IN THE SUPREME COURT OF FLORIDA

CASE NO. 69,743

ON REVIEW OF CERTIFIED QUESTIONS OF
GREAT PUBLIC IMPORTANCE FROM THE
FOURTH DISTRICT COURT OF APPEAL

JOSEPHINE STURIANO

Plaintiff, Petitioner,

v.

MARTIN BROOKS, as Guardian Ad Litem
of the Estate of Vito Sturiano, Deceased

Defendant, Respondent.

INITIAL BRIEF OF PETITIONER JOSEPHINE STURIANO

January 9, 1987

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INTRODUCTION

This Brief is filed on behalf of JOSEPHINE STURIANO, the Plaintiff in a personal injury negligence action. For the sake of clarity, this Brief refers to the parties either by name or by their status in the trial court.

The decisions presented for review passed upon questions of great public importance, certified by the district court in the following form:

> I. DOES THE LEX LOCI CONTRACTUS RULE GOVERN THE RIGHTS AND LIABILITIES OF THE PARTIES IN DETERMINING THE APPLICABLE LAW ON AN ISSUE OF INSURANCE COVERAGE, PRECLUDING CONSIDERATION BY THE FLORIDA COURTS OF OTHER RELEVANT FACTORS, SUCH AS THE SIGNIFICANT RELATIONSHIP BETWEEN FLORIDA AND THE PARTIES AND/OR THE TRANSACTION?
>
> II. DOES THE DOCTRINE OF INTERSPOUSAL IMMUNITY BAR AN OTHERWISE VALID CLAIM BY AN INJURED PASSENGER WHOSE NEGLIGENT SPOUSE DIED AS A RESULT OF THE ACCIDENT, WHERE THE CLAIM IS LIMITED TO THE AMOUNT OF INSURANCE COVERAGE, THE PLAINTIFF IS THE ONLY PARTY INTERESTED IN THE ESTATE AND A GUARDIAN AD LITEM IS APPOINTED?

Brooks v. Sturiano, 11 F.L.W. 2439 (Fla. 4th DCA Nov. 19, 1986).

To facilitate orderly analysis, the certified questions will be dealt with in the order presented in the Fourth District Court of Appeal opinion. The District Court

opinion is set forth in its entirety in the Appendix to Petitioner's Initial Brief.

STATEMENT OF THE CASE AND FACTS

This case is before the Court to review the decision in Brooks v. Sturiano, 11 F.L.W. 2439 (Fla. 4th DCA Nov. 19, 1986). The District Court found that the interspousal immunity defense did not apply in this case and expressed an opinion that the facts of this case were "uniquely different from those found in any prior cases involving the interspousal immunity defense." The district court certified that Brooks passed upon questions of great public importance as to both the interspousal immunity defense and the doctrine of lex loci contractus, thereby vesting this Court with jurisdiction. Art. V, §3(b)(4), Fla. Const. (1985).

JOSEPHINE STURIANO initially filed a complaint against herself as personal representative of the Estate of her deceased husband, Vito Sturiano, and against his insurer, Government Employees Insurance Company ("GEICO") (R-216-223). The complaint alleged, inter alia, that JOSEPHINE STURIANO suffered personal injuries as a result of an accident on November 6, 1982, in which she was a passenger in a vehicle driven by her husband, and that his negligent operation of the vehicle caused it to collide with a tree. It was alleged that JOSEPHINE STURIANO was afforded coverage pursuant to a $50,000.00 insurance policy issued by GEICO.

The initial Motion to Dismiss filed by GEICO on behalf of the insurer and JOSEPHINE STURIANO in her role as personal representative, argued that GEICO was not a proper party and that the doctrine of interspousal immunity barred the lawsuit (R-218-219). The Motion was denied (R-224). However, MARTIN BROOKS, was then appointed Guardian Ad Litem for the Estate of Vito Sturiano for the purpose of the litigation (R-224). Thereafter, BROOKS answered the complaint, and incorporated the grounds set forth in the earlier Motion to Dismiss (R-228). GEICO was subsequently dismissed from the action pursuant to Section 627.7262, Fla.Stat. (1985) (R-229, 260).

