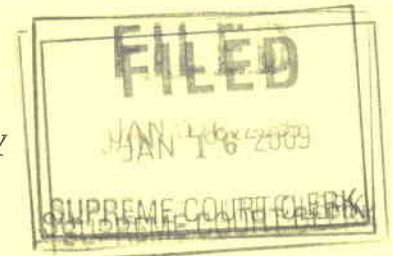


COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
2008-SC-000211-DG



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

APPELLANTS

APPEAL FROM OHIO CIRCUIT COURT
ACTION NO. 03-CI-000178

vs.

DISCRETIONARY REVIEW FROM KENTUCKY COURT OF APPEALS
CASE NO. 2006-CA-2248-MR

OHIO COUNTY HOSPITAL CORPORATION

APPELLEE

**APPELLANTS' REPLY BRIEF TO BRIEF OF APPELLEE,
OHIO COUNTY HOSPITAL CORPORATION**

Respectfully submitted,

A. V. CONWAY, II
CONWAY & KEOWN
124 West Union St., P. O. Box 25
Hartford, KY 42347
(270) 298-3231

LAURENCE R. DRY
WANDA DRY
140 East Division Road, Suite C-3
Oak Ridge, TN 37830
(865) 482-6600

The undersigned does hereby certify that true copies of the foregoing were this day served on the following named parties by mail, postage prepaid, on this 12th day of January, 2009, to: Clerk, Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; Honorable Ronnie C. Dortch, Ohio Circuit Court, P. O. Box 169, Hartford, KY 42347; Ronald G. Sheffer, William K. Burnham, 101 South Fifth St., Suite 450, Louisville, KY 40202; Paul A. Casi, II, 440 South 7th St., Suite 100, Louisville, KY 40202; and Kevin C. Burke, 125 South 7th St., Louisville, Ky 40202.

A. V. CONWAY, II

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PURPOSE OF BRIEF

The purpose of this Reply Brief is to respond to those issues and arguments raised in Appellee's Brief.

ARGUMENT

I.. THE COURT OF APPEALS IMPROPERLY HELD THAT 42 U.S.C. 1395(d)(d)(a) REQUIRES PROOF OF IMPROPER MOTIVE.

The Appellee relies upon Cleland v. Bronson Health Care Group, Inc., 917 F.2d 266 (6th Cir. 1990), and Newsome v. Mann, 105 F.Supp.2d 610 (2000) in support of its argument that the Court of Appeals properly determined that it was entitled to a directed verdict on Appellant's claim that it had failed to provide appropriate medical screening as required by the Emergency Medical Treatment and Active Labor Act, 42 U.S.C. § 1395(d)(d)(a). In Cleland, the Sixth Circuit bizarrely chose to define "appropriate" to "to preclude resort to a malpractice or other objective standards of care," and stated that a finding of improper motive must be made to establish that inappropriate care necessary to uphold a violation of EMTALA. Cleland, at 272.

In Roberts v. Gayland of Virginia, Inc., 520 U.S. 249 (1999), the Supreme Court made reference to the Cleland decision and its rather strange definition of the statutory term "appropriate". In so doing the Supreme Court citing authority from other federal circuits pointed to the fact that the Sixth Circuit was in the minority in determining that proof of improper motivation was a prerequisite to an EMTALA claim brought under § 1395(d)(d)(a).

The Sixth Circuit's decision in Cleland and Appellee's reliance on that decision are inappropriate because there is nothing in the statutory language that remotely suggest that proof of improper motive is, or should be, a prerequisite to pursuing an EMTALA claim under § 1395(d)(d)(a). The Court of Appeals decision dismissing this portion of Appellants' claim was inappropriate.

II. THE COURT OF APPEALS IMPROPERLY HELD THAT OHIO COUNTY HOSPITAL COMPLIED WITH 42 U.S.C. 1395 (d)(d)(b) BY COMPLETING THE CERTIFICATION THAT THE BENEFITS OF TRANSFER OUTWEIGHED THE RISKS.

In effect, the Appellee argues that since the Hospital's emergency room physician, Dr. Gregory, signed the certification for transfer required by 42 U.S.C. 1395(d)(d)(c)(1)(A)(ii), then there can be no liability for failure to properly stabilize the Decedent as required to § 1395(d)(d)(b). Thus, a complete failure by the Hospital to stabilize a patient who with proper care should have been stabilized, is rendered moot, if the Hospital properly completes the transfer certification referenced in 42 U.S.C. 1395(d)(d)(b)(1). In this instance, stabilization required by EMTALA was necessary because it is uncontradicted that the emergency room physician and the Hospital determined immediately that Decedent had an emergency condition. In fact, for the vast majority of her stay at the Hospital, Decedent was unconscious and in recognized hypovolemic shock.

