SUPREME COURT OF FLORIDA

TUESDAY, NOVEMBER 10, 1992

SHERYL DYKSTRA-GULICK Petitioner, vs. DOUGLAS GULICK Respondent.	CASE NO.: 80,846 District Court of Appeal, Fifth District No. 91-1992

ANSWER BRIEF OF RESPONDENT, DOUGLAS GULICK

ON APPLICATION FOR REVIEW OF A QUESTION CERTIFIED TO BE OF GREAT PUBLIC IMPORTANCE BY THE FIFTH DISTRICT COURT OF APPEAL, DAYTONA, VOLUSIA COUNTY, FLORIDA

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STATEMENT OF THE CASE AND OF THE FACTS

Respondent adopts Petitioner's Statement of the Case and of the Facts.

SUMMARY OF ARGUMENT

Petitioner's claim is barred by the doctrine of interspousal immunity which has consistently been reaffirmed by this Court even though several other states have abrogated this doctrine. The courts of this state have applied the interspousal immunity doctrine even where the parties were not married at the time of the tort, but subsequently married.

This Court has repeatedly stated that the doctrine of interspousal immunity is not contrary to public policy. Any abrogation of the interspousal immunity doctrine must come from the legislature and not by judicial action.

ARGUMENT

THE TRIAL COURT AND THE DISTRICT COURT CORRECTLY RULED THAT THE DOCTRINE OF INTERSPOUSAL IMMUNITY BARS PLAINTIFF'S CLAIM.

The trial court properly applied the most recent pronouncements of this Court and the public policy of this state in ruling that the doctrine of interspousal immunity bars recovery by one spouse for the negligent acts of the other. **Snowten v. United States Fidelity & Guaranty Company**, 475 So. 2d 1211 (Fla. 1985); **Raisen v. Raisen**, 379 So. 2d 352 (Fla.1979), **cert. denied** 449 U.S. 886 (1980).

The courts of this state have on several occasions been faced with the issue of whether the interspousal immunity doctrine applies where parties were not married at the time of the tort but subsequently married. On each occasion the result has been that such a suit is barred. In **Chatmon v. Woodard**, 492 So. 2d 1115 (Fla. 3d DCA 1986), the trial court dismissed the case where defendant raised interspousal immunity as "an absolute, unanswerable defense to the action". The appellate court affirmed the dismissal. See also, **Gaston v. Pittman**, 224 So. 2d 326 (Fla. 1969); **Shoemaker v. Shoemaker**, 523 So. 2d 178 (Fla. 3d DCA 1988); **Amendola v. Amendola**, 121 So. 2d 805 (Fla. 2d DCA 1960). While Petitioner attempts to distinguish this line of cases contending that they do not bear on the continued validity of the doctrine of interspousal immunity itself, Respondent submits that these cases directly uphold the common law doctrine of interspousal immunity under the circumstances of the instant case.

The Fifth District Court in the first appeal below of **Dykstra-Gulick v. Gulick**, 579 So. 2d 406 (Fla. 5th DCA 1991), while dismissing on jurisdictional grounds, recognized the application of this line of cases to the instant case saying:

> While we recognize that the proper disposition of the instant case is abatement of the cause of action pending the possible termination of the marriage of the parties...

Petitioner asserts that the current law on this issue is contrary to public policy. This is the same assertion made by the Plaintiff in **Raisen v. Raisen**, **supra** and the same assertion that the undersigned attorney made on behalf of the Plaintiff in **Snowten v. United States Fidelity and Guaranty Company**, **supra**. This Court rejected these arguments out of hand saying:

> 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's spouse will be paid by an insurance company and will ultimately benefit both spouses.

Snowten, 475 So. 2d at 1213. (Citing **Raisen**, 379 So. 2d at 355.)

The major premise of Petitioner's argument is that she has a "right" to sue her husband. This premise is flawed. It clearly violates the traditional policy reasons set forth in the above cited decisions for continuing interspousal tort immunity: (1) the legal unity of Husband and Wife; (2) avoidance of marital disharmony; and (3) avoidance of fraudulent and collusive claims. These reasons have not lost their vitality since this Court last visited this issue. **Snowten**, 475 So. 2d at 1212.

While Petitioner seeks to convince the Court that "the courts and the legislature have been chipping away at the doctrine," review of the post-**Raisen** and post-**Snowten** decisions show that those cases involve facts and issues distinct from those involved sub-judice. These cases neither overrule **Raisen** or **Snowten**, nor do they require abrogation or modification of interspousal immunity. To the contrary, this Court has consistently refused to modify the doctrine of interspousal immunity to permit recovery for negligent torts between **living** spouses, even to the extent of insurance coverage.

