

COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
2008-SC-0211-D

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TINA MARTIN, ADMINISTRATRIX OF
THE ESTATE OF BILLIE CAROL SHREVE,
DECEASED; AND DONALD RAY SHREVE,
INDIVIDUALLY

APPELLANTS

vs. APPEAL FROM THE KENTUCKY COURT OF APPEALS
Action No. 2006-CA-002248-MR

OHIO COUNTY HOSPITAL CORPORATION

APPELLEE

BRIEF FOR APPELLANTS, TINA MARTIN, ADMINISTRATRIX OF
THE ESTATE OF BILLIE CAROL SHREVE, DECEASED; AND
DONALD RAY SHREVE, INDIVIDUALLY

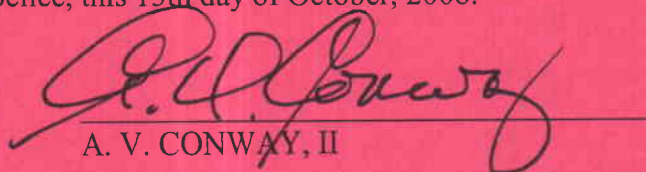
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The undersigned does hereby certify that copies of this Brief were served upon the following individuals by mailing a true copy thereof by U. S. Mail, postage prepaid, to: Clerk, Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; Honorable Ronnie C. Dortch, Judge, Ohio Circuit Court, P. O. Box 169, Hartford, KY 42347; Ronald G. Sheffer, William K. Burnham, Sheffer Law Firm, 101 South Fifth Street, Suite 1600, Louisville, KY 40202, counsel for Appellee, this 13th day of October, 2008.



A. V. CONWAY, II

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I. INTRODUCTION

This is an appeal from a decision of the Kentucky Court of Appeals which affirmed in part, and reversed in part, the jury verdict and the rulings of the Ohio Circuit Court. This is a case of medical negligence which resulted in wrongful death. At issue on this appeal is the proper interpretation and application of the Emergency Medical Treatment and Active Labor Act (EMTALA), 42 U.S.C. § 1395 (d)(d); and the allowable right of recovery for loss of consortium by a surviving spouse, including whether the law of this state should now be changed to allow recovery for post death loss of consortium.

II. STATEMENT CONCERNING ORAL ARGUMENT

The Appellants specifically request an oral argument. The basis of this request is that there is an issue raised on this appeal which is a matter of first impression and is of significant importance not only to Appellants, but also to future litigants.

In addition, in this appeal, Appellants are asking this Court to change the longstanding law of this state with regard to spousal loss of consortium. With regard to both issues, Appellants believe that an oral argument might be beneficial to the Court and therefore, is appropriate.

III. STATEMENT OF POINTS, STATUTES, AND AUTHORITIES

A. THAT THE COURT OF APPEALS ERRED IN DETERMINING THAT APPELLEE WAS ENTITLED TO A DIRECTED VERDICT ON APPELLANTS' CLAIMS BROUGHT PURSUANT TO THE EMERGENCY MEDICAL TREATMENT AND ACTIVE LABOR ACT, 42 U.S.C. § 1395 (d)(d).

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IV. STATEMENT OF THE CASE

The Decedent, Billie Carol Shreve, was injured in an automobile accident on June 20, 2002. The accident occurred a very short distance from the facilities of the Respondent, Ohio County Hospital Corporation (hereinafter referred to as "Hospital"), and Decedent was properly transferred to the Hospital where she was received in the emergency department at approximately 11:20 a.m. On arriving at the Hospital, she was first seen by Holly Strader, a registered nurse, who performed the triage responsibilities and then continued to treat Decedent until the time of her death. Nurse Strader's supervisor, Vicki Hendricks, maintained her office in or near the emergency room and therefore was continuously aware of Decedent's condition while she remained in the Hospital.¹ (See Record, August 18, 2006, 11:15:00 through 11:16:50). The emergency room physician responsible for Decedent's care was Dr. Kevin Gregory.

On arriving at the Hospital, Decedent had evidence of blunt abdominal trauma which was reflected by the seatbelt abrasions and bruises across her shoulder and abdomen. (See Record, August 15, 2006, 04:04:38 through 04:52:48; and Record, August 16, 2006, 09:46:00 through 09:48:00). At the outset, Decedent indicated that she was uncomfortable but otherwise appeared to be stable. Even so, Nurse Strader indicated that there was a high index of suspicion that Decedent had sustained a serious injury. Thereafter, Decedent's condition rapidly deteriorated as evidenced by a severe drop in her blood pressure, an increase in her pulse rate which began at approximately 12:45 p.m. and continued until she became unconscious at 12:54 p.m. (See Record, August 15, 2006,

¹Reference in this brief to the record will mean the Trial Court Video Record of this trial.

