine should be abolished.

ARGUMENT

Petitioner's Point I reads as follows:

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

is corrected to read as follows:

> THE DOCTRINE OF INTERSPOUSAL IMMUNITY CANNOT BE WAIVED, TO THE EXTENT OF AVAILABLE LIABILITY INSURANCE, WHEN THE ACTION IS FOR A NEGLIGENT TORT.

The doctrine of interspousal immunity is in full force and effect in this State. This Court has repeatedly declined to alter the doctrine in recent years. In Raisen v. Raisen, 379 So.2d 352 (Fla. 1980), the Court recognized the continued validity of those public policy arguments which have traditionally supported the doctrine, i.e.

> . . . that interspousal tort actions disturb domestic tranquility, cause marital discord and divorce, cause fictitious, collusive, and fraudulent claims; cause a rise in liability insurance; and prompt trivial actions.

Raisen, supra, at 354.

In upholding the doctrine, the Court in Raisen, supra, addressed the issue of whether interspousal immunity should be partially abrogated where the defendant spouse is covered by liability insurance. In declining to do so the Court stated:

> Adversary tort lawsuits between spouses have an upsetting and embittering effect upon domestic tranquility and the marital relationship. But non-adversary lawsuits that do not disturb the peace and harmony of the marriage encourage fraudulent and collusive claims, particularly where a third-party insurance company must pay any judgment awarded. Florida's solution to this dilemma since 1829 has been interspousal immunity. This is still a viable solution. There have been many changes in Florida since 1829, but the policy reasons justifying interspousal immunity still exist.

Raisen, supra, at 355.

Change of Doctrine in Hands of Legislature

In addition to the Court's approbation of the policy reasons behind the rule, the Court noted in Raisen that the foundations of the interspousal tort immunity doctrine lie in English common law. The Court points out that, as the doctrine of interspousal immunity is part of the common law codified by §2.01, Florida Statutes, a change in the common law so codified should be made through legislative enactment and not by judicial decision. In this regard the Court stated:

> Only in very few instances and with great hesitation has this Court modified or abrogated any part of the common law enacted by §2.01, and then only where there was a compelling need for change and the reason for the law no longer existed.

Raisen, supra, at 354.

As noted by the Supreme Court, 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 Raisen 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, 904-05 (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 A.2d 481, 483 (1970). (Interspousal immunity abrogated based on a pre-nuptial tort).

At least one legislative body devised a scheme which protects 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.

Petitioner's Reliance on Ard v. Ard, Hill v. Hill, and Tubbs v. Dressler Misfounded

The petitioner argues that decisions subsequent to Raisen have modified the doctrine so as to allow interspousal tort lawsuits where the defendant spouse is insured. The cases relied on by the plaintiff are Ard v. Ard, 414 So.2d 1066 (Fla. 1982); Hill v. Hill, 415 So.2d 20 (Fla. 1982); and Dressler v. Tubbs, 435 So.2d 792 (Fla. 1983).

In Ard, supra, the Supreme Court modified the doctrine of parental immunity so as to allow a minor child to sue a parent for negligence to the extent of the parents' available liability insurance coverage. There is no language in the Ard opinion to indicate the court was receding from its position on interspousal immunity as expressed in Raisen, supra. On the contrary, the court cited Raisen, pointing out that unlike the doctrine of interspousal immunity, the parental immunity doctrine did not have its origin in the common law of England. Ard, supra, at 1067.

In Hill, supra, the Supreme Court declined to modify the doctrine of interspousal immunity so as to allow a wife to sue her husband for an intentional tort. The husband and wife in Hill were in a dissolution proceeding when the wife instituted a separate action for malicious prosecution, false imprisonment, and abuse of process.

The Supreme Court held in Hill:

> We hold that the protection of the family unit and its resources requires us to answer the question in the negative and

> reject a change in the interspousal immunity doctrine at this time. In doing so, however, we emphasize that the trial judge in a dissolution proceeding has authority to require an abusive spouse to pay necessary medical expenses and the authority to consider any permanent injury or disfigurement or loss of earning capacity from such abuse when setting alimony.

Hill, supra, at 21.

Then, the Court in Hill stated as dicta:

> We also point out that in this circumstance we are unable to modify our immunity doctrine as we did with parental immunity in Ard v. Ard, 414 So.2d 1066 (Fla. 1982), because insurance coverage is not available for intentional torts.

Hill, supra, at 21.