The decision in **Waite v. Waite**, 593 So. 2d 222 (Fla. 3d DCA 1991), represents no change in the application of the interspousal immunity doctrine to negligent torts. **Waite** involved an intentional act as opposed to a negligent act and therefore does not affect the doctrine of interspousal tort immunity in cases involving negligent torts. The court in **Waite** put great emphasis on the extreme nature of the intentional tort to show that all of the traditional policy considerations were eradicated. **Id.** at 223. While the action arose prior to the effective date of the statute abrogating interspousal tort immunity in actions for battery, the court specifically noted that, "the statute delineates Florida's public policy" in that regard. The court also distinguished interspousal battery actions from general interspousal tort immunity saying: "However, today the tort of battery is entirely outside the former bar of interspousal tort immunity". **Id.** at 224.

The court in **Waite** based its decision on **Sturiano v. Brooks**, 523 So. 2d 1126 (Fla. 1988), which involved the application of interspousal immunity in an action brought by a widow against her husband's estate. While holding that the doctrine did not bar

such a suit, this Court reaffirmed the basic policy reasons for maintaining interspousal immunity saying, "In cases where these considerations apply, the doctrine of interspousal immunity shall continue to bar actions between spouses." Id. at 1128. This Court went on to say that in situations where the injured Plaintiff and negligent Defendant spouse were both living and where there was an insurance policy, there was ample reason to believe collusion was a possibility or that the spectre of a lawsuit by one spouse charging negligence against the other would be extremely disruptive to the family. Id. This Court concluded:

> We note at this point that *Snowten* and the doctrine of interspousal tort immunity are still good law.

Id. at 1128.

In the instant case both spouses are still living so that the policy reasons for maintaining interspousal immunity are applicable. While Petitioner asserts that not allowing her to file suit is promoting family disharmony, protracted litigation between the parties could have the same effect. The immunity obviously does not have an adverse effect on this marriage by the fact that the parties did marry and continue to be married.

While **Ard v. Ard**, 414 So. 2d 1066 (Fla. 1982), modified the doctrine of parental/interfamily immunity to permit recovery by a minor child from a negligent parent to the extent of liability coverage, the doctrines of parental/interfamily immunity and interspousal immunity are not equated so as to justify application of the **Ard** ruling to interspousal immunity. Interspousal immunity has its roots in the common law and

was incorporated into the law in Florida in 1829. § 2.01, Fla. Stat. As such, it cannot be abrogated by the judiciary unless there is "a compelling need for a change and the reason for the law no longer exists." **Snowten**, 475 So. 2d at 1213. This Court has consistently held that this is not the case in the area of interspousal tort immunity. **Id.** Interfamily immunity, however, was not an established common law doctrine but was adopted by Florida decisional law. **See Ard, supra**, at 1067. As such, it is more amenable to judicial modification than interspousal immunity.

This Court has held that any abrogation of the interspousal immunity doctrine must come from the legislature and not by judicial action. **Snowten, supra**, at 1213; **Raisen, supra**, at 353; **Bencomo v. Bencomo**, 200 So. 2d 171 (Fla. 1967), **cert. denied**, 389 U.S. 970 (1967); **Corren v. Corren**, 47 So. 2d 774 (Fla. 1950). As the Fifth District Court observed in **Treciak v. Treciak**, 547 So. 2d 169 (Fla. 5th DCA 1989):

> Initially the application of the doctrine of interspousal immunity to the facts of this case may seem to render a harsh and unjust result. However, we recognize that the Florida Supreme Court has consistently refused to chip away at this doctrine even in hard cases. We leave to them, as we must, the decision of when to adopt an overall change in philosophy and substantial modification of this difficult area of the law.

As Petitioner points out, the Florida legislature in 1985 abrogated interspousal immunity with regard to the intentional tort of battery. § 741.235, Fla. Stat. (1985). This statute was a compromise by the legislature. In 1984, the House bill on the subject sought to abrogate all intentional torts (A-1) while the corresponding Senate bill sought to abolish the entire doctrine of interspousal tort immunity (A-2). Both of these bills

expired on their respective calendars. In 1985, the Florida Legislature passed § 741.235 (A-3) to abrogate only the intentional tort of battery. In so doing, the legislature has spoken in "positive unambiguous language" by refusing to abolish interspousal immunity for negligent torts as well. The Florida Legislature has consistently refused to abrogate interspousal tort immunity for negligent torts and respectfully, this Court should not do what our representatives have refused to do. This Court should follow its previous decisions and only allow reconsideration of interspousal immunity to take place in the legislature.

