IN THE SUPREME COURT OF FLORIDA

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

BRIEF ON THE MERITS OF RESPONDENT SOUTHWEST FLORIDA REGIONAL MEDICAL CENTER, INC.

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, Inc. (hereafter "Southwest") disagrees with Appellant, Barbara E. Connor, on the following matters.

This case is under review pursuant to the Court's discretionary jurisdiction recognized in Fla. R. App. P. 9.030(a)(2)(A)(iv) and (vi). Before the Court is a decision of the Second District Court of Appeal which reversed a trial court's order dropping Mrs. Connor as a party defendant from Southwest's action and dismissing the action as to her for failure to state a cause of action. Record at 37-39 (hereafter R. at 37-39); Southwest Florida Regional Medical Center v. Connor, 643 So. 2d 681 (Fla. 2d D.C.A. 1994).

Mrs. Connor states Southwest "failed" to get her signature on a hospital admission agreement which would have obligated her contractually for her husband's medical care. She argues its "failure" to do so indicates she was joined a defendant without cause. Brief of Appellant at 5. Southwest never has conceded it had any duty to obtain such an agreement from her, nor does Mrs. Connor argue Southwest had such a duty.

The trial court rendered an order dismissing Southwest's Complaint against Mrs. Connor July 9, 1993. R. at 37. Acknowledging Southwest's reliance on Webb v. Hillsborough County Hospital Authority, 521 So. 2d 199 (Fla. 2d D.C.A. 1988), the trial court ruled

> Webb did not directly address the question presented in this cause for it involved a

> hospital suing a husband for necessaries furnished to his wife. And while the Second District Court did observe that under certain circumstances, "a wife may be responsible for necessaries provided to her husband" (emphasis added), such observation was not essential to its holding that the husband's equal protection rights had not [sic] been violated. In any event, a district court's decision cannot overturn a pronouncement of the highest court of the state. Shands clearly states the law of Florida on this point: There exists no legal obligation on the part of a wife to pay for necessaries furnished to her husband.

R. at 38.

In the opinion under review, the Second District recognized that this Court in Shands Teaching Hospital and Clinics, Inc. v. Smith, 497 So. 2d 644 (Fla. 1986) considered it wiser to leave to the legislature the decision of whether to expand the common law in the context of that decision. This Court, however, did not direct that the decision be left to the legislature in all circumstances. Southwest Florida Regional Medical Center v. Connor, 643 So. 2d at 684-85 referring to Shands, 497 So. 2d at 646. Members of the panel in the Second District's decision under review here expressed concern about the consistency of their court's decisions on this point in concurring opinions, but the Second District did not avail itself of any en banc procedure under Fla. R. App. P. 9.331, nor did Mrs. Connor seek rehearing en banc.

SUMMARY OF ARGUMENT

The Florida Supreme Court should expand the doctrine of necessaries to provide a cause of action against wives for reasonable and necessary medical expenses incurred by their husbands.

The Florida Supreme Court has not reviewed this issue under the compulsion of an equal protection defense to liability raised by a husband under the United States Constitution. Standing to raise that issue expressly was rejected in Shands Teaching Hospital and Clinics, Inc. v. Smith, 497 So. 2d 644 (Fla. 1986).

The doctrine of necessaries arose from the disability of married women under coverture. Its purposes then for coming into existence and today for expansion remain to provide benefits to the parties affected by it and to enhance the institution of marriage generally. Evolution of the marital unity into a partnership of equals and an economic unit, the benefits to be conferred on the partners and the unit by expansion of the doctrine, enhancement of the mutual obligations of support between spouses and fairness to creditors all indicate the doctrine should be expanded. No consequence of the disappearance of the disabilities of coverture requires the doctrine to be abrogated.

This Court should join the majority of other jurisdictions which have considered this issue, and eliminate the present constitutional defect in the doctrine by expanding it to both sexes in marriage.

