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

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

FILED

OCT 30 1996

CLERK
SUPREME COURT

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

APPELLANTS

v.

BRIEF FOR APPELLEES, VELMA TAORMINA, M.D. AND UNIVERSITY OF KENTUCKY MEDICAL CENTER RESIDENTS TRAINING PROGRAM

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

This is NOT new legislation it recognizes changes in Common Law ? Jural Rights ?

21 states do NOT

GALLION, BAKER & BRAY, P.S.C.
PNC Bank Plaza
200 West Vine Street, Suite 710
Lexington, Kentucky 40507-1620
Telephone: (606) 255-6885

BY: _____
WILLIAM J. GALLION
ATTORNEY FOR APPELLEES

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing pleading has been served by mail 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; Susan Stokeley Clary, Clerk, Kentucky Supreme Court, 209 New Capital Building, 700 Capital Avenue, Frankfort, KY 40601-3488; David C. Trimble, Esq., 2800 Lexington Financial Center, Lexington, KY 40507; Kenneth W. Smith, Esq., Ste. 200, 167 W. Main St., Lexington, KY 40507; William Adkins, Esq., 444 W. Second St., Lexington, KY 40507; and Ann B. Oldfather, 1330 S. Third St., Louisville, KY 40208, Counsel for Appellants on this the 30th day of October, 1996:

_____
WILLIAM J. GALLION

INTRODUCTION

The issue before the Court is whether to radically expand the scope of forseeable plaintiffs and judicially create a new cause of action for children to sue for a loss of parental consortium.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE FACTS

On January 21, 1992, Mary K. Giuliani (hereinafter "Decedent") died while giving birth to her fourth child at Central Baptist Hospital in Lexington, Kentucky. The Decedent's baby was properly delivered by Appellee, Dr. Velma Taormina and is presently a healthy, normal child.

The cause of death was a rare obstetrical syndrome known as amniotic fluid embolism (hereinafter "AFE"). AFE occurs when abnormal or toxic amniotic fluid enters into the bloodstream and causes severe pulmonary and respiratory collapse. In virtually every pregnancy some amniotic fluid escapes into the bloodstream. However, with AFE, the ensuing pulmonary and respiratory collapse causes death in 80 to 86 percent of those who suffer from the syndrome. It is believed that the amniotic fluid of the women who suffer from AFE is abnormal. However, the specific abnormal factor has not been isolated to a scientific certainty.

The Appellants in this medical malpractice action are the husband and the infant children of the Decedent. In addition to various other claims for damages which are not the subject of their appeal, the Appellants seek damages for the "permanent loss of the care, society, love, companionship and affection of their mother." This is in effect a claim for the loss of parental consortium of the Decedent by the infant appellants.

Because this cause of action has not been recognized in Kentucky, Appellee Michael Guiler moved the Trial Court for partial summary judgment in dismissal of the claims of parental consortium. This Motion was sustained by Judge Adams of the Fayette Circuit Court. The Court of Appeals subsequently affirmed Judge Adams' ruling.

Appellants are now asking this Court to judicially legislate a new cause of action, overturn clear precedent and unnecessarily extend tort liability in this Commonwealth.

ARGUMENT

I. THE GIULIANI CHILDREN WILL NOT BE DEPRIVED OF A REMEDY IF THEIR CONSORTIUM CLAIMS ARE DISMISSED.

Kentucky's Wrongful Death statute, KRS 411.130 makes it very clear that in a situation such as the instant case, children of a deceased parent are entitled to monetary damages. Specifically, the statute states that if there is a recovery on behalf of a decedent and the decedent "leaves a widow and children or a husband and children, then one-half (1/2) to the widow or husband and the other one-half (1/2) to the children of the deceased." KRS 411.130 (2)(b) (emphasis added). Thus, contrary to the implications of Appellants' brief, James, Katie, David and Mary Kay will not be rendered destitute as a result of any decision made by this Court.

Additionally, this right of recovery under the Wrongful Death Statute would pose a danger of double recovery for the Giuliani children if they are also allowed to assert a claim for the loss of parental consortium. First of all, there is no doubt that any amount of money will not be a true replacement for the loss of a mother in these children's lives. The California Supreme Court found this argument persuasive in its decision in Borer v. American Airlines, 563 P.2d 858 (Cal. 1977). Consequently, any award of damages is going to be purely speculative. The jury will no doubt see the Giuliani children in court every day, and it is likely that the presence of the motherless children will engender sympathy in the jurors. This would obviously affect the amount of damages they award

in the wrongful death suit. The measure of damages set forth in the Wrongful Death Statute is wholly adequate to compensate the Giuliani children, and the additional threat of double recovery from any new cause of action should preclude the Court from being swayed by sympathy for the children.