CONCLUSION

The law in the State of Florida is clear that a wife cannot sue her living husband in negligence, even for a pre-marital tort. Petitioner's complaint fails to state a cause of action against Respondent because it is absolutely barred as a matter of law. The decision of the Fifth District Court of Appeal should be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Dock Blanchard, Esquire, Post Office Box 1869, Ocala, Florida, 32678, by United States Mail, this 10th day of November, 1992.

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APPENDIX

HB 638

By Representatives Simon and Abrams

A bill to be entitled

An act relating to torts; creating s. 768.35, F.S.; abrogating the doctrine of interspousal tort immunity for certain intentional torts; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 768.35, Florida Statutes, is created to read:

768.35 Doctrine of interspousal tort immunity abrogated.--The common law doctrine of interspousal tort immunity is hereby abrogated with respect to the following intentional torts, and the ability of a person to sue another person for any such intentional tort shall not be affected by any marital relationship between the persons:

(1) Assault.

(2) Battery.

(3) False imprisonment.

(4) Trespass to personal property.

(5) Trespass to real property.

(6) Conversion.

Section 2. This act shall take effect October 1, 1984.

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HOUSE SUMMARY

Abrogates the common law doctrine of interspousal tort immunity for certain specified intentional torts.

CODING: Words in ~~struck through~~ type are deletions from existing law; words underlined are additions.

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SENATE BILL 75 BY FOX

A bill to be entitled

An act relating to torts; creating s. 768.35, F.S.; abolishing the doctrine of interspousal tort immunity; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 768.35, Florida Statutes, is created to read:

768.35 Doctrine of interspousal tort immunity abolished.--The common law doctrine of interspousal tort immunity is abolished, and the ability of a person to sue another person in tort shall not be affected by any marital relationship between the persons.

Section 2. This act shall take effect October 1, 1984.

CODING: Words in ~~struck through~~ type are deletions from existing law; words underlined are additions.

741.235 Doctrine of interspousal tort immunity abrogated.—The common law doctrine of interspousal tort immunity is hereby abrogated with regard to the intentional tort of battery, and the ability of a person to sue another person for the intentional tort of battery shall not be affected by any marital relationship between the persons.

History.—s. 1, ch. 85-328.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JULY TERM 1992

NOT FINAL UNTIL THE TIME EXPIRES TO FILE REHEARING MOTION, AND, IF FILED, DISPOSED OF.

SHERYL DYKSTRA-GULICK,

Appellant,

v. CASE NO. 91-1992

DOUGLAS GULICK

Appellee.

_____/

Opinion filed September 11, 1992

Appeal from the Circuit Court
for Marion County,
William T. Swigert, Sr., Judge.

Dock A. Blanchard of Blanchard,
Custureri, Merriam, Adel & Kirkland,
P.A., Ocala, for Appellant.

Anthony J. Salzman of Moody &
Salzman, Gainesville, for Appellee.

PER CURIAM.

Appellant Sheryl Dykstra-Gulick was injured while riding as a passenger in an automobile owned and operated by appellee Douglas Gulick. Appellant and appellee were married after the accident, and appellant subsequently filed a negligence action against appellee seeking damages for injuries she sustained in the accident. The trial court granted appellee's motion to dismiss the complaint with prejudice holding that appellant's action was barred by the doctrine of interspousal immunity. We reverse the final judgment only to the extent that it provides for a dismissal with prejudice and remand with instructions to abate this action.

NEGLIGENT SPOUSE FOR ALL OF THE INJURED SPOUSE'S DAMAGES, OR SHOULD THE DOCTRINE BE ABROGATED PARTIALLY TO ALLOW SUCH AN ACTION WHERE RECOVERY IS LIMITED TO THE EXTENT OF INSURANCE COVERAGE?

Accordingly, we affirm the trial court's holding that the instant action is barred by the doctrine of interspousal immunity. However, we reverse the final judgment to the extent that it provides for a dismissal with prejudice, and remand for entry of a final judgment abating this action until such time as the doctrine of interspousal immunity is no longer applicable.

AFFIRMED in part; REVERSED in part and REMANDED.

GOSHORN, C.J. and DIAMANTIS, J., concur.

DAUKSCH, J., concurs specially, with opinion.

