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IN THE SUPREME COURT OF FLORIDA

SOUTHWEST FLORIDA REGIONAL MEDICAL CENTER, INC., a Florida corporation,	)	
Appellant,	)	
vs.	)	CASE NO. 84,670 District Court of Appeal, 2nd District - No. 93-02766
BARBARA E. CONNOR,	)	
Appellee.	)	

INITIAL BRIEF OF APPELLANT, BARBARA E. CONNOR

ON APPEAL FROM THE DISTRICT COURT OF APPEAL
SECOND DISTRICT, STATE OF FLORIDA

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STATEMENT OF THE CASE

Southwest Florida Regional Medical Center (hereinafter "Southwest") initiated this action by filing a Complaint alleging that it had provided reasonable and necessary medical services and supplies to Kenneth R. Connor. R. at 1-5. The Complaint alleged that Mr. Connor had not made full payment for said services and supplies and requested judgement against him for damages pursuant to a written agreement he had signed upon entering the hospital. R. at 1-2. The agreement which Mr. Connor had signed included spaces for the signature of Mr. Connor's spouse, Barbara Connor, or of a guarantor. R. at 5. Southwest, however, failed to obtain the signature of Mrs. Connor or of any party other than Mr. Connor. R. at 5.

Despite their failure to obtain a contractual commitment from her, Southwest nevertheless joined Barbara Connor as a defendant to its action against Mr. Connor, alleging that she was liable for the services rendered to her husband because he was unable to pay for them. R. at 1-2. Barbara Connor moved to dismiss Southwest's Complaint on the basis that she had never agreed to pay for the services and supplies rendered to her husband and that the hospital had no cause of action against her. R. at 9-10. Both sides filed Memoranda of Law addressing the issue of whether or not the common law doctrine of necessaries could be applied to create liability in Mrs. Connor for medical care rendered to her husband. R. at 12-36. In its Memorandum the hospital argued that Mrs. Connor, despite the fact that she had not expressly agreed to pay the hospital, should nevertheless be required to pay under the doctrine of necessaries. R. at 19-30. Mrs. Connor's response explained that her case was controlled by the Florida Supreme Court's decision in *Shands Teaching Hospital & Clinics, Inc. v. Smith*, 497 So.2d 644 (Fla. 1986), which had declined to extend the doctrine of necessaries to wives. R. at 12-18 and 31-36. Mrs.

Connor asserted that there was, as a consequence of that decision, no legal basis for the hospital's claim against her. R. at 12-18 and 31-36. Southwest argued that the case was controlled by *Webb v. Hillsborough County Hospital Authority*, 521 So.2d 199 (Fla. 2d DCA 1988) and that Mrs. Connor could therefore be found liable under the doctrine of necessaries. R. at 19-30.

The trial court dismissed Southwest's action against Mrs. Connor on the authority of this court's decision in *Shands*. R. at 37-39. It held that the decision of the Second District in *Webb* to extend the doctrine of necessaries was not essential to the holding in that case and that even if it were, it would conflict with this court's decision in *Shands* and could not therefore be the law of Florida. R. at 38. The trial court rendered its Order that Barbara Connor be dropped from this action with prejudice on July 6, 1993. *Id.*

Southwest appealed the order of the trial court to the Second District Court of Appeals. R. at 40. The Second District acknowledged the fact that their opinion in *Webb* conflicted with the law in Florida's Fourth and Fifth District. *Southwest Florida Regional Medical Center v. Connor*, 643 So.2d 681, 684-685 (Fla. 2d DCA 1994). They expressly recognized that this Court, in *Shands*, had directed that any extension of the doctrine of necessaries to create liability in the wife must be left to the legislature. *Id* at 683-684. Two of the three justices hearing the instant case admitted that the *Webb* decision had gone too far. *Id* at 685-686. The majority admitted that their own court had previously rejected *Webb* as precedent for this issue in *Rydstrom v. Bayfront Medical Center*, 632 So. 2d 143 (Fla. 2d DCA 1994). *Id* at 684, *Footnote* 2 and 686. The majority cited the fact that no other Florida court had adopted the reasoning in *Webb*. *Id* at 684. Nevertheless, the Second District reversed the lower court's decision to

dismiss Barbara Connor on the authority of *Webb* and certified a conflict with the Fourth and Fifth Districts. *Id* at 685. Barbara Connor now appeals that decision.

SUMMARY OF ARGUMENT

The doctrine of necessaries was never intended to afford a third party the ability to sue one spouse for the debts of the other. Rather, it was intended to protect contractually disabled married women by allowing them to pledge their husband's credit to obtain necessary goods and services from merchants. Faced with the possibility that merchants would not enter into credit arrangements for necessaries with a married woman because her contracts could not be enforced, the common law created an agency in the wife to pledge the credit of her husband, in place of her own. The doctrine of necessaries made that pledge enforceable against the husband so long as the goods or services which the wife obtained on his credit were for necessary items. In addition, the creditor was obligated to prove that the goods and services were intentionally rendered on the credit of the husband and not on the sole credit of the wife and that such an intention existed between the wife and the creditor at the time the transaction took place.

With the removal of the married woman's contractual disability, there is no longer a viable reason for retaining the doctrine of necessaries. A married woman's contractual authority is now no different than her husband's. Moreover, the original doctrine is clearly a violation of the Florida and federal constitutions in that it imposes a burden upon married men which is not imposed upon married women. Despite these facts the Second District, in *Webb v. Hillsborough County Hospital Authority,* 521 So.2d 199 (Fla. 2d DCA 1988), faced with an equal protection challenge brought by a husband, chose to extend the doctrine of necessaries to apply equally to both spouses rather than to abrogate it. Appellant contends that the decision in *Webb* was incorrect, that it conflicts with this court's decision in *Shands Teaching Hospital & Clinics, Inc.*

v. Smith, 497 So.2d 644 (Fla. 1st DCA 1986) and that it should be overturned. As a consequence, the decision of the trial court in the instant case should be affirmed.

