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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- 00178

vs.

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

OHIO COUNTY HOSPITAL CORPORATION — APPELLEE

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BRIEF FOR APPELLEE, OHIO COUNTY HOSPITAL CORPORATION

****

Respectfully Submitted,

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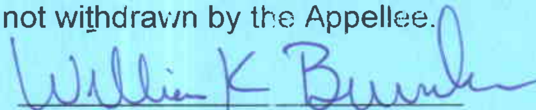
CERTIFICATE REQUIRED BY CR 76.12(6)

The undersigned does hereby certify that copies of the foregoing have been served on the following named persons by mail, postage pre-paid, this the 12th day of December, 2008, to wit: Clerk, Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; Judge Ronnie C. Dortch, Ohio Circuit Court, 130 E. Washington Street, Hartford, KY 42347; Hon. A.V. Conway, 124 West Union Street, P.O. Box 25, Hartford, KY 42347, Hon. Lawrence Dry and Wanda Dry, 140 East Division Road, Suite C-3, Oak Ridge, TN 37830; Paul A. Casi, II, 440 South 7th Street, Suite 100, Louisville, KY 40202; Kevin C. Burke, 125 South 7th Street, Louisville, KY 40202. The undersigned counsel further certifies that the record on Appeal was not withdrawn by the Appellee.



William K. Burnham

I. STATEMENT CONCERNING ORAL ARGUMENT

Appellant believes that oral arguments would be helpful in this matter. The issues of this case are unique and can best be argued before the Court.

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III. COUNTERSTATEMENT OF THE CASE

On June 20, 2002, at approximately 10:55 a.m., decedent, Billie Carol Shreve was involved in a motor vehicle accident at the entrance to the road leading to Ohio County Hospital ("OCH"). It was uncontested that the accident was caused by a third party, who was not made a party to the instant suit. An apportionment instruction was given to the jury. The Ohio County EMS responded to the scene and transported Ms. Shreve to the nearby OCH emergency room. Upon arrival at 11:20 a.m., she was triaged, provided an appropriate medical screening exam and monitored by Holly Strader, RN and Dr. Kevin Gregory, emergency room physician. Ms. Shreve stated she was in no pain but was merely "uncomfortable." Despite the relatively benign complaints, Ms. Shreve continued to be monitored by the nursing staff and Dr. Gregory. Ms. Shreve's subsequent treatment was complicated by the fact that she was 5'6" tall and weighed approximately 290 lbs. Prior to her arrival at OCH she had been diagnosed with a myriad of medical conditions including anemia, mild renal failure, diabetes, hyperlipidemia, high blood pressure and morbid obesity.

At approximately 12:54 p.m., Ms. Shreve became unresponsive to verbal stimuli and a CT Scan was ordered by Dr. Gregory. When results of the CT Scan were received by Dr. Gregory, he determined that Ms. Shreve would require surgical intervention. It was then learned by Dr. Gregory that the lone surgeon at OCH was going out of town and was unavailable to receive

emergency consultations. Dr. Gregory arranged transfer to Owensboro Medical Health System, Inc. ("OMHS") for surgery. Prior to transfer, Dr. Gregory certified that the benefits of transfer outweighed the risks. Either while en route or upon arrival, Ms. Shreve died from the injuries she received in the automobile accident.

IV. ARGUMENT

B. THE COURT OF APPEALS CORRECTLY HELD THAT DIRECTED VERDICT SHOULD HAVE BEEN GRANTED FOR THE APPELLEE'S ON APPELLANTS' 42 USC 1395dd "EMTALA" CLAIM.

I. The Court of Appeals correctly held that 42 USC 1395dd(a) requires proof of improper motive.

"In 1986, Congress enacted EMTALA (Emergency Medical Treatment and Active Labor Act) to prevent hospitals 'from dumping patients who lack insurance to pay for their claims, by either refusing treatment or transferring them to other hospitals.'" Lawless v. Methodist Hospital, Slip Copy, 2006 WL 1669873 (W.D. Ky.) *quoting* Thornton v. Southwest Detroit Hosp. 895 F.2d 1131, 1132 (6th Cir. 1990). The statute was enacted to assure that all patients, regardless of their ability to pay, have equal access to the services of a hospital. Dollard v. Allen, 260 F.Supp.2d 1127 (D.Wyo. 2003).

Citing to Cleland v. Bronson Health Care Group, Inc. 917 F.2d 266 (6th Cir. 1990), the Court of Appeals held that pursuant to 42 USC 1395dd(a) the term "appropriate medical screening" means a screening that a hospital would have

offered to any paying patient. Court of Appeals Opinion, Page 8, citing Id. at 268.

