SUPREME COURT OF FLORIDA

FRIDAY, OCTOBER 16, 1992

CASE NO. 80,~~846~~ 486

SHERYL DYKSTRA-GULICK,

Petitioner,

vs.

DOUGLAS GULICK,

Respondent.
_____/

District Court of Appeal,
Fifth District No. 91-1992

INITIAL BRIEF OF PETITIONER

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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INTRODUCTION

SHERYL DYKSTRA-GULICK ("DYKSTRA-GULICK") appealed to the Fifth District Court of Appeal from a Final Judgment rendered against her on August 13, 1991, and in favor of DOUGLAS GULICK ("GULICK"). On the 11th day of September, 1992, the Fifth District Court of Appeal rendered its opinion which reversed the decision of the trial court and sent the case back to the trial court to be abated. The Fifth District Court of Appeal also certified the following questions to be 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 against the allegedly negligent spouse for all of the injured spouse's damage, or should the doctrine be abrogated partially to allow such an action where recovery is limited to the extent of insurance coverage?

On the 21st day of September, 1992, DYKSTRA-GULICK filed its notice for review, and on the same day, this Honorable Court entered its Order Postponing The Decision On Jurisdiction And Briefing Schedule.

Pertinent portions of the record will be attached to the brief as an appendix and will be referred to by the designation "A" followed by the page number.

STATEMENT OF THE CASE AND THE FACTS

On May 15, 1987, SHERYL DYKSTRA-GULICK ("DYKSTRA-GULICK") was injured in an automobile accident while riding as a passenger in a vehicle being driven by DOUGLAS GULICK ("GULICK"). The parties were not married at that time. GULICK had insurance at the time of the accident, and DYKSTRA-GULICK was not a member of his household. DYKSTRA-GULICK filed suit against GULICK based upon the allegation that his negligence caused her injuries. Although she was not married to GULICK at the time of the accident, she did subsequently marry him (A-1).

GULICK filed a Motion to Dismiss, asserting that the action was barred by the doctrine of "interspousal immunity." The trial court granted GULICK's Motion to Dismiss (A-2), and later entered its Final Judgment on the Order (A-3). DYKSTRA-GULICK timely filed her Notice of Appeal to the Fifth District Court of Appeal (A-4).

On the 11th day of September, 1992, the Fifth District Court of Appeal rendered its opinion reversing the decision of the trial court and sending the case back to the trial court for entry of an Order abating the cause of the action during the marriage. The Fifth District Court of Appeal also certified the following questions to the Florida Supreme Court to be 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 against the allegedly negligent spouse for all of the injured spouse's damage, or should the doctrine be abrogated partially to allow such an action where recovery is limited to the extent of insurance coverage?

DYKSTRA-GULICK filed her Notice to Invoke Discretionary Jurisdiction to this Court on the 21st day of September, 1992.

SUMMARY OF ARGUMENT

The decision of the Fifth District Court of Appeal in this case followed, with a critical concurring opinion, past decisions of this court. The lower court recognized however that adhering to the doctrine of interspousal immunity, would, under these facts, thwart the very public policy considerations which have been stated to be the basis for its continued existence. Thus, the district court followed its interpretation of the ruling in Sturiano v. Brooks 523 So.2d 1126 (Fla. 1988), Gastone v. Pittman, 224 So.2d 326 (Fla. 1969) and the procedural dictates of Hoffman v. Jones, 280 So.2d 439 (Fla. 1979).

This immunity doctrine, which was originally founded upon the fiction of "*unity*" of the husband and wife at common law, has no rationale in late Twentieth Century Society, and it most certainly has no rationale under facts such as those presented here.

When an injured party must get a divorce to maintain an action for recovery, and when that divorce cannot be collaterally attacked as being obtained solely for the purposes of maintaining such an action, the "doctrine of interspousal immunity" encourages collusion and fraudulent divorces and further encourages the breakup of the family unit. If these considerations are not furthered, the doctrine must fall. Sturiano, *supra*.

This should however, not be left to a case-by-case analysis by the trial court and Florida should now recognize that it is the duty of the judiciary to abrogate this outdated concept as the judiciary has done in forty-four (44) other states, and as the legislature has done in only two (2) states.