ARGUMENT

Jurisdiction

Southwest concedes this Court has jurisdiction. Art. V, Sec. 3(b)(3) and (4), Fla. Const. The decision of the Second District below conflicts expressly and directly with Heinemann v. John F. Kennedy Memorial Hospital, 585 So. 2d 1162 (Fla. 4th D.C.A. 1991) and Faulk v. Palm Beach Gardens Community Hospital, Inc., 589 So. 2d 1029 (Fla. 4th D.C.A. 1991), and expressly certified conflict with those decisions and with Halifax v. Ryals, 526 So. 2d 1022 (Fla. 5th D.C.A. 1988) and Waite v. Leesburg Regional Medical Center, Inc., 582 So. 2d 789 (Fla. 5th D.C.A. 1991). Conflict jurisdiction being apparent, this Court has the duty to accept jurisdiction and resolve the conflict. Tyus v. Apalachicola Northern Railroad Company, 130 So. 2d 580 (Fla. 1961).

Equal Protection Violation

Under the United States Constitution, a gender-discriminating law denies equal protection unless a fair and substantial relationship to a legitimate and important governmental objective is demonstrated. Reed v. Reed, 354 So. 2d 864 (Fla. 1978); Brown v. Dykes, 601 So. 2d 568 (Fla. 2d D.C.A. 1992). Other courts have found an equal protection violation in the doctrine of necessaries under the precise circumstances here. St. Francis Regional Medical Center, Inc. v. Bowles, 251 Kan. 334, 836 P. 2d 1123 (Kan. 1992); Landmark Medical Center v. Gauthier, 635 A. 2d

1145 (R.I. 1994). Mrs. Connor appears to concede constitutional review is appropriate.

In Webb v. Hillsborough County Hospital Authority, after finding that the petitioning husband had standing to assert his equal protection rights, the Second District Court of Appeal ruled that

> for a husband to be responsible for necessaries provided to his wife while his wife is not responsible for necessaries provided to her husband would violate the equal protection clause of the United States Constitution.

Webb at 202. This finding made unavoidable a decision whether both husband and wife, or neither, would be responsible for necessaries provided to the other of them. Webb limited its decision in favor of mutual liability to circumstances in which the spouse to whom necessaries were provided was unable to pay for them.

Webb has not been reviewed by this Court. Webb is the precedent on which the opinion under review is founded. Accordingly, the equal protection issue absent in Shands Teaching Hospital and Clinics, Inc. v. Smith, 497 So. 2d 644, 646 n. 1 (Fla. 1986) but present here compels this Court's constitutional review of the doctrine of necessaries first recognized by this Court in Phillips v. Sanchez, 35 Fla. 187, 17 So. 363 (Fla. 1895).

Florida Judicial Treatment of Issue

Before the first Florida appellate decision regarding a wife's liability for her husband's medical expenses, the law was clear that a husband was liable for reasonable and necessary

medical expenses of his wife. If he failed in his duty to provide for the care, the law made his wife his agent to pledge his credit in order to be able to obtain treatment. The rule was for the benefit of the wife, and not for the benefit of the creditor. Phillips v. Sanchez; Holiday Hospital Association v. Schwarz, 166 So. 2d 493 (Fla. 2d D.C.A. 1964).

The Second District appears to be the first appellate court in the state to have ruled on the issue of a wife's liability for her husband's reasonable and necessary medical expenses. In Manatee Convalescent Center, Inc. v. McDonald, 392 So. 2d 1356 (Fla. 2d D.C.A. 1980), it held wives to be liable for their husband's reasonable and necessary medical expenses, principally in recognition of the legislature's rendering gender-neutral alimony obligations in 1971, but also after reviewing decisions of the courts of several other states. It applied its ruling prospectively only, therefore affirming the trial court's dismissal of a complaint against a wife by a medical provider in that case. The Third District Court of Appeal in Parkway General Hospital, Inc. v. Stern, 400 So. 2d 166 (Fla. 3d D.C.A. 1981) joined the Second in its ruling, but applied it retrospectively to reverse dismissal of a cause of action against a wife by a medical provider. No equal protection issue was discussed in these opinions.