The Court of Appeals further cited Cleland and stated:

> "We believe that the terms of the statute, specifically referring to a medical screening exam by a hospital "within its capabilities" precludes resort to a malpractice or other objective standard of care as the meaning of the term "appropriate." Instead, "appropriate" must more correctly be interpreted to refer to the motives with which the hospital acts. If it acts in the same manner as it would have for the usual paying patient, then the screening provided is "appropriate" within the meaning of the statute.
>
> This result does not constitute a backdoor means of limiting coverage to the indigent or uninsured. A hospital that provides a substandard (by its standards) or nonexistent medical screening for any reason (including, without limitation, race, sex, politics, occupation, education, personal prejudice, drunkenness, spite, etc.) may be liable under this section.
>
> On the other hand, if...a hospital provides care...that is no different than would have been offered to any patient, and, from all that appears, is "within its capability" (that is, constitutes a good faith application of the hospital's resources), then the words "appropriate medical screening" in the statute should not be interpreted to go beyond what was provided here."

In 2000, the Federal Court for the Eastern District of Kentucky considered whether EMTALA required proof of improper motive. Newsome v. Mann, 105 F.Supp.2d 610 (E.D. Ky. 2000). In Newsome, Plaintiff sued Defendant alleging a violation of EMTALA. Defendant moved for Summary Judgment which was granted by the District Court. In rendering its decision, the District Court considered Cleland and found that the 6th Circuit requires a showing of improper motive in order to sustain a claim for violation of the "appropriate medical screening" prong of EMTALA. Id. at 611.

Appellants cite to Roberts v. Galen of Virginia, 525 U.S. 249 (1999) in support of their argument that an improper motive is not required. However, this reliance is misplaced. The Roberts Court did not address the improper motive requirement. As noted in Newsome, the Supreme Court determined that the "'appropriate medical screening requirement' is not before us, and we express no opinion on it here." Newsome 105 F.Supp.2d at 611; *citing* Roberts, 525 U.S. at 687. Therefore the law as enunciated in Cleland, and recognized by the Court of Appeals, that a Plaintiff must show proof of improper motive is still the governing law in the 6th Circuit.

While Appellee does not believe its screening was substandard, that is not the analysis that the Court is asked to make when reviewing an EMTALA claim for "appropriate medical screening". Instead, the Court is asked to determine whether the medical screening was the same screening which the hospital applies to all patients regardless of their ability to pay. Holcomb v. Monahan, 30 F.3d 116 (11th Circ. 1994)("As long as a hospital applies the same screening procedures to indigent patients which it applies to paying patients, the hospital does not violate this section of the act.") To define appropriateness in terms of standard of care would circumvent the purpose of 42 U.S.C. 1395. "Courts have universally recognized that EMTALA was not conceived as a federal medical malpractice statute." Lawless at 2, *quoting* Morgan v. North Mississippi Medical Center, Inc., 403 F.Supp.2d 1115, 1124 (S.D. Ala.2005) (*citing* Nolen v. Boca

Raton Community Hosp., Inc., 373 F.3d 1151, 1154 (11th Cir. 2004); Harry v. Marchant, 291 F.3d 767, 772 (11th Cir. 2002).

Wherefore, the Appellee, Ohio County Hospital, contends that the analysis and conclusions of the Court of Appeals were appropriate on the issue of whether EMTALA requires proof of improper motive. Appellee, Ohio County Hospital, respectfully requests this Honorable Court to uphold the finding on the Court of Appeals concerning 42 U.S.C 1395dd(a).

II. The Court of Appeals correctly held that Ohio County Hospital complied with 42 U.S.C. 1395dd(b) by completing the certification that the benefits of transfer outweighed the risks.

The Appellate Court correctly stated the law pursuant to 42 U.S.C. §1395dd(b)(1), which states specifically,

> "If any individual comes to a hospital and the hospital determines that the individual has an emergency medical condition, the hospital must provide... – (B) for transfer of the individual to another medical facility in accordance with subsection (c) of this section."

According to subsection (c),

> "If an individual at a hospital has an emergency medical condition which has not been stabilized the hospital may not transfer the individual **unless... (A)(ii) a physician has signed a certification that based upon the information available at the time of transfer, the medical benefits reasonably expected from the provision of appropriate medical treatment at another medical facility outweigh the increased risks to the individual**." (Emphasis added).