04:19:30 through 04:20:20). Both Nurse Strader and Dr. Gregory indicated that they were aware by 12:54 that Decedent had gone into shock and was probably hemorrhaging. Nurse Strader indicated that she knew as early as 12:45 that Decedent needed a surgeon. (See Record, August 15, 2006, 04:19:30 through 04:19:45). Dr. Gregory likewise felt that Decedent needed to see a surgeon, but originally was unsure whether the situs of Decedent's problem was her head, chest, or the actual place of hemorrhaging, the abdomen. His concerns about where the blood was coming from were lame at best, because the evidence is uncontradicted that there was no neurosurgeon (for head injury), no thoracic surgeon (for a chest injury), or general surgeon available to the Hospital for the injuries that she had sustained. (See Record, August 18, 2006, 11:30:00 through 11:31:49). Nurse Strader candidly pointed out that the Decedent needed a surgeon from 11:45 until the time she was finally transferred to Owensboro Mercy Health Systems in Owensboro, Kentucky, a trip which did not commence until 4:00 p.m. (See Record, August 18, 2006, 11:13:00 through 11:14:15; and Record, August 16, 2006, 09:53:00 through 09:54:05; Record, August 16, 2006, 02:07:00 through 02:09:00). Decedent remained continuously in shock from 11:56 until 4:00 because of the continual hemorrhaging from her abdomen.

After she lapsed into unconsciousness, the decision was made to begin blood transfusions. At the time of this accident, there were in existence standards called the Advanced Trauma Life Support (ATLS) which set out the criteria for the treatment of patients like the Decedent (see Trial Exhibit 5). Other standards were equally applicable, including the Inter-Facility Transfer of Injured Patients Guideline for Rural Community

(Trial Exhibit 9) and the Evaluation of Abdominal Trauma (Trial Exhibit 10). The standard enunciated by ATLS required the Hospital to insert two large bore IVs into Decedent for the administration of fluid or blood products. (See Record, August 16, 2006, 09:48:00 through 09:49:00; Record, August 16, 2006, 02:01:30 through 02:05:00). Rather than two large bore IVs, the Appellee placed two small gauge IVs which were totally inadequate for a hemorrhaging patient who had just gone into shock. The referenced standards required an early surgical consult and that the patient transfer not be delayed for the performance of diagnostic tests if a surgeon was not readily available. (See Record, August 16, 2006, 02:37:00 through 02:41:30). Neither of these occurred because there was no available surgeon for the Hospital and in fact Decedent's transfer was not even considered and therefore tragically delayed while a CT scan was being performed at the Hospital. To make matters even worse, the Hospital did not have an available radiologist and the films had to be forwarded to the Owensboro hospital for interpretation causing additional delays while Decedent's condition deteriorated.

With regard to the availability of a surgeon, both Nurse Strader and Dr. Gregory indicated that it was sometime after 2:15 p.m. when they first learned that Dr. Pathi, the only general surgeon in the area, was unavailable. (See Record, August 16, 2006, 04:21:00 through 04:22:00). Since Nurse Strader indicated that a surgeon was needed as early as 12:45, there is no explanation as to the why it took approximately three (3) hours to determine the availability of a surgeon for a hemorrhaging patient in shock. The evidence with regard to Dr. Pathi's availability is more than a bit in conflict, but neither side of the conflict is helpful to the Hospital. Nurse Strader first related that Dr. Pathi

was not taking trauma calls at the Hospital at the time of this accident. (See Record, August 15, 2006, 04:27:00 through 04:30:0). Neither Dr. Gregory, Nurse Strader, Nurse Hendricks, or any other employee of the Hospital has indicated that they attempted to contact Dr. Pathi, but state that he was unavailable. To the contrary, Dr. Pathi whose office is located in the same building with the Hospital and who was in his office while Decedent was in the emergency room, testified that he was available to consult with and surgically treat Decedent, but no one from the Hospital ever contacted him on June 20, 2002. (See Record, August 18, 2006, 01:22:40 through 01:24:00).

When the transfer finally occurred, on arriving at the hospital in Owensboro, the treating surgeon who received the Decedent in Owensboro hospital came out and informed Nurse Strader that you have brought me a dead patient.