Shands expressly and unequivocally addressed the issue of whether or not it is the proper place of the judiciary to extend the doctrine of necessaries. In that case, the Florida Supreme Court held that any extension of the doctrine must come from the legislature. Appellant contends that the presence of an equal protection challenge did not change the need to apply the *Shands* decision to *Webb,* or to the present case. The presence of the equal protection challenge in *Webb* did required the appellate court to act. However, because *Shands* had directed that a modification of the doctrine of necessaries was the province of the legislature, the only proper act available to the *Webb* court was to abrogate the doctrine altogether. Their decision to modify it was error because it was a clear violation of Florida Supreme Court precedent in the *Shands* case. Put simply, *Shands* mandated the abrogation of the doctrine of necessaries as the remedy for an equal protection challenge because it specifically forbad judicial extension. This mandate was improperly ignored in both *Webb* and the present case.

Beyond precedent, judicial extension of the doctrine of necessaries would simply be a mistake. The historical basis, foundation and policy for the original doctrine vanished with the removal of the woman's contractual disability. Extension would therefore create entirely new law, untied to the reason behind this common law rule and unjustifiable by any interpretation of the original doctrine. In *Shands* it was clearly recognized that the extension of *existing* common law with respect to the doctrine of necessaries was the province of the legislature. The creation of what is tantamount to *new* law is unequivocally outside the authority of the judiciary. The decision of the trial court must therefore be affirmed.

ARGUMENT

I. Jurisdiction

This appeal centers upon the modern day application of the common law doctrine of necessaries and, more particularly, upon whether that doctrine should be extended to allow third party creditors to recover the cost of medical services provided to the husband from the wife when the wife has made no independent agreement to pay for those services. The appellant has maintained that no such liability exists in Florida based upon this Court's decision not to extend the doctrine of necessaries in *Shands Teaching Hospital & Clinics, Inc. v. Smith,* 497 So.2d 644 (Fla. 1st DCA 1986) and upon later decisions by the Fourth and Fifth District Courts of Appeal in *Faulk v. Palm Beach Gardens Community Hospital, Inc.*, 589 So. 2d 1029 (Fla. 4th DCA 1991); *Waite v. Leesburg Regional Medical Center*, 582 So. 2d 789 (Fla. 5th DCA 1991) and *Halifax Hospital Medical Center v. Ryals*, 526 So. 2d 1022 (Fla. 5th DCA 1988), all following the *Shands* precedent. Because the Second District declined to follow these precedents in the case at bar, this Court has discretionary jurisdiction pursuant to Rule 9.030(a)(2)(iv) of the Florida Rules of Appellate Procedure.

Appellant maintains that there is currently a direct conflict between the appellate decision in the instant case and the prior decision of this Court in *Shands*. Appellant further maintains that there is a direct conflict between the present decision and decisions of other Florida district courts in *Faulk, Waite* and *Halifax.*

The Second District Court of Appeals has recognized and certified the conflict between their decision in the instant case and decisions by the Fourth and Fifth districts in *Faulk, Waite*

and *Halifax*. Thus, this court also has discretionary jurisdiction over this matter pursuant to Rule 9.030(a)(2)(vi) of the Florida Rules of Appellate Procedure. Appellant would urge the Court to accept jurisdiction of this appeal for the reasons indicated by the Second District in their decision in this case. The conflict between the districts presents an inconsistency and instability in the law of Florida. The law regarding the doctrine of necessaries varies by jurisdiction within the state. This, if left unresolved, will accord disparate treatment to individual married women in Florida depending upon where they reside and, as is hereafter explained, will allow the perpetuation of a doctrine founded upon inequality between the sexes.

II. Argument

> "Imaginative interpretation of constitutions and statutes is well within the prerogative of the judiciary, but when courts ignore the broad powers within their prerogative and attempt to modify the common law rules because they are "outmoded" or "anachronistic", they confuse the judicial role with the legislative."

Shands Teaching Hospital and Clinics, Inc., v. Smith, 480 So. 2d 1366, 1375 (Fla. 1st DCA 1985) (Barfield, J., concurring) [hereinafter *Shands I*].

I.

The doctrine of necessaries, as it originally developed under the common law, provided that a husband could be held liable under specific circumstances for necessary goods or services purchased by his wife. 41 AM. JUR. 2D *Husband and Wife* §348 (1964). The imposition of such liability depended upon many factors, including the character of the goods or services provided, the wife's misconduct, her separate earning capacity, the status of the marriage, the good faith of the provider and whether notice had been given to the merchant that the wife was

not permitted to pledge the credit of her husband. *Id.* The doctrine did not automatically impose liability on the husband. *Runkel v. Southeast Palm Beach Hospital District,* 453 So.2d 939, 940 (Fla. 4th DCA 1984). Instead, it created an agency in the wife whereby she could pledge the credit of her husband to any provider that might be hesitant to supply her with necessaries on her own credit due to her contractual disability. *Phillips v. Sanchez,* 17 So. 363, 364 (Fla. 1895) (wife has authority to bind husband as his agent for necessaries without the creation of an express agency in her); *Holiday Hospital Association v. Schwarz,* 166 So. 2d 493, 495 (Fla. 2d DCA 1964) (wife is an agent able to pledge the credit of her husband); *Runkel* at 940 (Fla. 4th DCA 1984); *See also* 41 AM. JUR. 2D *Husband and Wife* §349 (1964). Without such a pledge and without an intention on the part of the creditor to bind him, the doctrine did not operate to create liability in the husband for necessaries provided to his wife. *Id.*

The doctrine of necessaries remained unchanged and in force in this and in many other states after the passage of Married Women's Acts removed the contractual disability giving rise to it. *See especially* §708.08, Fla. Stat. (1943). At the time of the *Phillips* decision this agency relationship was thought necessary to ensure the continued support of the married female whose identity, and thus her independence, had merged into her husband. A married woman, unlike a single woman at that time, was unable to assure third parties that they would have any recourse against her if she failed to pay for the goods or services which were tendered on her credit. The danger to the creditor was that the woman could disaffirm her contract and not pay. Yet, it was not concern for the creditor which engendered the doctrine of necessaries. *Holiday* at 495 (doctrine of necessaries is "not for the benefit of the creditor furnishing goods and services").