Dr. Kevin Gregory signed the certification which was made a part of the Trial Record as Defense Exhibit 2. Clearly based on the signed certification, Ohio

County Hospital met the requirements of 42 U.S.C. 1395dd(b) and a directed verdict should have been granted.

Courts have recognized that no liability can attach for an EMTALA violation provided the transferring facility has weighed the risks versus benefits of transfer. In Vargas v. Del Puerto Hospital, 98 F.3d 1202 (9th Circ. 1996), Plaintiff sued Defendant Hospital alleging violations of EMTALA after her child suffered injury following a transfer from the Defendant Hospital. Prior to transfer, the attending ER physician completed the necessary certification but failed to fully list the risks of transfer. The Trial Court heard evidence on the issue of whether failure to specifically list the risks was sufficient to prove a violation of EMTALA. The Trial Court ruled in favor of the Defendant. The ruling was affirmed by the Court of Appeals which held that even a technical violation of the EMTALA certification requirement does not lead to liability under EMTALA. Id. at 1204.

In this case there is no violation of the EMTALA certification requirement whether technical or otherwise, but the result is the same as Vargas, completion of a certification stating that the benefits of transfer outweigh the risks is sufficient to satisfy the stabilize and transfer requirement of 42 U.S.C. 1395dd(b). Dr. Gregory completed the Certificate of Transfer and therefore did not violate U.S.C 1395dd(b) and a directed verdict should have been granted.

Courts have recognized that in order "to succeed on a section 1395dd(b) claim, a plaintiff must present evidence that the patient had an emergency condition, the hospital knew of the emergency condition, the patient was not

stabilized before being transferred **and the hospital neither obtained the patient's consent to transfer nor completed a certificate indicating the transfer would be beneficial to the patient**." (Emphasis added) Holcomb, supra, *citing* Baber v. Hosp. Corp. of America, 977 F.2d 872, 884 (4th Cir. 1992). As previously stated, Dr. Gregory signed a certificate of transfer stating the risks of transfer were outweighed by the benefits. Therefore Ohio County Hospital could not be held liable for a violation of 42 U.S.C. 1395dd (b) and the Court of Appeals correctly held that a directed verdict should have been granted.

According to Burditt v. U.S. Department of Health and Human Services, 934 F.2d 1362, 1371 (5th Cir. 1991):

> "a hospital may violate this provision (1395dd(b)) in four ways. First, before transfer, the hospital might fail to secure the required signature from the appropriate medical personnel on a certification form. But the statute requires more than a signature; it requires a signed *certification*. Thus, the hospital also violates the statute if the signer has not actually deliberated and weighed the medical risks and medical benefits of transfer before executing the certification. Likewise, the hospital fails to make the certification required by 42 U.S.C. 1395dd(c)(1)(A)(ii) if the signer makes an improper consideration of a significant factor in the certification decision. Finally a hospital violates the statute if the signer actually concludes in the weighing process that the medical risks outweigh the medical benefits of transfer, yet signs the certification that the opposite is true."

None of the four (4) violations listed above occurred in the instant case. First, Dr. Gregory certified that the benefits of transfer outweighed the risks. Second, Dr. Gregory testified that he weighed the risks against the benefits and determined that, based on the fact that there was no surgeon available at Ohio County

Hospital, the benefits of transfer outweighed the risks. Third, there was no evidence entered that Dr. Gregory took any improper considerations in determining that transfer was necessary. Finally, there was no evidence that the risks actually outweighed the benefits. In fact, Appellant's own experts all testified that a transfer was necessary. Dr. Lewis Kaplan, Appellant's surgical expert, testified that Ms. Shreve should have been transferred to another facility. (See Trial Court video record, dated August 16, 2006, 1:31:56 through 4:02:48). Appellant's other medical expert, Dr. Robert Mulliken, also testified that Ms. Shreve required transfer. (See Trial Court video record, dated August 16, 2006, 10:13:12 through 10:13:48; and 10:41:26 through 10:42:00.) Given that the transferring physician and both of Appellant's own experts testified that transfer was necessary, there could be no evidence that the decision to transfer Ms. Shreve violated 42 U.S.C. 1395dd(b).

Further, 42 U.S.C. 1395dd(b) "is logically structured to set forth two options for transferring a patient with an emergency medical condition: a hospital must either provide stabilization treatment prior to transferring a patient pursuant to subsection (A), or, pursuant to subsection (B), provide no treatment and transfer according to one of the statutory exceptions." Harry v. Marchant, 291 F.3d 767, 771 (11th Cir. 2002). In transferring Ms. Shreve to Owensboro Mercy Health System, Ohio County Hospital complied with the statutory exception that allows for transfer of a patient who has not been stabilized provided the transferring facility certifies that the benefits of transfer outweigh the risks.