Appellants' evidence in this case included the testimony of Dr. Robert Mulliken, a physician who specializes in emergency medicine in Chicago, Illinois, and Dr. Lewis Kaplan, a general surgeon from Yale University. The effect of both Dr. Mulliken's and Dr. Kaplan's testimony was that Dr. Gregory and the Hospital failed to properly screen, stabilize, and treat Decedent, thereby making the late transfer meaningless. Both doctors testified that Decedent bled to death.² (See Record, August 16, 2006, 10:03:00 through 10:04:00; Record, August 16, 2006, 02:32:00 through 02:33:00). They each stated that the Hospital's negligence caused Decedent's death and that her life would have been saved if proper and timely screening, stabilization, and treatment had taken place, including the necessary surgery to stop the abdominal bleeding. (See Record, August 16,

² An autopsy was performed on decedent by Dr. Brian Ward, chief pathologist with Owensboro Mercy Health Systems in Owensboro, Kentucky. Dr. Ward also testified that decedent bled to death.

2006, 09:22:08 through 10:32:27; and Record, August 16, 2006, 01:31:54 through 03:15:19).

Prior to the trial, Appellants settled their claims against Dr. Gregory. The original accident which brought Decedent to the Hospital was caused by an individual who was never made a party to the proceeding. However, Movants introduced evidence with regard to the accident and its cause and the Court properly gave an apportionment instruction with regard to the negligent driver, Dr. Gregory, and the Hospital. The jury found in favor of the Movants and apportioned fault 50% to Dr. Gregory and 50% to the Hospital. In addition, the trial court gave an instruction on EMTALA and the right of Appellant, Donald Ray Shreve, to recover for his loss of spousal consortium.³ As a part of its verdict, the jury found in favor of the Plaintiffs on both the negligence and EMTALA instructions and awarded damage which included spousal loss of consortium to Mr. Shreve. The Court of Appeals concluded that the Hospital was entitled to a directed verdict on both the EMTALA and loss of consortium issues. Appellants sought discretionary review by this Court which was granted.

V. ARGUMENT

A. **THE COURT OF APPEALS ERRED IN DETERMINING THAT APPELLEE WAS ENTITLED TO A DIRECTED VERDICT ON APPELLANTS' CLAIMS BROUGHT PURSUANT TO THE EMERGENCY MEDICAL TREATMENT AND ACTIVE LABOR ACT, 41 U.S.C. § 1395 (d)(d).**

³Appellants tendered an instruction pursuant to KRS 411.145 which would have allowed Decedent's surviving spouse, Donald Ray Shreve, to have recovered post death loss of spousal consortium. The instruction for loss of spousal consortium given by the Trial Court ended Mr. Shreve's right to recover such damages upon the death of decedent.

At trial, Appellants introduced evidence and argued that the Hospital failed to properly screen and stabilize the decedent, Billie Carol Shreve, prior to transferring her to the nearby hospital in Owensboro, Kentucky. As a result, the Appellants argued that the Hospital violated both the medical screening and stabilization requirements mandated in the Emergency Medical Treatment and Active Labor Act, 42 U.S.C. § 1395(d)(d)(a) and (b). Based on the evidence, an EMTALA instruction was given by the Court. The jury found that Appellee violated the specific requirements of EMTALA in its care and treatment of the decedent. In its Opinion, the Court of Appeals concluded that the trial court should have directed a verdict in favor of the Appellee on both of Appellants' EMTALA claims. Court of Appeals Opinion, pp. 10-11. Although the Court of Appeals correctly sustained the jury's decision to the effect that the Hospital was negligent, the EMTALA issues have not previously been considered in this jurisdiction and since the Court of Appeals decision was clearly erroneous, it should now be reversed.⁴

At trial, the Hospital argued that EMTALA was commonly referred to as the anti-dumping statute and since Appellants introduced no evidence that decedent was transferred to another hospital because of lack of insurance or inability to pay, that EMTALA was not applicable. Relying upon the Sixth Circuit decision in Cleland v. Bronson Health Care Groups, Inc., 917 F.2d 266 (1990), the Court of Appeals determined that the Appellants were required to prove improper motive before establishing a claim

⁴The Court of Appeals sustained the jury's verdict in favor of Appellants on the issue of medical negligence. Court of Appeals Opinion, p. 17. The case was then remanded back for a new trial on damages only. The EMTALA related matter is being raised on this appeal solely because (1) there are issues of original impression in this jurisdiction; (2) Appellants believe the Court of Appeals decision in that regard to be erroneous; and (3) the Court of Appeals decision was published.