ARGUMENT

WHERE ONE SPOUSE PRIOR TO MARRIAGE NEGLIGENTLY INJURES THE OTHER SPOUSE, THE DOCTRINE OF INTERSPOUSAL IMMUNITY SHOULD BE ABROGATED COMPLETELY TO ALLOW THE INJURED SPOUSE TO MAINTAIN A NEGLIGENCE ACTION AGAINST THE ALLEGEDLY NEGLIGENT SPOUSE FOR ALL OF THE INJURED SPOUSE'S DAMAGE, OR THE DOCTRINE SHOULD BE ABROGATED PARTIALLY TO ALLOW SUCH AN ACTION WHERE RECOVERY IS LIMITED TO THE EXTENT OF INSURANCE COVERAGE.

A. INTRODUCTION

It is appropriate that the first Florida decision noting the existence of "interspousal immunity," also dealt with an accident which occurred prior to a marriage. Webster v. Snyder, 133 So. 755 (Fla. 1932). It is now time for those same facts to be the basis for a reinterpretation of the rule itself.

In Webster, Justice Bufford, in his dissent, referred to six (6) other states, whose courts had, as of 1932, interpreted the common law to mean that civil actions between spouses were barred. As of 1992, however, all six (6) of the states cited in Webster as support for the position, had abrogated the doctrine. It is important to note that they had done so by judicial interpretation, not legislative action. McDonald v. McDonald, 412 A.2d 71 (Me. 1980); Shook v. Crabb, 281 N.W.2d 616 (Iowa 1979); Hack v. Hack, 433 A.2d 859 (Pennsylvania 1981); Price v. Price, 732 S.W.2d 316 (Tex. 1987); Surratt v. Thompson, 183 S.E.2d 200 (Va. 1971) and Coffindaffer v. Coffindaffer, 244 S.E.2d 338 (W. Va. 1978).

The methodology by which the courts of these states and the courts of the vast majority of other states have come to the conclusion to abrogate the doctrine of interspousal immunity should now be adopted by this court to do so also.

B. HISTORY

It is often said that the doctrine of interspousal immunity dates to the English common law, and that it was re-adopted and reaffirmed by §201, Fla. Stat. This is not as clear as it might, at first blush, seem.

Between 1863 and 1913, 12 state courts were asked to permit interspousal tort actions. Tobias, 23 GALR 359 (1989). In disallowing this right to sue, the courts simply announced, with little explanation, that there was a "substantive common law rule" of interspousal immunity. Technically, however, there was no such rule. At common law, actions between husband and wife were unknown. (Haglund, Tort Actions Between Husband and Wife, 27 GEO L.J. 697, 704 (1939). "Torts were not considered a discreet branch of law until the late Nineteenth Century" G. White, Tort Law in America 1 (1979). Thus, the courts, universally prior to 1913, took the common law fiction of marital merger (developed and applied by Blackstone), and transformed it into a substantive court rule. W.Prosser and W.P. Keaton, The Law of Torts, Section 122 (5th Ed.).

As each court concluded that there was a common law rule of tort immunity, up until 1913, each also announced that the rule could be modified only by statute (Abbott v. Abbott, 67 Maine 304, 307 (Me. 1887). Freethy v. Freethy, 42 Barb 64, 61-42 (N.Y. 1865).

This view of a substantive rule of common law and a deference to legislative action reached its zenith in Thompson v. Thompson, 218 U.S. 611, 31 S.Ct. 111 (U.S. 1910).

In Thompson, the Court of Appeal for the District of Columbia announced that the "merger doctrine" (i.e. unity) was the basis for interspousal immunity and that only the legislature should modify it. It is interesting to note however that the Thompson court was interpreting a statute which it conceded was designed to destroy such merger and to grant to married woman separate rights. Nonetheless, the court held that because the statute did not expressly and specifically authorize suits between husband and wife, the statute did not abrogate the common law. Thompson, Page 616, 617.

POST-THOMPSON

It would seem logical to assume therefore that, after Thompson, the courts would hold that the common law recognized "interspousal immunity" and that the doctrine could only be changed by legislative action. Such has, almost universally, not been the case.

By 1981, twenty-seven (27) states had completely abrogated the doctrine of interspousal immunity. Hack v. Hack, 433 A.2d 859 (Pa. 1981). Of those twenty-seven (27) states, only one state (New York) had abolished the doctrine by legislation, Hack, *supra* Page 69. Of the remaining twenty-six (26) states abrogating the rule, one, Illinois, had judicially abolished the rule only to later have it legislated back into existence and finally, legislated out of existence. (Hack, *supra* and Illinois Revised Statutes 1987, Chapter 40). Thus, in only two instances had the legislatures acted and in the others, the court took the lead.

In addition to these twenty-seven (27) states which had totally abrogated the

rule, eleven (11) states had judicially modified the rule of interspousal immunity. Thus, as of 1981, twelve (12) states and the District of Columbia still followed the common law doctrine of interspousal immunity, Hack, *supra* Page 69.