Absent evidence that Ohio County Hospital did not certify that the benefits of transfer outweighed the risks, Appellant failed to make a *prima facie* case under EMTALA. At the close of both Appellant's case in chief and at the conclusion of all evidence, Appellee moved for Directed Verdict on Appellant's EMTALA claims. Despite the fact that there was no evidence of disparate treatment and evidence of the certification was entered, the Court erroneously denied Appellee's Motions. The Court of Appeals correctly held that a Directed Verdict should have been granted on Appellant's EMTALA claims and it correctly held that a New Trial should be conducted. This Court is respectfully requested to uphold the finding of the Court of Appeals and return this matter to the Trial Court for further proceedings.

B. THE COURT OF APPEALS CORRECTLY HELD THAT A DIRECTED VERDICT SHOULD HAVE BEEN GRANTED ON APPELLANT'S CLAIMS FOR LOSS OF CONSORTIUM.

I. The law in Kentucky provides that recovery for spousal consortium ends at death.

Appellants argue that spouses should be entitled to recover for loss of consortium past death. This position does not conform to the definition of marriage pursuant to KRS 402.005 which states:

> "As used and recognized in the law of the Commonwealth, "marriage" refers only to the civil status, condition, or relation of one (1) man and one (1) woman united in law ***for life***, for the discharge to each other and the community of the duties legally incumbent upon those whose association is founded on the distinction of sex. (emphasis added)"

There is no provision within the laws of this Commonwealth for the marriage relationship, and therefore consortium, to continue past the death of a spouse. To allow the marriage relationship to continue past death for the purpose of allowing recovery for loss of spousal consortium would be in direct conflict with KRS 402.005. The General Assembly has defined marriage as being for the finite period of the life of one of the parties. Therefore, a marriage is considered terminated by the death of a spouse and therefore any recovery related to the marriage relationship cannot continue after death.

This is further supported by the very definition contained within KRS 411.145. According to KRS 411.145, "'consortium' means the right to the services, assistance, aid, society, companionship and conjugal relationship between husband and wife, or wife and husband." Once the marriage relationship is terminated, a husband or wife no longer has a right to the services, assistance, aid, society companionship or conjugal relations. This is also true if the parties choose to voluntarily sever the relationship by divorce. Clearly, if the parties are still married, there is a right to recover for loss of consortium, provided the spouse survives for an appreciable period of time before death. Since a marriage is terminated at the time of the death of a spouse, a party cannot recover for the services, assistance, aid, society, companionship or conjugal relations after death. For obvious reasons there is no statute which defines marriage as extending past death.

Therefore, the Court of Appeals correctly held that a claim by a spouse for loss of consortium ends upon the death of one of the parties to the marriage relationship.

II. Changes to the laws regarding wrongful death require legislative action.

Appellant further suggests that it "can be reasonably inferred that the legislature has decided to yield to the courts on the question of whether such a claim (spousal consortium) should be recognized in Kentucky." Brief for Appellant, p. 16. This inference is unreasonable. "It is not the proper function of the judiciary to further develop the common law in the area of loss of consortium claims in the context of wrongful death... in light of Constitutional provision that [the] sole responsibility for determining who can recover what damages for the wrongful death of another is with the legislature. Const. § 241." Clements v. Moore, 55 S.W.3d 838, 840-841 (Ct. App. 2001). Although Clements dealt with the claims of adult children to recover for loss of parental consortium, the Court's reasoning still applies.

> "Section 241 of the Kentucky Constitution provides: Whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then, in every such case, damages may be recovered for such death, from the corporations and persons so causing the same. Until otherwise provided by law, the action to recover such damages shall in all cases be prosecuted by the personal representative of the deceased person. The General Assembly may provide how the recovery shall go and to whom belong; and until such provision is made, the same shall form part of the personal estate of the deceased person." Id. at 841.

It is up to the General Assembly to determine what may be recovered in a wrongful death action and by whom. As stated in Appellant's brief, the General Assembly has attempted only twice to allow recovery for post-death spousal consortium. On both occasions the issue passed the House, but did not make it out of committee in the Senate. There was never a vote taken by the Senate on the issue either in favor of, or opposing, recovery for post-death loss of spousal consortium. Therefore, absent some finality by the legislature either voting yeah or nay on the issue of post-death recovery, this Court is respectfully requested to observe the separation of powers and allow the legislative process to work, before overruling both an existing statute, a constitutional provision and their longstanding common law foundation.