BROOKS later renewed his Motion to Dismiss based upon the doctrine of interspousal immunity (R-234-235), which Motion was denied without prejudice (R-239). Thereafter, BROOKS moved for summary judgment again on the basis of interspousal immunity, and further argued that under the laws of the State of New York, where the GEICO insurance policy was issued, all policies were deemed to exclude coverage for liability of an insured to an injured spouse, unless an express provision for such coverage was specifically included in the policy. No such provision existed in the GEICO policy (R-241-244).

In opposition to the Defendant's Motion for Summary Final Judgment, JOSEPHINE STURIANO contended that she and her late husband, Vito, had lived in Florida for eight (8) months of the year for the past five (5) or six

(6) years, and that Florida law should apply so as not to bar coverage under the GEICO policy (R-246-250). The record further reflected that JOSEPHINE STURIANO and her husband sold their home in New York and had moved to Florida in 1979 (R-95-97).

The case proceeded to trial. According to the accident investigator, the STURIANO vehicle was found to have struck a tree (R-15). Vito Sturiano, the driver, was located just outside the driver's side of the vehicle and was not conscious (R-16, 19).

JOSEPHINE STURIANO testified that on the day of the accident she and her husband were driving home from a shopping mall. Her husband was driving the vehicle and she was riding in the front passenger seat (R-100-114). JOSEPHINE STURIANO stated that she was talking with her husband, that all of a sudden he "got dizzy" and doubled over the wheel and that the car went off the road and hit a tree (R-116, 118). At the time of the accident, Vito Sturiano was eighty-two (82) years old and since retiring to Florida in 1979, had suffered dizzy spells frequently in which he would "pass out." These episodes would occur sometimes three (3) or four (4) times in a week (R-98), however, Mr. Sturiano refused to stop driving (R-99).

Mrs. Sturiano further testified that her husband's, Vito Sturiano's, appearance before the collision was similar to that which she had observed at the time of prior dizzy spells.

The medical examiner's testimony was that the cause of death was a ruptured aneurysm which, in her opinion, preceded the accident. It was the medical examiner's view that the leaking aneurysm caused the loss of consciousness, which in turn caused the accident. It was undisputed that Vito Sturiano had such an aneurysm for many years prior to the collision and had knowledge of his condition.

At the close of the Plaintiff's case, and again at the close of all of the testimony, Brooks moved for a directed verdict (R-130-144, 184-191), which motions were denied (R-144-191) and the case was submitted to the jury for its determination. The jury found the deceased, guilty of negligence and that JOSEPHINE STURIANO was not guilty of any comparative negligence. Damages were assessed at $75,000.00 (R-213-214), but the trial court, without objection, reduced the recovery to the policy limits (R-360).

BROOKS post-trial Motions for judgment notwithstanding the verdict and Motion for judgment in accordance with the Motions for directed verdict were denied (R-349-350), and an appeal ensued to the Fourth District Court of Appeal.

On November 19, 1986, the District Court rendered the decision presently under review. (App.) The District Court held, that JOSEPHINE STURIANO'S negligence action was not barred by the doctrine of interspousal immunity because none of the policy considerations surrounding interspousal

immunity existed under the factual scenario raised by the pleadings and issues tried in this action. However, on the second issue presented for determination, the Fourth District Court of Appeal reversed the trial court's judgment applying the lex loci contractus rule to bar any recovery under the GEICO liability insurance policy issued in New York.

MRS. STURIANO timely filed her Notice to Invoke Discretionary Jurisdiction on December 19, 1986, and this Court has accepted jurisdiction in accordance with Art. V, §3(b)(4), Fla. Const. (1985).

