IN THE SUPREME COURT OF FLORIDA

CASE NO: 65,261

SHARYN ZIMMERMAN,

Petitioner,

vs.

JEFFREY ZIMMERMAN and NATIONWIDE MUTUAL INSURANCE COMPANY, as Insuror,

Respondents.
_____/

INITIAL BRIEF OF PETITIONER

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SUMMARY OF ARGUMENT

The interspousal immunity doctrine, as stated by this Court in 1979 in Raisen, should be modified to allow suit by one spouse against the other to the extent of available liability insurance. This Court in 1982 modified parental immunity to allow a minor child to sue his or her parents to the extent of available liability insurance. Parental and interspousal immunity should be treated the same.

Waiving interspousal immunity to the extent of liability insurance coverage will not harm family unity, nor will it deplete family resources. On the contrary, it will protect family resources, aid family harmony and preserve the family unit.

In cases of intentional torts between spouses dissolution or criminal proceedings can provide remedies. No forum for recourse exists in negligence actions if spouses are categorically denied access to the Courts.

Since 1979, eight additional states have abrogated the doctrine of interspousal immunity bringing the total to 36. The American Law Institute, as well as prominent legal scholars, have urged the abrogation or modification of interspousal immunity. Social changes have led this Court to modify common law negligence to allow for comparative negligence. Statutory modifications to tort law have allowed contribution from a driver's spouse in an action brought by the passenger spouse in a two car accident.

If a minor child, mother, business partner, lifelong best friend and spouse are all injured as passengers as a result of the driver's negligence, why should all but the driver's spouse be allowed to file suit? Is there not the possibility of fraud and collusion with respect to each passenger's claim?

The supreme courts of many other jurisdictions have concluded that the opportunity for fraud or collusion does not justify foreclosing relief to an entire class of persons because of the potentiality for fraud in some future case. The courts are equipped to deal with alleged fraud or collusion on a case by case basis. Judicial relief should not be summarily denied.

Interspousal immunity, like parental immunity, should be waived to the extent of liability insurance.

STATEMENT OF THE CASE AND OF THE FACTS

Plaintiff, SHARYN ZIMMERMAN, was injured in an automobile accident in which she was a passenger in a car driven by her husband, JEFFREY ZIMMERMAN, and owned by her mother-in-law, HARRIET ZIMMERMAN. Plaintiff filed suit against JEFFREY ZIMMERMAN and his insurance carrier, NATIONWIDE MUTUAL INSURANCE COMPANY, and against HARRIET ZIMMERMAN, and her insurance carrier, THE CONTINENTAL INSURANCE COMPANY. (R 1-2).

Defendants, JEFFREY ZIMMERMAN, and NATIONWIDE, moved for Summary Judgment contending that Plaintiff's suit was barred under the doctrine of interspousal immunity, as set forth in Raisen v. Raisen, 379 So.2d 352 (Fla. 1979). (R 71-79).

Plaintiff opposed the Motion for Summary Judgment, arguing that the holding of Raisen had been modified to allow a suit by one spouse against the other to the extent of available liability insurance. Ard v. Ard, 414 So.2d 1066 (Fla. 1982), Hill v. Hill, 415 So.2d 20 (Fla. 1982) and Tubbs v. Dressler, 419 So. 2d 1151 (Fla. 5th DCA 1982), affirmed on other grounds 435 So.2d 792 (Fla. 1983).

The lower court entered summary final judgment in favor of Defendants, JEFFREY ZIMMERMAN and NATIONWIDE MUTUAL INSURANCE COMPANY, as insuror. (R 109) Plaintiff filed a motion for rehearing (R 81-85), which was denied (R 91).

Plaintiff appealed. The Third District Court of Appeals affirmed the Circuit Court's ruling in an opinion filed

April 3, 1984, a copy of which is attached hereto as an Appendix, holding that "interspousal immunity bars the maintenance of an automobile negligence case notwithstanding that the defendant spouse is covered by liability insurance" Zimmerman v. Zimmerman, 447 So.2d 1019 (Fla. 3d DCA 1984).