In 1985 the First District decided Shands Teaching Hospital and Clinics, Inc. v. Smith, 480 So. 2d 1366 (Fla. 1st D.C.A. 1985). It declined to follow the Second and Third

Districts' expansion of the common law rule and affirmed the trial court's dismissal of a complaint against a wife defendant, certifying conflict with Manatee and Parkway. On review by this Court, Shands Teaching Hospital and Clinics, Inc. v. Smith, 497 So. 2d 644 (Fla. 1986) approved the First District's decision and disapproved Manatee and Parkway. The opinion noted

> The issue of whether it is a denial of equal protection to hold a husband liable for a wife's necessaries when a wife is not liable for a husband's necessaries is not before us. Petitioner makes an equal protection argument that this is so, but we do not accept that petitioner has standing to make such an argument.

497 So. 2d at 646 n. 1 (Citation omitted). All three cases involved suits by providers against wives. The equal protection argument could not be raised by a medical provider to provide a cause of action against a wife where none existed at common law. The opinion recognized the husband-only aspect of the law was an anachronism, but distinguished the situation from ones in which courts recognized new causes of action because no equal protection issue was present.

The Second District followed Shands in Wetjen v. Sarasota County Public Hospital Board, 506 So. 2d 97 (Fla. 2d D.C.A. 1987) where a claim had been made against a wife. However, a year later when a husband appealed a judgment holding him liable for his wife's medical expenses on equal protection grounds, the Second District was compelled to eliminate the gender-based discrimination of the doctrine of necessaries. Deciding Webb, it expanded the

doctrine expressly in order to preserve it (and confer its benefits on both genders), and protect the constitutional rights of husbands. Webb v. Hillsborough County Hospital Authority, 521 So. 2d 199. See Southwest Florida Regional Medical Center v. Connor, 643 So. 2d at 684.

The same year, in North Shore Medical Center, Inc. v. Angrand, 527 So. 2d 246 (Fla. 3d D.C.A. 1988), the Third District relied on Webb to affirm entry of a judgment against a wife for her husband's reasonable and necessary medical expenses until, on rehearing, the court learned the action against the wife had been dismissed.

In conflict, the Fourth and Fifth District Courts of Appeal declined to follow Webb shortly afterwards. In Halifax v. Ryals, 526 So. 2d 102 (Fla. 5th D.C.A. 1988), a hospital appealed the trial court's order dismissing its action against a husband for medical expenses incurred by his wife. The trial judge concluded that Shands revoked the common law doctrine of necessaries by refusing to find a wife liable for her husband's care. The opinion agreed with the Second District's reasoning in Webb that equal protection would require that either both spouses or neither should be liable for the other's medical expenses. However, the Fifth District wrote it was bound by the doctrine of necessaries, followed Shands and reversed the trial court's order without further explanation. Three years later in Waite v. Leesburg Regional Medical Center, Inc., 582 So. 2d 789 (Fla. 5th D.C.A. 1991), the Fifth District reaffirmed its holding in Halifax, and

affirmed the trial court's Final Judgment against a husband and wife arising out of medical care provided to the wife. The Fifth District refused to uphold the equal protection defenses raised by the husbands in these cases, stating it was bound by Shands. Apparently, it felt common law was immune from constitutional scrutiny, since it wrote in the last paragraph of its opinion in Waite.

> Unless an act of the legislature violates the greater constitutional law the judiciary is constrained from interfering.

582 So. 2d at 790.

The Fourth District twice has reversed trial court judgments against wives for hospital services rendered to their husbands, the first time in Heinemann v. John F. Kennedy Memorial Hospital, 585 So. 2d 1161 (Fla. 4th D.C.A. 1991). The summary opinion there cited only this Court's opinion in Shands, and Waite, stating she was not liable. The latter opinion, Faulk v. Palm Beach Gardens Community Hospital, Inc., 589 So. 2d 1029 (Fla. 4th D.C.A. 1991) did the same, citing only Heinemann.