Despite § 241, Plaintiffs seek to rely on Guiliani v. Gulier, 951 S.W.2d 318 (Ky .1997) in asking this Court to change the laws concerning loss of spousal consortium. While Guiliani does suggest that the Court has the authority to overrule the common law, that authority is limited. "Guiliani does not place an affirmative duty on the courts to act in the absence of the failure of the legislature to do so, but instead stands for the proposition that it is not the sole province of the legislature to develop the common law." Pearson v. National Feeding Systems, Inc., 90 S.W.3d 46, 52 (Ky. 2002). If the General Assembly chooses to do so now, it is up to the General Assembly to begin the process of amending the Constitution.

Further, the General Assembly has already been provided with a chance to amend the common law and chose not to do so. In 1970, KRS 411.145 was created in order to allow husbands and wives equality for recovery for loss of spousal consortium. The purpose of this statute was to overrule the common law that only a husband was able to recover and his wife was not. Despite the fact that Kentucky had rigidly applied the common law that loss of consortium ends at death, there was no attempt made within the statute to affirmatively overrule the common law on that point. Prior to 1970, there was ample support in the case law for the right to recover for loss of consortium to end at death. Eden v. Lexington & Frankfort R.R. Co., 53 Ky. 204 (1853); Louisville & N.R. Co. v. McElwain, 34 S.W. 236 (Ky. App. 1896) Rogers v. Fancy Farm Telephone Co., 170 S.W.178 (Ky.App. 1914); Louisville N.R. Co. v. Kinman, 206 S.W. 880 (Ky.App. 1918); and McGuire v. East Kentucky Beverage Co., 238 S.W.2d 1020 (Ky.App. 1951). Despite this fact, the legislature chose to overrule only part of the prior Common Law and codify that both a husband and wife could recover for loss of consortium, but not to overrule the common law that loss of consortium should end at death.

III. Loss of Parental Consortium is distinguishable from Loss of Spousal Consortium.

Appellants argue that the law of spousal consortium should be changed by this Court to be brought in line with recovery for loss of parental consortium. This argument fails for a number of reasons. First, the legislature has already had the

opportunity to align the two (2) statutes and chose not to. KRS 411.135, which allows for the recovery of parental consortium, was adopted by the legislature in 1968, two (2) years before KRS 411.145. At the time of adoption of KRS 411.145, the Legislature had the opportunity to align the two statutes and did not do so.

Second, the damages recoverable pursuant to KRS 411.135 are limited only to a loss of affection and companionship. The only analogous damage in KRS 411.145 is companionship. KRS 411.145 also allows for the recovery of services, assistance, aid, society and conjugal relations. Despite these additional damages available to a spouse pursuant to KRS 411.145, Appellants still argue that the two (2) statutes are not mutually exclusive and should be made congruent. This is a faulty argument on the basis of recoverable damages alone.

Finally, the marriage relationship, as defined by the laws of the Commonwealth is a relationship which is finite and ends with the death of one of the parties. KRS 402.005. The relationship between parent and child as protected by KRS 411.135 and Guiliani v. Guiler, 951 S.W.2d 318 (Ky. 1997), is not one which has been limited by Statute as has the marriage relationship. The relationship between a child and parent is significantly different than the relationship between spouses. At the risk of sounding insensitive, it is possible to replace the services, assistance, aid, society, companionship or conjugal relations which can be provided by a spousal relationship, but it is not possible to

replace the parent-child relationship. In fact, people voluntarily terminate the spousal relationship at an alarming rate.

The spousal relationship is one which can be terminated almost at will through divorce. According to the National Center for Health Statistics, in 2004 in Kentucky, there were 8.8 marriages for every 1000 people. Conversely there were 4.9 divorces for every 1000 people. (See Appendix 1) Based on this data alone, the divorce rate in Kentucky is well over 50% of the marriage rate. Counsel for Appellee has not been able to find any data concerning children filing for emancipation from parents, or parents voluntarily terminating parental rights, but feels confident it is significantly less than the 50% divorce rate. Therefore, even the reality of the fungibility of the marriage relationship is significantly different than the relationship between parents and their children. Therefore loss of parental consortium and loss of spousal consortium do not require alignment as stated by Appellant.

