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

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

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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-**

**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.**

(Johnstone out)

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

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FILED
OCT 1 1996
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SUPREME COURT

# BRIEF FOR APPELLANTS

How about Yuttrell v Wood 902/817 ('95)

ANN B. OLDFATHER
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T.Ct one page partial sum. jd.
C.A required to do so. reversed

## CERTIFICATE OF SERVICE

It is hereby certified that a copy hereof was this 30th day of September, 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; David C. Trimble, Esq., 2800 Lexington Financial Center, Lexington, KY 40507, Kenneth W. Smith, Esq., Ste. 200, 167 W. Main St., Lexington, KY 40507 and William T. Adkins, Esq., 444 W. Second St., Lexington, KY 40507; and William J. Gallion, Esq., 200 W. Vine St., Ste. 710, Lexington, KY 40507-1620, Counsel for Appellees.

Counsel for Appellants

# INTRODUCTION

Appellants are four minor children whose mother, Mary K. Giuliani, died during childbirth. By and through their father, Denis Giuliani, Appellants have filed claims for the loss of the love, affection, guidance, care, comfort and protection of their mother. The issue before this Court is whether Kentucky should recognize a minor's claim for the loss of parental consortium.

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## APPENDIX

A. Trial Court Judgment, entered December 10, 1993

B. Court of Appeals Opinion, entered October 27, 1995

ATTACHED IN SEPARATE BINDER ENTITLED "APPENDIX TO BRIEF FOR APPELLANT:"

1. Audubon-Exira v. Illinois Cent. Gulf R. Co., 335 N.W.2d 148 (Iowa 1983)
2. Belcher v. Goins, 400 S.E.2d 830 (W.Va. 1990)
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7. Hibpshman v. Prudhoe Bay Supply, Inc., 734 P.2d 991 (Alaska 1987)
8. Nulle v. Gillette-Campbell Fire Bd., 797 P.2d 1171 (Wyo. 1990)
9. Pence v. Fox, 813 P.2d 429 (Mont. 1991)
10. Reagan v. Vaughn, 804 S.W.2d 463 (Tex. 1990)
11. Romero v. Byers, 872 P.2d 840 (N.M. 1994)
12. Theama v. Kenosha, 344 N.W.2d 513 (Wis. 1984)
13. Ueland v. Reynolds Metal Company, 691 P.2d 190 (Wash. 1984)
14. Villareal v. State, Dept. of Transp., 774 P.2d 213 (Ariz. 1989)
15. Williams v. Hook, 804 P.2d 1131 (Okla. 1990)
16. B. Gehle, Loss of Consortium: Kentucky Should No Longer Prohibit a Child's Claim For Loss of Parental Consortium Due To The Negligent Act Of a Third Party, 84 Ky. L.J. 173 (1995-96)
17. J. Parker, Parental Consortium: Assessing Contours of New Tort in Town, 64 Miss. L.J. 37 (Fall 1994)

## STATEMENT OF THE CASE

On January 21, 1992, Mary K. Giuliani died during childbirth. She was thirty three years old. Mary Giuliani left behind three young children, James, Katie and David, Appellants herein, who were ages 9, 7 and 3 respectively when they lost their mother. Her baby daughter was named after her. Little Mary Kay never met her mother. Their father, Denis Giuliani, is employed full-time with Lexmark International in Lexington, Kentucky in marketing as a program manager.

Appellee Dr. Guiler was Mary Giuliani's obstetrician. He was not present at Mary's delivery because he chose to go to dinner with friends rather than to attend Mary. He did get to the hospital before she died, but only after a code had been called. Dr. Guiler decided to induce delivery on January 21, 1992. He was scheduled to leave for vacation the next day, and he had just given the Giulianis the distressing news that the baby had a birth anomaly[1/]. Dr. Guiler instructed nurses at Central Baptist Hospital to administer pitocin to induce labor. Mary's labor did not progress normally and her condition showed the first signs of deterioration by late afternoon, some sixteen hours into the induction. After seeing Mary at 6:00 p.m., Dr. Guiler apparently decided that he was not needed and he left for a dinner get together at a friend's home. The record then shows numerous pages and calls as the nurses became more concerned about Mary's progress. As Mary and the baby showed increasing signs and symptoms of maternal and fetal distress, and as delivery was imminent,