SUMMARY OF ARGUMENT

1. Modern society has become a migratory transient society. A majority of Florida's residents are persons who have had their original roots in other states and who frequently have maintained their insurance policies issued from those other states anticipating that they will be covered and protected under Florida law if they are involved in an automobile accident in the State of Florida. This Court must now take the next logical step forward and adopt the significant relationship test and standards as enunciated in the Restatement (Second) of Conflict of Laws §188 (1971), so as to protect those citizens of this State.

2. For the reason set forth above, and because of dissatisfaction with, and the inability of courts to find complete solutions in the mechanical formulas of the traditional choice of laws lex loci contractus rule, numerous jurisdictions have over the last few decades adopted the modern approach in Conflicts of Law primarily, known as the "Significant Relationship Test".

3. Under the significant relationship test, the Courts instead of regarding as conclusive the parties' intention, or the place of making or performance of the contract, lay emphasis upon the law of the place which has the most significant relation, connection, or contacts with the matter in dispute.

4. This Court should take the next logical step and follow its prior decision in Bishop v. Florida Specialty

Paint Company, 389 So.2d 999 (Fla. 1980), where the significant relationship test was adopted for tort actions and reject the traditional lex loci contractus rule.

5. Numerous courts of other jurisdictions have adopted the test enunciated in the Restatement (Second) of Conflict of Laws §188 (1971) finding that the lex loci contractus doctrine should be abandoned in favor of the modern significant relationship approach.

6. Although the GEICO insurance policy issued to the STURIANO'S was executed in New York, the STURIANO'S have resided since 1979 in the State of Florida and justifiably relied and expected that they would be adequately protected under the laws of the State of Florida so as to recover under their insurance policy.

7. The doctrine of interspousal immunity does not bar an otherwise valid claim by an injured passenger whose negligent spouse died as a result of the accident, where the claim is limited to the amount of insurance coverage, the Plaintiff is the only party interested in the estate, and a Guardian Ad Litem is appointed.

8. The harsh effect of the doctrine of interspousal immunity will not bar a claim by an injured spouse regardless of the facts and policy considerations that existed in promulgating the doctrine of interspousal immunity in the first place.

9. Where none of the policy considerations which have been used to support interspousal immunity exist under

the factual scenario of a case, the doctrine of interspousal immunity should not be applied to bar recovery to an injured party who would otherwise be entitled to compensation from an insurance carrier.

ISSUES PRESENTED AND CERTIFIED TO THIS COURT:

I. DOES THE LEX LOCI CONTRACTUS RULE GOVERN THE RIGHTS AND LIABILITIES OF THE PARTIES IN DETERMINING THE APPLICABLE LAW ON AN ISSUE OF INSURANCE COVERAGE, PRECLUDING CONSIDERATION BY THE FLORIDA COURTS OF OTHER RELEVANT FACTORS, SUCH AS THE SIGNIFICANT RELATIONSHIP BETWEEN FLORIDA AND THE PARTIES AND/OR THE TRANSACTION?

II. DOES THE DOCTRINE OF INTERSPOUSAL IMMUNITY BAR AN OTHERWISE VALID CLAIM BY AN INJURED PASSENGER WHOSE NEGLIGENT SPOUSE DIED AS A RESULT OF THE ACCIDENT, WHERE THE CLAIM IS LIMITED TO THE AMOUNT OF INSURANCE COVERAGE, THE PLAINTIFF IS THE ONLY PARTY INTERESTED IN THE ESTATE AND A GUARDIAN AD LITEM IS APPOINTED?

ARGUMENT

I. THE LEX LOCI CONTRACTUS RULE SHOULD NO LONGER GOVERN THE RIGHTS AND LIABILITIES OF THE PARTIES IN DETERMINING THE APPLICABLE LAW ON AN ISSUE OF INSURANCE COVERAGE THEREBY PRECLUDING CONSIDERATION BY THE FLORIDA COURTS OF OTHER RELEVANT FACTORS, SUCH AS THE SIGNIFICANT RELATIONSHIP BETWEEN FLORIDA AND THE PARTIES AND/OR THE TRANSACTION.