Rather, the doctrine of necessaries "was engrafted in the law for the benefit of the wife". *Id.* The overarching public policy consideration giving rise to it was that a married woman might, under certain circumstances, be left without any means of obtaining goods and services necessary to her survival. At the time *Phillips* was decided, as now, a husband was required to provide necessary goods and services to his wife. If he failed to do so it was feared that the wife's contractual disability would rob her of the means to independently obtain those goods by discouraging creditors from dealing with her. The doctrine of necessaries was created to avoid such a result. The law, myopic as it was, had taken the woman's independence away by legal operation of marriage. Having done so, it must then ensure that she is fed, clothed and taken care of.

This was the reasoning behind the doctrine of necessaries. It is reasoning which was rooted in outdated principles and a male dominated ethos, confusing because it controverts the logic of present times. Yet confuse it does. Often characterizing it as arising from the husband's duty to maintain and support his wife, courts which have allowed the doctrine of necessaries to continue to operate in the modern world have reasoned that, since the support duty has been extended by the legislature to include a reciprocal obligation in the wife to support the husband, so to must the doctrine of necessaries be broadened to create a liability in her. *See Jersey Shore Medical Center-Fitkin Hospital v. Estate of Baum*, 417 A. 2d 1003, 1005 (N.J. 1980); *Webb v. Hillsborough County Hospital Authority*, 521 So. 2d 199, 205 (Fla. 2d DCA 1988); *St. Francis Regional Medical Center, Inc. v. Bowles*, 836 P.2d 1123, 1127 (Kan. 1992); *Richland Memorial Hospital v. Burton*, 318 S.E. 2d 12, 13 (S.C. 1984). This is faulty

reasoning, incorrectly premised, based upon a creditor friendly misapplication of the original common law rule.

The doctrine of necessaries did not arise from the duty of maintenance and support, it arose from the contractual disability which the unity concept of marriage created in women. Alone, the duty of maintenance and support created no cause of action in third party creditors and obligated the husband only to his wife. *See* §61.09 Fla. Stat. (1993); *Wood v. Wood,* 47 So. 560 (Fla. 1908). It did not give rise to the doctrine of necessaries because there was no reason for it to do so. A woman had as viable a cause of action against her husband for support then as she does now. Rather, the legal disability of the married woman made the doctrine necessary, for without that disability her contractual capacity to acquire necessary goods and services *on her own* would have been no different than her husband's. It was the potential for disaffirmance of the married woman's contract which caused the creditor to refrain from tendering necessary items, irrespective of whether or not she *could* pay. Eliminating the ability to disaffirm equalized the sexes and removed any reason for the doctrine. With earning capacity nearing equality as well, it certainly cannot be said today that a married woman is without the ability to support herself or to establish her own credit. Thus, the doctrine of necessaries now serves no objective and the equalization of the duty of maintenance and support by the legislature, far from being a keystone in the logic militating for the extension of the doctrine is, in fact, yet another advancement in the perception of women which argues for the *abolition* of the common law rule. The recognition of equality should not be allowed to serve as the basis for the preservation of law which is founded upon inequality.

There is still another reason why the equalization of the duty of maintenance and support should not be used as the vehicle for extending the doctrine of necessaries. Unlike the doctrine, the maintenance and support obligation was recognized by the legislature as having a presently viable and important function *between the marital partners* which is not founded upon inequality but upon the equal obligation that each spouse has *to the other*. To use this recognition as a basis for extending the doctrine of necessaries ignores not just the circumstances giving rise to the common law rule but the party which was originally intended to benefit. The cases which employ this reasoning universally posit that, since spouses are now equal, each should expect to be liable for the others debts.[1] Assuming that this statement is true does not lead inevitably to the conclusion that this "expectation" between the spouses runs to the benefit of the creditor. Clearly, each spouse has a right as against the other, but to create such a right in the creditor under a duty not running to that third party is something wholly new which modifies the support obligation itself. *Shands I* at 1367; *See also Condore v. Prince George's County,* 425 A.2d 1011, 1019 (Md. 1981). Beyond the fact that such a modification of the support obligation has been preempted by legislative enactments on the subject, *Shands I* at 1369, it is an extension which exceeds even that given to third party intended beneficiaries under contract law. In contract, an intended beneficiary must at least show that it was the specific intention of the parties that the contract benefit the third person before the third person will be permitted to enforce it. RESTATEMENT 2D CONTRACTS §302. Certainly married individuals do not pledge to support one another with the intention that their union will be for the benefit of their

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[1]See *Jersey Shore Medical Center-Fitkin Hospital v. Estate of Baum*, 417 A. 2d 1003, 1008-1010 (N.J. 1980) for an example of this reasoning.

creditors, yet the net effect of extending the doctrine of necessaries would be to allow a third party creditor to enforce the support obligation between the partners for its own benefit.