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1/ While this anomaly had been present for months, Dr. Guiler had just made the diagnosis. Fortunately it turned out that the anomaly was corrected with surgery shortly after birth and the baby was fine.

the nurses had to send for two doctors[2/] who had no familiarity with Mary's case since Dr. Guiler had made no arrangements for care in his absence. Mary Kay was born with an apgar of 3 and without voluntary respiration. Mary Giuliani suffered a cardiac and respiratory collapse minutes after the baby's birth, a code was called, but she could never be successfully resuscitated. Mary Giuliani was pronounced dead one hour and fifteen minutes after her daughter was born.

Denis Giuliani filed a claim for wrongful death as administrator, his own claim for loss of consortium and a claim for loss of consortium as father and next friend for each of his children, James, Katie, David and Mary Kay. The case below is still in discovery. On motion of Appellee Guiler, the trial court dismissed the children's claim for loss of their mother's consortium. The Court of Appeals affirmed the dismissal. Both the trial court and the Court of Appeals were inclined to recognize the children's claims for loss of parental consortium but felt constrained by the then single applicable precedent, *Brooks v. Burkeen*, Ky., 549 S.W.2d 91, (1977), which refused to recognize such a claim on the grounds that no other legislature or court had ever done so. The trial court stated:

> I don't disagree with your [the Plaintiffs] philosophical and policy arguments, so I'll make that clear. I am ruling in their favor strictly on the basis that case law requires me to rule that way. (TAPE 12/3/93 motion hour; 9:22:44).

Similarly, the Court of Appeals held:

> We are inclined to agree with [appellants'] contention that the logical evolution, indicated both in legislative and judicial forums, would be to extend to the child the parent's correlative right of recovery.

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[2/] Appellee Dr. Bennett, the anesthesiologist, and Appellee Dr. Taormina, the obstetrical resident on call.

> ...
> Unfortunately, we believe this Court is not at liberty to recognize the tort of loss of parental consortium at this time.
> ...
> We can only encourage our Supreme Court to revisit this issue in light of modern developments in this area of the law; we are not empowered to overrule the Brooks precedent in this venue.

Court of Appeals Opinion, October 27, 1995, at 2, 4 and 5.

The Giuliani children moved for discretionary review on the grounds that *Brooks v. Burkeen* is no longer valid precedent and should be overruled. Just as the motion for discretionary review was filed, this Court issued its opinion in *Adams v. Miller*, Ky., 908 S.W.2d 112 (1995). Kentucky already recognizes loss of consortium claims between husband and wife. Kentucky already recognizes the parents' claim for loss of their children's affection and companionship upon the child's death. Appellants submit that, under the common law of Kentucky, this Court should now recognize a child's loss of parental consortium as well. This Court granted discretionary review.

## ARGUMENT

Loss of a parent's love, affection, and guidance is devastating to a child. A child who loses a parent suffers emotionally, psychologically and developmentally. Children should be able to bring a loss of consortium claim to recover from the wrongdoer whose negligent act has caused this harm. While such a cause of action does not currently exist in Kentucky, it should. Loss of consortium is a judge-made common law doctrine which this Court has both the power and the duty to modify and conform to the changing conditions of society. When the common law is out of step with the times, this Court has a duty to change the law.