The District Court erred in applying the lex loci contractus rule so as to preclude consideration by the trial court of other relevant factors, such as the significant relationship between Florida and the parties and/or the transaction thereby barring JOSEPHINE STURIANO from recovery.

In reversing the trial court's Final Judgment, the Fourth District Court of Appeal ruled that the STURIANO'S insurance policy issued in the State of New York did not provide coverage to JOSEPHINE STURIANO because of a New York statute which provided that there could be no coverage to a marital partner injured by that partner's insured spouse unless coverage was specifically provided for in the insurance contract. N.Y. Ins. Law §3420(g) (McKinney 1985). In so doing, the Fourth District Court of Appeal applied the traditional and out-dated lex loci contractus rule. It is respectfully submitted that this Court should now take the next logical step forward and adopt the significant relationship standard as enunciated in the Restatement (Second) of Conflict of Laws §188 (1971). By doing so, this

Court should now acknowledge that the lex loci contractus rule is no longer of any efficacy in a modern transitory society particularly in Florida where the migratory nature of Florida's ever growing non-native population and its protection is a prime consideration.

The question then turns to what is the modern preferable and less mechanical rule in applying a choice of laws context to contracts. Clearly, dissatisfaction with, and the inability of courts to find complete solutions in the mechanical formulas of the traditional choice of laws lex loci contractus rule, has over the last few decades led to the development of the modern approach, primarily known as the "significant relationship test." Under this approach, which is adopted by the Restatement (Second) of Conflict of Laws §188 (1971), the courts, instead of regarding as conclusive the parties intention, or the place of making or performance of the contract, lay emphasis upon the law of the place which has the most significant relation, connection or contacts with the matter in dispute. See 16 Am.Jur.2d Conflict of Law §§83-84 (1979).

The issue here is quite simple. What law should the State of Florida apply where an automobile liability insurance policy is entered into one state and an accident resulting in a claim under that policy occurs in Florida. In Gillen v. United Services Automobile Association, 300 So.2d 3 (Fla. 1974), this Court was asked to adopt the Restatement (Second) of Conflict of Law significant

relationship test but declined the invitation to do so, noting that it was unnecessary whether to adopt or reject the Restatement (Second) position because under the facts of Gillen, such a determination was unnecessary to its resolution.

It is respectfully submitted that this case, under its facts, presents the perfect opportunity for this Court to adopt the Restatement (Second) of Conflict of Laws significant relationship test particularly in light of the burgeoning transitory population that has developed in Florida since the Gillen decision in 1974 and which now forms a large portion of the state's population. In fact, some six (6) years after Gillen was decided, this Court, in Bishop v. Florida Specialty Paint Company, 389 So.2d 999 (Fla. 1980), was faced with a certified question of public importance regarding the lex loci delicti rule governing the rights and liabilities of parties in tort actions and abandoned that rule in favor of the significant relationship test.

In adopting the position of the Restatement (Second) of Conflict of Laws §146 (1971), that in actions for personal injury, the local laws of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to that particular issue, some other state has a more significant relationship to the occurrence and parties, this Court held:

> Instead of clinging to the traditional lex loci delicti rule, we now adopt the 'significant relationships test' as set

> forth in the Restatement (Second) of Conflict of Laws §§145-146 (1971) ... .
>
> The conflicts theory set out in the Restatement does not reject the 'place of injury' rule completely. The state where the injury occurred would, under most circumstances, be the decisive consideration in determining the applicable choice of law. Indeed, the rationale for a strict lex loci delicti rule ... 'ease in the determination and application of the law to be applied' are cited as major factors in determining the proper choice of law. In contrast to the inflexible place of injury rule, however, the Restatement rule recognizes that the state where the injury occurred may have little actual significance for the cause of action. Other facts may combine to outweigh the place of injury as a controlling consideration making the determination of applicable law a less mechanical, and more rational, process. Bishop, 389 So.2d at 1001.

