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

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

J. DENIS GIULIANI, ET AL. — APPELLANTS

V.

MICHAEL GUILER, M.D., ET AL. — APPELLEES

** ** ** ** ** ** ** ** ** ** ** ** ** ** ** ** **

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

** ** ** ** ** ** ** ** ** ** ** ** ** ** ** ** **

BRIEF FOR APPELLEE, MICHAEL GUILER, M.D.

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FILED

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SUPREME COURT

NEWBERRY, HARGROVE & RAMBICURE, PSC

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This is to certify that a true copy of the within Brief was served by first-class mail, postage prepaid to Ann Oldfather, Esq., Oldfather and Morris, 1330 South Third Street, Louisville, KY 40208; Kenneth W. Smith, Esq., Roberts & Smith, 167 West Main Street, Suite 200, Lexington, KY 40507; Gregory Jenkins, Esq., Boehl, Stoepher & Graves, 444 West Second Street, Lexington, KY 40507; William Gallion, Esq., Gallion, Baker & Bray, PNC Bank Plaza, Suite 710, 200 West Vine Street, Lexington, KY 40507; Hon. John R. Adams, Judge, Fayette Circuit Court, Fayette County Courthouse, 215 West Main Street, Lexington, KY 40507; and to Hon. George Fowler, Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; this 15 day of October, 1996.

ATTORNEY FOR APPELLEE
MICHAEL GUILER, M.D.

INTRODUCTION

This is a wrongful death action in which Appellants are asking this Court not only to overturn longstanding Kentucky precedent, but to enact by judicial order a quasi-legislative modification or amendment to the Kentucky Wrongful Death statute, to adopt a cause of action for a minor's claim for loss of parental consortium. Appellees respectfully submit that amendment, addition to, or modification of statutory causes of action should be left within the province of the General Assembly.

STATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

This is a medical malpractice action filed pursuant to the Kentucky Wrongful Death statute, KRS 411.130, *et seq.* Appellant's decedent, Mary K. Giuliani, died on January 21, 1992, as the result of the effects of a rare and deadly medical syndrome known as "amniotic fluid embolism" (hereinafter "AFE"). AFE is under intensive study by the obstetrical community to determine its precise cause, and whether anything can be done to predict or prevent its occurrence, or successfully treat it once it strikes. However, it is known that AFE occurs in between 1::30,000, and 1::80,000 births, and has an 86% morbidity and mortality rate in women in whom it occurs. Unfortunately, Mary K. Giuliani was one of its victims.

Thus, contrary to the shamefully inaccurate portrait of this case submitted in Appellant's Brief, this was not a case of neglect, nor a case of delay in diagnosis or treatment. And it is certainly not a foregone conclusion that Appellants will prevail at trial, as they seem to suggest to this Court. Rather, Appellant's decedent was at all times well-attended by trained health care personnel, including this Appellee and many others. Changes and developments in her condition were monitored and responded to appropriately and in accordance with accepted standards of medical and hospital practice. But for the occurrence of the AFE, there is no reason to believe that Mary

Giuliani would not be alive and well today. Discovery is proceeding in the trial court, in anticipation of a trial of this matter in 1997, at which time Appellees fully expect that their care of Mrs. Giuliani will be vindicated.

Thus, it is respectfully submitted that there is no reason or basis for this Court to proceed on the assumption that it would or would not be depriving the Giuliani children by making a ruling which is based on the law, regardless of Appellant's repeated pleas for sympathy for these children. Were this case solely about sympathy, there would be no issue, because no civilized human being would be unsympathetic to children who have lost a parent. Appellants, however, have yet to establish in a court of this Commonwealth any entitlement to damages, nor liability for same in any of the Appellees. This appeal is therefore simply about a legal issue upon which this Court has previously spoken, and an issue of defining the elements of recoverable damages under the Wrongful Death Statute, which is more properly debated in the committees and on the floor of the Kentucky General Assembly than before the bench of this Court.

ARGUMENT

I. THE COURT SHOULD NOT JUDICIALLY AMEND THE WRONGFUL DEATH STATUTE

The event which precipitated this litigation was the death of Mary K. Giuliani; it is therefore an action which was filed under, and is governed by, the Kentucky Wrongful Death Statute, KRS 411.130 *et seq.* Any argument made for a change in the law in therefore necessarily an argument asking this Court to judicially amend an act of the legislature. There is no element of common law, or development of public policy, that is relevant to the issue before this Court. Rather, it is simply a question of whether the Courts can, or should, make rulings which have the effect of becoming judicial legislation. This Court has long held that it cannot, and should not, do so; there is no reason it should depart from this rule of law in this action.