D. THE DIMINISHING THIRTEEN

Although twelve (12) states and the District of Columbia still adhered to the old common law rule of "interspousal immunity" as of 1981, as of today, that number has been reduced to four (4) states plus the District of Columbia. Of the eight (8) states which have abrogated the rule during this time, not one has done so through the legislature.

The decisions in these eight (8) states are as follows:

1. In Delaware, the Supreme Court not only held that one spouse may sue another, but also that the Federal Constitution does not place any limitations upon abrogating interspousal immunity. Alfree v. Alfree, 410 A.2d 161 (Del. 1979). This decision criticized Mountjoy v. Mountjoy, 206 A.2d 733 (D.C. D.C.A. 1965) which had cited Thompson with approval and had stated that any change in the doctrine of interspousal immunity should be done by the legislature.

2. In Mississippi, the doctrine of interspousal immunity was judicially abrogated in 1988. Burns v. Burns, 518 So.2d 1205 (Miss. 1988).

3. In Montana, in 1986, the doctrine of interspousal immunity was abrogated based upon the tenet that judicial modification of common law is sometimes required to prevent great injustice or to insure that common law is consonant with the changing needs of society. Miller v. Miller, 721 P.2d 342 (Mont.

1986).

4. In Iowa, the doctrine of interspousal immunity was abrogated in 1985, along with all other inter-family immunities. Shearer v. Shearer, 480 N.E.2d 388 (Iowa 1985).

5. Oregon followed suit in 1987. Heino v. Harper, 759 P.2d 253 (Or. 1987).

6. In Tennessee, while noting the court's prior adherence to the common law doctrine and its previous desire to defer to the legislature, abrogated the doctrine of interspousal immunity judicially in 1983. Davis v. Davis, 657 S.W.2d 753 (Tenn. 1983).

7. In Utah, the doctrine of interspousal immunity was apparently abrogated in 1980, Stoker v. Stoker, 616 P.2d 590 (Utah 1980), although some doubt has been cast upon the application of the doctrine in negligence cases. State Farm Mutual Automobile Insurance Company v. Mastbaum, 748 P.2d 142 (Utah 1987).

8. Similarly in 1987, Wyoming abrogated the doctrine of interspousal immunity and held that the new rule was to be applied both prospectively and retroactively. Tader v. Tader, 737 P.2d 165 (Wyo. 1981).

Of the ten (10) states which were noted in Hack, *supra*, to have modified the common law rule of interspousal immunity (Hack actually lists eleven, but Oregon is listed twice), all have now judicially abrogated the common law doctrine. Fernandez v. Romo, 646 P.2d 878 (Ariz. 1982), an automobile accident; Flag v. Loy, 734 P.2d 1183 (Kansas 1987); Boblitz v. Boblitz, 162 A.2d 506 (Md. 1983); S.A.V. v.

K.G.V., 708 S.W.2d 651 (Mo. 1986); Rupert v. Stienne, 528 P.2d 1013 (Nevada 1974); Maestas v. Overton, 531 P.2d 947 (N.M. 1975); Heino v. Harper, 759 P.2d 253 (Or. 1987); Digby v. Digby, 388 A.2d 1 (R.I. 1978); Price v. Price, 732 S.W.2d 316 (Tex. 1987), a case also dealing with a pre-marriage accident; Richard v. Richard, 300 A.2d 637 (Vt. 1973); Surratt v. Thompson, 183 S.E.2d 200 (Virginia 1971).

Thus, as previously stated, only four (4) states and the District of Columbia cling to the archaic concept, and of the forty-six (46) states which have abrogated the concept, only two (2) states have done so by statute (New York and Illinois).

E. THE REMAINING FOUR AND FLORIDA - THE LAST HOLD-OUTS

Thus, it appears that the doctrine of interspousal immunity still has at least some viability in the District of Columbia, Georgia, Hawaii, Louisiana and lastly, and hopefully not truly lastly, Florida.

Of these five (5), only two (2) states strictly adhere to the traditional common law interspousal immunity doctrine, the District of Columbia, Mountjoy v. Mountjoy, 206 A.2d 733 (D.C. D.C.A. 1965) and Hawaii, Peters v. Peters, 634 P.2d 586 (Hawaii 1981).

In Georgia, the doctrine of interspousal immunity has been judicially abrogated in favor of a case by case analysis when the facts of that particular case no longer support the reason for the doctrine's existence. Stanfield v. Stanfield, 371 S.E.2d 265 (C.A. Ga. 1988). The burden is however on the Plaintiff to show that the relationship is so "acrimonious" as to overcome interspousal immunity.