The above quoted language is not support for petitioner's position that interspousal immunity no longer applies where insurance coverage is present.

This Court in Raisen v. Raisen, supra, has already determined that where there is insurance coverage, the doctrine of interspousal immunity will still apply as seen from the language quoted in footnote 1 , infra.

It is interesting to note that the Florida Supreme Court's reluctance to tamper with interspousal immunity is further shown by its recent decision in Dressler v. Tubbs, supra. Dressler concerned a wrongful death action brought by a deceased wife's estate against the estate of her deceased husband and his insurer. Before the case reached the Supreme Court, the Fifth District in the same case styled Tubbs v. Dressler, 419 So.2d 1151 (Fla. 5th DCA 1982), certified the following question to

the Florida Supreme Court: [1]

---

1. Based on the holding in Ard v. Ard, supra, that the doctrine of parental immunity is modified to the extent that the negligent parent is protected by liability insurance, the Fifth District in Tubbs concluded:

> On the basis of Ard as it applies to the parental immunity, there is no reason in logic or public policy to conclude that the same principles do not apply to interspousal immunity.

The Court in Tubbs believed it found further support for its position in the language of Hill v. Hill, supra, wherein the Supreme Court stated, inter alia, that there is no insurance coverage available for intentional torts.

Unfortunately, the Fifth District failed to consider that the Supreme Court in Raisen v. Raisen, supra, thoroughly considered the effect of insurance coverage in its decision to reaffirm the interspousal immunity doctrine in a case involving the alleged negligent driving of Mrs. Raisen's insured husband. For, the Supreme Court stated:

> A truly adversary tort lawsuit between husband and wife, by its very nature, would have an upsetting and embittering effect upon domestic tranquility. In such cases, there is little likelihood of fraud and collusion, but there is a great probability that the marriage relationship will be adversely affected. On the other hand, if the lawsuit is not adversary and there is no real conflict of interest between the spouses, the peace and harmony of the marriage is not threatened, but there is a great probability of fraudulent or collusive claims. This is particularly true where the defendant spouse is insured and both spouses will benefit if the plaintiff spouse wins the lawsuit and enforces the claim against the insurance company. 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.

> Is the doctrine of interspousal immunity like the doctrine of parental immunity waived to the extent of available liability insurance when the action is for a negligent tort causing injury or death?

Tubbs, supra, at 1154.

After accepting review, this Court in Dressler stated that since both spouses were dead, there is no suit between spouses and no marital unit to preserve. The Court held that wrongful death actions were not barred by interspousal immunity relying upon the reasoning set forth in Shiver v. Sessions, 80 So.2d 905 (Fla. 1955). Since the Court approved the lower court's decision on other grounds, it did not reach or answer the certified question.

As noted, the Supreme Court in Dressler declined to answer the certified question. Chief Justice Alderman, although disagreeing with the majority's interpretation of the wrongful death statute, responded to the issue raised by the certified question. In his response the Chief Justice reflected clearly the Court's position on the question of interspousal immunity, as can be seen in the following language:

> . . . It [the 5th District in Tubbs v. Dressler] determined, however, that, in light of this Court's later decision in Ard v. Ard . . . this Court has changed its thinking and modified the doctrine of interspousal immunity. This was an incorrect assumption. This Court's holding in Ard v. Ard is limited to a modification of parental immunity and in no way affected the doctrine of interspousal immunity and our holding in Raisen v. Raisen . . . . (Emphasis added).
>
> * * * * *

> Raisen v. Raisen continued to be controlling precedent on the question of interspousal immunity. In Raisen, this Court concluded that the doctrine should not be abrogated in any way since there are valid policy reasons justifying its retention . . . .
>
> * * * * *
>
> . . . In Hill v. Hill . . . we again refused to abrogate or modify the doctrine of interspousal immunity.
>
> I would therefore answer the certified question in the negative and hold that the doctrine of interespousal immunity is not waived to the extent of available liability insurance.

Dressler, supra, at 795.

Petitioner states that spouses in Florida can sue each other over contract and property rights pursuant to Sections 708.08 and 708.09, Florida Statutes (1981). She contends that a negligent action is less likely to impair family harmony than an action for breach of contract or conversion of property. An uncompensated tort, petitioner contends, creates conflict and strife, both financially and emotionally. The effect of the Married Women's Property Act (Sections 708.08 and 708.09, supra) as to the right of the wife to sue her husband in tort, is answered in Raisen v. Raisen, supra, at 354, as follows:

> . . . In Corren, we rejected the argument that the Married Women's Property Act destroyed the unity of marriage and explained:
>
> "[T]he so-called emancipation act did not so affect the marriage relationship that the husband and wife were thenceforward permitted to go their separate ways, but instead were still mates residing in a common home, each making in his own way a contribution to the marriage venture.