Last year, the issue returned to the Second District in Rydstrom v. Bayfront Medical Center, 632 So. 2d 143 (Fla. 2d D.C.A. 1994) which this Court should disregard since the Second District, in the opinion under review, acknowledged that in Rydstrom it may not have properly dealt with Webb. 643 So. 2d at 684 n. 2. As one of the judges on the panel who decided Rydstrom, Judge Parker concedes Rydstrom is contrary to the holding in Webb. 643 So. 2d

at 686 (Parker, J., concurring). These decisions complete the Florida precedent on point for the opinion under review.

Florida Prefers Marriage to be Treated as a Partnership of Equals

Florida has expressed in many ways that marriage should be treated as a partnership, and that the partners be treated equally. In Merchant's Hostess Service of Florida v. Cain, 9 So. 2d 373 (Fla. 1942), the Florida Supreme Court reviewed a decision of a trial court dismissing claims against a married woman by a business creditor. The plaintiff had sold assets of a business to her and was attempting to recover after her default in paying for them. Catherine Cain raised the defense of coverture, that the contract could not be enforced against her because she was a married woman (and, presumably, her husband had not joined in the creation of her obligation). This Court disallowed the defense, holding in the course of such that,

> ... if there was ever sound reason for the disability of coverture, that reason has disappeared, every element on which it was predicated has been outmoded and discarded. In the marital state, husband and wife are partners and equals; in business both know their way about and being so there is no earthly reason why the wife should be hobbled by such an impediment. There is every reason to discard it when its main use is to void her obligations.

9 So. 2d at 375. Accordingly, this Court reversed the trial court's dismissal and remanded the case for trial. The lone dissent of Chief Justice Brown that the common law disability of

coverture, even if outmoded, could only be repealed by the legislature was unpersuasive. 9 So. 2d at 376 (Brown, C. J., dissenting).

In adopting the 1968 constitution, the voters approved and enacted a provision which indicated

> There shall be no distinction between married women and married men in the holding, control, disposition, or encumbering of their property, both real and personal; except that dower or curtesy may be established and regulated by law.

Art. X, Sec. 5, Fla. Const. (1968). This provision was in stark contrast to the prior constitutional provision regarding women's separate property. From the 1885 constitution it read:

> All property, real and personal, of a wife owned by her before marriage, or lawfully acquired afterward by gift, devise, bequest, descent, or purchase, shall be her separate property, and the same shall not be liable for the debts of her husband without her consent given by some instrument in writing executed according to the law respecting conveyances by married women.

Art. XI, Sec. 1, Fla. Const. (1885).

This constitutional change was part of the basis for an opinion of this Court four years later, Hallman v. Hospital & Welfare Board of Hillsborough County, 262 So. 2d 669 (Fla. 1972), in which a woman sought to escape liability for expenses of medical care to her husband. She had signed a note payable to the provider after the treatment. She defended claiming coverture, that the debt was that of her husband and that she never had consented that her separate property be held liable with any instrument in writing

executed according to the law respecting conveyances by married women. This Court reasoned the forgoing constitutional change evidenced that the people of Florida recognized married women had assumed positions of prominence, that they intended to remove "legal shackles," which also made it "necessary to lower the protective wall immunizing married women from various causes of action, for freedom of activity carries with it many responsibilities." 262 So. 2d at 670. The cause of action at issue there is not the same as that here, but this Court clearly read the constitutional change to grant greater rights and impose greater burdens on women. No longer would it be necessary for a woman to execute instruments in writing according to the law respecting conveyances by married women. Accordingly, the judgment of the trial court holding her personally liable on the note was affirmed.

In 1971, in the face of the constitutional amendment and general public pressure, the legislature enacted sweeping changes to the alimony and child support laws, intending to render them gender-neutral. Chapter 71-241, Laws of Florida. Obligations which previously had been imposed on husbands or fathers alone became obligations of either sex spouse as particular circumstances required.

In the same year this Court decided Gates v. Foley, 247 So. 2d 40 (Fla. 1971) to create a cause of action in a wife against a third party tortfeasor who injures her husband for her loss of his consortium. The Court recognized that the giving way of "the

unity concept of marriage" to "the partner concept" in which "a married woman stands as an equal" had established a right without a remedy, and expanded the common law. 247 So. 2d at 44. In 1980, Canakaris v. Canakaris, 382 So. 2d 1197 (Fla. 1980) was founded entirely on the equality of the partners in marriage.