In Louisiana, the only state to statutorily mandate interspousal immunity, the

cause of action is revived upon divorce. In other words, it is only suspended during the term of the marriage for torts occurring during the marriage. Myhre v. Erler, 575 So.2d 519 (La. 5th Cir. 1991).

Thus, forty-six (46) states, and arguably Georgia, have abrogated the common law doctrine of interspousal immunity. Only two (2) states have done so statutorily. The remaining forty-four (44) states, operating under the same constraints as does this court relative to "stare decisis" and adherence to the common law, and deference to the legislature, nonetheless, judicially, stepped forward to abrogate the doctrine of interspousal immunity.

The Texas Supreme Court, pointed out the anomalies that were being created by the continued reliance upon the rationale of Thompson when it noted:

> "While the new legislation (The Married Women Acts) forced recognition of the rights of a married woman to recover from her husband if he broke the leg of her mule, the courts continued to clothe him with immunity if he torturously broke his wife's leg." Price, *supra* Page 317

F. FLORIDA

In Florida, the doctrine of interspousal immunity, although weakened, statutorily modified and now based upon a theory that did not exist at common law, is apparently still alive. Sturiano v. Brooks, 523 So.2d 1126 (Fla. 1988).

In Sturiano, the last decision of this court dealing directly with the doctrine of interspousal immunity, this court analyzed the history of the doctrine and made several statements which do not appear to be reconcilable:

First,

> "The common law unit concept is no longer a valid justification for the doctrine of interspousal immunity." Sturiano, *supra* Page 1128.

Second,

> "That the court would not "blindly" adhere to a doctrine of interspousal immunity that has no application to these facts. To do so would promote injustice for the sake of expediency and consistency." Sturiano, *supra* Page 1128.

Third,

> "Snowten and the doctrine of interspousal immunity are still good law." Sturiano, Page 1128. Snowten v. United States Fidelity and Guaranty Co., 475 So.2d 1211 (Fla. 1985).

Finally, fourth,

> "We hold that when no such policy considerations exist, the doctrine of interspousal immunity is waived to the extent of applicable liability insurance." Sturiano, *supra* Page 1128.

The difficulty in resolving the above-described four statements is made apparent by the decision in Waite v. Waite, 593 So.2d 222 (Fla. 3rd DCA 1991). In Waite, a wife brought an action against her former husband for an intentional assault occurring apparently while he was insane. The parties were subsequently divorced. Thus, while the facts were not exactly the same as in Sturiano (i.e. the husband was still alive), the policy considerations would be the same.

If we look at these policy considerations, as cited in Sturiano, as the sole basis for the existence of interspousal immunity, then the immunity most certainly should not be applied under the facts of Waite nor under the facts of the instant case.

These considerations were:

> "Domestic tranquility, peace and harmony in the family unit, and the possibilities of fraud or collusion." Sturiano, *supra* Page 1128.

In addition, if we then look at the specific holding of Sturiano, *supra* Page 1128, and we look at the facts of each individual case, then the immunity should not apply neither in Waite nor the instant case.

How is it possible to reconcile this with Snowten and the continued existence of the doctrine of interspousal immunity? There is no way, unless Sturiano stands for the proposition that it must be done on a case by case basis. In other words, the decision would be made by the trial court on the facts of each case on general criteria developed by the Appellate Courts. This apparently is the law of Georgia. Stanfield v. Stanfield, 371 S.E. 2d 265 (C.A. Ga. 1988).

If this is the law, clearly the spouses in both Waite and the instant case should be allowed to maintain their actions.

To illustrate why the considerations of "domestic tranquility, peace and harmony in the family unit and the possibilities of fraud of collusion" are not furthered by application of the doctrine in the instant case, it is only necessary to consider the impact that an accident would have upon an otherwise cohesive family unit. Consider the following example:

> Boy and girl fall in love and are engaged to be married. By religion and by family training they desire a traditional family unit and marriage for their lifetime. Boy has a policy of automobile insurance with a one million dollar limit. Boy and girl are making arrangements for their wedding and are traveling in his automobile when, because of his concentration on other matters (probably his impending marriage) he runs a stop light and girl is rendered a quadriplegic because of a broken neck.