Clearly, the courts which have presented this "expectation" theory have wrestled with the fact that they are using the support obligation between the spouses to extend a doctrine which will afford no benefit to the parties it was intended to protect. Not surprisingly, this grappling seems to have given rise to a desire to articulate a viable benefit running to the spouses. This desire remains unfulfilled. Beyond mere statements that they are motivated by important considerations, courts extending the doctrine of necessaries seem limited in their rationale to the statement that their activism will achieve the public policy goal of ensuring that the husband is not turned away at the hospital. *See North Carolina Baptist Hospitals, Inc. v. Harris*, 354 S.E. 2d 471 (N.C. 1987) (where the court states that there are several beneficial functions to the doctrine but only cites encouragement of the health care provider to treat married persons). It need only be said of this reasoning that it begs too many questions. Are single women turned away at the hospital because they are not married? Does the hospital even engage in a marital inquiry before treating a patient?[2] What about single men, single mothers, single fathers, couples simply living together? Are all of these unmarried individuals currently receiving substandard treatment because they are *not* married? The rationale that the doctrine of

[2] It should be noted that this is an important issue in another respect. Under the original doctrine, as previously explained, the creditor must *intend* to secure the credit of the other spouse. Additionally, the wife must *not* intend to pledge her own credit but, rather, must be acting within her agency. It is difficult to see how a hospital can show that it intended at the outset to secure the credit of the husband when it does not *first* ensure the sufficiency of the individual credit of the wife and then seek the credit of the husband from her. Where no marital inquiry is made at the outset, it is similarly difficult to see how the hospital could ever show that it *intended* to establish any rights at all under the doctrine.

necessaries should be extended as an outgrowth of the equality of the support obligation is simply unsound. It is a rationale that crumbles upon close scrutiny.

II.

Beyond leaving it as a rule without a reason, the passage of the Married Women's Property Act also left the doctrine of necessaries as an unrealized inconsistency in the law. To withstand scrutiny under the Equal Protection Clause, "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." *Califano v. Webster,* 430 U.S. 313, 316-317, 97 S. Ct. 1192, 51 L. Ed. 2d 360 (1977). The doctrine of necessaries always created a classification subject to scrutiny, providing different treatment to men and women under the law. While it is true that the doctrine does not appear to have been constitutionally challenged prior to the abolition of the unity concept of marriage, in that original context it did have the important objective of providing necessary goods and services to married women which may not otherwise have been obtainable. The means of attaining that objective were also substantially related to it. If a married women was, as a result of her marriage, deprived of her ability to enter into contracts independent of her husband, then providing a conditional agency in her for the purchase of necessary goods and services on her husband's credit is a logical method for resolving an important social objective. This, notwithstanding the fact that the contractual disability was itself a violation of equal protection.

Removal of the contractual disability of married women, however, removed all justification for the doctrine, leaving an outmoded anachronism in the law wide open to constitutional

challenge and grievously suspect at its core. Interestingly, this potentially explosive pocket appears to have remained untouched, at least at the appellate level, for some time.[3] It was not until hospitals began to exploit the doctrine in an attempt to recover the cost of medical services provided to the husband from the wife that its anachronistic nature and its constitutional infirmities became apparent.

The first case to reach the appellate level in Florida in which a hospital sought to establish liability in the wife under the doctrine of necessaries was *Manatee Convalescent Center, Inc., v. McDonald,* 392 So. 2d 1356 (Fla. 2d DCA 1980). This case was followed a short time later by *Parkway General Hospital, Inc. v. Stern,* 400 So. 2d 166 (Fla. 3d DCA 1981), which endorsed and adopted the reasoning in *Manatee*. Both cases involved a hospital's attempt to recover from a wife for medical services rendered to the husband. *Id.* Without resort to an equal protection analysis not then available, the *Manatee* court reasoned that *Gates v. Foley,* 247 So. 2d 40 (Fla. 1971) provided them with sufficient authority, and an obligation, to modify the common law to extend the doctrine of necessaries to both sexes. In support of this reasoning, *Manatee* cited a now familiar passage from *Gates*:

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[3] The first case involving the doctrine of necessaries as it relates to the instant issue appears to be *Holiday Hospital Association v. Schwarz,* 166 So. 2d 493 (Fla. 2d DCA 1964). This case was brought by the hospital against the husband and the wife for services rendered to the wife prior to her death. The hospital sought to find the husband liable under the doctrine of necessaries. The husband defended on the common law basis that he had been separated from his wife, had initiated divorce proceedings based on her misconduct and had complied with an award of temporary alimony to her by the court. Summary judgement was entered by the trial court against the hospital with respect to the husband and the Second District Court of Appeals affirmed. The husband apparently failed to raise a constitutional challenge to the doctrine and relied upon his common law defenses.

> "The law is not static. It must keep pace with changes in our society, for the doctrine of stare decisis is not an iron mold which can never be changed.
>
> . . . . . .
>
> It may be argued that any change in this rule should come from the legislature.... Legislative action could, of course, be taken, but we abdicate our own function, in a field peculiarly non-statutory, when we refuse to consider an old and unsatisfactory court-made rule."

Id at 43. Upon this authority and the trend of decisions on the issue which it claimed were pointed out in *Jersey Shore Medical Center-Fitkin Hospital v. Estate of Baum,* 417 A. 2d 1003 (N.J. 1980), the Second District Court of Appeals made its first attempt to expand the doctrine of necessaries by declaring that the law had changed. *Manatee* at 1358.

However, *Manatee*'s reliance on *Gates* for authority to expand the doctrine of necessaries was misplaced. Admittedly, *Gates* is confusing. In the context of the present issue it would appear to support the view that the Court has extended causes of action to women which had previously been afforded only to men. Assuming this premise, there would appear to be precedent for the decision to modify the common law and to extend the doctrine of necessaries to allow a married woman to be held liable for the debts of her husband. In reality, this is a cursory interpretation which ignores the basis of the decision in *Gates* as well as the foundation and policy behind the doctrine of necessaries.

