IN THE SUPREME COURT OF FLORIDA

CASE NUMBER 79,463

BERES WAITE, :

Petitioner, :

vs. :

JOYCE WAITE, :

Respondent. :

DISCRETIONARY REVIEW OF A DECISION
OF THE THIRD DISTRICT COURT OF APPEAL

REPLY BRIEF OF PETITIONER, BERES WAITE

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ISSUE ON APPEAL

WHETHER A FORMER SPOUSE CAN MAINTAIN AN ACTION IN TORT AGAINST THE OTHER SPOUSE FOR A BATTERY ALLEGEDLY COMMITTED DURING MARRIAGE WHERE SUCH MARRIAGE HAS SINCE BEEN DISSOLVED BY DIVORCE.

REPLY ARGUMENT

Respondent offers an emotional panoply for allowing her to sue her former spouse. The fundamental flaw is in her advocating retrospective and subjective "case by case" analysis as a substitute for objective application of established rule of law.

Respondent contends that interspousal immunity should not be an available defense when the tort is "egregious." By what standard should egregiousness be measured? Is egregiousness to be litigated along with the underlying tort, with separate verdict interrogatories for the jury? Is litigation over egregiousness any more or less susceptible to fraud, collusion, or disruption of marital harmony and domestic tranquility? Is the

possibility of fraud or collusion itself a question for the jury? Is the jury to decide, factually, whether the underlying litigation is disruptive of marital harmony or domestic tranquility?

These are all difficult questions, already answered by this Court in Hill v. Hill, 415 So.2d 20, 21 (Fla. 1982):

> The retention or elimination of interspousal immunity for intentional torts presents a difficult dilemma. We find on one hand that neither a wife nor a husband should be required to suffer physical abuse from their spouse without suitable means of retribution. On the other hand, a means of recovery within the traditional tort system can seriously affect the family unit, family financial resources, and could result in multiple inter-related court proceedings.
>
> 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. 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 present factual situation illustrates the need to retain the present immunity doctrine. This proceeding is the result of a tragic domestic relations custody dispute, complicated by the possibility that one spouse has a mental condition which may require treatment.

In Snowten v. United States Fidelity and Guaranty Company, 475 So.2d 1211 (Fla. 1985), this Court affirmed its allegiance to Hill v. Hill and promised, "this Court will

not abrogate any part of the common law enacted by section 2.01 unless there is a compelling need for a change and the reason for the law no longer exists." 475 So.2d at 1213. Just as there was no phenomenon or circumstance from 1980 to 1985 to compel abandonment of the common law in Snowten, there has been no event from 1985 to date to now authorize this Court's departure from well settled precedent.

The test is objective. If the plaintiff and defendant spouse are living, the defense is available. In Snowten and its many predecessors, the injured plaintiff and the defendant spouse were both living. It is the existence of the marital relationship, not its subjective quality, that triggers the common law defense of interspousal immunity in tort. The only recognized exception is that found in Sturiano v. Brooks, 523 So.2d 1126, 1128 (Fla. 1988), where the negligent spouse died as a result of the accident. The estate was not entitled to the defense. In Sturiano, there was no defendant spouse alive and entitled to the defense of interspousal immunity. Here there is.

CONCLUSION

The summary judgment should be reinstated.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was served upon NORMAN M. WAAS, ESQ., Parenti, Falk & Waas, P.A., 1150 Courthouse Tower, 44 West Flagler Street, Miami, Florida 33130; KENNETH R. DRAKE, ESQ., Touby, Smith, DeMahy & Drake, P.A., Penthouse, Bayside Office Center, 141 Northeast Third Avenue, Miami, Florida 33132; and FRANK A. ABRAMS, ESQ., 9450 Sunset Drive, Suite 200D, Miami, Florida 33173, this 26th day of May, 1992.

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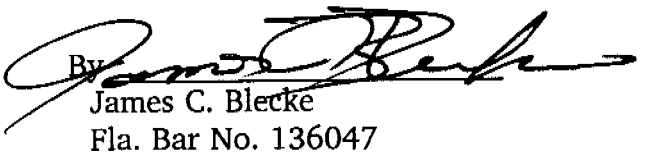
By 
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