II. IN A WRONGFUL DEATH SUIT, KENTUCKY HAS NEVER JUDICIALLY RECOGNIZED A RIGHT OF RECOVERY BEYOND THAT ALLOWED FOR BY KRS 411.130.

Contrary to Appellants' assertions, this is clearly a wrongful death suit. By statute, an action for wrongful death is an action to recover damages for death resulting from the "negligence or wrongful act of another." KRS 411.130 (1); Kentucky Constitution, §241. This case is one in which damages are sought in response to the death of Mrs. Giuliani, which Appellants allege was caused by the negligence or wrongful act of the Appellees. Therefore, this is clearly a wrongful death action despite Appellants' urgings that the consortium claims constitute a separate cause of action.

Appellants assert that Department of Education v. Blevins, Ky., 707 S.W.2d 782 (1986) provides a basis to distinguish their consortium claims and allows them to be brought concurrently with the wrongful death claim of the estate. Blevins involved a wrongful death action as well as a claim for loss of a minor's consortium. The Court held that both of these claims could be brought separate and independently. However, the consortium claim in Blevins was entirely based upon statute, KRS 411.135. Appellants in this case are seeking to create a new common law right of action. Therefore, Blevins does not present controlling precedent for Appellants' argument that they are making two separate claims.

Since this is clearly a wrongful death claim, Appellants can only prosecute it pursuant to Kentucky statutory law. "No cause of action existed at common law to recover for death, and an action to recover for a death of a person can only be maintained in this state by virtue of §6 Ky. St., enacted pursuant to §241 of the Constitution." Smith's Administrator v. National Coal and Iron Company, 135 Ky. 671, 117 S.W. 280 (1909). "The maxim, actio personalis moritur cum persona, [a personal right of action dies with the person] was the uniform rule of the common law, and prevails in Kentucky today, except where it has been modified by the express language of the Constitution and statute." Stewart's Administrator v. Bacon, 253 Ky. 748, 70 S.W.2d 522 (1934). The only modification when a death results from negligence is KRS 411.130. Based on this clear precedent, the Courts should continue to defer to the legislature regarding who can bring and recover in a wrongful death action. City of Louisville v. Hart's Administrator, 143 Ky., 171, 136 S.W. 212 (1911).

A long line of Kentucky cases has consistently held that the damages available in a wrongful death action are limited to the value of the destruction of the Decedent's power to work and earn money. This has been as recently recognized as 1995 in both Adams v. Miller, Ky., 908 S.W.2d 112 (1995) and Luttrell v. Wood, Ky., 902 S.W.2d 817 (1995). The Court stated in Luttrell that the status of survivors has no bearing on the calculation of this value. For this Court to recognize, as urged by Appellants, that this damages figure should be changed would go directly against the judicial principle of stare decisis. One hundred years of judicial consistency should not be discarded in favor of a principle with no foundation in Kentucky jurisprudence.

Since these consortium claims are being brought in a wrongful death context, whether or not Kentucky should allow a cause of action for a loss of parental consortium should be left to the legislature. The only consortium claims recognized in Kentucky are statutory. KRS 411.135-145. KRS 411.145 (1) defines "consortium" as the right to the services, assistance, aid, society, companionship and conjugal relationship between husband and wife, or wife and husband." (emphasis added). The second part of the statute expressly states that only a "wife" or "husband" can recover for loss of consortium due to the negligent acts of another person. Also, KRS 411.135 recognizes only the right of parents to recover for "loss of affection and companionship" of a child in a wrongful death claim. Neither statute expressly or implicitly authorizes a claim by a child for loss of a parent's consortium. Clearly, the legislature has considered the merits of consortium claims generally and it would be absurd to think that they have not realized their ability to enact such a cause of action should they choose to do so.

As this Court has noted previously, "a general rule of statutory construction is that the enumeration of particular things excludes other items which are not specifically mentioned." Louisville Water Company v. Wells, Ky. App., 64 S.W.2d 525, 527 (1984); citing Smith v. Wedding, Ky., 303 S.W.2d 322 (1957). Given this rule, it is clear that the legislature has considered the issue of consortium claims and has decided that only those specific claims authorized by KRS 411.135 and KRS 411.145 are valid.

The legislature is the appropriate governmental body to decide this issue because that body is better suited to make public policy decisions for the citizens of the Commonwealth. The legislature has greater resources and the political mandate to act

or not act and, thereby, reflect the will of the general populous. As stated by Kentucky's highest Court, "the public policy of a state is to be found: first, in the Constitution; second, in the acts of the legislature; and, third, in its judicial decisions." Kentucky State Fairboard v. Fowler, Ky., 220 S.W.2d 435 (1949). Absent a constitutional violation, it would be improper for this Court to create a right which has not been recognized by the legislature. The role of the court system in Kentucky is to interpret existing statutory or case law, not to create new legislation. Chapman v. Chapman, Ky., 498 S.W.2d 143 (1973).

