HON. DONALD C. WINTERSHEIMER
JUSTICE SUPREME COURT
P.O. BOX 387
COVINGTON, KY 41012-0387

MW

COMMONWEALTH OF KENTUCKY
SUPREME COURT
NO. 95-SC-001004

J. DENIS GIULIANI, Administrator of the Estate of Mary K. Guiliani, Deceased; J. DENIS GIULIANI, Individually, J. DENIS GIULIANI, FATHER AND NEXT FRIEND OF JAMES GIULIANI, an infant, KATHERINE M. GUILIANI, an infant, MARY K. GIULIANI, an infant, and DAVID GIULIANI, an infant — APPELLANTS,

-v-

MICHAEL GUILER, M.D., RICHARD BENNETT, M.D., VELMA TAORMINA, M.D., UNIVERSITY OF KENTUCKY MEDICAL CENTER RESIDENTS TRAINING PROGRAM; and BAPTIST HEALTH CARE SYSTEMS, INC., D/B/A CENTRAL BAPTIST HOSPITAL — APPELLEES.

ON APPEAL FROM THE COURT OF APPEALS OF KENTUCKY
NO. 94-CA-0021-MR

BRIEF FOR APPELLEE, BAPTIST HEALTH CARE SYSTEMS, INC. D/B/A/ CENTRAL BAPTIST HOSPITAL

FILED

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CLERK
SUPREME COURT

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CERTIFICATE OF SERVICE

It is hereby certified that a copy hereof was this 30th day of October, 1996, mailed to Hon. John R. Adams, Judge, Fayette Circuit Court, Division 4, Fayette County Courthouse, 215 W. Main St., Lexington, KY 40507; Hon George Fowler, Clerk, Kentucky Court of Appeals, 360 Democrat Boulevard, Frankfort, KY 40601, Hon. David C. Trimble, 2800 Lexington Financial Center, Lexington, KY 40507, Hon. Kenneth W. Smith, Ste. 200, 167 W. Main St., Lexington, KY 40507; and Hon. Ann B. Oldfather, 1330 South Third St., Louisville, KY. 40208.

Counsel for Appellee,
Baptist Healthcare Systems, Inc.

INTRODUCTION

The Appellants in this case are requesting this Court to alter the law in a fashion which would not only would overturn solid precedent, but would invade the province of the legislature, namely to create a loss of parental consortium action. Appellee, Baptist Health Care Systems, Inc., d/b/a/ Central Baptist Hospital, joins in the arguments set forth by Co-Appellee, Dr. Michael Guiler, and respectfully requests that the Court decline to take the improper step advocated by the Appellants.

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COUNTERSTATEMENT OF THE CASE

The Appellants in this action are the husband and four children of Mary K. Guiliani, who died during childbirth on January 21, 1992. Mrs. Guiliani suffered from an extremely rare condition known as Amniotic Fluid Embolism. This condition continues to perplex experts in the field of obstetrics to this day, as it is still unknown if the condition can be prevented, or treated once it becomes manifest. There was even less known about this condition four years ago, at the time of Mrs. Guiliani's death. This condition takes the life of almost ninety percent of those who are struck with it, however. Despite the preceding, the Appellants, the children and husband of the deceased, have alleged that the treatment that Mrs. Guiliani received from the Appellees was instead to blame. This is the essence of the proceeding which will take place in the trial court in 1997.

The issue which is presently before this Court is much more straightforward: Should this Court abandon its precedent, assume the duties designated to the legislature, and create a new cause of action? This is exactly what is being requested by the Appellants. The trial court and the Kentucky Court of Appeals have properly recognized that the infant's claim for loss of parental consortium is not and never has been recognized in the Commonwealth of Kentucky. The Appellee, Baptist Health Care Systems, Inc., respectfully requests that the radical step propounded by the Appellants be denied by this Court as well.

ARGUMENT

THERE HAS BEEN NO CHANGE SINCE THE COURT'S LAST VISIT TO THIS ISSUE SO DRASTIC AS TO WARRANT AN ABANDONMENT OF ITS PRECEDENT.