In *Gates*, a wife sought the right to bring a cause of action for damages against a defendant for loss of consortium due to an injury to her husband. Florida had previously disallowed the wife's right to assert this common law action based upon the unity concept of marriage and the wife's lack of a separate existence. *Ripley v. Ewell,* 61 So.2d 420 (Fla. 1952). *Gates* recognized that the passage of the Married Woman's Property Act removed this disability and noted that

a wife was now separate from and equal to her husband. *Gates* at 44. As a result, the court held that the *bar* to the married woman's right to maintain a suit for loss of consortium no longer had any legal justification. *Id.* Finding that "medieval concepts which have no justification in our present society should be rejected", the Court held that *Ripley* must be overturned and that the *discriminatory court made rule* preventing the assertion of the loss of consortium cause of action by married women must be abolished. *Id* at 45 ("The classification by sex formerly made by this Court discriminates unreasonably and arbitrarily against women and must be *abolished".*).

The appellant does not dispute the fact that the net effect of the decision in *Gates* was to allow married women access to a new cause of action. The difference between *Gates* and the present case lies in the fact that the viability of the cause of action for loss of consortium was never itself in question. Far from being an anachronism, the right to sue for loss of consortium was recognized in *Gates* as a "precious" right. What was considered anachronistic in *Gates* was case law and precedent which *barred* the woman's right to assert a cause of action. The court never considered extending the bar to loss of consortium claims such that it would apply equally to men, since the cause of action was itself viable and there was no reason to eliminate it. Instead, the *Gates* court expressly overruled case law disallowing the assertion of the cause of action by women and thereby abolished the outmoded bar to such claims.

Like the impediment to a woman's right to assert a cause of action for loss of consortium in *Gates*, the doctrine of necessaries has as its foundation the disability which the unity concept had imposed upon married women. Because she had no separate ability to contract, it was necessary to extend to the wife some method to acquire necessary goods and services when her husband refused to provide them. The passage of the Married Women's Property Act removed

the married woman's contractual disability but left the doctrine of necessaries ostensibly intact, just as the bar to the right to assert a cause of action for loss of consortium was left intact until *Gates*. Under the principle of stare decisis the doctrine of necessaries is not equal to the cause of action at issue in *Gates*, it is equal to the bar to the assertion of that cause of action. Unlike a cause of action for loss of consortium, the doctrine of necessaries *is* the anachronism; unlike a claim for loss of consortium, the reason for the doctrine of necessaries has failed. The lesson from *Gates* is clear. Removing the disabilities created by the unity of marriage concept requires the abrogation of rules arising from that anachronistic concept. The doctrine of necessaries is just such a rule. Far from supporting the extension of such a doctrine, *Gates* stands squarely in the path of perpetuating an outmoded law, the reason for which has failed. *Gates* does not say that extension of an ill-founded law is appropriate, it says that where the reason underlying a rule has failed, the rule must be abolished.

The First District Court of Appeals was later confronted with the same issues and facts which had resulted in the Second District's extension of the doctrine of necessaries in *Manatee*. *Shands Teaching Hospital and Clinics, Inc., v. Smith*, 480 So. 2d 1366 (Fla. 1st DCA 1985). Declining to adopt the reasoning in *Manatee* and *Parkway*, the First District held that it was without power to modify the Supreme Court's original delineation of the doctrine of necessaries found in *Phillips v. Sanchez*, 17 So. 363, 364 (Fla. 1895). This decision was based upon the warning in *Hoffman v. Jones*, 280 So. 2d 431, 434 (Fla. 1973) that the district courts are without power to overrule Florida Supreme Court precedent. The *Shands* appellate court held that it was without power to modify the common law doctrine of necessaries because the *Phillips* decision had delineated the extent of the doctrine. In addition, that court held that even if it had

such authority, any decision to modify the doctrine of necessaries must come from the legislature. *Shands I* at 1366. This latter holding was explicated in a lengthy and well-reasoned concurring opinion by Judge Barfield which analyzed in detail the appropriateness of any modification of the common law doctrine of necessaries by the judiciary. *Id* at 1367-1382. Warning that the type of judicial activism seen in *Manatee* and *Parkway* is both elitist and dangerous because it is result oriented and leads to judges turning their own value choices into law, Judge Barfield concluded that any modification of the common law doctrine of necessaries should be made by the legislature. *Id.* The First District Court of Appeals certified conflict with *Manatee* and *Parkway, Id* at 1366, and the Florida Supreme Court accepted jurisdiction in *Shands Teaching Hospital and Clinics, Inc. v. Smith*, 497 So. 2d 644 (Fla. 1986).

It was in the *Shands* case that this court first confronted the issue of whether the doctrine of necessaries should be judicially extended to make a wife liable for debts incurred by her husband. This court indicated that the *controlling question* was whether the judiciary was the proper institution to determine whether such expansion was appropriate. *Shands* at 646. Deciding this question in the negative, the court expressly and unequivocally disapproved both *Parkway* and *Manatee*, holding that it was the province of the legislature to alter the common law doctrine of necessaries and not the court. *Id.* The court concluded that, because the decision to modify or extend the doctrine of necessaries was one with "broad social implications, the resolution of which requires input from husbands, wives, and the public in general" and because the judiciary was the least capable of the three branches of government of resolving such a broad public policy question, it was "wiser to leave it to the legislative branch with its greater ability

to study and circumscribe the cause." *Id* at 646 and quoting *Zorzos v. Rosen*, 467 So. 2d 305 (Fla. 1985).