under the medical screening requirement of EMTALA, § 1395(d)(d)(a). In Cleland, the Sixth Circuit hung its decisional hat on the reference in the statute to “appropriate medical screening” and determined that the word appropriate was intended to refer to the motive with which the hospital acts. Thus, according to the Court in Cleland and our Court of Appeals, in order to pursue an EMTALA claim based on inadequate medical screening, a claimant must first prove improper motivation on the part of the hospital. The decision in the case at bar, though in conformity with the Cleland decision, is in direct conflict with the decisions reached by the vast majority of federal circuits to the effect that a plaintiff is not required to introduce proof of motive or other non-medical reasons to establish a disparate treatment claim under EMTALA. See Summers v. Baptist Medical Center Arkadelphia, 91 F.3d 1132 (8th Cir. 1996); Correa v. Hospital San Francisco, 69 F.3d 1184 (1st Cir. 1995); Repp v. Anadarko Municipal Hospital, 43 F.3d 519 (10th Cir. 1994); Power v. Arlington Hospital Association, 42 F.3d 852 (4th Cir. 1994); and Gatewood v. Washington Healthcare Corporation, 933 F.2d 1037 (D.C. 1991). See also Brodersen v. Sioux Valley Memorial Hospital, 902 F.Supp. 931, 948 wherein the Court states, “a defendant’s motive in failing to provide appropriate emergency treatment is irrelevant.”

In Roberts v. Gayland of Virginia, Inc., 525 U.S. 249 (1999), a similar argument was made that proof of improper motive was also a requirement before a claim could be made for failure to properly stabilize a patient under EMTALA § 1395(d)(d)(b). The Supreme Court eluded to the Sixth Circuit decision in Cleland with regard to the medical screening requirement, but determined improper motivation was not a proof requirement

on a claim for failure to stabilize under EMTALA. Although the Supreme Court did not address the correctness of the Cleland decision, it plainly noted that Cleland was in conflict with the law of other circuits which did not read subsection (a) as an imposing an improper motive requirement. Roberts, at 253. It is submitted that the Court of Appeals reliance upon the Cleland decision is inappropriate since there is absolutely nothing within the medical screening provision of EMTALA that would require proof of improper motive by the treating hospital. That is in fact the conclusion reached by every other federal circuit and as pointedly referenced by the Supreme Court in Roberts.

The Court of Appeals next concluded that the trial court should also have directed a verdict with required to the stabilization requirement of EMTALA § 1395(d)(d)(b). The Court correctly concluded that Appellants were not required to prove improper motivation by the Hospital. Court of Appeals Opinion, p. 10. However, relying upon Halcomb v. Monohan, 30 F.3d 116 (11th Cir.), the Court in essence concludes that all the Hospital had to do was appropriately complete the certification required by 42 U.S.C. 1395 (d)(d)(c) with regard to the transfer of patients, and having done so, the Hospital complied with the statute. In effect, the total failure to stabilize an emergent patient and timely transfer directly leading to the patient's death is irrelevant. That is an interesting conclusion recognizing that the decedent was at the Hospital for some five (5) hours and the evidence is uncontradicted that she was never stabilized. Moreover, the evidence is uncontradicted that decedent was dead when she arrived at the next facility which is less than thirty minutes from the Hospital. The Court of Appeals reliance upon Halcomb v. Monohan, 30 F.3d 116 (1994), is inappropriate because in Halcomb there is no indication

that the hospital was ever aware that the patient had a emergency medical condition that required stabilization. In this case, decedent was basically unconscious for over three hours and both her treating physician and primary nurse recognized that she was in hypovolemic shock.

In Harry v. Marchant, 291 F.3d 767 (11th Cir. 2002), the Court concluded that EMTALA mandates stabilization of an individual only in the event of a transfer as defined by EMTALA. The Court further pointed out that the term stabilize is specifically defined by the statute. "Under EMTALA the term to stabilize means with respect to a medical emergency condition . . . a hospital must provide such medical treatment of the condition as may be necessary to assure, with reasonable medical probability that no material deterioration is likely to result or occur during the transfer of the individual from a facility." Marchant, at 771.

Under EMTALA, the stabilization requirement of subsection (b) is not met by the emergency room physician and the hospital certifying the need to transfer a near death patient who dies in transit where both the treating physician and hospital have completely failed in their stabilization requirements. The Court of Appeals has incorrectly determined that the Hospital was entitled to a directed verdict on Appellants' EMTALA claims.