The Third District recognized that its decision conflicted that the holding of the Fifth District in Tubbs v. Dressler, 419 So.2d 1151 (Fla. 5th DCA 1982), affirmed on other grounds, 435 So.2d 792 (Fla. 1983) that "interspousal immunity for negligent acts is waived to the extent of the negligent spouse's available insurance coverage." Tubbs v. Dressler, supra at 1153.

The Third District agreed that the issue is appropriate for reconsideration by the Supreme Court in light of Ard v. Ard, and certified the following question as one of great public importance:

> 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? Zimmerman v. Zimmerman, supra at 1019.

A timely notice invoking this Court's discretionary jurisdiction was filed by Plaintiff on April 30, 1984.

ARGUMENT

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.

Policy reasons no longer justify prohibiting one spouse from recovering for injuries resulting from the other spouse's negligence, where there is liability insurance. The real party in interest is an insurance company. It matters not whether the Plaintiff and Defendant are wife and husband, child and parent, brother and sister, or uncle and nephew. Public policy is concerned with compensating the injured party.

Allowing a waiver of immunity where there is liability insurance is a recognized policy in Florida. Ard v. Ard, 414 So.2d 1066 (Fla. 1982).

The major argument advanced against allowing a claim against an insurance company for negligence in family related lawsuits is the possibility of fraud and collusion. This Court, in modifying the doctrine of parent/family immunity in Ard v. Ard, supra, agreed that the "possibility" of fraud and collusion was not sufficient to deny claims altogether.

Although Ard dealt with parental immunity, this Court quoted with approval from the Indiana Supreme Court in Brooks v. Robinson, 284 N.E.2d 794, 797 (Ind. 1972), which abrogated interspousal immunity:

> The possibility of fraud and collusion exists in all litigation. However, we are not convinced that the danger is so great when the plaintiff and defendant are also husband and wife, that judicial relief should be summarily denied. Ard v. Ard, supra at 1069. (Emphasis added.)

In allowing recovery to the extent of the parents' available liability insurance, this Court recognized the trend toward abrogating or limiting family immunity based on changes in contemporary conditions and public policy. The presence of liability insurance "cannot create a liability where none previously existed, but, rather, forms the basis for the recognition of the change in conditions upon which the public policy behind the immunity is based." Ard. v. Ard, supra at 1068.

Hill v. Hill, 415 So.2d 20 (Fla. 1982), decided on the same date as Ard, involved an action between two spouses for an intentional tort for which insurance coverage is not available. This Court, in declining to modify the immunity doctrine for an intentional tort, took into consideration that a dissolution of marriage proceeding was pending between the parties where the trial judge had authority to direct the offending spouse to pay medical expenses and to consider any permanent injury or loss of earning capacity in establishing alimony.

Based on Ard and Hill, the Fifth District Court of Appeals in Tubbs v. Dressler, 419 So.2d 1151 (Fla. 5th DCA 1982)

affirmed on other grounds 435 So.2d 792 (Fla. 1983), reasoned that interspousal immunity and parental immunity find their support in similar policy reasons and that both should be abrogated to the extent of available liability insurance.

> 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 also apply to interspousal immunity. Nothing compels us to a contrary conclusion. We find further support for this proposition in the language of Hill v. Hill, 415 So.2d 20 (Fla. 1982), where, in refusing to abrogate interspousal immunity for intentional torts committed by one spouse against the other, the court said:
>
> > 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.
>
> The action here is for a negligent tort, and is against the insuror which allegedly has coverage. We thus hold, for the reasons set forth in Ard, that interspousal immunity for negligent acts is waived to the extent of the negligent spouse's available insurance coverage. Tubbs vs. Dressler, supra at 1153.

This Court affirmed, approving the result on other grounds, and did not reach the certified question of whether interspousal immunity, like parental immunity, was waived to the extent of available liability insurance. Dressler v. Tubbs, 435 So.2d 792 (Fla. 1983) Relying on the case of Shiver v. Sessions, 80 So.2d 905 (Fla. 1955), the doctrine of interspousal immunity was held to be inapplicable under the facts of Dressler, because both the wife and the husband died as a result of the husband's alleged negligence. Since the suit was between

the estates of the respective spouses, it was not a suit between spouses. Hence, the doctrine of interspousal immunity was inapplicable. The action was not limited to available liability insurance.