The Second District Court of Appeal decided otherwise in *Webb v. Hillsborough County Hospital Authority*, 521 So. 2d 199 (Fla. 2d DCA 1988). Citing the fact that it had been presented with the first viable challenge to the doctrine of necessaries brought on equal protection grounds, the *Webb* court resurrected its reasoning in *Manatee* and *Parkway* in a second attempt to expand the doctrine. *Webb* at 203 (*"Manatee* and *Parkway* provide non-disapproved additional support for our holding in this case"). In *Webb*, a hospital sought to hold a husband liable for medical services rendered to his wife under the unmodified common law doctrine of necessaries. *Id* at 200. The husband, as a defense to liability, asserted that the doctrine violated his right to equal protection under the Florida and federal constitutions. *Id.* In deciding the case, the *Webb* court correctly concluded that the doctrine of necessaries violated the husband's right to equal protection under the law. *Id* at 202. It incorrectly concluded that the equal protection issue forced it into a choice of law. *Id.* It compounded this error by choosing to extend the doctrine. *Id.* The Second District has now reaffirmed these errors in *Webb* by refusing to follow its own subsequent precedent in *Rydstrom v. Bayfront Medical Center*, 632 So.2d 143 (Fla. 2d DCA 1994) and by affirming *Webb's* application to the case at bar. *Southwest Florida Regional Medical Center v. Connor*, 643 So. 2d 681, 685 (Fla. 2d DCA 1994).

The reasoning in *Webb* suffers from all of the historical and analytical infirmities previously addressed in this brief. Its difficulties, however, are not confined to those issues. To suggest, as *Webb* does, that the equitable nature of a decision to extend the doctrine of

necessaries somehow changes due to the presence of an equal protection challenge makes little sense. The *Webb* court, however, seems to have ascertained that it was faced with just such a challenge, necessitating a choice of law that was "inevitable" to avoid ignoring an equal protection violation. *Webb* at 207. This was not the case. As Judge Fulmer stated in her concurring opinion to the present case,

> "I do not believe that the presence of the equal protection issue required the court to create a new rule of law. Our holding that the common law doctrine violated the equal protection clause of the United States Constitution abrogated the doctrine. Stopping here would not have ignored the constitutional violation. The abrogation alone redressed the violation of the husband's right to equal protection by removing his unilateral liability."

Southwest at 686. Judge Parker concurred with Judge Fulmer in her opinion that *Webb* should have limited its holding to a finding that the doctrine of necessaries was unconstitutional. *Id.*

As the majority in *Southwest* indicates, the *Webb* court was never faced with a choice of law. There was little choice but to remedy a violation of the husband's constitutional rights. Instances of the judiciary's need to take such action are not unique and the remedy is typically effected without similar angst. It has always been a proper role of the court to void those laws which are unconstitutional. This is even more certainly the case when an equal protection challenge is brought by a party entitled to protection who is not seeking to extend a right, but is raising a defense to a third party's attempt to impose liability upon him. Equal protection is, after all, a constitutional *right*, not a *liability*. Violations of equal protection are remedied by affirming the *asserting* party's equal *right* to the same *benefits* of the law that are given to every other person. In such cases the court must decide whether a *right or benefit* should be denied to all or extended to all, not whether new law should be created that compels an added *burden*

on the protected party while working to benefit a third person. Every equal protection case cited in *Webb* supports this view.

In *Califano v. Goldfarb*, 430 U.S. 199, 51 L. Ed. 2d 270, 97 S. Ct. 1021 (1977) and *Weinberger v. Weisenfeld*, 420 U.S. 636, 43 L. Ed. 2d 514, 95 S. Ct. 1225 (1975) a widower sued on equal protection grounds to receive the same statutory *benefits* under Social Security as a widow would have received. In *Frontiero v. Richardson*, 411 U.S. 677, 86 L. Ed. 2d 583, 93 S. Ct. 1764 (1973) a servicewoman sued on equal protection grounds to receive the same family *benefits* on the same terms as male soldiers. *Reed v. Reed*, 404 U. S. 71, 30 L. Ed 2d 225, 92 S. Ct. 251 (1971), *Craig v. Boren*, 429 U.S. 190, 50 L. Ed. 2d 397, 97 S. Ct. 451 (1976) and *Gates v. Foley*, 247 So. 2d 40 (Fla. 1971) all held laws unconstitutional because they did not afford the same *rights* to the complaining party. And, in *Califano v. Westcott*, 443 U. S. 76, 61 L. Ed. 2d 382, 99 S. Ct. 2655 (1979) two couples challenged a statute which provided benefits to families with unemployed fathers but not to unemployed mothers. In a 5 to 4 split opinion, the Court held that the proper remedy in that case was to order the extension of *benefits* to families of unemployed mothers. *Id* at 394. Four justices dissented on the basis that the proper remedy was to enjoin benefits entirely. *Id* at 398. In none of these cases, all cited in *Webb,* did a court uphold a *burden* imposed by law against the party asserting protection while at the same time finding the challenged statute in violation of equal protection. *Webb* did.

The net effect of the *Webb* decision was to turn the shield of equal *protection* into a sword. The result of the husband's challenge in that case was a change in the law, not to enable the husband to obtain the same benefits which were accorded to married women, but to make new law giving the creditor hospital a right of action against wives. In doing so, *Webb protected* the

creditor, imposed a burden upon the wife and denied relief to the husband. In doing so, the *Webb* court imposed its own view of equality without affording the suspect class any protection.

Ultimately, the choice which the court posited for itself in *Webb* was not the forced selection of one law over another, it was the choice between judicial activism and proper judicial action, between creating new law and declaring unconstitutional law unconstitutional. The former course leads to the imposition of the elitist value judgements of which Judge Barfield warned, the latter is the recognized role of the judiciary. What the *Webb* court admittedly chose to do was to extend the doctrine of necessaries and invite the legislature to disagree if it liked. *Webb* at 205. It is difficult to see how this differs from the Congress's act of passing a law subject to executive veto. It is certainly not the role of the judiciary.