B. THAT IT SHOULD NOW BE DETERMINED THAT A SURVIVING SPOUSE HAS A RIGHT OF RECOVERY FOR LOSS OF CONSORTIUM THAT CONTINUES AND EXIST AFTER THE WRONGFUL DEATH OF THE OTHER SPOUSE. ACCORDINGLY, IT SHOULD FURTHER BE DETERMINED THAT THE COURT OF APPEALS ERRED IN DETERMINING THAT THE APPELLEE WAS ENTITLED TO A DIRECTED VERDICT ON THE CLAIM OF APPELLANT, DONALD RAY SHREVE, FOR LOSS OF CONSORTIUM.

Relying upon Clark v. Hauck Mfg. Co., 910 S.W.2d 247 (1995), the Court of Appeals held that the loss of consortium claim of Appellant, Donald Ray Shreve, relates only to damages incurred between the negligent act and death. Citing authority that predated the enactment of KRS 411.145, the Court then concluded that no appreciable time had elapsed between the alleged negligent act and Decedent's death so that Mr. Shreve could not have suffered any damages for loss of consortium. Thus, the Court stated the trial court should have dismissed the loss of consortium claim. However, a majority of the Court of Appeal's panel had more to say on the issue of spousal loss of consortium. Specifically, in a separate opinion filed by Judge Thompson, and joined by Judge Taylor, this Court was urged to revisit its prior interpretation of the common law and adopt a claim of loss of post-death spousal consortium. Court of Appeals Opinion, pp. 17-18.

The issue of post-death loss of spousal consortium was first raised during the trial through the instructions tendered by the Appellants. The trial court chose not to give that instruction, but instead gave one consistent with Clark and Brooks v. Burkeen, Ky., 549 S.W.2d 91 (1977). Although decedent lived a little over five (5) hours after she arrived at

the hospital, the jury still awarded the majority of the damages in this case to the surviving husband for his loss of consortium. Why? Could it be that the uncontradicted evidence established that he was uneducated and mentally impaired to the point that he had never worked and the decedent as his wife had for many years been his sole and exclusive caregiver. To sustain the Court of Appeals decision, this Court must continue to hold to prior decisions to the effect that spousal loss of consortium, unlike a minor child's claim for loss of parental consortium, or a parent's claim for loss of a child's consortium, ends at death. It certainly has never been clear how a spouse can lose the services, companionship and society of a wife or husband, while that injured spouse is alive, but somehow does not sustain an even greater loss when the injured spouse tragically dies.

In fact, the only one who wins by the continuance of the existing law is the negligent tortfeasors, since under the existing law he bears no responsibility for the loss sustained by the surviving husband or wife, for the ultimate injury that he wrongfully wrought on their spouse, i.e., death.

We concur with Judge Thompson and Judge Taylor and request this Court to adopt a claim for loss of post-death spousal consortium as the law of this jurisdiction.

The law should be changed for the following reasons:

1. The change will be consistent with the spousal loss of consortium statute, KRS 411.145. The legislative history of spousal loss of consortium is checkered at best. For many years, the sole claim for loss of consortium rested in the husband. The wife had no such right. Bair v. Cincinnati, New Orleans & Texas Pacific R.Co., Ky., 368 S.W.2d

172. Finally, in Kotsiris v. Ling, Ky., 451 S.W.2d 411 (1970), our Court gave recognition to a wife's cause of action for loss of consortium. Subsequent to Ling, our legislative enacted KRS 411.145 styled "Damages for loss of consortium", and which provides:

- (1) As used in this section "consortium" means the right to services, assistance, aid, society, companionship and conjugal relationship between husband and wife, or wife and husband.
- (2) Either a wife or husband may recover damages against a third person for loss of consortium, resulting from a negligent or wrongful act of such third person.

With that enactment, the meaning of consortium and the right of both spouses to recover damages for loss of consortium was codified. No where within the statute is there any language defining or limiting the time in which a spouse can claim or recover damages for loss of consortium. If the legislature intended for the right of recovery to end at the death of the injured spouse, the statute would have so stated. Yet, there is no such limitation.

However, the first occasion that the Court had to reconsider post death loss of consortium after the enactment of the statute, and without any reference to KRS 411.145 and relying on the authority of two cases which pre-dated the enactment of the statute, concluded that a wife's recovery is limited to damages sustained before her husband's death. Brooks v. Burkeen, Ky., 549 S.W.2d 91 (1977). The Court in Brooks also determined that a minor child was not entitled to recover for loss of parental care on the death of that child's father.

Since Brooks, this Court has continued to hold to the position that spousal loss of consortium ends upon the death of the injured spouse. To the contrary, in Giuliani v.