Since this Court put the legislature on notice that the premise for the doctrine of necessaries had disappeared in Merchant's more than fifty years ago, the legislature has not acted one way or the other with respect to the doctrine. Although it creates an obligation on a husband and provides a source of recovery for a creditor, it expressly was recognized and allowed in order to confer a benefit on the wife, which was to make necessities more readily accessible for her. Holiday Hospital Association v. Schwarz, 166 So. 2d 493. Inaction for this period of time by the legislature certainly cannot be read to be disapproval of the doctrine of necessaries. There has been no public clamor for its abolition. As the Second District wrote in its opinion under review, the purposes of its expansion of the doctrine in Webb were to preserve the doctrine as opposed to abolish it, and to treat both spouses equally. 643 So. 2d at 684. The abrogation of coverture and the vitality of the doctrine of necessaries today shown by Shands and its acceptance and expansion in many other jurisdictions indicate Mrs. Connor's argument for the abolition of the doctrine should be rejected.

This Court has quoted Holmes, The Common Law:

> The customs, beliefs or needs of a primitive time establish a rule or a formula. In the

> course of centuries the customs, belief, or necessity disappear, but the rule remains. The reason which gave rise to the rule has been forgotten, and ingenious minds set themselves to inquire how it is to be accounted for. Some ground of policy is thought of, which seems to explain it and to reconcile it with the present state of things; and then the rule adapts itself to the new reasons which have been found for it, and centers on a new career. The old form receives a new content, and in time even the form modifies itself to fit the meaning which it has received.

Gates v. Foley, 247 So. 2d at 43. Although used there in support of adopting a cause of action in a wife for loss of her husband's consortium, it fits equally here. The original reason which gave rise to the doctrine of necessaries was coverture; the new reason is the marital partnership. Extension of the doctrine to be applied for the benefit of both spouses and the marriage is the modification of the old form. The liability of a wife is but an incident of the doctrine's benefits to the marital partnership.

The trend in Florida has been to increase the freedoms of a wife, to make her truly sui juris, while necessarily at the same time reducing the safeguards attached to her property interests. One of the functions of the Court is to ensure that the law keeps pace with the times. Gates v. Foley, 247 So. 2d at 43; Hoffman v. Jones, 280 So. 2d at 431, 435 (Fla. 1973). This Court would abdicate its responsibility if it were to allow the law to fall behind.

If the doctrine of necessaries were abrogated, then one of the benefits of the doctrine would be reduced, that being the ease with which spouses obtain medical care. Already a medical

provider somehow must have the liability of both spouses in order to have recourse to jointly-owned marital assets. Meyer v. Faust, 83 So. 2d 847 (Fla. 1955). That liability now is available generally for care only of a wife, except in the second appellate district. If this Court were to abrogate the doctrine, the provider's ability to obtain such recourse would be substantially reduced, and in reaction a provider's selectivity could only increase if equilibrium were to be maintained. Insurance proceeds perhaps available to just one spouse may not be available to the provider if the doctrine is abrogated.

Abrogation would be destructive generally of the partnership concept of marriage. Even through the adoption of no-fault divorce procedure, the partnership concept has managed to evolve. The wife has gained stature as an independent person, and her property rights have been freed. Adoption of a mutual application of the doctrine of necessaries will not subject all assets of an elderly couple to loss. The usual protection from the claims of creditors will remain, including particularly exemptions for homesteads and retirement benefits.