As recently as the decision in Adams v. Miller, Ky., 908 S.W.2d 112 (1995), in which this Court was asked to find in favor of a claim of a child's loss of consortium, the *identical* claim before the Court herein, this Court rejected an attempt to seek judicial amendment of the wrongful death statute. In so doing, the Court affirmed the legislatively-established measure of damages for wrongful death:

> The damages recoverable in [a] wrongful death action have been clearly defined and limited almost from its inception. The

damages are such sum as will fairly and reasonably compensate the decedent's estate for the destruction of the decedent's earning power, *and do not include the affliction which has overcome the family by reason of the wrongful death.* (Emphasis added).

Id. at 116, quoting from Louisville and N. R. Co. V. Eakin's Adm'r, Ky., 45 S.W.2d 529, 530 (1898).

This holding is consistent with a long line of cases recognizing, and ruling in conformity with, the measure of damages as set by the legislature. See, e.g., Department of Education v. Blevins, Ky., 707 S.W.2d 782 (1986); Roland v. Beckham, Ky., 408 S.W.2d 628 (1966). As has also been observed by the United States Circuit Court of Appeals for the Sixth Circuit, in the course of interpreting Kentucky law, wrongful death actions are purely statutory, and claims not provided for thereunder must be dismissed. Harris Corp. v. ComAir, 712 F.2d 1069 (6th Cir. 1983). The dismissal by the trial court of the childrens' loss of parental consortium claim herein was therefore consistent with the statute, and this Court's rulings thereon over a long period of years.

Much is made by Appellants by the provision for the parents' claim for loss of consortium based on the death of a child as found in KRS 411.135. However, the significant point about the existence of *that* element of damages

is that it is found in KRS 411.135, i.e., *the legislature enacted it*, and provided for that form of recovery. This was *not* court-made law, but was the result of the proper function of the legislature to amend the law as it saw fit. Well-settled rules of statutory interpretation hold that it is to be presumed that the legislature knew of potential legal principles when it enacted legislation, and that its failure or refusal to include other provisions in such enactment is to be read as the intent of the legislature that such other provisions not be a part of the law of this state. Haven Point Enterprises, Inc. v. United Kentucky Bank, Inc., Ky., 690 S.W.2d 393 (1985); Smith v. Wedding, Ky., 303 S.W.2d 322 (1957); Louisville Water Co. v. Wells, Ky.App., 664 S.W.2d 525 (1984). Thus, rather than providing some basis upon which the childrens' loss of consortium could be implied by this Court, as urged by Appellants, this statute provides compelling evidence that the General Assembly intended that such element of damages should not be a part of the law of Kentucky. No other interpretation is permissible under the law.

Moreover, it must be noted that the wrongful death statute specifically does provide for the persons who are entitled to recover, and share in, damages allowed for death. The statute provides for recovery on behalf of both a surviving spouse and surviving children, and for the manner of apportionment of any recovery to such children. The legislature has therefore clearly

addressed the rights of children under existing law, and must be presumed by this Court to have done so with the intent to limit their potential recovery to that which they have provided by its enactments. Clearly, children are entitled to share in any recovery for wrongful death, under the existing statute. Thus, any suggestion by Appellant that denial of a loss of consortium cause of action leaves the children without a remedy is patently inaccurate.

One of the founding principles upon which the government of this country, and of this state, is based is that of the separation of powers. Unquestionably, it is the function of the legislative body of a political entity to enact laws, and in so doing to exercise its collective judgment regarding what those laws should be. Likewise, it is unquestionably the function of the Courts to interpret and enforce those laws. Chatman v. Chatman, Ky., 498 S.W.2d 143 (1973). In this instance, the wrongful death statute, and what it does or does not allow as elements of damage, is exclusively the province of the Kentucky General Assembly. The adoption of a claim for a child's loss of parental consortium should therefore be an issue for consideration in the committees and on the floor of the legislature, and not the subject of judicial enactment at the bench of this Court.

II. THERE IS NO COMPELLING PUBLIC POLICY, NOR TREND IN THE COURTS, UPON WHICH THIS COURT SHOULD CONSIDER A CHILD'S LOSS OF CONSORTIUM CLAIM

Appellants urge reversal of the decision of this Court in Brooks v. Burkeen, Ky., 549 S.W.2d 91 (1977), on the basis of a perceived "trend" in the law to recognize a cause of action for a child's loss of parental consortium. Aside from the impropriety of asking that this change in the law occur in a judicial forum as opposed to the legislature, there is no such "trend", "extraordinary" or otherwise, upon which this Court should consider a change in the precedent of this Commonwealth.

It is highly significant that most of the courts cited by Appellants as forming the purported "trend" have found for the existence of this cause of action on the basis that the respective *state legislatures* have provided for such claim *in their wrongful death statute.* See, Still by Erlandson v. Baptist Hospital, Tenn., 755 S.W.2d 807 (1988). Thus, any "trend" there may be is legislative, and the court decisions merely reflect that changes have occured *within the legislatures.* The Kentucky General Assembly has not so acted, and a child's loss of parental consortium is therefore still not recoverable under Kentucky law.