> As we have already commented, this fundamental relationship does not seem directly affected by the provisions of organic and statutory law with reference to the woman's dominion over her own property, and we feel that we would have to resort to the illogic to hold that there can be found in any of them the implication even that she might sue her spouse for injuries resulting from the negligent operation of his automobile. 47 So.2d at 775."

One of the most compelling reasons for not abrogating the doctrine of interspousal immunity is the very serious and real threat of fraud and collusion between spouses, who are involved as adversaries in a negligence action, where there is insurance coverage.

In this regard petitioner contends that the possibility of fraud and collusion exists in every lawsuit, but is not a valid justification for denying compensation for injuries negligently inflicted by a spouse for which there is insurance coverage. (Petitioner's brief at 6). In support of her position that the danger of fraud and collusion should not prevent the abolishment of the interspousal immunity doctrine where liability insurance exists, the petitioner cites and argues that the following cases are authority for disregarding fraud and collusion as a valid policy reason not to abolish the doctrine:

> "The laws of contract and evidence are ample protection against any danger of fraud or collusion." Hack v. Hack, 433 A.2d 859, 866 (Pa. 1981).

> The opportunity for fraud or collusion should not be a reason for denying admission to the courts. The Arizona Supreme Court felt that "the attorneys for the insurance company, will, we are

> sure, be quick to detect and bring to the court's attention any evidence of collusive conduct by the parties. Fernandez v. Romo, 646 P.2d 878, 882 (Ariz. 1982).
>
> In Boblitz v. Boblitz, 462 So.2d 506 (Md. 1983), the Supreme Court of Maryland quoted from opinions issued by the courts of Kentucky, Arizona, New Jersey, California and West Virginia, as well as other Maryland decisions, and agreed that courts have "at their command ample means to cope with the real or asserted spectre of fraud in the context of marital tort claims." Merenoff v. Merenoff, 388 A.2d 951, 961 (N.J. 1978).

(Plaintiff's brief at 7-8).

The arguments that the attorneys for the insurance company and the Courts will have ample means to discover fraud fails to recognize the true realities of the increased danger of collusion and fraud between the spouses (parties) where there is insurance coverage. This Court's sound language in Raisen v. Raisen, is far more persuasive than any reasoning advanced in the cases cited by petitioner.

On the issue of the great probability of fraudulent or collusive claims, the Court in Raisen stated:

> On the other hand, if the lawsuit is not adversary and there is no real conflict of interest between the spouses, the peace and harmony of the marriage is not threatened, but there is a great probability of fraudulent or collusive claims. This is particularly true where the defendant spouse is insured and both spouses will benefit if the plaintiff spouse wins the lawsuit and enforces the claim against the insurance company. 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.

This foregoing quoted language about the realities of life as concerns one spouse suing the other spouse to enforce a claim against the spouse's insurance company makes far greater sense than the general ideology of the Courts that have followed the piper's tune that the judiciary is not so ineffective that it must deny relief to a person otherwise entitled simply because in some future case a litigant may be guilty of fraud or collusion.

This Court had the courage in Raisen v. Raisen, supra, to adhere to the doctrine based on valid policy reasons. It cannot be gainsaid that the questions on the doctrine are ones of great public policy and,accordingly, any change should emanate from the Legislature.

CONCLUSION

For the reasons and authorities stated, the certified question should be answered in the negative, and the decision of the District Court of Appeal of Florida, Third District, affirmed.

Respectfully submitted,

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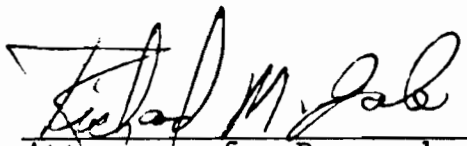

Attorneys for Respondents

CERTIFICATE OF SERVICE

I hereby certify that a copy hereof was mailed to Theodore R. Bayer, Esq., Tobin, Bayer & Jacobson, 10661 N. Kendall Drive, Suite 207, Miami, Florida 33176, Attorneys for Petitioner, this 13 day of March, 1985.

Richard M. Galo