Most other jurisdictions which have considered this issue have opted to expand the doctrine and make the spousal obligations for the other spouse's necessities mutual. The following decisions appear to have expanded the common law of their states when confronted with this issue: Jersey Shore Medical Center-Fitkin Hospital v. Estate of Baum, 417 A. 2d 1003 (N.J. 1980); Kurpiewski v. Kurpiewski, 254 Pa. Super. 489, 386 A. 2d 55 (1978); St. Francis

Regional Medical Center, Inc. v. Bowles, 251 Kan. 334, 836 P. 2d 1123 (Kan. 1992); Our Lady of Lourdes Memorial Hospital v. Frey, 152 A.D. 2d 73, 548 N.Y.S. 2d 109 (A.D. 3 Dept. 1989); North Carolina Baptist Hospitals, Inc. v. Harris, 345 S.E. 2d 471 (N.C. 1987); Richland Memorial Hospital v. Burton, 318 S.E. 2d 12 (S.C. 1984); Marshfield Clinic v. Discher, 314 N.W. 2d 326 (Wis. 1982); Landmark Medical Center v. Gauthier, 635 A. 2d 1145 (R.I. 1994); Bartrom v. Adjustment Bureau, Inc., 618 N.E. 2d 1 (Ind. 1993); Medical Services Association v. Perry, 819 S.W. 2d 82 (Mo. App. 1991); Borgess Medical Center v. Smith, 386 N.W. 2d 684 (Mich. App. 1986). Additionally, many other jurisdictions have construed statutory versions of the doctrine of necessaries to apply to both sexes in order to meet constitutional equal protection requirements. Hansen v. Hayes, 154 P. 2d 202 (Ore. 1944); Higgason v. Higgason, 516 P. 2d 289 (Cal. 1973); Iowa Methodist Hospital v. Utterback, 6 N.W. 2d 284 (Iowa 1942); Nichol v. Clema, 195 N.W. 2d 233 (Neb. 1972); State v. Whitver, 3 N.W. 2d 457 (N.D. 1942); Swogger v. Sunrise Hospital, Inc., 88 Nev. 300, 496 P. 2d 751 (1972); De Nisson v. National Bank of Commerce of Seattle, 84 P. 2d 1024 (Wash. 1938).

Many considerations were cited by the courts in choosing to expand the common or statutory law. In Jersey Shore, answering whether a widow would be liable for the hospital and medical expenses of the last illness of her deceased husband, the Supreme Court in New Jersey concluded, "that the common law rule must yield to the evolving interdependence of married men and women and to the

reality that a marriage is a partnership." It declared that "both spouses are liable for necessary expenses incurred by either spouse in the course of the marriage." 417 A. 2d at 1005. The court even felt the hospital in the case had sufficient standing to raise the equal protection challenge against New Jersey's doctrine of necessaries. Id at 1006-07. Repeated references and citations by the court to Orr v. Orr, 440 U.S. 268, 99 S. Ct. 1102, 59 L. Ed. 2d 306 (1979) (holding husbands-only alimony statute unconstitutional) and the partnership concept of modern marriage evidenced its thinking in expanding the common law rule. The court does not appear to have considered abrogation of the rule in any manner other than a literal reading of some existing married women's act statutes which would have left each spouse independent of the other financially. It declined to do that since such "would leave creditors of a dependent spouse without recourse to the only realistic source of payment, the financially independent spouse." Id at 1009. It noted further

> The act tends to ignore that in a modern marriage husbands and wives, whether they contribute income or domestic services, are a financial unit. A necessary expense incurred by one spouse benefits both. In a viable marriage, husbands and wives ordinarily do not distinguish their financial obligations on the basis of which one incurred the debt. Consequently, literal application of the Married Woman's Act would not comport with the expectations of husbands, wives, or their creditors.

Id. The New Jersey Supreme Court thus chose to expand the law making spouses secondarily liable for each other's necessities

after resources of the primary spouse were determined to be insufficient. The court, perceiving it fair, required that the resources of the primary spouse first prove insufficient. Id at 1010. The court apparently did not consider deferring the issue to legislative initiative in the face of the constitutional defect.

In North Carolina Baptist Hospitals, Inc. v. Harris, 354 S.E. 2d 471 (N.C. 1987), the North Carolina Supreme Court specifically was requested to abrogate the doctrine. It ruled

> We see no reason to take this course. The doctrine has historically served several beneficial functions. Among these are the encouragement of health-care providers and facilities to provide needed medical attention to married persons and the recognition that the marriage involves shared wealth, expenses, rights, and duties. We conclude that the benefits to the institution of marriage will be enhanced by expanding rather than abolishing the doctrine of necessaries. Our decision is a recognition of a personal duty of each spouse to support the other, a duty arising from the marital relationship itself and carrying with it the corollary right to support from the other spouse.