As its rationale for extending the doctrine of necessaries, the *Webb* court reasoned that to do otherwise would leave a hiatus in the law making neither spouse liable for the necessary items of the other. *Id.* The court apparently found this result inconsistent with existing legislation which placed the duty of support equally upon both the husband and the wife and felt that it would be better to place the burden upon both and leave it to the legislature to relieve that burden should it choose to do so. *Id.* This is sophistry on several levels. In the first case, it is a recognized principle that the silence of the legislature may indicate that that body feels no need for change. This was pointed out in *Shands I* where Judge Barfield acknowledged that legislative silence may reflect any variety of attitudes, including legislative approval of the status quo. *Shands I* at 1374. To use the inaction of the legislature as a ground for the judiciary's creation of new law invites the judiciary to act in any area which the legislature has not addressed. The opportunities to make law under this "everything but" approach are legion and

the net effect of accepting such a rationale is to place the legislative function in the judiciary and turn the legislature into a reactionary body reviewing law produced by the judiciary. In the second place, the *Webb* court confuses the nature of the doctrine of necessaries with the duty that exists *between* the spouses to support and maintain one another. As demonstrated above, the doctrine of necessaries is not founded upon the obligation of support between the spouses and the legislature's decision to make the duty of maintenance and support sex neutral sets no precedent for the extension of that doctrine by the judiciary.

In reality, the *Webb* court was obligated to abrogate, not to extend the doctrine of necessaries, having before it no choice but to follow the dictates of the Constitution. Any purported choice had already implicitly been made by this court in *Shands* when it left to the legislature any decision to extend the doctrine of necessaries. Under *Hoffman*, the *Webb* court was bound to follow the *Shands* decision in this regard, yet it did not. *Webb* attempts to skirt this difficulty by using the equal protection issue as camouflage for the same logical subterfuge which this Court rejected in *Manatee* and *Parkway*.

Shands neither hinted nor implied that a valid equal protection attack on the doctrine of necessaries would change the decision that the extension of that doctrine must rest in the hands of the legislature. Quite the contrary. *Shands* simply distinguished *Gates* on the basis that there was "no valid equal protection argument that the petitioner hospital was being denied a *right*" to a cause of action which was "available to other plaintiffs." *Shands* at 646. The situation in *Webb* was no different. In that case, there was no valid equal protection argument that the husband was being denied the *right* to a cause of action available to other plaintiffs. The husband in *Webb* was denied a defense; he was not a plaintiff. As previously stated, *Gates*

simply had no precedential value with respect to the judicial modification of the doctrine of necessaries because it was distinguishable on its facts. One of those facts happened to be that the case involved an equal protection challenge, but this is where that case's similarity to *Shands* ended, and where it should have ended in *Webb.*

In addition, it is a dubious suggestion that the *Shands* Court, having read case law from other jurisdictions, including *Jersey Shore*, was unaware of the fact that a truly viable equal protection challenge to the doctrine of necessaries could be brought by the husband in defense of his liability to third parties for the care of his wife. Rather, it seems clear that the Court simply declined to act when not required to do so. In so declining, the *Shands* Court advised that any extension of this doctrine must be left to the legislature. This was a clear indication to the District Courts that, should they later be faced with a valid equal protection challenge necessitating an act, that act must be confined to the abrogation of the doctrine of necessaries since extension was not an option.

III.

The argument in *Shands* that the extension of this doctrine should come from the legislature, beyond being judicial precedent, was also rooted in pragmatism. Despite the societal changes often cited as a reason for extending the doctrine, no case seems to consider why such an extension should be limited to necessaries. If this unique concept of equality is carried to its logical conclusion, there would seem to be no currently applicable reason to distinguish between various types of goods. The *Jersey Shore* court points out that it would be unfair to accord the same rights to a creditor entering into a contract with both spouses as it would to a creditor who

does not have such a contract. *Jersey Shore* at 1010. Why, now, is it fair to accord hospitals greater rights than other creditors based upon the nature of the services which they render? Certainly, the original justification has been removed; a woman can and does buy both necessaries and unnecessaries on her own authority. Nor do legislatively enacted governmental support programs appear to be allowing married women to starve in advance of their single counterparts. It would seem, therefore, that any consideration given to expanding the doctrine of necessaries based upon the fact that it should be modernized should address this issue as well. Is it practical for the judiciary to undertake such an analysis?

Closely related is the question of what, today, would constitute a necessary good or service under such a modernized doctrine. Arguably, an automobile may be necessary today. Certainly clothing is necessary, but how much? While it is clear that the doctrine as originally applied would include medical bills as necessary items, courts have not yet had occasion to consider the modern application of the doctrine which they espouse to other items. Nor do they seem to consider how extending the doctrine will affect ante and post-nuptial agreements. If the spouses independently agree to abrogate their duty of support to each other during the marriage and to use their separate funds for their own needs, will this be effective to abrogate their new duty to each others' creditors?

All of these issues clearly illustrate the necessity of taking a comprehensive approach to the doctrine of necessaries which the judiciary is ill-equipped to undertake. Yet, they also unmask the logical inconsistencies in the reasoning behind the extension of this obsolete doctrine. It is difficult to imagine how the common law is "adapting to progress" , *Jersey Shore* at 1009, by manipulating a support obligation *between the spouses* in such a way as to afford a third party

creditor additional rights, especially in view of the fact that the doctrine was expressly intended to benefit the wife, was expressly not intended to benefit creditors and was clearly designed to compensate for a contractual disability that has been expressly abolished. If courts like *Jersey Shore* truly wish to impose "liability based on marital status alone" they should not cloak their desire to extend creditor's rights in the seductive guise that they are bringing equality to the sexes. *Id* at 1010. It is a practical reality that spouses are not suing each other under the doctrine of necessaries, *creditors are suing one or the other spouse*. Nor are those suits being maintained as a result of the wife pledging the credit of her husband due to the creditor's fear that she would disaffirm the contract. They are being maintained as collection remedies. As yet, the legislature does not allow a creditor to sue one spouse based upon his or her duty to support the other. If this Court extends the doctrine of necessaries, they will judicially create such a right. It is the appellant's contention that *Shands* clearly indicates that the creation of this right by the judiciary can not be countenanced on any grounds.