Additionally, the allowance of this cause of action will greatly increase the number of potential claimants in any given lawsuit. See, e.g., Borer, supra; Russell v. Salem Transportation Company, 295 A.2d 862 (N.J. 1972). This will be true whether there is a simple car accident or medical malpractice action such as this case. Consequently, the burden on the insurance companies and thus the insureds will greatly increase. This will be a great financial burden upon all the taxpayers of the Commonwealth and thus is properly a consideration for the legislature because it is a major public policy issue. Therefore, in light of the fact that Kentucky has never judicially recognized any rights of recovery in a wrongful death action other than that allowed by statute, this Court should leave the loss of parental consortium claim for the consideration of the legislature.

Appellants rely on two cases for the proposition that the judicial branch has the power to create this new cause of action. However, these cases are distinguishable. In Hilen v. Hays, Ky., 673 S.W.2d 713 (1984), the Supreme Court of Kentucky was joining a majority of 32 states by recognizing comparative negligence. The Court did not do

what the present Appellants are asking, namely to join a distinct minority of jurisdictions in broadening the scope of tort liability based upon emotionally compelling but legally inapplicable theories. The Appellants also rely on Kotsiris v. Ling, Ky., 451 S.W.2d 411 (1970). Kotsiris involved a wife's claim for loss of consortium when her husband was injured. It had nothing to do with a claim asserted under the Wrongful Death Statute. Additionally, in so ruling, the Court joined the clear modern trend which recognized that wives are not their husbands chattel. Clearly, these two cases do not provide the strength of precedent which Appellants assert.

Furthermore, the Appellants tacitly admit that this is a legislative issue when they argue repeatedly that the legislature has specifically adopted provisions for the protection of children. (Appellants' Brief at 4,9). Yet, while Appellants imply that the issue of parental consortium is a foregone conclusion due to the strong emphasis on family in the Kentucky statutes, they fail to explain while the legislature has not recognized such a cause of action despite the state's steadfast concern for the well-being of children. The obvious answer is that the legislature has conclusively decided that this particular cause of action does not merit legal recognition.

III. IN LIGHT OF THE ATTENDANT BURDENS ON SOCIETY OF ALLOWING LOSS OF PARENTAL CONSORTIUM, THIS COURT SHOULD NOT EXPAND THE SCOPE OF FORSEEABLE PLAINTIFFS.

There is no dispute that in any personal injury action there are secondary injuries to relatives, friends or people who rely on or care for the injured party. The law always allows the allegedly injured party a right of action in order to make herself whole. This is a right which Appellees do not dispute. However, Appellants are seeking to recover

for alleged injuries to persons other than the party suffering the actual harm. Such expansion of tort liability has always been frowned upon by Kentucky courts, and should not be endorsed by allowing claims for loss of parental consortium.

For example, the courts of this Commonwealth have never joined the growing trend of jurisdictions recognizing a "zone of danger" rule for negligent infliction of emotional distress. The Court of Appeals refused to allow bystander recovery without physical contact in the case of Wilhoite v. Cobb, Ky.App., 761 S.W.2d 625 (1988). In that case, a mother saw a vehicle run over her child. Her claim was denied by the Court of Appeals as being too tenuous. The appellate court was following the well-established "contact rule" set down by this very Court in Deutsch v. Shein, Ky., 597 S.W.2d 141 (1980), "an action will not lie for fright, shock or mental anguish which is unaccompanied by physical contact or injury." Id. at 145-146, citing Morgan v. Hightower's Administrator, Ky., 163 S.W.2d 21, 22 (1942). This area of the law clearly shows the courts' unwillingness to greatly expand the scope of the forseeable plaintiffs beyond those directly injured by a tort feasor's negligence. This Court should apply the same caution to the instant case.

Merely because Appellants' argument may be logically appealing does not mean there is a "duty" to create a new cause of action. If the pure logic of Appellants' argument is applied with integrity, then it will be difficult to prevent anyone with a close relationship to an injured party from asserting a claim for loss of consortium on their behalf. As stated by the California Supreme Court "all agree that somewhere a line must be drawn" Borer v. American Airlines, 563 P.2d 858, 862 (Cal. 1977). The current line

drawn by the legislature, at the husband-wife relationship, is a very discernable and justifiable point to draw the line. Extension of the line will only lead to an inevitable deluge of consortium claims by anyone who ever had a close relationship with an injured party. There is no need to do so.

