IN THE SUPREME COURT OF FLORIDA

CASE NO: 65,261

SHARYN ZIMMERMAN,

Petitioner,

vs.

JEFFREY ZIMMERMAN and NATIONWIDE MUTUAL INSURANCE COMPANY, as Insuror,

Respondents.
_____/

REPLY BRIEF OF PETITIONER

THEODORE R. BAYER, Esquire
TOBIN, BAYER & JACOBSON
10661 North Kendall Drive
Suite 207
Miami, Florida 33176
Telephone: (305) 598-0700

Attorneys for Petitioner

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SUMMARY OF ARGUMENT

The common law interspousal immunity doctrine can and should be modified by this Court to allow actions between spouses to the extent of available liability insurance.

Such a modification would not deplete the family's assets, nor would it disrupt domestic tranquility.

This Court did not address such a modification in Raisen v. Raisen, 379 So.2d 352 (Fla. 1979), but did adopt such a modification of the doctrine of interfamilial immunity in Ard v. Ard, 414 So.2d 1066 (Fla. 1982).

Common law rules can and should be altered by this Court when new conditions and circumstances develop that make their application inappropriate. The automobile and liability insurance for it were unknown at common law. The need to compensate automobile accident victims and to equitably resolve legal conflicts based on fault led this Court to change the common law doctrine of contributory negligence to the modern doctrine of comparative negligence. Hoffman v. Jones, 280 So.2d 431 (Fla. 1973).

There is a compelling need now to change the common law doctrine of interspousal immunity to make it consistent with comparative negligence and intrafamily immunity. This can be done without harming the family unit by waiving interspousal immunity to the extent of available liability insurance.

The possibility of fraud or collusion in some cases is not a sufficient reason to deny access to the Courts of a whole class of claimants.

ARGUMENT

Since this Court decided Raisen v. Raisen, 379 So.2d 352 (Fla. 1979), the interspousal immunity doctrine has significantly shriveled both in Florida and her sister states. In addition to the 28 states listed in the dissenting opinion in Raisen, seven additional states have modified or abrograted the doctrine of interspousal immunity.[1] Florida has modified the doctrine of family immunity to allow an action by a minor child against a parent to the extent of available liability insurance. Ard v. Ard, 414 So.2d 1066 (Fla. 1982).

This Court did not address, in Raisen, the issue of a partial abrogation of the doctrine of interspousal immunity to the extent of available insurance. This is the issue Petitioner is now raising.

Petitioner is not asking this Court to totally abrogate the doctrine of interspousal immunity. Rather, Petitioner is suggesting that there is no reason to allow a minor child to pursue a negligence claim against his parent's liability insurance, while prohibiting a spouse from pursuing a negligence claim against his spouse's liability insurance.

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[1]Arizona: Fernandez v. Romo, 646 P.2d 878 (1982); Iowa: Shook v. Crabb, 281 N.W.2d 616 (1979); Maine: MacDonald v. MacDonald, 412 A.2d 71 (1980); Nebraska: Imig v. March, 279 N.W.2d 382 (1979); Pennsylvania: Hack v. Hack, 433 A.2d 859 (1981); Texas: Bounds v. Caudle, 560 S.W.2d 925 (1977); and Utah: Stoker v. Stoker, 616 P.2d 590 (1980).

Suppose Petitioner/wife, and her minor child had been injured as passengers in the subject vehicle driven by Respondent/husband, when it hit a telephone pole. What sense is there that Petitioner's minor child could recover from Respondent's insurance company, while Petitioner could not.

Today, automobile liability insurance is an accepted method of protecting society against the injuries which will inevitably arise from the prevalent use of the automobile. In most situations where a passenger is the plaintiff, the automobile negligence action is not truly adversarial, as there is no substantial liability question. The issue is determining a fair compensation for the injuries suffered. The fact that the defendant driver is the spouse of the plaintiff passenger should not result in different legal consequences from the situation where the plaintiff passenger is the minor child, mother, best friend, partner or lawyer of the defendant driver.