IV. Kentucky is not alone in terminating recovery for loss of consortium at the death of the spouse.

South Dakota, like Kentucky, does not recognize damages for loss of spousal consortium past death. South Dakota has defined consortium as "a right growing out of the marital relationship... [which] includes the right of either spouse to the society, companionship, conjugal affections and assistance of the other." Zoss v. Dakota Truck Underwriters, 590 N.W.2d 911, 914 (S.D. 1999); *citing* Pankratz v. Miller, 401 N.W.2d 543, 546 (S.D. 1987). Therefore, "loss of

consortium is an action that can be maintained only by a spouse and exists only during the decedent's lifetime prior to death." Zoss 590 N.W.2d at 914; *citing* Selchert v. Lien, 371 N.W.2d 791, 794 (S.D. 1985).

Appellant next argues that because Kentucky is one (1) of four (4) states to continue to adhere to the common law rule that consortium ends at death, it must be the wrong law. Only Kentucky, Delaware, New York and South Dakota have no wrongful death statute which allows for the recovery of loss of consortium. However, they are not the only states that limit recovery to the time period between injury and death. In each of these states, the reason for denying wrongful death is based on statutory construction.

Furthermore, New York's wrongful death statute, found at McKinney's EPTL § 5-4.1, does not contain any provision for a party to recover for loss of consortium and New York, like Kentucky, limits recovery for loss of consortium to the period of time from injury to death. Liff v. Schildkrout, 404 N.E.2d 1288 (NY App. 1980). In Liff, the Plaintiff's wife died while under anesthesia for a caesarian section. The Plaintiff filed an action for wrongful death on behalf of his wife's estate, including an allegation of loss of consortium. The complaint was later amended to assert an independent claim for loss of consortium. Id. at 1289. Upon review, the New York Court of Appeals first looked to the New York Wrongful Death Statute and determined that there was no claim for loss of consortium enunciated within the statute. The Court declined to extend such a claim absent clear statutory language and instead enunciated that "if a change

should be made, it is for the legislature not the Courts to make." Id. at 1292. The Court next undertook an analysis of whether there was a common law cause of action for permanent loss of consortium and again decided that any such right must be founded in statutory authority. Id. at 1291. The Supreme Court of New York then determined that Plaintiff did not have an individual claim for loss of consortium after death, but only during the period of the decedent's conscious pain and suffering. Id.

The Delaware wrongful death statute is found at 10 Del. C. §3724. Like New York, Delaware's statutory scheme does not allow for recovery for loss of consortium as it is considered a pecuniary loss. Reynolds v. Willis, 8 Storey 368, 58 Del. 368, 209 A.2d. 760 (Del. 1965). There has been no case law overruling the Reynolds case. Additionally, Delaware amended its wrongful death statute in 2006, but did not amend it to include a measure of recovery for loss of consortium. While Appellant may argue that there is a nationwide trend which should be followed by Kentucky, certainly not every state is following this purported trend.

Of the forty-six (46) jurisdictions which Appellants state currently allow recovery for post-death loss of consortium, thirty-four (34) of those states have codified this right in their wrongful death statutes, including Illinois (Illinois Compiled Statute 180/0.02), Idaho (Id. St. § 5-311), Iowa (I.C.A. §613.15), Mississippi (Miss.Code Ann. §11-7-13), Nebraska (Neb.Rev.St. § 810), New

Mexico (N.M.S.A. 1978 § 41-2-1), and Washington whose wrongful death statutes were not cited by Appellant in their brief.

Of the states without a wrongful death statute, Plaintiff cites to Zimmerman v. Lloyd Noland Foundation, Inc., 582 S.2d 548 (Ala. 1991) in support of its argument that Alabama case law allows for recovery for loss of consortium past death. Appellant's reliance on Zimmerman is misplaced. In fact, Zimmerman actually supports the position of Appellee. In Zimmerman, Plaintiff and wife were visiting a local hospital when his wife fell and suffered injury. The parties then filed suit for personal injury and loss of consortium. During the pendency of the action, the wife died and Mr. Zimmerman elected to proceed with claims for wrongful death and on his individual claim for loss of consortium. After some legal wrangling at the trial court level, all of Plaintiff's claims were dismissed, including the claim for loss of consortium. Id. at 549. On Appeal, the Supreme Court of Alabama reviewed whether Mr. Zimmerman's claim for loss of consortium was extinguished with the death of his wife. The Court held that the claim for loss of consortium survived death, but the period of damages was "from the time of his injury until his death.... The exclusiveness of the wrongful death remedy does not defeat a surviving spouse's cause of action for loss of consortium for the period between the decedent's injury and death. Id. at 551; *citing* Acuff v. Schmit, 248 Iowa 272, 78 N.W.2d 480 (1956). In fact, Alabama, like Kentucky, actually only allows for recovery for consortium from the time of injury until the time of death. Id.