The Appellee cites Burditt v. U. S. Department of Health and Human Services, 934 F.2d 1362 (1991) and references the four ways that the Court in Burditt concluded a hospital could violate the provision of § 1995(d)(d)(b) in the physician's certification. See Burditt, at 1371.

Do the violations referenced in Burditt include the Hospital, through its emergency room physicians, giving false or factually incorrect testimony with regard to significant factors in the certification process. Obviously, it does. The Appellee argues that Dr. Gregory testified that he weighed the risks against the benefits and since no surgeon was available at the Hospital, the benefits outweighed the risk. Appellee's Brief, pp. 7-8. In fact, the evidence is virtually uncontradicted that the Hospital never attempted to contact the general surgeon, Dr. Pathi, who was available and testified that he would have attended to Decedent

if anyone from the Hospital had contacted him. (See Record, August 18, 2006, 01:22:40 through 01:24:00).

In this instance, it is submitted that there was substantial evidence of the Hospital's failure to properly stabilize Decedent as required by § 1399(d)(d)(b) and for that issue to be presented to the jury. The Court of Appeals decision to the contrary should be reversed.

III. KRS 402.005 DOES NOT BAR CONSORTIUM DAMAGES RESULTING FROM THE DEATH OF A SPOUSE.

Appellee argues that KRS 402.005, the statutory definition of "marriage", prohibits loss of consortium damages resulting from the death of a spouse. This argument is flawed because it assumes that recovery for post-death loss of consortium damages requires the marriage relationship to continue past death.

Appellant is not asking this Court to extend the marital relationship beyond death. Instead, Appellant asks the Court to fully compensate the surviving spouse when the marital relationship is destroyed by the negligent or wrongful behavior of another. When the marital relationship is destroyed by a negligent or wrongful act, a real loss is suffered by the surviving spouse, and this Court should recognize a remedy for such loss.

Like every other state in this country, Kentucky recognizes that the "marriage" ends at death. Nevertheless, the legal definition of marriage has not defeated just compensation for the wrongful destruction of the marital relationship as amply demonstrated by virtually every state in the country which now permits recovery for post death loss of spousal consortium.

Appellee in essence is asking this Court to treat a marital relationship destroyed by the wrongful or negligent act of another no differently than a marriage terminated by the natural death of a spouse or by divorce. This defies logic and is inconsistent with the

purpose of tort law which is to compensate persons for harm caused by wrongdoers and to deter future wrongdoing.

All familial relationships terminate at death. The parent-child relationship terminates on the death of either. This relationship can also be voluntarily or involuntarily terminated during life. Despite such termination, KRS 411.135 and Giuliani v. Guiler, 951 S.W.2d 318 (Ky. 1997) allow recovery for damages resulting from death of the parent or child due to a tortfeasor's negligence. The same recovery should be afforded to a spouse whose husband or wife has been wrongfully killed. Nothing in KRS 402.005 addresses consortium damages resulting from the death of spouse. It is unreasonable to suggest that marriage is sufficiently important to define and protect, but of such little consequence that consortium damages flowing from its destruction should be denied.

Appellee also claims that the definition of consortium in KRS 411.145 precludes recovery for post-death loss of spousal consortium. This argument is also flawed. When a wrongdoer negligently or wrongfully destroys the marital relationship by killing one of the spouses, not only is the marital relationship in existence but the spouses' mutual rights to the services, assistance, aid, society, companionship and conjugal relationship of one another are also in existence. Recovery is already permitted against a negligent tortfeasor whose wrongful behavior cause injury to one spouse, the effect which also damages the marital relationship. Appellant merely asks this Court to allow recovery when a tortfeasor's negligent or wrongful act leads to death which is the ultimate and final injury. This is consistent with KRS 411.145(2) which allows consortium recovery, without limitation, for all "damages...resulting from the negligent or wrongful act of a third person." It is also logically consistent. There is "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.” Missouri Pacific R.Co. V. Dawson, 662 S.W.2d 740, 742 (Tex.App. 1983).

IV. SECTION 241 OF THE KENTUCKY CONSTITUTION DOES NOT BAR CONSORTIUM DAMAGES RESULTING FROM THE DEATH OF A SPOUSE.

The Appellee argues that Section 241 of the Kentucky Constitution prohibits this Court from recognizing a claim for post-death loss of spousal consortium.