For the reasons expressed in Bishop, this Court receded from the inflexible lex loci delicti rule thereby joining numerous other jurisdictions which had adopted the more flexible, modern approach to that aspect of Conflicts of Law. It makes absolutely no sense whatsoever for this Court not to apply the same standards in receding from the inflexible lex loci contractus rule thereby joining the numerous jurisdictions which have now adopted the more flexible significant relationship test as enunciated in the Restatement (Second) Conflict of Laws §188 (1971).

Other states have grappled with the idea of adopting the significant relationship test and abandoning the lex loci contractus rule and have found that adopting

the significant relationship test brings those jurisdictions in tune with modern society. Thus, in Cole v. State Automobile & Casualty Underwriters, 296 N.W.2d 779 (Iowa 1980), the Iowa Supreme Court adopted the significant relationship test and abandoned the lex loci contractus rule:

> In common with most states in facing choice-of-law questions, we have long struggled with competing interests. On the one hand, the public needs predictability in its conflict-of-law rules. On the other hand, there is a need for flexibility. These conflicting needs were long reflected in our opinions and in those from other states.
>
> Some choice-of-law opinions aim for simplicity, uniformity and predictability. This approach, which was adopted in 1934 in the Restatement of Conflict of Laws, proceeded from the belief that conflict problems should focus on the vesting of the interests of the litigants. This view presupposed that all right and obligations under a contract vested at a certain time and place and was controlled by the law of that place. This simple but harsh view was applied in a number of our opinions ... .
>
> The American Law Institute abandoned the simple, harsh approach in the Restatement (Second) of Conflict of Laws. The second Restatement recognizes widespread repudiation of the test espoused in the first Restatement. Under the second Restatement there are two general rules. First, with certain restrictions not applicable here, contracting parties themselves determine the law which is to control. Restatement (Second) of Conflict of Laws §187. The second rule applies where the parties do not make the choice. The Court then applies the law of the jurisdiction with the 'most significant

relationship' to the transaction in dispute. Id. at 781.

Similarly, in Unigard Insurance Group v. Royal Globe Insurance Company, 100 Idaho 123, 594 P.2d 633 (1979), the Supreme Court of Idaho adopted verbatim the official draft of the Restatement (Second) of Conflict of Laws §188 (1971) for its state. That provision provides in pertinent part:

> §188. Law Governing in Absence of Effective Choice by the Parties
>
> (1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in §6.
>
> (2) In the absence of an effective choice of law by the parties (see §187), the contacts to be taken into account in applying the principles of §6 to determine the law applicable to an issue include:
>
> (a) the place of contracting,
>
> (b) the place of negotiation of the contract,
>
> (c) the place of performance,
>
> (d) the location of the subject matter of the contract, and
>
> (e) the domicile, residence, nationality, place of incorporation and place of business of the parties.

> These contacts are to be evaluated according to their relative importance with respect to the particular issue.[1]

Similarly, in Wood Bros. Homes, Inc. v. Walker Adjustment Bureau 198 Colo. 444, 601 P.2d 1369 (1979) the Colorado Supreme Court noted that it had already adopted the Restatement (Second) of Conflict of Law approach in tort actions recognizing the shortcomings of the traditional Conflict of Laws rule and the benefits of the most significant relationship approach and for these same reasons adopted the significant relationship test in contract actions involving a choice of law.

Turning to the facts of this appeal, this Court must look to the objectives of the Restatement (Second) of Conflict of Laws which is to locate the state having the "most significant relationship" to the particular issue. In