In support of its position that New Jersey allows recovery for post-death consortium, Appellant seeks to rely on Thalman v. Owens-Corning Fiberglass Corporation, 676 A.2d. 611 (N.J. 1995). As with Zimmerman, Appellant's reliance is wholly misplaced. Thalman actually stands for the proposition that consortium is to be measured from the time of injury until the time of death and does not extend past death. According to the Thalman Court, "the jury should have calculated the consortium award for the period beginning with the onset of injury caused by Owens' product and ending with Thalman's death." Id. at 614. New Jersey's handling of loss of spousal consortium is akin to that of Kentucky. Like Kentucky, New Jersey measures loss of consortium damages for the period of the injured party's life only. That is exactly what the Court of Appeals has correctly done in the instant case.

Georgia also limits recovery for loss of consortium from the time of injury until the time of death. T & M Investments, Inc. v. Jackson, 425 S.E.2d 300 (Ga.App. 1992). In T & M Investments, Plaintiff was injured by slipping on grease which was negligently disposed of. He filed suit for his injuries and his wife filed suit for loss of consortium. During the pendency of the litigation, Plaintiff's wife died. Judgment was entered on behalf of the Plaintiff for his injuries and on behalf of the wife's estate for loss of consortium. Defendant appealed. Id. at 302-303. The Court of Appeals held that "the right of consortium exists only during the joint lives of the husband and wife." Id. at 304; *citing* Cody v. Peaks, 149 S.E.2d 521 (Ga. App. 1966). Despite a wrongful death

statute expressly allowing for recovery of loss of consortium, Georgia, like Kentucky, limits recovery to the period of time from injury to death.

New Hampshire also limits recovery for loss of consortium from the time of injury until the time and death and does not allow recovery for post-death consortium. Archie v. Hampton, 287 A.2d 622 (N.H. 1972). In Archie, the Plaintiff's husband died while working. Plaintiff recovered under Workers' Compensation but sought additional damages for her loss of consortium. Id. at 623. The Supreme Court of New Hampshire held that Plaintiff did have an independent claim for loss of consortium, and "that the damages to be recovered by the plaintiffs are to be restricted to her loss of consortium from the time of her husband's injury to his death." Id. at 625. New Hampshire has a wrongful death statute which allows for recovery of loss of consortium damages. Despite the statute, such damages are still limited to the period of time from injury to death.

Appellant's have cited Barnes v. Outlaw, 964 P.2d 484 (Ariz. 1998) in support of their position that Arizona allows recovery for loss of consortium after death. This is simply not true. Barnes stands for the proposition that a party need not suffer physical injury in order to recover for loss of consortium. Id. at 487. Barnes does not address whether a party can recovery for post-death consortium. Barnes is clearly distinguishable from the case at bar.

Appellant's have also erroneously cited to Home Insurance Company v. Wynn, 493 S.E.2d 622 (GA. 1998) in support of their argument. Home Insurance Company, involves a lawsuit filed by children, against their mother, who settled a

personal injury case on behalf of their father's estate. While the case does mention that one portion of the settlement proceeds were earmarked for a loss of consortium claim, the case does not discuss whether loss of consortium damages exist post-death. Id.

Like its reliance on Home Insurance, a case which does not even discuss spousal consortium, Appellant's reliance on Jones v. Carvell, 641 P.2d 105 (Utah 1982) is also misplaced. Jones deals with a parent's loss of consortium for the death of their child. Id. at 107. There is no mention, discussion or even reference to a loss of spousal consortium or whether a right of recovery exists for post death loss. Therefore this case is clearly distinguishable from the case at bar.

Further Appellant's have cited to Idaho case law as supportive of their argument. Hepp v. Ader, 130 P.2d 859 (Id. 1942). Idaho is another state which relies on its wrongful death statute to allow for recovery of damages for loss of consortium. However, the wrongful death statute in Idaho is extremely liberal and actually allows for the recovery of whatever damages may be just. Even the Idaho Supreme Court recognizes the liberality of the statute. "Our statute, heretofore quoted, providing for recovery of damages for death, caused by wrongful act or negligence, is as liberal as any we have examined. It places but one restriction on the amount which may be recovered. That restriction is to be found in this language: '*such damages may be given as under all the circumstances of the case may be just.*'" Id. at 862. This is indeed extremely

liberal language and is entirely inconsistent with the wrongful death statute in Kentucky and therefore Idaho's loss of consortium case law is clearly distinguishable from that of our Commonwealth.