It is submitted that the reasoning of the Fifth District is sound and consistent with the decisions of this Court. Where insurance exists, whether the suit is between a child and a parent or between spouses, the litigation is really between the plaintiff and the insurance carrier.

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 parent or a spouse for which there is insurance coverage. Family assets will not be depleted in favor of the claimant at the expense of other family members. Rather, the reverse will be true. The family unit will be better served by allowing an injured spouse to recover from her spouse's insurance company.

As the Supreme Court of California has stated:

> It would be a sad commentary on the law if we were to admit that the judicial processes are so ineffective that we must deny relief to a person otherwise entitled simply because in some future case a litigant may be guilty of fraud or collusion. Once that concept were accepted, then all causes of action should be abolished. Our legal system is not that ineffectual. Klein v. Klein, 376 P.2d 70, 73 (Cal. 1962).

Since this Court's decision in Raisen v. Raisen, 379 So.2d 352 (Fla. 1979), an additonal eight (8) states have abrogated or partially abrogated the doctrine of inter-

spousal immunity, bringing the total to 36 states. Of the remainder, two (2) states, Illinois and Louisiana, have a rule of immunity imposed by statute and only twelve (12) states, Delaware, Florida, Georgia, Hawaii, Kansas, Mississippi, Missouri, Montana, Ohio, Oregon, Tennessee and Wyoming continue to recognize the common law doctrine.

The Supreme Courts in Pennsylvania, Arizona and Maryland, three of the most recent states to change the common law interspousal immunity doctrine, each dealt with the argument of the danger of fraud and collusion in abolishing interspousal immunity where liability insurance existed. Each court rejected this argument.

"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 A.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).

Legal scholars support the abrogation or modification of the common law doctrine of interspousal immunity based upon modern social conditions. As early as 1956, Harper and James concluded that the danger to the family peace and tranquility has been grossly overemphasized. Harper and James: The Law of Torts, Section 8.10 Volume I, Page 645.

Dean Prosser concluded that there is no possible justification for the interspousal immunity doctrine except that of historical survival. Prosser, The Law of Torts, Section 122 (4th ed. 1971).

The American Law Institute in the Restatement of Torts Second, Section 895(f) (1979) approved the abrogation of the interspousal immunity doctrine.

The prevailing philosophy is that liability follows tortious conduct. Hack v. Hack, supra. If there is a tortious injury, there should be recovery. Boblitz v. Boblitz, supra. The widespread use of a dangerous instrumentality, the automobile, and the widespread use of liability insurance have dramatically changed the need for the common law doctrine of interspousal immunity. The reason for the rule with respect to negligence has ceased and the rule should be discarded.

Spouses can sue each other over property and contract rights. Section 708.08 and 708.09 Fla. Stat. (1981). Yet a negligent action is less likely to impair family harmony than an action for breach of contract or conversion of property. An uncompensated tort creates conflict and strife, both financially and emotionally.

Where a driver of an automobile, which is covered by liability insurance, has an accident injuring his passengers, what justification is there in logic or public policy to allow claims by the driver's minor child, his mother and his business partner, but not by his spouse. Is there not the possibility of fraud and collusion with respect to each of the claims? Does not the possibility exist in all litigation of fraud and collusion? Will our adversary system not be able to ferret out all of the non-meritorious claims?

> In a day when automobile accidents are unfortunately becoming so frequent and the injuries suffered by the passengers are often so severe, it seems unjust to deny the claims of the many because of the potentiality for fraud by the few. Moreover, there is something wanting in a system of justice which permits strangers, friends, relatives and emancipated children to recover for injuries suffered as a result of their driver's negligence but denies this right to the driver's spouse and minor children who are also passengers in the same vehicle. Immer v. Risko, 267 A.2d 481, 488 (N.J. 1970).

The interspousal tort immunity doctrine is a rule of common law which can be abrogated by judicial decision. When the reason for any rule of law ceases, the rule should be discarded. Hoffman v. Jones, 280 So.2d 431 (Fla. 1973).