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[1]Examples of other jurisdiction which have recently adopted the significant relationship test espoused by the Restatement (Second) of Conflict of Laws §188 (1971), are generally set forth in the annotation Conflict of Laws in Determination of Coverage Under Automobile Liability Insurance Policy, 20 A.L.R.4th 738 (1983). Some examples are (Iowa) Joseph L. Wilmotte & Co. v. Rosenman Bros., 258 N.W.2d 317 (Iowa 1977); (Kentucky) Lewis v. American Family Ins. Group, 555 S.W.2d 579 (1979); (New Jersey) State Farm Mut. Auto. Ins. Co. v. Simmons, 84 N.J. 28, 417 A.2d 488 (1980); (Washington) Baffin Land Corp. v. Monticello Motor Inn, Inc., 70 Wash.2d 893, 425 P.2d 623 (1967); (Colorado) Wood Bros. Homes, Inc. v. Walker Adjustment Bureau, 198 Colo.444, 601 P.2d 1369 (1979); (New York) Auten v. Auten, 308 N.Y. 155, 124 N.E.2d 99 (1954); (Illinois) Champagnie v. W. E. O'Neil Constr. Co., 77 Ill.App.3d 136, 395 N.E.2d 990 (1979); (Massachusetts) Choate, Hall & Stewart v. SCA Services, Inc., 378 Mass. 535, 392 N.E.2d 1045 (1979).

analyzing whether the laws of the State of New York (the situs of the execution of the GEICO policy contract) or the State of Florida where the STURIANOS have resided since 1979 apply, the principles set forth in the Restatement (Second) Conflict of Laws §6 and §188 (1971), must be taken into account. Restatement (Second) of Conflict of Laws §6 (1971) provides:

> 3. §6 Choice-of-Law Principles
> (1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
> (2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include:
> (a) the needs of the interstate and international systems,
> (b) the relevant policies of the forum,
> (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
> (d) the protection of justified expectations,
> (e) the basic policies underlying the particular field of law,
> (f) certainty, predictability and uniformity of result, and
> (g) ease in the determination and application of the law to be applied.

Once the state having the most significant relationship is identified, the law of that state is then applied to resolve the particular issue. Turning now to the factors set forth in Sections 188 and 6 of the Restatement (Second) Conflict of Laws, it is crystal clear that Florida law should have been applied in determining that JOSEPHINE STURIANO was entitled to recovery under the GEICO insurance

policy. Although the contract was issued and negotiated in the State of New York, the place of performance and location of the subject matter of the contract were clearly in Florida. More importantly, the domicile and residence of STURIANOS (since 1979) was Florida; further, the needs of interstate commerce and the protection of the STURIANOS' justified expectations that since they were Florida residents for the past six (6) years, that Florida courts and laws would protect them, literally cries out for a determination that JOSEPHINE STURIANO should be entitled to recover under the GEICO insurance policy.[2]

In light of this Court's appreciation of the effects of modern society as it relates to its citizens (See Hoffman v. Jones, 280 So.2d 431 (Fla. 1973), where this Court abrogated the doctrine of contributory negligence and accepted the doctrine of comparative negligence), the State of Florida must now enter into a new enlightened era joining

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[2]The laws of the State of New York, the location of the execution of the GEICO insurance policy would also allow Josephine Sturiano to recover. Under the Conflict of Laws theory known as the doctrine of "Renvoi", the Court of the forum in determining the question before it, must take into account the whole law of the other jurisdiction, including not only the local law of such other jurisdiction, but also its rules as to Conflict of Laws, and then apply the law as to the actual question which the rules of the other jurisdiction prescribe. Under New York Conflicts of Law, New York Courts would utilize the substantial relationship test in applying its choice of law. Clearly, under the substantial relationship test Florida substantive law would allow Josephine Sturiano to recover.

its sister jurisdictions in adopting the significant relationship test espoused by the Restatement (Second) of Conflict of Laws §188 (1971). Indeed, if the citizens of this State are to be adequately protected by its laws, this Court must adopt the significant relationship test now with resounding authority.