One of the primary reasons cited by the Appellants for their position that this new cause of action should be created in our state is the trend of such being done in other jurisdictions. The predecessor of this court declined to create this cause of action in 1977. Brooks v. Burkeen, Ky., 549 S.W.2d 91 (1977). It is rather misleading to call what has actually taken place since 1977 with regard to this issue a trend in favor of the Appellants position. In fact, more courts have examined this issue and affimatively declined to take the step advocated by the Appellants, than have taken the opposite stance. The Supreme Courts of no less than twenty states have made the decision not to bring this cause of action into their jurisdictions. These cases are as follows:

1993 Monias v. Endal, 623 A.2d 656 (md. 1993)

1993 Noll v. City of Philadelphia, 620 A.2d 613 (Pa.Cmwlth. 1993)

1992 State Department of Motor Vehicles v. Hafen, 842 P.2d 723 (Nev. 1992)

1992 Butz v. World Wide, Inc., 492 N.W.2d 88 (N.D. 1992)

1990 Dearborn Fabricating and Engineering Corp., Inc. v. Wickham, 551 N.E.2d 1135-(Ind. 1990).

1989 Van De Veire v. Sears, Roebuck & Company, 533 N.E.2d 994 (Ill. APp. Ct. 1989).

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1989 Vaughn v. Clarkson, 376 S.E.2d 236 (N.C. 1989)

1988 Still by Erlandson v. Baptist Hospital Inc., 755 S.W.2d 807 (Tenn. App. 1988).

1986 Lee v. Colorado Department of Health, 718 P.2d 221 (Colo. 1986).

1985 Zorzos v. Rosen by and through Rosen, 467 So.2d 305 (Fla. 1985).

1985 Lewis v. Rowland, 701 S.W.2d 122 (Ark. 1985).

1983 W.J. Bremer Co., Inc., v. Graham, 312 S.E.2d 806 (Ga.App. 1983).

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1982 Norwest v. Presbyterian Intercommunity Hospital, 652 P.2d 318 (Or. 1982).

1981 DeAngelis v. Lutheran Medical Center, 445 N.Y.S.2d 188, (N.Y.App.,Div. 1981), aff'd 449 N.E.2d 406 (N.Y.1983).

1977 Borer v. American Airlines, 563 P.2d 858 (Cal. 1977).

1975 Hickman v. Parish of East Baton Rouge, 314 So.2d 486 (La. App. 1975).

1972 Russell v. Salem Transportation Company, 295 A.2d 862 (N.J. 1972).

From a temporal standpoint, several of these cases are very recent, and fully half of these courts made this decision in the last ten years. If this Court should decide that the decisions on this matter by other states is a highly significant factor, then this should simply place more weight on the Appellee's side of the scales. The true trend has been against recognizing such a cause of action. Therefore, the Appellant's argument that a significant trend warrants a different result than that in Brooks v. Burkeen is without merit. 549 S.W.2d at 94.

THE CREATION OF LAW ADVOCATED BY THE APPELLANTS IS TANTAMOUNT TO LEGISLATION, AND SHOULD BE LEFT TO THE GENERAL ASSEMBLY.

It is clear from examining the history of loss of consortium claims in this jurisdiction, and those elsewhere, that creating such claims is a task for the legislature. First and foremost, it has long been part of the jurisprudence of this Commonwealth that it shall be left to the province of the General Assembly to create new legislation, such as new causes of action. Chapman v. Chapman, Ky., 498 S.W.2d 134, 137 (1973). The predecessor to this Court once stated, "We have the greatest sympathy for appellant in this big loss which it has sustained, but we cannot permit that sympathy to impel us to legislate on its behalf. [O]ur function is to declare the law as it is, not to legislate." Glenmore Distilleries Co. v. Dept. of Revenue, Ky., 131 S.W.2d 460, 463 (1939). The fact that this is a matter properly placed in the hands of the General Assembly is witnessed by the fact that all of the presently-existing claims for loss of consortium have been legislatively created. K.R.S. 411.135, K.R.S. 411.145. It is also clear that, given the actions which have been created, the legislature has given thorough attention to the issue of how far this type of action should be extended. The General Assembly has effectively drawn a line by their exclusion of this cause of action after much deliberation on the subject. Despite the Appellant's claim to the contrary, it is respectfully submitted that the Court should not ignore that line, and essentially engage in legislation, by creating a cause of action which did not heretofore exist.