As this Court has explained, a decision to modify the doctrine of necessaries is one of equity. *Shands* at 646. As has been previously demonstrated in the context of *Gates*, such a decision cannot be said to follow lockstep other decisions which seemingly extend rights or causes of action to women that were previously only available to men. This fact is recognized in the better reasoned decisions of other states which have addressed the present issue and rejected the arguments in *Jersey Shore. See Condore*; *Schilling v. Bedford County Memorial Hospital, Inc.*, 303 S.E. 2d 905 (Va. 1983); *Emanuel v. McGriff*, 596 So.2d 578 (Ala. 1992). It was also recognized in this state in *Halifax Hospital Medical Center v. Ryals*, 526 So. 2d 1022 (Fla. 5th DCA 1988).

In *Halifax*, a hospital appealed the dismissal of its claim under the doctrine of necessaries against a husband for medical care furnished to his wife. *Id* at 1022. The trial court had, on equal protection grounds, refused to apply the doctrine to the husband where no such burden was imposed on the wife. *Id*. Recognizing the preference expressed by the Second District in *Webb v. Hillsborough County Hospital Authority*, 521 So. 2d 199 (Fla. 2d DCA 1988), the *Halifax* court nevertheless found itself bound by the precedent in *Shands* to defer the question to the Florida legislature. *Id*. The present case should have been treated no differently.

Since *Shands* and *Halifax*, the 4th District Court of Appeals has followed the lead of the Florida Supreme Court in finding that a hospital's action against a wife for the husband's medical services was unfounded under Florida law in the absence of an express agreement by the wife. *Heineman v. John F. Kennedy Memorial Hospital*, 585 So. 2d 1162 (Fla. 4th DCA 1991); *Faulk v. Palm Beach Gardens Community Hospital, Inc.*, 589 So. 2d 1029 (Fla. 4th DCA 1991). The 3rd District appears to have misapplied the decision in *Webb*, finding liability in the wife for a husband's medical expenses in *North Shore Medical Center, Inc. v. Angrand*, 527 So. 2d 246 (Fla. 3rd DCA, 1988). However, that case was dismissed on appeal and has no precedential value. In fact, the erroneous reasoning in *Webb* has not, to date, been adopted by any other Florida court.

CONCLUSION

> "*[T]*he primary question is not whether or not the law ... should be changed, but rather, who should do the changing ... If such a fundamental change is to be made in the law, then such a modification should be made by the legislature where proposed change will be considered by legislative committees in public hearing *[and]* where the general public may have an opportunity to be heard ... *[It]* should not be made by judicial fiat. Such an excursion into the field of legislative jurisdiction weakens the concept of separation of powers and our tripartite system of government."

Shands I at 1382 *quoting Hoffman* at 443. [italicized portions modify original text].

Ultimately, the doctrine of necessaries should never have been extended by the Second District Court in *Webb* as that extension was contrary to both judicial precedent and to the policy and history which originally gave rise to the doctrine. Those courts which have broadened the scope of the doctrine of necessaries have done so by misusing or misinterpreting established legal principles, including the support obligation between the spouses and the equal protection clause of the federal constitution. Appellant would request that this court adhere to the reasoning first presented in *Shands,* abrogate the doctrine of necessaries in Florida and overrule *Webb.*

For the foregoing reasons, the dismissal of this action as to Barbara Connor by the Circuit

Court for the Twentieth Judicial Circuit should be affirmed.

Respectfully Submitted,

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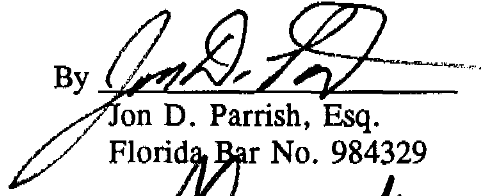
By 
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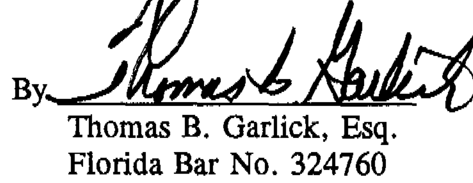
By 
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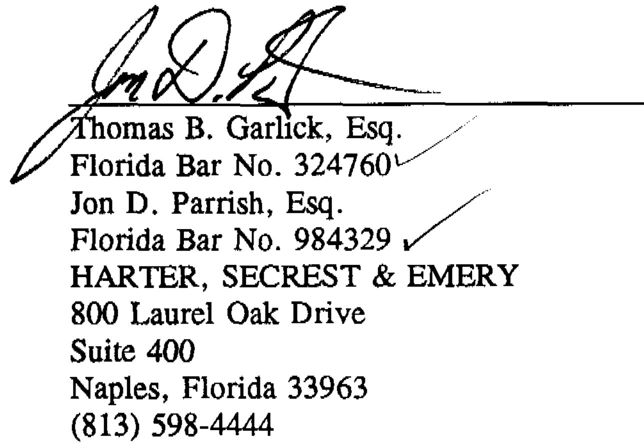
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Initial Brief has been furnished by United States Mail to James G. Decker, Esq., Decker & Smith, P.A., Attorney for Appellant, Post Office Box 9208, Fort Myers, Florida 33902-9208, this 17th day of January, 1995.



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