Modern society has become a migratory transient society. A majority of Florida's residents are persons who have had their original roots in other states and who frequently have maintained their insurance policies issued from those other states anticipating that they will be covered and protected under Florida Law if they are involved in an automobile accident, in the State of Florida. To deny recovery to those individuals because of the harsh effect of the doctrine of lexi loci contractus, would serve as a penalty to our newer citizens who might today form a majority of Florida's residents. This was not the case in 1974 when this Court wrote its opinion in Gillen, supra. Since this Court has already sounded the death knell for the doctrine of lexi loci delicti, it is now high time that the Court adopt the modern significant relationship test and abrogate the doctrine of lex loci contractus.

II. THE DOCTRINE OF INTERSPOUSAL IMMUNITY DOES NOT BAR AN OTHERWISE VALID CLAIM BY AN INJURED PASSENGER WHOSE NEGLIGENT SPOUSE DIED AS A RESULT OF THE ACCIDENT, WHERE THE CLAIM IS LIMITED TO THE AMOUNT OF INSURANCE COVERAGE, THE PLAINTIFF IS THE ONLY PARTY INTERESTED IN THE ESTATE AND A GUARDIAN AD LITEM IS APPOINTED.

The pending dispute requires this Court to take the next logical step in following its line of cases commencing with Raisen v. Raisen, 379 So.2d 352 (Fla. 1979), cert. denied, 449 U.S. 886 (1980), and going through the recent decisions of Ard v. Ard, 414 So.2d 1066 (Fla. 1982), and Dressler v. Tubbs, 435 So.2d 795 (Fla. 1983), to determine whether the doctrine of interspousal immunity bars an otherwise valid claim by an injured passenger whose negligent spouse died as a result of the accident, where the claim is limited to the amount of insurance coverage, the Plaintiff is the only party interested in the estate, and where a Guardian-Ad-Litem is appointed. The Fourth District Court of Appeal followed the next logical step in deciding that in the factual circumstances in this action, presented absolutely no public policy reason for applying the interspousal immunity doctrine.

JOSEPHINE STURIANO'S situation presents a factual pattern not previously presented to this Court on this issue. With the exception of Roberts v. Roberts, 414 So.2d 190 (Fla. 1982), none of the prior decisions of this Court dealt with a circumstance in which a spouse is suing a

deceased spouse's estate for recovery under an insurance policy. Thus, the Fourth District Court of Appeal found that this Court's most recent decisions in Snowten v. Snowten, 475 So.2d 1211 (Fla. 1985), and Raisen v. Raisen, supra, do not control the outcome of the appeal so as to bar JOSEPHINE STURIANO'S right to recover under the doctrine of interspousal immunity. Those are cases involving living persons where the facts supporting interspousal immunity exist.

Respectfully, it is submitted that this Court has already lighted the path to recovery with its decisions in Dressler v. Tubbs, supra, and Ard v. Ard, supra, which decisions allowed the Fourth District Court of Appeal to base its determination that JOSEPHINE STURIANO'S was not barred by the doctrine of interspousal immunity.

In Dressler, supra, the wife's estate brought suit against the estate of the husband for wrongful death caused by his negligence. The Court found that the doctrine of interspousal immunity did not apply because the wrongful death created a separate distinct right in the wife's survivors. This Court reasoned, in distinguishing Raisen v. Raisen, supra, that:

> Raisen was decided on the grounds that allowing such a suit would be destructive of marital unity and harmony. Obviously, Raisen cannot be applied to the factual situation here. Husband and wife are dead. There is no suit between spouses, just as there is no longer any marital unit to serve. 435 So.2d at 794 (emphasis added).

In Ard v. Ard, supra, decided on the same day as Roberts, supra, this Court recognized that parental immunity was waived to the extent of available insurance coverage. However, in Snowten, supra, this court held that interspousal immunity was not waived, even to the extent of available insurance. In Snowten, this court considered Dressler and Ard, and stated that Dressler and Ard did not signal a departure from the general principle set forth in Raisen. However, in Snowten, unlike in this case, the negligent spouse had not died prior to the suit, and this Court again recited the traditional policy considerations in declaring that interspousal immunity defense, unlike parental immunity, would not be waived even to the extent of insurance coverage where the spouses were both living.