As many Courts have noted, recognizing claims for loss of parental consortium will greatly increase the amount of litigation arising from even a simple car accident. See, Borer v. American Airlines, supra, and Russell v. Salem Transportation Company, 295 A.2d 862 (N.J. 1972). In the Borer case, for example, nine children sued American Airlines for $100,000 apiece when their mother was allegedly injured by a falling light. Clearly, the liability from one injury is multiplied. The injury suffered by the mother could be quantified as one, while the tortfeasor was being asked to pay nine times the amount of damages sustained by the injured party. This potential significant increase in recovery will undoubtedly lead to rising litigation costs, insurance costs and costs to society as a whole.

Therefore, these Appellees urge the Court to follow its previous decisions in the realm of second injury claims and not greatly expand the scope of forseeable plaintiffs. "[L]egal responsibility must be limited to those causes which are so clearly connected with the result and of such significance that the law is justified in imposing liability." Keeton, Prosser and Keeton on the Law of Torts, §41, at 264 (5th ed. 1984). Although Appellants' argument may be logical, it is the duty of this Court to weigh the benefits and the burdens of expanding costs to society and realize that the attendant burdens are too great for the minimal benefit. This conclusion is especially true in light of the fact that

the Appellants have right of full recovery under the Wrongful Death Statute created by the legislature.

IV. THE MAJORITY OF JURISDICTIONS IN THIS COUNTRY DO NO RECOGNIZE A CLAIM FOR LOSS OF PARENTAL CONSORTIUM.

The vast majority of states do not recognize a child's right to sue for loss of parental consortium. See list infra. In most of the cases cited by Appellants in which a child's claim for loss of parental consortium has been recognized, the states have already had language in their Wrongful Death Statute providing for such recovery. See, Still by Erlandson v. Baptist Hospital, Inc., 755 S.W.2d 807 (Tenn. App. 1988). In those cases, the courts reason that if the legislature had allowed such claims to children whose parents were negligently killed, analogous claims should be allowed to those children whose parents who were negligently injured. Clearly, these Courts have followed the legislature rather than unilaterally recognizing a new claim for loss of parental consortium. As previously stated, in Kentucky a person cannot recover in a wrongful death suit for the "affliction which is overcome the family by reason of wrongful death." Department of Education v. Blevins, Ky. 707 S.W.2d 782, 783 (1986). Thus, the statutory basis relied upon in those cases cited by Appellant is absent in Kentucky. The following is a sampling of some of the cases in which jurisdictions have refused to recognize a right of action for loss of parental consortium:

Pleasant v. Washington Sand and Gravel Company, 262 F.2d 471 (D.C. Cir. 1958);

Meredith v. Scruggs, 244 F.2d 604 (9th Cir. 1957);

Hoesing v. Sears Roebuck and Company, 484 F.Supp. 478 (D. Neb. 1980);

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

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

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

Zorzos v. Rosen, 467 So.2d 305 (Fla. 1985);

W.J. Bremer Company v. Graham, 312 S.W.2d 806 (Ga. Ct. App. 1983);

Meuller v. Hellring Construction Company, 437 N.E.2d 789 (Ill. App. Ct. 1982);

Dearborn Fabricating v. Wickham, 551 N.E.2d 1135 (Ind. 1990);

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

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

Salin v. Kloempken, 322 N.W.2d 736 (Minn. 1982);

Bradford v. Union Electric Company, 598 S.W.2d 149 (Mo. Ct. App. 1979);

General Electric Company v. Bush, 498 P.2d 366 (Nev. 1972);

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

DeAngelis v. Lutheran Medical Center, 445 N.Y.S.2d 188 (1981);

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

Morgel v. Winger, 290 N.W.2d 266 (N.D. 1980);

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

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

(21)

Clearly, the vast majority of jurisdictions in this country do not recognize a child's right to sue for loss of parental consortium.

CONCLUSION

This suit is clearly a wrongful death case, because it is brought because of alleged injuries resulting in death. Damages in wrongful death actions are limited by statute, and the courts of this Commonwealth have always held that they are limited to the decedent's lost earnings. Therefore, these Appellees respectfully request that this Court not greatly extend the scope of forseeable plaintiffs and refuse to recognize Appellants' claims for loss of parental consortium. In doing so, this Court will not be depriving Appellants of a remedy, because they will be provided for under the Wrongful Death Statute if their claims are indeed meritorious.

Respectfully submitted,

GALLION, BAKER & BRAY, P.S.C.
PNC Bank Plaza
200 West Vine Street, Suite 710
Lexington, Kentucky 40507-1620
Telephone: (606) 255-6885
Facsimile: (606) 253-9709

BY: _____
WILLIAM J. GALLION
ATTORNEY FOR APPELLEES