Over the twentieth century, society has begun to recognize the rights of children, as seen by the constitutional rulings of the United States Supreme Court. Children are recognized as unique individuals with their own emotional and developmental needs which are highly dependent on the parent-child bond. The parent-child relationship is the wellspring from which other family relationships derive. *See Villareal v. State, Dept. of Transp.*, 774 P.2d 213, 217 (Ariz 1989). Kentucky has recognized the changing nature of parent-child relationships and the importance of children in the family unit. The General Assembly has made it the express public policy of this Commonwealth to protect and care for children in a nurturing home. KRS 600.010. It also has recognized children's individuality and value to a family by providing parents a consortium claim for the loss of their child's love and affection. KRS 411.135. Given this change in our understanding of the family unit and parent-child relationships, this Court, as the steward of the common law, should provide a remedy for children who lose the love, care and affection of their parents due to the negligence of another. This Court should conform the common law to provide a remedy for children who lose their parents due to another's negligence and should refuse to "perpetuate an anachronistic and sterile view of the relationship between parents and children." *Gallimore v. Children's Hospital Medical Center*, 617 N.E.2d 1052, 1060 (Oh. 1993).

## I. This Court Should Overrule *Brooks v. Burkeen* and Recognize a Child's Claim For Loss of Parental Consortium.

### A. Children Suffer a Real Loss Upon a Parent's Death. The Premise of *Brooks v. Burkeen* Is No Longer Valid and It Should be Overruled.

The trial and appellate courts were "not at liberty" to recognize the children's

claim for loss of their mother's consortium due to only one case, *Brooks v. Burkeen*, Ky., 549 S.W.2d 91 (1977). The *Brooks v. Burkeen* court had refused to recognize a loss of parental consortium claim ***solely*** because "no court or legislature in the United States has yet seen fit to recognize such action." *Brooks v. Burkeen*, 549 S.W.2d at 92. That was the extent of the *Brooks* court's reasoning. That premise no longer exists. Since 1977 when *Brooks v. Burkeen* was decided, fifteen courts and two state legislatures have recognized the validity of children's claims for the loss of their parent's care, affection, love and companionship.[3]

**The Trend Toward Consortium**

| | |
|---|---|
| **1980** | **MASSACHUSETTS:** *Ferriter v. Daniel O'Connell's Sons, Inc.*, 413 N.E.2d 690 (Mass. 1980) |
| **1981** | **MICHIGAN:** *Berger v. Weber*, 303 N.W.2d 424 (Mich. 1981) |
| **1983** | **IOWA:** *Audubon-Exira v. Illinois Cent. Gulf R. Co.*, 335 N.W.2d 148 (Iowa 1983) |
| **1984** | **WISCONSIN:** *Theama v. Kenosha*, 344 N.W.2d 513 (Wis. 1984) |
| **1984** | **WASHINGTON:** *Ueland v. Reynolds Metal Company*, 691 P.2d 190 (Wash. 1984) |
| **1985** | **VERMONT:** *Hay v. Medical Center Hospital of Vermont*, 496 A.2d 939 (Vt. 1985) |
| **1987** | **ALASKA:** *Hibpshman v. Prudhoe Bay Supply, Inc.*, 734 P.2d 991 (Alaska 1987) |
| **1989** | **ARIZONA:** *Villareal v. State, Dept. of Transp.*, 774 P.2d 213 (Ariz. 1989) |
| **1990** | **OKLAHOMA:** *Williams v. Hook*, 804 P.2d 1131 (Okla. 1990) |
| **1990** | **WYOMING:** *Nulle v. Gillette-Campbell Fire Bd.*, 797 P.2d 1171 (Wyo. 1990) |
| **1990** | **W. VIRGINIA:** *Belcher v. Goins*, 400 S.E.2d 830 (W.Va. 1990) |
| **1990** | **TEXAS:** *Reagan v. Vaughn*, 804 S.W.2d 463 (Tex. 1990) |
| **1991** | **MONTANA:** *Pence v. Fox*, 813 P.2d 429 (Mont. 1991) |
| **1993** | **OHIO:** *Gallimore v. Children's Hospital Medical Center*, 617 N.E.2d 1052 (Oh. 1993). |
| **1994** | **NEW MEXICO:** *Romero v. Byers*, 872 P.2d 840 (N.M. 1994) |

[3] The following table shows jurisdictions that in the past 16 years have allowed children to bring claims for loss of parental consortium. For this Court's convenience, copies of these cases are attached alphabetically in the Appendix. In addition, the Florida and Louisiana state legislatures have recognized parental consortium claims.