Section 241 provides: “Whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then in every case, damages may be recovered for such death. . .” (emphasis added). Section 241 prohibits the legislature from limiting damages resulting from death, but the Appellee argues that legislation is not required to allow damages resulting from death.

The Kentucky Constitution provides that “damages may be recovered” whenever the death of a person shall result from injury inflicted by the negligence or wrongful act of another. It does not in any way limit those damages nor does it prevent the Court from specifying what damages “may be recovered.”

This Court has historically established the damages to be recovered for wrongful death. For example, KRS 411.130(1) parrots the language of Section 241 by providing that “[W]henver the death of a person results from an injury inflicted by the negligence or wrongful act of another, damages may be recovered for the death from the person who caused it.” It is this Court (and not the legislature) which has established that the measure of damages under KRS 411.130 is the sum of money which will fairly compensate the estate for “the destruction of the decedent’s power to earn money.” See, e.g. Cuniffe’s Ex’x v. Johnson, 279 Ky. 663, 132 S.W.2d 47, 48 (1939). Under the Appellee’s reasoning, only the legislature may constitutionally determine what damages can be recovered.

Appellee's argument also completely ignores the fact that the legislature has acted. KRS 411.415 recognizes an independent cause of action for the loss of services, assistance, aid, society, companionship, and conjugal relationship caused by the negligent or wrongful act of a third person. Floyd v. Gray, 657 S.W.2d 936, 938 (Ky. 1983). The statute creates an independent cause of action to be asserted by the spouse (or surviving spouse) and not the estate.

Indeed, Appellee does not acknowledge the relevant language of KRS 411.145 anywhere in its brief: "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." KRS 411.145(2). Nowhere in the plain language of the statute did the legislature restrict or limit loss of consortium damages to injuries, as opposed to death caused by the negligent or wrongful act of another. The Court should not impose an ancient common law restriction on loss of consortium damages when the legislature chose not to do so.

Appellee claims that KRS 411.145 was enacted to overrule the common law rule which prohibited a wife from recovering for the loss of consortium of her husband. To the contrary, this Court had already overruled the old English common law rule over a month before the statute was enacted by its decision in Kotsiris v. Ling, 451 S.W.2d 411 (Ky. 1970). Furthermore, it is clear that the legislature did not merely codify the Kotsiris case because it chose not to limit loss of consortium damages to those situations "resulting from injury" as the Court did in Kotsiris, p. 12.

Even without KRS 411.145, this Court is empowered to recognize recovery for damages resulting from death at common law consistent with Section 241. Not only has the Court historically established such damages, but in Giuliani v. Guiler, supra, the Court

allowed recovery by a child for loss of love and affection as the result of the death of a parent even though the legislature chose not to act. There is no legitimate reason to deny recovery for consortium damages due to the death of spouse when one considers the language of Section 241 and the reasoning of Giuliani.

V. FULL COMPENSATION SHOULD BE ALLOWED FOR SPOUSAL CONSORTIUM CONSISTENT WITH OTHER CONSORTIUM CLAIMS.

Appellee argues that KRS 411.135 and KRS 411.145 are fundamentally different and should not be “made congruent.” In the Department of Education v. Blevins, 707 S.W.2d 782, 785 (Ky. 1986), overruled on other grounds by Williams v. Kentucky Department of Education, 113 S.W.3d 145 (Ky. 2003), this Court stated:

KRS 411.145(2) which sets out the right of a spouse to recover damages for loss of consortium, is similar in wording to KRS 411.135, which sets out the right of a parent to recover damages for loss of affection and companionship resulting from the wrongful death of their child. It follows that the two statutes should be interpreted consistently.

By statute, parents are allowed to recover for the loss of consortium resulting from the wrongful death of their child. KRS 411.135. By judicial decision, children are permitted to recover for the loss of parental consortium caused by the wrongful death of a parent. Giuliani v. Guiler, 1951 S.W.2d 318 (Ky. 1997). Only the marital relationship between the husband and wife has been left unprotected (and uncompensated) by prior decisions of this Court. The time has come for the Court to remedy this injustice.