Guiler, Ky., 951 S.W.2d 318 (1997), the Court recognized the right of a minor child to recovery for the loss of parental consortium, thereby in part reversing Brooks.

It is submitted that the Court's decision in Brooks and the subsequent reliance upon that decision are inconsistent with the language of KRS 411.145. To now hold that the loss of spousal consortium is recoverable after the death of the injured spouse is in fact consistent with the broad language of that statute.

2. The change would provide the same right of recovery to a spouse that is now available to a minor child and to a parent. The core of the family unit consists of the husband, the wife, and the children. The relationships established are those of spouse, parent, and child. The reality is that the death of any member of the family unit also represents the total destruction of the deceased's relationship with the other family members. In KRS 411.135, our legislature recognized the importance of a minor child to the family by allowing the child's parents to recover for the loss of consortium resulting from that child's wrongful death. In Guiliani, this Court recognized the importance of each parent to the family unit and the precious relationship that exist between parent and child. In arriving at its decision, the Court in Guiliani stated:

The doctrine of stare decisis does not commit us to the sanctification of the ancient fallacy. Hilen v. Hays, Ky., 673 S.W.2d 713 (1984). Stare decisis does not preclude all change. The principle does not require blind imitation of the past or adherence to a rule which is not suited to present conditions. See Hays, supra. The "ancient fallacy" continued by Brooks and Adams is the view that children do not have identity as individuals and as members of the family separate from their parents. This has never been true and it is long overdue that we recognize the essential personhood of each individual while giving homage and deference to their inclusion in the family. The loss suffered by each child in this case is separate and distinct from the loss of

their brothers and sisters and from the loss suffered by their father. . . . It is the purpose of all tort law to compensate one for the harm caused by another and to deter future wrongdoing. City of Louisville v. Louisville Seed Co., Ky., 433 S.W.2d 638 (1968), overruled on other grounds by Gas Service Company, Inc. v. London, Ky., 687 S.W.2d 144 (1985). Loss of consortium is a common law cause of action. Common law grows and develops and must be adapted to meet the recognized importance of the family This Court has the authority and responsibility to modify loss of consortium as a common law doctrine when necessary.

By statute, parents are now allowed to recover for their loss of consortium resulting from the wrongful death of a child. By judicial mandate this Court recognized the right of children to recover for the loss of parental consortium caused by the wrongful death of a parent. That leaves only the marital relationship, the husband and wife, unprotected in the event of the wrongful death of the other. Joined together by contract and a solemn oath "to death do us part", married men and women have the right to expect and believe that their relationship, companionship, society, and the services they provide one to the other will not be destroyed by death caused by the wrongful and negligent actions of others. If a child experiences a loss on the death of a parent, or a parent experiences a loss on the death of a child, how is it that the relationship which is the foundation of the entire family unit, i.e., the marital relationship experiences no loss when the husband or wife lose their spouse, not just to the affects of injury while alive, but to total and complete destruction through wrongful death.

Brooks and its progenies fail to recognize the loss sustained by a living spouse on the wrongful death of the other spouse. In so doing, the living spouse is denied recovery for his or her loss and the tortfeasor is not deterred from his wrongful actions.

In Guiliani, the Court relied on (1) the devastation that accompanies the loss of an immediate family member; (2) the fact that loss of consortium is a judge-made common law doctrine that the Court can modify to conform to changing norms; (3) that many, or in this case most, other states recognize the claim; and (4) that the general claim for loss of consortium has long been recognized in Kentucky. Guiliani, at 319-321. In fact, this Court in Guiliani explicitly held that “when the common law is out of step with the times, this Court has a responsibility to change the law.” Id. at 319.

This is an appropriate case for judicial intervention. In Hilen v. Hays, 673 S.W.2d 713 (Ky. 1984), the case adopting the comparative fault rule in Kentucky, the Supreme Court carefully considered the relative merits of judicial action versus legislative action. Justice Liebson, writing for the Court, said “that we must reform common law doctrines that are unsound and unsuited to present conditions.” Id. (quoting Goetzman v. Wichern, 327 N.W.2d 742, 753 (Iowa 1983)). Noting that forty-one states had adopted comparative negligence (five fewer than have adopted recovery for post-death spousal consortium), the high court stated that “the time has come for us to address the real question in this case: whether there are principles of fundamental fairness . . . so compelling that contributory negligence as a complete defense should be discarded.” Id. Likewise, the time has come that principles of fundamental fairness require recognition of post-death spousal consortium, just as Kentucky recognizes claims for pre-death loss of spousal consortium and post-death loss of parental consortium.