At this point in time assume two possibilities:

> First, they go to a lawyer and the lawyer advises them not to get married and to bring a law suit and have it completely concluded before they marry; does this encourage any of the policy considerations stated?
>
> Or second,
>
> Consider that they are unaware of the law and because of their strong love and desire to be a family unit and notwithstanding the girl's injuries they proceed to get married. They are then told that the wife's injuries will go uncompensated unless they get a divorce. They are further told that if they get a divorce no one can challenge their divorce as being fraudulently obtained.

These examples clearly show that imposing the "doctrine of interspousal immunity" under these facts, does not foster the policy considerations cited in Sturiano.

While it must be argued, from the standpoint of this case, most strongly, that Sturiano can be interpreted to allow a cause of action on a case by case analysis, wouldn't it be wiser to recognize the absurdity of continuing to follow a doctrine whose time has come and past? Wouldn't it be wiser to allow juries to have all of the information to evaluate the honesty and truth and potential for collusion? Is the nature of family life or the existence of these policy considerations any different in the forty-six (46) other states that have abrogated the doctrine of interspousal immunity? Don't these other states have the same obligations as to the "common law" and deference to the legislature? Clearly, the answers to all of these questions urge that the doctrine be abrogated, and be abrogated now.

As has been stated, the common law does not require blind adherence to an

outdated concept. The maxim *cessante ratione cessat et ipsa lex* is also a part of the common law that was adopted by § 201, Fla. Stat. Randolph v. Randolph, 146 Fla. 491, 1 So.2d 480, 481 (Fla. 1941). Ripley v Ewell, 61 So.2d 420 (Fla. 1952). Thus, when conditions require the common law to be modified, there is a common law duty to judicially do so.

Further, it can be, and has been, argued that the doctrine is "inconsistent" with the Constitution and laws of this state. See Justice Roberts' dissent in Amendola v. Amendola, 118 So.2d 13 (Fla. 1960). § 708.08 and 708.09, Fla. Stat. Art. I, § 21, Fla. Const.; Art. I, § 9, Fla. Const.; Art. I, § 21, Fla. Const.

In addition, as noted by Justice Roberts in Amendola, *supra*, if a spouse can do indirectly what that spouse cannot do directly, how are any public policy considerations served by the immunity?

As of Webster, the spouse could sue the employer of a spouse for that spouses negligence.

In Paoli v. Shor, 345 So.2d 789 (Fla. 4th DCA 1977) it was held that interspousal immunity was no bar to an action based upon contribution among joint tortfeasors.

In Shiver v. Sessions, 80 So.2d 905 (Fla. 1955), it was held that a spouse could sue the spouse's estate for torts occurring during the marriage.

In Ard v. Ard, 414 So.2d 1066 (Fla. 1982), an unemancipated minor child was allowed to sue a parent in negligence actions.

From a policy consideration standpoint, how are any of these cases truly

different from holding a third party liable when that third party is an insurance company?

Each one of the courts in the forty-four (44) states which have abrogated the doctrine of interspousal immunity by judicial interpretation have dealt with these issues of policy considerations. They have each found them insufficient to support the continued existence of the doctrine of interspousal immunity. They have also each overcome the argument that they should defer to the legislature.

Maine in abrogating the doctrine, noted that it "was originally fashioned by the courts." McDonald vs. McDonald, 412 A.2d 71 (Me. 1980). The court added that it was the "primary responsibility" of judges to judicially change the common law "when they perceive that its operates erratically with respect to the fulfillment of its underlying purpose and produces undesirable results in frequently recurring kinds of situations." McDonald, Page 74.

Along the same lines, the Pennsylvania Supreme Court stated:

> "...It is the essence of common law courts today, as in earlier times, to view the body of the law as a living and developing legal system, designed to serve societal needs in elevating the life and utility of the law rather than as a static set of rules..."
>
> Precedence speak for the past, policy for the present and the future. The goal which we seek is a blend which takes into account in due proportion the wisdom of the past and the needs of the present. McDonald, *supra* Page 74.

CONCLUSION

The present state of Florida law, if it requires a spouse to get a divorce before an action may be maintained for a pre-marriage tort, encourages the breakup of the family unit and collusion among family members. Under Sturiano *supra*, the doctrine of interspousal immunity should be abrogated under these facts at least to the extent of any applicable insurance.

In addition, the application of the doctrine in this case shows that the time has come for Florida to join its sister forty-four (44) states in judicially abrogating this doctrine entirely.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and exact copy of the foregoing Initial Brief has been furnished by U.S. Mail this 16th day of October, 1992 to Anthony J. Salzman, Esquire, Attorney for Respondent, Post Office Drawer 2759, Gainesville, Florida, 32602.

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APPENDIX