Of the seventeen jurisdictions which have recognized a child's right to bring a claim for loss of parental consortium, six reversed previous positions denying such claims. J. Parker, *Parental Consortium: Assessing Contours of New Tort in Town*, 64 Miss. L.J. 37, 47 (Fall 1994) (attached in appendix). Additionally, in those narrow areas where the federal courts have been required to establish federal common law, compensatory damages have been allowed to children for loss of the society, companionship, nurture and guidance of their parents, unless there is a specific statute which precludes loss of society recovery. *In Re Air Disaster at Lockerbee, Scotland*, 37 F.3d 804, 828-9 (2nd Cir. 1994), *cert denied*, ___U.S. ___, 115 S.Ct. 934, 63 USLW 355 (1995).

The *Brooks v. Burkeen* court declined to recognize a child's claim for loss of parental consortium solely because no other jurisdiction had yet done so. The Court did not examine the merits of this cause of action. Now with seventeen jurisdictions in favor of such a cause of action, the underpinning of such deferential abstention no longer exists. The issue of parental consortium was raised again in *Adams v. Miller, supra*. The Court decided the case on other grounds and addressed the consortium issue in dicta. The *Adams v. Miller* court, after finding that a landlord had no liability for failing to install fire detectors in a single family dwelling, held that appellant could not recover for loss of parental consortium. The argument for the recognition of a parental consortium claim was limited solely to the assertion that the damages were ***part of*** the wrongful death statute. This assertion is only an alternative argument in this appeal.[4]

The decisions of *Brooks v. Burkeen* and *Adams v. Miller* do not foreclose the

[4] See Argument II. B., *infra*.

relief sought. Law that is not "based upon a reasonable premise" should be brought "in touch with modern reality." *Corbin Motor Lodge v. Combs*, Ky., 740 S.W.2d 944, 948 (1987) (Lambert, J., dissenting). There is no glory in "rigid adherence to poorly reasoned precedent" and *stare decisis* does not require such. *Schilling v. Schoenle*, Ky., 782 S.W.2d 630, 635 (1990) (Leibson, J. dissenting).

In 1953, when this Court finally recognized a woman's right to sue her husband, this Court relied on the wisdom of Justice Brandeis to address conflicting precedent: "*Stare decisis* is normally a wise rule of action. But it is not a universal, inexorable command. The instances in which the Court has regarded its admonition are many." *Brown v. Gosser*, Ky., 262 S.W.2d 480, 484 (1953) (citing *Washington v. W.C. Dawson and Company*, 264 U.S. 219 (1924)). More recently, in adopting the comparative negligence standard for this Commonwealth, this Court has again acknowledged that *stare decisis* does not mandate that the court perpetuate erroneous decisions, nor those which no longer have a rational basis.

> *Stare decisis* does not preclude the change. The principle does not require blind imitation of the past or adherence to a rule....We must reform common law doctrines that are unsound and unsuited to present conditions.

*Hilen v. Hayes*, Ky., 673 S.W.2d 713, 717 (1984). Put more bluntly, "the doctrine of *stare decisis* does not commit us to the sanctification of ancient fallacy." *Ibid.*

The "ancient fallacy" perpetuated by *Brooks v. Burkeen* and *Adams v. Miller* is the view that children do not have rights or identity as individuals and as members of a family separate from their parents. This no longer is true. While Appellees will admit that the Giuliani family has suffered a tragic loss with the death of its young mother and wife, it

is important for this Court to understand, for purposes of recognizing a child's claim for loss of parental consortium, that the loss suffered by each child is separate and distinct from their siblings' loss and from the loss suffered by their father:

> Children then are not adults in miniature. They are deemed per se, different from their elders in their mental nature, their functioning, their understanding of events, and their reactions to them.

Joseph Goldstein, Anna Freud, Albert Solnit, Beyond The Best Interest Of The Child, 13 (1973). But also, "because individuals are not separate unto themselves, death happens not to one person but to the whole family." Michael Nichols, Family Therapy: Concepts And Methods, 161 (1984). Death and loss of a family member is more stressful to other family members when death happens to one who was not expected to die (i.e., a mother in her child-bearing years).