VI. KENTUCKY SHOULD JOIN THE VAST MAJORITY OF STATES WHICH ALLOW SPOUSAL CONSORTIUM DAMAGES RESULTING FROM DEATH.

Appellee has taken exception with several of the case authorities from other states cited by Appellant for the proposition that the state allowed post-death loss of spousal consortium. However, what the Appellee fails to state is that the vast majority of other

states, including all states surrounding this Commonwealth, by statute or case authority, allow recovery for loss of spousal consortium resulting from the wrongful death of a spouse. That having been said, Appellants' counsel has the duty to acknowledge that we improperly cited Zimmerman v. Lloyd Nolin Foundation, Inc., Ala. 582 So.2d 548 (1991); and Thalman v. Owens Corning Fiberglass Corporation, N.J., 676 A.2d 611 (1995), as case authority that the states of Alabama and New Jersey allowed recovery for post-death loss of consortium. The Appellee has correctly pointed out that these two states do not at this time appear to allow such recovery.

However, with those exceptions, Appellants submit that much of the authority, and the arguments emulating therefrom, cited by Appellee are incorrect. The Appellee cites Zoss v. Zoss Dakota Truck Underwriters, S.D., 590 N.W.2d 911 (1999) for the proposition that the state of South Dakota does not allow loss of consortium after the wrongful death of a spouse. Appellee's argument in this regard is misleading. In Zoss, the Court ultimately concluded that in a wrongful death action, the spouse's recovery for pecuniary injury damages may include a recovery for the pecuniary loss of the decedent's society and companionship, which includes such things as protection, guidance, advice, and assistance. Zoss, at 914.

The Appellee next points to Georgia and suggests that it is a state that does not allow post-death loss of consortium. Appellants take no exception with the authority indicating that Georgia does not allow a separate derivative cause of action for post death loss of consortium. The recovery allowed in Georgia is set forth in GA Code § 51-4-2 which specifically allows recovery for the "full value of the life of the decedent as shown by the evidence". This claim is one then brought by the fiduciary of the decedent's estate.

However, “full value of life” for the purposes of wrongful death under Georgia law, is comprised of . . . lost tangible items whose value cannot be precisely quantified such as society, advice, example, and counsel as determined by an enlightened jury. Child v. U. S., 923 F.Supp. 1570 (S.D. GA 1996); Consolidated Freight Ways Corporation of Delaware v. Futrell, GA, 410 S.E.2d 751. Thus in its wrongful death statute, Georgia has established a mechanism where a spouse can make a claim for those matters which we routinely consider to fall into the category of loss of consortium damages.

The Appellee next cites Archie v. Hampton, N.H., 287 A.2d 622 (1972) for the proposition that New Hampshire does not allow recovery for post-death consortium. The Archie case analyzes loss of consortium under N.H. Rev. Stat. § 507:8(a), which is the loss of consortium statute. However, in 1997, the New Hampshire wrongful death statute was amended to allow these damages in the case of death. Specifically, N. H. Rev. Stat. § 556:12(ii) now states:

In addition, the trier of fact may award damages to a surviving spouse of the decedent for the loss of comfort, society and companionship of the decedent . . .

As a result, to the extent that Archie holds that there is no claim for loss of consortium, it is has now been superseded by statute.

Appellee then attempts to distinguish Barnes v. Outlaw, Ariz. 964 P.2d 484 (1998). However, Appellee does not suggest that Arizona does not allow post-death loss of spousal consortium. See Sedillo v. City of Flagstaff, Ariz. App., 737 P.2d 1377 (1987); and Voies v. Cole, Ariz., 407 P.2d 917 (1965) which substantiates that Arizona allows post-death loss of spousal consortium.

The Appellee next attempts to distinguish Jones v. Carvell, Utah, 641 P.2d 105 (1982). Once again, Appellants do not suggest that Utah does not allow post-death loss of

consortium. See Murray v. United States, 327 F.Supp. 835, 841 (D. Utah 1971) and In re: Behm's Estate, Utah, 213 P.2d 657, 661 (1950) which hold that such damages are recoverable.

Lastly, Appellee argues that Salin v. Kloempken, Minn., 322 N.W.2d 736 (1982) has no relevance to the issue of post-death loss of spousal consortium. Although Appellee again chooses to limit the cited authority, it does not suggest to this Court that Minnesota does not allow such recovery. See Steinbrecher v. McLeon, Minn.App., 392 N.W.2d 709 (1986), to the effect that such damages are recoverable in Minnesota.

CONCLUSION

The decision of the Court of Appeals which in effect would dismiss Appellants' EMTALA claims and the loss of consortium claim of Appellant, Donald Ray Shreve, should be reversed.

Respectfully submitted,



A. V. CONWAY, II
CONWAY & KEOWN
124 W. Union St., P. O. Box 25
Hartford, KY 42347
(270) 298-3231

and

LAURENCE R. DRY
WANDA DRY
140 East Division Road, Ste C-3
Oak Ridge, TN 37830
(865) 482-6600