The issue here is whether this Court will take the next logical step in line with its past opinions in order not to allow the harsh affect of the doctrine of interspousal immunity to bar a claim by an injured spouse regardless of the facts and policy considerations that existed in promulgating the doctrine of interspousal immunity in the first place. In this case, there is no marital unit to preserve. Second, there is no chance of promoting marital disharmony. Third, with one spouse dead, there is no danger of collusive claims, since the only parties in interest are the Plaintiff (JOSEPHINE STURIANO) and the insurance company. Actually, none of the policy considerations which have been used to support interspousal

exists under the factual scenario of this litigation. In addition, the negligent spouse is dead, there are no children or adverse estate interests, there is insurance, a Guardian Ad Litem has been appointed to represent the estate of the deceased spouse, and no other public policy issue would be served by barring recovery to the injured party who would otherwise be entitled to compensation from an insurance carrier, which insured against negligent conduct by the automobile driver.

While this Court recognized in Ard v. Ard, supra, that the possibility of fraud and collusion exists in every lawsuit, that danger is not so great that it cannot be overcome by the common sense of a Judge and jury properly instructed as to the credibility of witnesses, impeachment, evidence, and weight of the evidence. Ard v. Ard, supra.

The policy considerations which led this Court to abrogate parental immunity to the extent of available insurance coverage (Ard v. Ard) are equally applicable under the facts of this case to the case of a spouse suing an insured deceased spouse's estate. Just as a parent has a duty to nurture, support and protect minor children, which duty the child has a right to enforce, Finn v. Finn, 312 So.2d 726 (Fla. 1975), spouses have an obligation to support and maintain one another. Fieldhouse v. Public Health Trust, 374 So.2d 476 (Fla. 1979). This obligation is fundamental to our society. Allowing suit by a spouse against a deceased spouse's estate to the limits of

available insurance would not promote disharmony nor drain family resources, but would instead ease the financial burden on the surviving spouse.

The Fourth District Court of Appeal clearly and categorically accepted the Plaintiff's argument that none of the policy considerations surrounding interspousal immunity exist in this case and followed the logical path outlined by this Court's prior opinions. In fact, this case vividly illustrates why the public policy considerations discussed in Ard v. Ard, supra, and Raisen v. Raisen, supra, compel the allowance of a suit for a deceased husband's negligence which, at the same time, show the irony of barring JOSEPHINE STURIANO'S suit. JOSEPHINE STURIANO, in the interest of preserving marital unity and harmony, accompanied her husband in their automobile when he insisted upon driving. He was negligent, caused an accident, and as a result, JOSEPHINE STURIANO is now a widow, bereft of the support which was Vito Sturiano's duty to provide.

It is respectfully submitted that this Court did not "shut the door" to a spouse injured by a spouse regardless of the facts and lack of policy considerations, but rather, that the facts will dictate the results (just as this Court's decision in Dressler v. Tubbs, supra, which is controlling, on the facts of this case), thereby permitting JOSEPHINE STURIANO to recover.

CONCLUSION

Based upon the foregoing analysis, this Court must affirm the Fourth District Court of Appeal's decision that interspousal immunity does not apply where the policy considerations supporting interspousal immunity do not exist. However, this Court should reverse the Fourth District Court of Appeal's decision applying the lex loci contractus rule and adopt the modern significant relationship approach enunciated in the Restatement (Second) of Conflict of Laws §188 (1971), so as to allow JOSEPHINE STURIANO to recover.

CERTIFICATE OF SERVICE

We hereby certify that a true and correct copy of the foregoing was furnished by mail this 9th day of January, 1987, to STEVEN BILLING, ESQ., Billing, Cochran & Heath, P.A., 888 S.E. 3rd Avenue, Suite 301, North Fort Lauderdale, Florida 33316, and to NANCY LITTLE HOFFMANN, ESQ., Nancy Little Hoffmann, P.A., 644 S.E. 4th Ave., Fort Lauderdale, Florida 33301.

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