> Whereas an elderly family member is viewed as having completed his/her life and has few remaining tasks and responsibilities, serious illness or death at another life cycle phase is considered to end an incomplete life; it does not follow the normal course of life. The timing is off; it is out of sync. In the author's experience those deaths or serious illnesses whose victims are in the prime of life are the most disruptive to the family. This can be partly understood by the fact that it is at this phase of the life cycle that the individual has the greatest responsibilities...

Betty Carter, Monica McGoldrick, The Changing Family Life Cycle: A Framework For Family Therapy, at 464 (2nd Ed. New York, 1988). A child is particularly vulnerable to and devastated by such an untimely loss.

> Babies need mothers. Sometimes lawyers, housewives, pilots, writers and electricians also need mothers. In the early years of life we embark on the process of giving up what we have to give up to be separate human beings. But until we can learn to

> tolerate our physical and psychological separateness, our need for a mother's presence - our mother's literal, actual presence - is absolute...If our mother *leaves us* - when are too young, too unprepared, too scared, too helpless - the cost of this leaving, the cost of this loss, the cost of this separation may be too high.
>
> There is a time to separate from our mother.
>
> But unless we are ready to separate - unless we are ready to leave her and be left - anything is better than separation.

Judith Viorst, Necessary Losses, 9-8 (1986).

The child's vulnerability to such loss and the importance of the family unit as a nurturing environment for a child are well recognized in Kentucky. It is the express public policy of this Commonwealth to strengthen and encourage family life for the protection and care of children and to strengthen and maintain the family unit for the benefit of children:

> (a) *The Commonwealth shall direct its efforts to the strengthening and encouragement of family life* ***for the protection and care of children;*** *to strengthen and maintain the biological family unit; and to offer all available resources to any family in need of them;*
>
> (b) *It also shall be declared to be the policy of this Commonwealth that all efforts* ***shall be directed toward providing each child a safe and nurturing home***;

KRS 600.010.

Children have a right to be compensated for their losses when that harm has been caused by the wrongdoing of another. "As against the world at large a child has an interest...in the society and affection of the parent." *Ferriter v. Daniel O'Connell's Sons, Inc.*, 413 N.E.2d at 696 (quoting Dean Pound, 14 Mich. L. Rev. 177, 185-86 (1916)). It is the purpose of tort law to compensate one for the harm caused by another and deter future wrongdoing. *Louisville v. Louisville Seed Co.*, Ky., 433 S.W.2d 638 (1968), *overruled on*

*other grounds, Gas Service Co., Inc. v. London*, Ky., 687 S.W.2d 144 (1985). There should be no argument against the proposition that children are persons who deserve protection under the law. Society's increasing recognition of a child's individuality, humanity, and separateness has resulted in the United States Supreme Court recognizing children as persons under the Constitution,[5/] who possess First Amendment rights[6/] and who are now granted protection under the 14th Amendment due process[7/] and equal protection clauses.[8/] See *Theama v. Kenosha*, 344 N.W.2d at 577.

Loss of consortium is a common law cause of action. The common law needs to be adapted to meet the recognized importance of the family unit, the recognition of the child as a person deserving of constitutional rights which will be protected by the courts and the recognition of the importance of the parent's love, care, and protection for the wholesome and complete development of the child. *See Theama v. Kenosha*, 344 N.W.2d 518 (Wis. 1984). The premise of *Brooks v. Burkeen* is no longer valid and the holding in *Adams v. Miller* was first, dicta and second, it did not address the substantive issues raised in this appeal. Changing times, which have established the child to be as deserving of society's protection as any adult and have recognized the importance of the parent-child relationship, demand that the child's real and devastating loss due to the death of a parent be compensated

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[5/] *See Tinker v. Des Moines School Dist.*, 393 U.S. 503, 89 S.Ct. 733, 21 L. Ed. 2d 731 (1969).

[6/] *See Board of Education v. Barnett*, 319 U.S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943).