Id at 474. Thus decided, the court ordered the case returned to the trial court for entry of judgment against the wife.

The Kansas Supreme Court in St. Francis Regional Medical Center, Inc. v. Bowles, 251 Kan. 334, 836 P. 2d 1123 (Kan. 1992), reviewed an intermediate appellate court's affirmance of a trial court judgment against a wife for her husband's medical expenses. It was entered in reliance on the common law rule of the doctrine of necessaries. The court in its opinion quoted this Court's decision in Shands for a definition of the doctrine. 836 P. 2d at

1125. In that case as well the parties agreed the doctrine violated the equal protection clause of the United States Constitution, citing Orr v. Orr. Authorities there also disagreed on the remedy to be applied. The Kansas Supreme Court was persuaded in part by the Second District's decision in Webb and found non-persuasive Schilling v. Bedford County Memorial Hospital, Inc., 225 Va. 539, 303 S.E. 2d 905 (1983). The wife in St. Francis, Tamara Bowles, argued the law to be announced by the court should shield the family unit from the reach of a spouse's creditors, but the court disagreed. It noted the exemption statutes of Kansas would remain applicable, and rejected her other argument that mutual liability would promote divorce in the event of serious illness. It followed Jersey Shore in declining to await legislative action and declining to abrogate the doctrine which it considered an element of modern marriage.

Mrs. Connor cites three decisions which refused to expand the doctrine. First, the Maryland Supreme Court in Condore v. Prince George's County, 425 A. 2d 1011 (Md. 1981), considered a claim by a government hospital against the wife of a decedent patient in the face of an equal rights amendment adopted by the voters of Maryland some nine years prior to the opinion. The court acknowledged the need to decide between an expansion of the doctrine or abrogation of it, without any apparent substantial consideration of the impact its decision would have on the marriage. It perceived that simultaneously with deciding whether to expand or abrogate the doctrine, it had to decide whether it

would construe conflicting provisions in the Maryland constitution which protected property of the wife from the debts of the husband with the later enacted provisions of Maryland's constitutional equal rights amendment. It felt the equal rights amendment did not mandate one course over the other; i.e., it could either abrogate the doctrine of necessaries, or expand the doctrine and try to harmonize the constitutional provisions regarding a wife's property with the ERA. Rather than create a new cause of action against a wife, it chose the lesser action of abrogating the doctrine and leaving the constitutional issues for legislative and electoral consideration.

Next, faced with a husband's equal protection defense and appeal of a trial court judgment for his wife's medical expenses, the Virginia Supreme Court recognized its duty to render the doctrine gender-neutral. Schilling v. Bedford County Memorial Hospital, Inc., 303 S.E. 2d 905 (Va. 1983). Without explanation, it abrogated the doctrine and left the issue to its legislature. Shortly afterwards the Virginia assembly amended Virginia law to provide that the doctrine as it existed at common law should apply equally to both spouses. Landmark Medical Center v. Gauthier, 635 A. 2d 1145, 1150 (R.I. 1994).

The remaining decision on this point cited by Mrs. Connor is Emanuel v. McGriff, 596 So. 2d 578 (Ala. 1992). The executrix of a husband's estate sought to escape liability for his wife's medical bills, claiming the doctrine of necessaries violated the equal protection clause. Judgment was entered against the

executrix. On review, the Alabama Supreme Court recognized the equal protection violation, and that it needed to choose between abrogation and expansion. It noted the legislature in 1975 had attempted to resolve the issue generally by enacting a provision which read

> The husband is not liable for the debts or engagements of the wife, contracted or entered into after marriage, or for her torts in the commission of which he did not participate, but the wife is liable for such debts or engagements, or for her torts, and is suable therefor as if she were sole.