Appellant's have also cited Salin v. Kloempken, 322 N.W.2d 736 (Minn. 1982) which is not relevant to this case. In Salin, the Minnesota Supreme Court was asked to determine whether children should have a claim for loss of parental consortium for injury to their father. Interestingly Salin is not even a wrongful death action since the Plaintiff's father did not die. Id. at 737. The Court was not asked to determine if a claim for spousal consortium allows recovery for post-death damages. In Salin the Court of Minnesota distinguished between a claim for loss of spousal consortium and a claim for loss of parental consortium. In fact, the Supreme Court of Minnesota held that the parent-child relationship is significantly different from the spousal relationship and the Courts shall not recognize a claim for loss of parental consortium, although they do recognize a claim for loss of spousal consortium. Id. at 739. The Court's did not consider whether a spouse can recover for post-death lost consortium. Appellants are asking this Court to rely on a Minnesota Court decision to bring Kentucky loss of spousal consortium law into line with loss of parental consortium. This reliance is misplaced given that Minnesota does not even recognize a claim for parental consortium.

Wherefore, based upon the overwhelming similarities between other states statutes and those of this Commonwealth, and given the fact that action by

the General Assembly to alter this particular statute is the only avenue for change, the Appellee respectfully requests that this Court affirm the opinion of the Court of Appeals that the a claim for loss of spousal consortium ends upon the death of the spouse and is only valid if the spouse survives an appreciable period of time.

V. CONCLUSION

The Court of Appeals correctly held that a directed verdict should have been granted to Appellee on Appellant's claims pursuant to 42 USC 1395dd(a). In the case at bar, Appellant did not enter any evidence into the record that Appellee acted with an improper motive in their care and treatment of Ms. Shreve. Further, Appellant entered no evidence that the medical screening examination provided by the Ohio County Hospital Emergency Room differed in any way from the medical screening examination of any other patient. Both of these elements must be met in order for the Plaintiff to make a prima facie case for a violation of EMTALA.

Further, the Court of Appeals correctly ruled that a directed verdict should have been granted to Appellee on Plaintiff's claims pursuant to 42 USC 1395dd(b). Evidence was entered into the record that Appellee, Ohio County Hospital, complied with 1395dd(b) in transferring Ms. Shreve to another hospital. The plain language of EMTALA allows a patient who has not been stabilized to be transferred provided the treating physician certifies that the benefits of transfer outweigh the risks. Evidence of the required certification was entered and

therefore directed verdict should have been granted to Appellee on Plaintiff's claims under EMTALA.

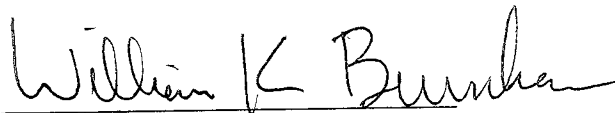
The Court of Appeals correctly held that a directed verdict should have been granted on Mr. Shreve's claim for loss of spousal consortium. The current state of the law in Kentucky is that a spouse is only entitled to loss of consortium from the time of injury until death, provided the spouse survives an appreciable period of time. In the instant case, Ms. Shreve was injured in an automobile accident at approximately 12:00 noon. She was pronounced dead at approximately 5:00 p.m. The Court of Appeals correctly held that this five (5) hour period was not an appreciable period of time and therefore directed verdict should have been granted.

Appellant is asking this Court to overrule the Constitution and common law of this Commonwealth to allow damages for loss of spousal consortium past death. Whether a party may recover for post-death spousal consortium is an issue for the legislature to decide. At this time there are thirty-four (34) states which have wrongful death statutes which specifically allow for recovery of post-death consortium. Despite this overwhelming trend to rely on the legislature to determine when a party may recover for loss of Consortium, Appellant is asking this Court to overrule Constitutional law and usurp the authority conveyed upon the General Assembly. Currently, Kentucky's Constitution does not allow for recovery of post-death consortium and it is up to the General Assembly to change the law if necessary.

WHEREFORE, based on the foregoing, this Court is respectfully requested to affirm the decision of the Court of Appeals and return this matter to the Trial Court for further proceedings.

Respectfully Submitted,

SHEFFER LAW FIRM, PLLC



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