The doctrine of interspousal immunity bars an action between a husband and wife based upon negligence. See Snowten v. United States Fidelity & Guaranty Co., 475 So.2d 1211 (Fla. 1985); Raisen v. Raisen, 379 So.2d 352 (Fla. 1979) cert. denied, 449 U.S. 886, 101 S.Ct. 240, 66 L.Ed.2d 111 (1980). See also Sturiano v. Brooks, 523 So.2d 1126 (Fla. 1988). However, if the parties' marriage should terminate by death[1] or dissolution[2] appellant could then maintain her action for negligence. In a case such as this, where the cause of action accrues prior to marriage, abatement of the action pending the possible termination of the marriage by dissolution or death is the proper disposition. See Gaston v. Pittman, 224 So.2d 326 (Fla. 1969); Dykstra-Gulick v. Gulick, 579 So.2d 406 (Fla. 5th DCA 1991); Shoemaker v. Shoemaker, 523 So.2d 178 (Fla. 3d DCA 1988); Chatmon v. Woodward, 492 So.2d 1115 (Fla. 3d DCA 1986).

Because of the important social implications of the doctrine of interspousal immunity, we certify the following question to the Florida Supreme Court as one of great public importance:

> WHERE ONE SPOUSE PRIOR TO MARRIAGE NEGLIGENTLY INJURES THE OTHER SPOUSE, SHOULD THE DOCTRINE OF INTERSPOUSAL IMMUNITY BE ABROGATED COMPLETELY TO ALLOW THE INJURED SPOUSE TO MAINTAIN A NEGLIGENCE ACTION DURING THE MARRIAGE AGAINST THE ALLEGEDLY

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[1] Sturiano v. Brooks, 523 So.2d 1126 (Fla. 1988). In *Sturiano* the supreme court held that the wife could maintain a negligence action which arose during marriage against her late husband's estate. Because she was the sole surviving family member with no lineal descendants, no disruption of the family unit could occur and there was nobody with whom she could conspire. The court in *Sturiano* does not specifically address the situation of surviving lineal descendants and the possible disruption of the family unit. In such a situation, limiting recovery to any insurance coverage would not disrupt the surviving family unit. Cf Ard v. Ard, 414 So.2d 1066 (Fla. 1982).

[2] Gaston v. Pittman, 224 So.2d 326 (Fla. 1969).

DAUKSCH, J., concurring specially.

As I did in Raisen v. Raisen, 370 So.2d 1148 (Fla. 4th DCA 1978), approved, 379 So.2d 352 (Fla. 1979), cert. den., 449 U.S. 886 (1980). I reluctantly concur because the supreme court has yet to act. Hoffman v. Jones, 280 So.2d 431 (Fla. 1973).

It is high time, in my opinion, for our courts to recognize the weakness of the arguments for the maintenance of the interspousal immunity doctrine and to step in line with the great majority of other states. After all, it has been done in other intrafamilial immunity cases. See, e.g., Ard v. Ard, 414 So.2d 1066 (Fla. 1982).

The two principal bases upon which the argument is made to maintain this inability to be compensated for injury are 1) the disruption of family, or marital, harmony and, 2) the possibility of collusion between the parties or fraud by them. The first has been largely discounted recently and in this case is hardly a factor because the marriage occurred after the injury and the attorney for appellee has, in no uncertain terms, admitted that he is the attorney for an insurance company and not really seeking the interests of Douglas Gulick. He said at oral argument that he has never consulted Mr. Gulick about his interests. Further, what is more disruptive than to require appellant to get a divorce in order to receive the compensation she is due for her injuries?

As far as collusion or fraud is concerned, this is the only place in the law where the possibility of a defense is a bar to suit. Is that fair? Or is it more fair for the suit to be allowed and the defense to be raised, if warranted, and the trier of the fact to decide? The answer must be obvious.

In Raisen, our supreme court held that it was the province of the legislature, not the court, to decide whether to "abrogate any part of the common law." The court found little hesitancy, however, in changing from contributory negligence to comparative negligence, Hoffman, even though it scolded the district court for its impertinence and presumptiveness (or courage and foresight, if viewed from another perspective). Lately, our supreme court saw fit to "construe" (the court's word) a criminal statute in someone's favor for reasons, inter alia, of " . . . public policy, reason and common sense. . . . " Johnson v. State, 17 F.L.W. S473 (Fla. 1992). That done in the face of statutory language. Here we have no statute, only tired old common law, so the fruit is ripe for the picking.

All are commended to the thoughtful and scholarly dissent of Judge Gersten in Waite v. Waite, 593 So.2d 222 (Fla. 3d DCA 1991).