[7/] *See Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975); *In re Winship*, 397 U.S. 358, 70 S.Ct. 1069, 25 L.Ed. 2d 368 (1920); and *In re Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967).

[8/] *See Brown v. Bd. of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L. Ed. 873 (1954).

by the negligent tortfeasor.

### B. Loss Of Consortium Is A Common Law Doctrine Which This Court Has Both The Power And The Duty To Modify.

Kentucky is a common law state. *Pryor v. Thomas*, Ky., 361 S.W.2d 279 (1962), *cert denied*, 372 U.S. 922 (1963). It is well-established that the claim for loss of consortium is a common law cause of action. *Dietzman v. Mullin*, 108 Ky. 610, 57 S.W. 247, 248 (1900); *Kotsiris v. Ling*, Ky., 451 S.W.2d 411, 412 (1970); B. Gehle, *Loss of Consortium: Kentucky Should No Longer Prohibit a Child's Claim For Loss of Parental Consortium Due To The Negligent Act Of a Third Party*, 84 Ky. L.J. 173, 174 (1995-96); J. Parker, *Parental Consortium: Assessing The Contours Of The New Tort In Town*, 64 Miss. L.J. 37, 38-40 (Fall 1994). Initially, at early common law, the action for loss of consortium protected only a husband's economic interest in his wife. *Dietzman*, 57 S.W. at 248. The concept was then expanded to include loss of a wife's companionship, love, security and sexual relationship. *See Parental Consortium*, 64 Miss. L.J. at 87. Catching up with the changing social understanding of a woman's role in society and the nature of family relationships, in 1970 this Court expanded the cause of action for loss of consortium to likewise allow a wife's claim for the loss of her husband's consortium. *Kotsiris v. Ling*, Ky., 451 S.W.2d at 412. Thereafter, the Kentucky General Assembly codified the *Kotsiris* decision at KRS 411.145. Most recently the legislature, on its own initiative, recognized a parent's loss of consortium claim for death of a child. *See* KRS 411.135.

So, although loss of consortium claims are now codified in Kentucky, loss of consortium is a judge-made common law cause of action, one clearly within the competence

of this Court to modify. As held by the *Kotsiris* court, "the changing of the rule [loss of consortium cause of action] is fully within the competence of the judicial function." *Kotsiris*, 451 S.W.2d at 412. It has been long recognized in Kentucky that:

> The law is both a progressive and resourceful science, and is ever alert to accommodate itself to the constant changing circumstances and conditions of society. Its reservoir of remedial relief has by no means become exhausted, and when it is necessary to apply old principles to new facts, or to employ a remedy to fit altered situations and conditions, it is not only proper, but ***it is the duty of courts*** to do so to the end that justice may be administered.

*Graham v. John R. Watts and Son,* 238 Ky. 96, 36 S.W.2d 859, 863 (1931) (emphasis added); *see also Ruby Lumber Co. v. K.V. Johnson Co.,* 299 Ky. 811, 187 S.W.2d 449, 453 (1945). Here, we have a very old principle (the loss of consortium) which needs to be applied to a new set of facts (societal recognition that children suffer a real loss when they lose their parents' care, society, love and affection). Put another way:

> The common law...is a system of elementary rules and of general judicial declarations of principles, which are continually expanding with the progress of society, adapting themselves to the gradual changes of trade, commerce, arts, inventions, and the exigencies and usages of the country.

*Louisville v. Chapman*, Ky., 413 S.W.2d 74, 77 (1967) (citation omitted).

The notion of loss of consortium has evolved with the changing social perceptions of human relations. It began as an acknowledgment of a man's property rights to his wife and children. Over the twentieth century, as women gained legal and social recognition as individuals in their own right, independent, separate and equal to their husband, the law of consortium was expanded to recognize a wife's claim of consortium for her husband so that loss of consortium claims between a husband and wife are now reciprocal.

*See Kotsiris v. Ling, supra.* As society has recognized the emotional and psychological importance (as opposed to pure economic value) of a child to parents, parental claims for loss of a child's love and affection (beyond simply "services") have also been recognized. *See Parental Consortium*, 64 Miss. L.J. at 43.