In negligence actions, where liability insurance is present, the fact that the plaintiff and defendant are married to each other really means very little. The real party in interest is the insurance company. Allowing such actions would not deplete the family's assets, nor would it disrupt domestic tranquility.

Respondent argues that a change in the common law should be made through legislative enactment and not by judicial

decision. (Respondent's brief at Page 5). This Court in rejecting that argument when it replaced the common law doctrine of contributing negligence with the modern doctrine of comparative negligence, said:

> 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. Hoffman v. Jones, 280 So.2d 431, 434 (Fla. 1973)
>
> 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. One of the most pressing social problems facing us today is the automobile accident problem, for the bulk of tort litigation involves the dangerous instrumentality known as the automobile. Our society must be concerned with accident prevention and compensation of victims of accidents. The Legislature of Florida has made great progress in legislation geared for accident prevention. The prevention of accidents, of course, is much more satisfying than the compensation of victims, but we must recognize the problem of determining a method of securing just and adequate compensation of accident victims who have a good cause of action.
>
> The contemporary conditions must be met with contemporary standards which are realistic and better calculated to obtain justice among all of the parties involved, based upon the circumstances applying between them at the time in question. Hoffman v. Jones, supra at 436.

Comparative negligence is consistent with the prevailing philosophy that liability follows tortious conduct and with the prevailing public policy consideration that those injured in automobile accidents ought to be compensated.

Waiving interspousal immunity to the extent of available liability insurance is likewise consistent with the prevailing public policy of compensating victims of automobile accidents, while still preserving family resources and tranquility. Such a waiver has already been adopted by this Court in Ard with respect to the doctrine of intrafamily immunity. It must be applied to interspousal immunity to bring consistency to the law in this area.

It is submitted that the Fifth District Court of Appeals has properly concluded that:

> "On the basis of Ard as it applies to the parental immunity, there is no reason or logic or public policy to conclude that the same principles do not also apply to interspousal immunity." Tubbs v. Dressler, 419 So.2d 1151, 1153 (Fla. 5th DCA 1982), affirmed on other grounds 435 So.2d 792 (Fla. 1983).

The remaining argument against allowing one spouse to sue to the extent of the other's liability insurance coverage is the danger of fraud and collusion. Such fears, whether real or imagined, can be controlled by our courts and our adversary system without closing the courthouse to all such claims. Able defense counsel have adequately protected the interests of insurance companies in the past. There is no reason to believe they cannot continue to do so in the future.

The vast majority of states have rejected fraud and collusion as a legitimate justification for preserving the interspousal immunity doctrine. In 1972, Judge Liles, dissen-

ting in Vinci v. Gensler, 269 So.2d 20 (Fla. 2 DCA 1972) wrote:

> I further believe that the courts are capable of distinguishing between a fraudulent raid on a treasury of an insurance company and legitimate claims of a wife or child where the benefit of liability protection has been purchased by the husband and father. I cannot believe that the father purchased this insurance policy to protect all other wives and children but not his own. Vinci v. Gensler, 269 So.2d 20, 21, 22 (Fla. 2 DCA 1972).

In 1979 three Justices of this Court quoted Judge Liles with approval in their dissent in Raisen. Subsequently, in 1982 in Ard, this Court adopted this reasoning with respect to claims by minor children against their parents' insurance policy. It is time for this Court to extend this right to spouses and to waive interspousal immunity to the extent of available insurance coverage.

CONCLUSION

For the reasons and authorities stated, the certified question should be answered affirmatively, so that interspousal immunity is waived to the extent of available liability insurance. The decision of the Third District Court of Appeals 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 Reply Brief of Petitioner was mailed this 28 day of March, 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 33131.

TOBIN, BAYER & JACOBSON
Attorneys for Petitioner
10661 North Kendall Drive
Suite 207
Miami, Florida 33176
Telephone: (305) 598-0700

BY: Theodore R. Bayer
THEODORE R. BAYER