Not only have the existing consortium claims in this jurisdiction been created by the legislature, but most of those jurisdictions which have seen fit to create the type of action at issue have done so pursuant to, not in contravention of, legislative provisions. A prime example comes from the neighboring state of Tennessee in Still by Erlandson v. Baptist Hospital, Tenn., 755 S.W.2d 807 (1988). Therein it was decided that the loss of parental consortium was recognized because that state's legislature had provided for such a claim in its wrongful death statute. Id. This is obviously not the case here, and this is a distinction of primary importance. Absent such legislative authority, the Court should abstain from creating new causes of action.

THERE ARE A HOST OF POLICY REASONS WHICH SPEAK AGAINST THE CREATION OF A LOSS OF PARENTIAL CONSORTIUM CAUSE OF ACTION.

The courts of other jurisdictions, in examining the present issue, have identified various important policy reasons which argue against the creation of the loss of parental consortium cause of action. A common thread among many of these decisions is that liability simply cannot be limitless, and that this specific type of claim holds the possibility of creating a multiplicity of actions which other similar claims do not. Salin v. Kloempken, Minn., 322 N.W.2d 736, 739 (1982)(citing Amaya v. Home Ice, Fuel & Supply Co., Ca., 379 P.2d 513, 522 (1963)). For instance, a spousal claim for loss of consortium, or even a parent's claim for loss of children's consortium, have natural bounds. Obviously, the

number of parents, or spouses, involved in such a claim are by definition limited. This is not true of the cause of action advocated by the Appellants, because a given parent may have any number of progeny to serve as additional plaintiffs. This is the type of consideration which distinguishes this cause of action from others, and one which almost certainly has not escaped the attention of this state's legislature.

The loss of parental consortium cause of action also presents the possibility of a double recovery. The intangible nature of the child's loss makes it difficult to assess damages and provides a further reason against judicial recognition of the cause of action. Koskela v. Martin, Ill. App., 414 N.E.2d 1148 (1980). It is likely that juries will already compensate the child for lost economic support through an award to the parent and, in addition, they may already indirectly factor in a child's emotional loss through an award to the parent. Id. It is undeniable that there is a natural element of sympathy and emotion present in any wrongful death case in which children are involved, and it is also undeniable that there is a dollar value contained therein. To the extent that this same element would be additionally provided for by the action proposed, there would indeed be a double recovery.

The Supreme Court of Kansas was well aware of these policy considerations when it considered this cause of action:

> If this court were to conclude that a cause of action is here alleged, the far-reaching results of such a decision would be readily apparent. A new field of litigation would thus arise between minor children and

> third party tort-feasors... The possibility of multiplicity of actions based upon a single tort and one physical injury, when there is added the double-recovery aspect of such a situation in the absence of some statutory control, is deemed sufficient to prevent this court from answering in the affirmative that a cause of action has been alleged.

Schmeck v. Shawnee, Kan., 647 P.2d 1263, 1267 (1980).

These important matters of policy make all the more apparent the legislative nature of this proposed creation of new law. "[T]he determination of whether a child should be granted this cause of action is one of legislatively determined public policy." Block v. Pielet Bros. Scrap & Metal, Ill. App., 457 N.E.2d 509, 512 (1983). "An expansion in the law of family relationships should be made by the legislature which could better weigh the merits of the proposed change against other considerations - such as double damages recovery, increased litigation, remoteness of damages as well as possible adverse effect on the family of separate or segregated awards to children." Id. These matters of policy are additional reasons why this Court should refuse to pursue the cause of action requested by the Appellants.

CONCLUSION

For the reasons presented herein it is respectfully resquested that the Court decline to proceed down the ill-advised path the Appellants are so anxious for it to clear. The loss of parental consortium cause of action is a proverbial can of worms, the ramifations of which can best be evaluated by the legislature. The

truth of the preceding is witnessed both by the more numerous courts who have declined to created this cause of action in their state, and by those who have created the cause of action only after being given a directive from the legislature. This Appellee prays that the Court not be led astray by the emotional pleas of the Appellant, but instead let the well-set policies of precedent and separation of powers guide it to a sound decision. This is not the day, or the method, for this cause of action to find its way into this Commonwealth.