Now, with society's recognition of the importance of the family unit, with the recognized need of a child for a parent's love, care and protection, with a better understanding of the impact of loss of a parent upon a child's emotional and developmental well-being, it is time that the common law again be conformed to recognize a child's claim for loss of parental consortium. As this Court has before held:

> We do not think that the framers of our Constitution intended to shackle the hands of the judicial branch of government in its interpretation, modification or abolition of the great body of mutable common law to meet the demands of changing times.

*Louisville v. Chapman*, 413 S.W.2d at 77. Free from shackles, this Court can and should allow a loss of parental consortium claim under the common law.

"It is the boast of common law that there is no right without a remedy." *Dietzman v. Mullin,* 57 S.W. at 248. The Giuliani children have each suffered a horrible loss with the death of their mother. It defies reason that four minor children do not have a remedy from negligent defendants who caused them to lose the love, care and affection of their mother forever. This Court has the power under the common law to provide such remedy:

> And so it is that when there is a wrong to be punished, whether it be great or small, or an injury to be redressed, whether it be big or little, and no statute or law of this state can be found that will afford the punishment or offer the remedy, we turn the common law for relief. And if we can find there a principle

> that is applicable to the situation or condition, it's aid may be invoked and under it the wrong punished or the injury redressed.

*Pryor v. Thomas*, Ky., 361 S.W.2d at 280. There is no question that there is an applicable principle here - i.e., loss of consortium. The only issue for this Court is whether its aid may be invoked to recognize children's claims for loss of their mother's love, care and affection.

Appellees may try to obfuscate the fact that loss of consortium is a common law cause of action by arguing that this is a public policy issue to be decided solely by the state legislature. It is unquestionably true that there is a whole line of cases articulating the principle that the public policy of the state is determined by its Constitution and statutes and, where those are silent, by the decisions of its courts. *See Chreste v. Louisville Railroad Co.*, 167 Ky. 75, 180 S.W. 49, 52 (1915); *Kentucky State Fair Board v. Fowler*, Ky., 221 S.W.2d 435, 439 (1949); *Commonwealth v. Wilkinson*, Ky., 828 S.W.2d 610, 614 (1992). However, it is also unquestionably "true that courts may, in the absence of legislative decree, adopt and apply public policy principles." *Owens v. Clemens*, Ky., 408 S.W.2d 642, 645 (1966); *Cloud v. Hug*, Ky., 281 S.W.2d 911, 913 (1955). If this were purely and only a public policy issue, which it is not, and while it is not the role of this Court to legislate, it is still the Court's responsibility to apply and enforce the laws of the Commonwealth. *Commonwealth v. Tellcom Directories, Inc.*, Ky., 806 S.W.2d 638, 642 (1991).

This issue involves the protection and development of the common law, and it would mislead this Court for one to argue that this is only a legislative issue. Loss of consortium is a judge-made common law doctrine and it is the Court's duty to apply the common law doctrines properly to the changing conditions of society.

> ...the common law is not now, nor was it ever a static body of law. It (the common law) may be likened to a mighty rising river. It may and it must spill over into new fields and new territory in order to make its way to the sea.

*Louisville v. Chapman*, 413 S.W.2d at 77. When the common law is out of step with the times, this Court has a duty to conform that law. It is not the province of the legislature to caretake the common law and the legislature's failure to do so does not render this Court impotent to enact such change. *Hilen v. Hayes*, Ky., 673 S.W.2d at 717; *Gallimore v. Children's Hospital Medical Center*, 617 N.E.2d at 1059.