Moreover, that which is portrayed as an overwhelming "trend" is in fact still a minority of the jurisdicitions to have spoken on the issue. Attached herewith as Appendix A is a listing of those court decisions reflecting no

recognition of a child's loss of parental consortium. While it is true that in other instances this Court has acted to overrule or change case law precedents, those instances have been where Kentucky was out of line with the mainstream of American jurisprudence, and where the law in question was based in the common law, not legislative action. For example, in Hilen v. Hays, Ky., 673 S.W.2d 713 (1984), this Court brought Kentucky in line with the vast majority of other jurisdictions in applying comparative fault to negligence cases. In Kotsiris v. Ling, Ky., 451 S.W.2d 411 (1970), this Court recognized as a matter of law that wives are not chattels, and provided that wives had an equal right to make claims for loss of spousal consortium. The expansion of tort liability as proposed here is not such a move into the mainstream, and should not be considered on that basis.

Several jurisdictions facing the question of recognizing this cause of action have refused to do so, for compelling policy reasons. The California Supreme Court, considered by many to be on the cutting edge of new causes of action, has rejected a child's loss of consortium claim on the following reasoning:

> Loss of consortium is an intangible, non-pecuniary loss; monetary compensation will not enable plaintiffs to regain the companionship and guidance of a mother; it will simply establish

a fund so that upon reaching adulthood, when plaintiffs will be less in need of maternal guidance, they will be unusually wealthy men and women.

Borer v. American Airlines, Cal., 563 P.2d 858, 862 (1977). The California Court thus considered this claim to constitute a future benefit for the child that bore little or no relation to the loss suffered. Id.; see, also, Hoessing v. Sears, Roebuck & Co., 484 F.Supp. 478,479 (D.Neb. 1980).

As noted above, the Kentucky statute specifically provides for distribution of any proceeds of a wrongful death action to the surviving children. This provision has been identified by at least three other jurisdictions as creating a risk of double recovery if the additional child's loss of consortium claim is recognized, i.e., allowing the child to recover his or her share of the loss of earning power to the estate, in addition to loss of parental consortium benefits. Ureland v. Reynolds Metal Co., Wash., 691 P.2d 190, 194 (1984); Borer, supra, 563 P.2d at 863; and Koskela v. Martin, Ill., 414 N.E.2d 1148, 1151 (1980). The latter two Courts, in addition to the highest Court of New Jersey, have also cited to the significant risk of an increase in litigation, and multiplicity of actions, with such expansion of tort law. Russell v. Salem Transportation Co., N.J., 293 A.2d 862 (1972). All of these Courts have recognized that it is necessary for the law to limit a tortfesor's potential

liability for damages to some reasonable degree, and have rejected a child's loss of parental consortium as unnecessarily expanding the bounds of potential tort liability.

In sum, analysis of the entire body of case law, either accepting or rejecting the cause of action for a child's loss of parental consortium, does not reveal an overwhelming or pervasive trend in the law of this country, so as to render Kentucky's position as voiced in the Brooks decision either archaic, or outside the mainstream in any degree, so as to merit a lemming-like rush to dive into the wellspring of sympathy Appellants urge on this Court. Should the General Assembly of this Commonwealth at some later date choose to amend the law to recognize this claim, that is its prerogative. However, there is no reason or basis upon which this Court should now be compelled to overrule the existing law of this state.

CONCLUSION

The Commonwealth of Kentucky does not recognize a claim for a child's loss of parental consortium, either by legislative action or by court decision. Insofar as this claim is concerned, the potential recovery for Appellants is defined and limited by the Kentucky Wrongful Death Statute, which does not include this type of claim or cause of action. This Court has previously, and consistently recognized that the wrongful death law is the

province of the legislature, and may only be amended by legislative action. This case is no different - a claim for child's loss of consortium should only be created by a legislative action, not by a decision of this Court. Furthermore, there is no reason or basis for this Court to be concerned over a purported national "trend"; Kentucky simply is not out of the mainstream of American jurisprudence for claims of this type, so as to necessitate any repositioning of the state of our laws. It is respectfully submitted and urged that this Court should decline to recognize this proposed new cause of action, and instead defer any such consideration to the legislative process.

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APPENDIX "A"

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

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

Lee v. Colorado Dept. Of Health, 719 P. 2d 221 (Colo. 1986)

Pleasant v. Washington Sand & Gravel Co., 262 F. 2d 471 (D.C. Cir. 1958)

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

W.J. Bremer Co. v. Graham, 312 S.E. 2d 806 (Ga. App. 1983); writ den. 312 S.E. 2d 787 (Ga. 1984)

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

Mueller v. Hellrung Const. Co., 437 N.E. 2d 789 (Ill. App. 1982)

Hoffman v. Dautel, 368 P. 2d 57 (Kan. 1962)

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

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

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

Hoessing v. Sears, Roebuck & Co., 484 F. Supp. 478 (D. Neb. 1980)

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

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

Ipcock for Hill v. Gilmore, 354 S.E. 2d 315 (N.C. App. 1987)

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