596 So. 2d at 579 (Citation omitted). The court considered, however, that a 1971 decision of the Alabama Court of Civil Appeals which held that the common law doctrine of necessaries applied to a husband, prevented the Supreme Court from harmonizing the necessaries doctrine with the 1975 statute. Instead, apparently because the legislature already had acted in the area, it ruled it would defer the issue to the legislature and simply abrogate the doctrine. 596 So. 2d at 580.

In view of the foregoing, no cogent reason appears for this Court to abrogate doctrine and defer action to the legislature. With the exception of Virginia, which gave no explanation for its deferral, the other courts have looked to recent legislative or constitutional activity apparently in choosing to defer action. Florida has no such recent history. This Court's construction of this common law rule is particularly within its purview, since the rule is not of legislative origin,

and action is compelled constitutionally. Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973); Gates v. Foley.

Mrs. Connor continues to argue in this Court that the Second District's Webb decision conflicts with this Court's holding in Shands. She insists Shands ordered this issue to be left to the legislature; however, this Court ruled in Shands that

> ... whether it is a denial of equal protection to hold a husband liable for a wife's necessaries when a wife is not liable for a husband's necessaries is not before us. Petitioner makes an equal protection argument that this is so, but we do not accept that petitioner has standing to make such an argument.
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> * * *
>
> The present case is distinguishable from Gates [v. Foley] in that here there is no valid equal protection argument that petitioner hospital is being denied a right available to other plaintiffs.

497 So. 2d at 646 n. 1 and text. This Court's jurisdiction in Shands was invoked by a conflict in the decisions in Manatee and Parkway (both involving claims by hospitals against wives) with a decision involving another hospital's claim against another wife in Shands 480 So. 2d 1366. On the other hand, the Second District's decision in Webb dealt with a husband who had been sued by a hospital and raised the equal protection constitutional defense. The Second District's expansion of the doctrine of necessaries became law without review by this Court. Applying such under stare decisis, the Second District now has reversed a trial court dismissal of a claim against a wife, and that reversal is

before this Court. Neither Webb nor the decision under review conflicts with this Court's opinion in Shands, 497 So. 2d 644. They do conflict with decisions of the Fourth and perhaps Fifth District as previously cited. The equal protection defense of Mr. Webb now, indirectly, is before this Court.

Mrs. Connor also argues the elimination of the original basis for the doctrine of necessaries compels that the doctrine now be abrogated. We have pointed out several reasons to the contrary. The doctrine originally was created to confer the benefit of support on the wife during coverture. In its modern application, as recognized by courts and legislatures in many states, it supports and enhances the institution and equal partnership of marriage. As Mr. Justice Holmes predicted, an old form has changed and expanded to meet new demands. Originally a court made law, one whose original foundation long has been eliminated, the law is peculiarly subject to court modification. No good reason to abrogate the doctrine, or even any reason applicable here, has been shown by other courts which have chosen to abrogate the doctrine. Two revoked the doctrine following recent constitutional or legislative activity on point, feeling apparently other institutions would act further on the issue if different action was warranted. The third gave no reason at all.

CONCLUSION

For the foregoing reasons, Southwest respectfully requests the Court to affirm the decision of the Second District Court of Appeal here under review, Southwest Florida Regional Medical Center, Inc. v. Connor, 643 So. 2d 681 (Fla. 2d D.C.A. 1994). The Court expressly should approve the earlier decision of the Second District on which the decision under review relies, Webb v. Hillsborough County Hospital Authority, 521 So. 2d 199 (Fla. 2d D.C.A. 1988), and should disapprove decisions of the Fourth and Fifth District Courts of Appeal in conflict therewith, Heinemann v. John F. Kennedy Memorial Hospital, Faulk v. Palm Beach Gardens Community Hospital, Inc., Halifax v. Ryals, and Waite v. Leesburg Regional Medical Center, Inc.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Brief on the Merits of Respondent Southwest Florida Regional Medical Center, Inc., has been furnished by United States Mail to JON C. PARRISH, ESQ. and THOMAS B. GARLICK, ESQ., Attorneys for Petitioner, Suite 400, 800 Laurel Oak Drive, Naples, Florida, 33963, this 6 day of March, 1994.

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