The courts have the duty and authority to change common law rules when the reason for the rules no longer exist and when application of the rule would cause injustice. The very nature of common law makes it adoptable to the requirements of society at the time of its application in court. Hack v. Hack, supra.

"Law must be stable and yet it cannot stand still." Dean Pound, Interpretations of Legal History, 1922.

> When the rationales which gave meaning and coherence to a judicially created rule are no longer vital, and the rule itself is not consonant with the needs of contemporary society, a court not only has the authority but also the duty to re-examine its precedents rather than to apply by rote an antiquated formula. Boblitz v. Boblitz, supra at 514.

Interfamily immunity has already been significantly eroded in Florida. In a two car accident, the passenger spouse may indirectly sue the driver spouse by suing the driver of the other car who may obtain a contribution from the driver spouse. Shor v. Paoli, 353 So.2d 825 (Fla. 1977). In a one car accident where one spouse dies, the estate of one spouse may be sued by the other spouse. Dressler vs. Tubbs, 435 So.2d 792 (Fla. 1983). An unemancipated child may directly sue his parents to the extent of available liability insurance coverage. Ard v. Ard, 414 So.2d 1066 (Fla. 1982).

There are numerous reasons to waive interspousal immunity to the extent of available liability insurance.

1. Parental and interspousal immunity should be treated the same. As interfamily immunity has clearly been abrogated by this court's decision in Ard, it should also be clearly abrogated in spousal cases.

2. Family harmony will not be disrupted if negligence actions are allowed when insurance is involved.

3. Insurance preserves and protects family resources and family harmony.

4. There is no other forum for recourse between spouses in negligence actions, as exists in intentional torts where dissolution or criminal proceedings can provide remedies.

5. Public policy requires the disregarding of an antiquated legal unity concept. Spouses have separate legal identity and rights.

6. The use of immunity should be compatible with Florida's theory of comparative negligence. Spouses should pay for the proportion of the injury they cause.

An extensive review of the immunity doctrine in Florida is contained in the Law Review article entitled "A Job Half Done: Florida's Judicial Modification of the Intra-Familial Tort Immunities" by Michael A. Young in Florida State University Law Review Volume 10, pages 639 through 666. There the author concludes that:

> Florida has sought to protect family resources and family harmony from intrusion by intra-familial suits. The Florida Supreme Court has recognized that insurance can protect family resources and tranquility. It was for this reason that the court waived parental immunity

to the extent of liability insurance coverage. Yet the Florida Supreme Court has left the job half done.

Interspousal Immunity must be waived to the extent of liability insurance coverage because insurance preserves family resources and tranquility in these suits as well. There is no reason to deprive a spouse of a civil remedy when insurance can substitute in protecting the family. If the supreme court leaves the intra-familial immunities in their current state, the court will be inconsistent with its own logic and its own precedent. Waiving interspousal immunity to the extent of insurance will increase a spouse's right to civil redress to the same level as a minor's and will make the use of the immunities wholly consistent with Florida's theory of comparative negligence. The court can do this and at the same time preserve the family unit. Florida State University Law Review, Volume 10 at Page 666.

CONCLUSION

Interspousal immunity should be waived to the extent of available liability insurance. The certified question should be answered affirmatively. The decision of the lower court should be reversed and appellant should be permitted to proceed against appellees to the extent of available insurance coverage.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of Petitioner was mailed this 31 day of January, 1985, to: RICHARD M. GALE, Esquire, Attorney for Respondents, JEFFREY ZIMMERMAN and NATIONWIDE MUTUAL INSURANCE COMPANY, Suite 2608, New World Tower, 100 North Biscayne Boulevard, Miami, Florida 33132; ALVIN WEINSTEIN, Co-Counsel for Respondents, JEFFREY ZIMMERMAN and NATIONWIDE MUTUAL INSURANCE COMPANY, 310 Biscayne Building, 19 West Flagler Street, Miami, Florida 33130; and JERRY TURNER, Esquire, of the Law Offices of MILLARD C. GLANCY, Esquire, Attorney for HARRIET ZIMMERMAN and CONTINENTAL INSURANCE COMPANY, 12550 Biscayne Boulevard, North Miami, Florida 33181.

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