The Kentucky General Assembly took up the issue of post-death loss of spousal consortium during its 2007 term. The House of Representatives passed the measure,

HB 403, but the Kentucky Senate chose not to act allowing it instead to languish in committee. A similar bill was introduced in the 2008, but again the Senate chose not to act. From this, it could reasonably be inferred that the legislature has decided to yield to the courts on the question of whether such a claim should be recognized in Kentucky. In fact, that posture mirrors the situation faced by the Kentucky Supreme Court when it decided the Giuliani case in 1997. In 1996, the Kentucky General Assembly had considered a bill to allow recovery for loss of parental consortium, “but Senate Bill 139 never got out of committee.” Giuliani, 951 S.W.2d at 321. By analogy and comparison, see legislative history of *HB 403*, 2007 Gen.Assem., Reg. Sess. (Ky. 2007). The Giuliani court ruled that “[t]he failure of the legislature to act does not negatively impact the authority of this court to adopt and conform the common law,” id., and then enacted the very same policy that the Kentucky Senate had failed to act upon. The legislature has now acquiesced to the Giuliani decision for 10 years. This is also a nearly identical posture to the situation underlying Hilen v. Hays, in which the Court established comparative negligence after the legislature failed to enact legislation following multiple attempts, many of them dying in committee. Hilen, 637 S.W.2d at 717.

It is thus submitted that it is time to recognize the right of the innocent living spouse to recover for the loss of spousal consortium which follows the wrongful death of the other spouse. Fundamental fairness requires nothing less.

3. The change would allow married couples in this state to have the same right of recovery now allowed in the vast majority of other states. Allowing recovery for post death loss of spousal consortium is not merely a trend, it is now the law in forty-six

(46) other states. In Cook v. Atlantic Coastline R.R., 13 S.E.2d 1 (S.C. 1941), the Supreme Court of South Carolina long ago recognized the uniqueness of the marital relationship when it stated:

The companionship and society of a wife are not articles of commerce. They cannot be weighed or measured. They are not bought and sold, and no expert is competent to testify to their value. The consideration upon which they are bestowed is not pecuniary. Cook, at 6-7.

South Carolina allows recovery for post death loss of spousal consortium.

Stewart v. State Farm Mut. Auto Ins. Co., 533 S.E.2d 597 (2000); Prier v. Mims, 476

S.E.2d 472 (1996). In Missouri Pacific Railroad Company v. Dawson, 662 S.W.2d 740

(1983), the Texas Court of Appeals was confronted with the argument that spousal loss of

consortium ends on the death of the injured spouse. We believe the Court's response to

that argument was and remains appropriate. The Court stated:

With these principles in mind, we must now view the arguments of the appellants against recovery for loss of consortium in this case. The only real argument raised by the brief of either of the appellants on this issue is that consortium is allowed only when injury results in loss of consortium, not death. All appellants argue that recovery under the Wrongful Death Statute is restricted to actual pecuniary loss. We do not agree.

By its very definition, the recovery sought is for loss of consortium, which includes either the impairment or total loss of the elements hereinbefore defined as constituting the cause of action. We can find little or no distinction between the situation where one spouse has suffered total paralysis and lives which, according to the definition appellants would have us give the right of recovery, would entitle a spouse to recovery and the death of a spouse which appellants claim extinguishes the right of recovery. Under either fact situation, the affected spouse has suffered a total loss of relationships which have been found to be the basis of recovery. We can find no logic in a rule of law which terminates a spouse's independent cause of action simply because a tortious act was committed with deadly efficiency.

A list of the states who now allow recovery for post-death loss of spousal consortium, including every state that adjoins this Commonwealth, include the following:

Alabama, see Zimmerman v. Lloyd Noland Foundation, 582 So.2d 548 (Al. 1991); *Alaska*, see Alaska Stat. § 09:55.580(c) and Alaska Stat. § 09117010 (1997); *Arizona*, See Barnes v. Outlaw, 964 P.2d 484 (Ariz. 1988); *Arkansas*, see Ark. Code Ann. § 16-62-102(2)(f)(1); *California*, see Krouse v. Graham, 562 P.2d 1022 (Cal. 1977); *Colorado*, see Colo. Rev. Stat. § 13-21-203; *Connecticut*, see Conn. Gen. Stat. § 52-5556, and Demarinis v. United Services Automobile Ass'n, 687 A.2d 1305; *Florida*, see Fla. Stat. Ann. § 768.21 and McQueen v. Jerpani, 909 So.2d 491 (Fl. 2005); *Georgia*, see Home Insurance Co. V. Wynn, 493 S.E.2d 622 (Ga. App. 1977); *Hawaii*, see Haw. Rev. Stat. § 663-3; *Idaho*, See Hepp v. Ader, 130 P. 2d 859 (Id. 1942); *Illinois*, see Kubian v. Alexian Bros. Medical Center, 651 N.E.2d 231 (1995); *Indiana*, see Ind. Code § 34-23-1-2, and Durham v. U'Haul International, 745 N.E.2d 755 (Ind. 2001); *Iowa*, see Madison v. Colby, 348 N.W.2d 202, 209 (1984); *Kansas*, see Kan. Stat. Ann. § 60-1904(a); *Louisiana*, see La. Civ. Code Ann. Art. 2315 and Shipman v. Tardo, 304 So.2d 381 (La. App. 1994); *Maine*, See Me. Rev. Stat. Ann. 18-A § 2-804; *Maryland*, see Md. Code Ann. [Cts & Jud. Proc.] § 3:904(d) and Cole v. Sullivan, 676 A.2d 85 (1995); *Massachusetts*, see Mass. Gen. Laws Ch. 229 § 2 and Caccavale v. Raymark Industries, Inc., 533 N.E.2d 1345; *Michigan*, See Mich. Stat. Ann. § 600-2922(6) and Estate of Eddington v. Eppert Oil Co., 490 N.W.2d 872 (1991); *Minnesota*, see Salin v. Kloemphin, 322 N.W.2d 736 (Minn. 1982); *Mississippi*, see Estate of Jones v. Howell,

687 So.2d 1171 (Miss. 1997); *Missouri*, see Mo.Rev.Stat. § 537.090 and Lopez v. Three Rivers Elec. Corp. Inc., 92 S.W.2d 165 (2002); *Montana*, see Mont. Code Ann. § 27-1-307(3)(b); *Nebraska*, see Selders v. Armentrout, 207 N.W.2d 686 (1973); *Nevada*, see Nev. Rev. Stat. § 41.085(4); *New Hampshire*, see N.H. Rev. Stat. 556.12(2); *New Jersey*, see Thalmon v. Owens-Corning Fiberlass Corp., 676 A.2d 611 (App. Div. 1996); *New Mexico*, see Romero v. Byers, 872 P.2d 840 (N.W. 1994); *North Carolina*, see N. C. Gen. Stat. § 28A-18-2 and Keys v. Duke University, 435 S.E.2d 820 (1993); *Tennessee*, see Jordan v. Baptist Three Rivers Hosp., 984 S.W.2d 583 (Tenn. 1999); *Texas*, see Yowell v. Piper Aircraft Corp., 703 S.W.2d 630 (Tex. 1986); *Utah*, see Jones v. Carvell, 641 P.2d 105 (Utah 1983); *Vermont*, see Vt. Stat. Ann.tit. 14, § 1492; *Virginia*, see Va. Code. Ann. § 8.01-52; *Washington*, see Chapple v. Ganger, 851 F.Supp. 1481 (E.D. Wash. 1994); *West Virginia*, see W.Va. Code § 55-7-6(c)(1); and *Wisconsin*, see Wis. Stat. § 895.04; *Wyoming*, see Wyo. Stat. Ann. § 1-38-102(c).

We urge the Court to enhance and improve the common law of our state by joining the majority of other states in recognizing the loss sustained by a marital partner on the wrongful death of his or her spouse.

In the alternative, we submit that even if the Court remains unwilling to allow recovery for post death loss of spousal consortium, the jury's award of loss of consortium to Mr. Shreve should be sustained. By analogy, many courts have sustained jury verdict well in excess of the amount awarded to Mr. Shreve for a very brief period of severe pain and suffering. The loss sustained by Mr. Shreve prior to decedent's death, albeit brief, was in a very real sense catastrophic to this particular husband.

VI. CONCLUSION

The decision of the Court of Appeals which in effect would dismiss Appellants' EMTALA claims improperly states the law applicable to 42 U.S.C. § 1395(d)(d), and should be reversed.

The decision of the Court of Appeals which dismissed the loss of consortium claim of decedent's husband, Appellant, Donald Ray Shreve, should also be reversed. In so doing, the Court should establish a post death right of recovery for loss of consortium for the surviving spouse in wrongful death cases, thereby overruling all previous case authority inconsistent therewith.

Respectfully submitted,



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