This Court should be advised that a bill was introduced in the 1996 Kentucky General Assembly to modify KRS 411.145 and to permit a child to recover damages for loss of parental consortium. SB 139. The bill never got out of committee. *See* Leg. Rec. Vol. 22, No. 85 at 23. Such legislative inertia in no way usurps this Court's authority and responsibility to adopt and conform the common law. An exactly similar situation existed in *Hilen v. Hayes* where this Court, in 1984, adopted comparative negligence even though comparative negligence bills had been introduced in the Kentucky General Assembly in 1968 (and almost every year thereafter) and never passed. In fact, the *Hilen* court noted that in 1984 two comparative negligence bills had been introduced but neither got out of committee. The *Hilen* court was not daunted by such legislative inactivity, holding that it was not for the Court to leave to the legislature the responsibility of undoing or changing what the courts have done in the first place. *Hilen v. Hayes*, Ky., 673 S.W.2d at 716.

There should be no reluctance on the part of this Court to rule on the parental loss of consortium issue merely because this particular issue has been put before the legislature and not ruled upon. The fact that the legislature could have passed a statute

recognizing the claim might render the issue in some people's minds to be "political" and therefore out of bounds by the Courts. Kentucky (in *Hilen v. Hayes*) and other states have resoundingly rejected this argument. As Alexis de Tocqueville so aptly noted when he visited America well over a century ago:

> [T]he American judge is dragged in spite of himself onto the political field. He only pronounces on the law because he has to judge the case, and he cannot refuse to decide a case. The political question he has to decide is linked to the litigants' interests, and to refuse to deal with it would be a denial of justice. It is by fulfilling the narrow duties imposed by his status as a judge that he also acts as a citizen.

A. de Tocqueville, Democracy in America, at 103, Ed. J.P. Mayer (1969).

Loss of parental consortium is now presented to the Court as requiring adaptation of the common law. Loss of consortium, in general and in its essence, is a common law doctrine under the purview and shepherdship of the courts. This Court has the power and indeed the duty to adapt the common law to provide recourse for the unquestioned loss suffered by a child upon the death of a parent.

### C. The Child's Claim For Loss of Parental Consortium Is The Reciprocal Of the Parent's Claim.

Kentucky by statute specifically provides for a parent's loss of a child's consortium:

> In a wrongful death action in which the decedent was a minor child, the surviving parent or, parents, may recover for loss of affection and companionship that would have been derived from such child during its minority, in addition to all other elements of the damage usually recoverable in a wrongful death action.

KRS 411.135. Kentucky has recognized that the parent-child relationship is as deserving of

protection as is the spousal relationship. Kentucky has determined that a tortfeasor is liable to a parent for the loss of companionship and services of a child.

Yet, despite our recognition of the preeminent policy concerns for the effective nurturing of children, we deny children this basic protection. We allow parents to recover for loss of consortium when their children or spouse are injured, while children are clearly in *greater* need of the law's protection:

> [T]o recognize a right of recovery for a parent's loss of a child's consortium, and not for a child's loss of a parent's consortium, runs counter to the fact that in any disruption of the parent-child relationship, ***it is probably the child who suffers most.***
>
> Since the child in his formative years requires emotional nurture to develop properly, the loss of love, care and companionship is likely to have a more severe effect on him than on an adult; and society has a strong interest in seeing that the child's emotional development proceeds along healthy lines. Moreover, an adult is in a better position than a child to adjust to the loss of a family member's love, care and companionship through his own resources. He is capable of developing new relationships in the hope of replacing some of the emotional warmth of which he has been deprived. A child, however, is relatively powerless to initiate new relationships that might mitigate the effect of his deprivation. Legal redress may be the child's only means of mitigating the effect of his loss.

*Weitl v. Moes*, 311 N.W.2d 259, 269 (Iowa 1981) (emphasis added).

Like Kentucky, Iowa had a statutory rule specifically allowing a parent to sue for loss of consortium resulting from the injury or death of a minor child. The *Weitl v. Moes* court held that "it was unpersuaded of any legal distinction between a parent's claim for loss of a child's consortium and a child's claim for loss of a parent's consortium." *Weitl v. Moes*, 311 N.W.2d at 265. Thus, the court allowed the three children's claims for loss of parental consortium.

Parents in Washington also have a statutory cause of action for loss of "love and companionship" resulting from injury to a child. *Ueland v. Reynolds Metal Co.*, 691 P.2d at 192. In recognizing this right of the parents, the court allowed the claims of the children. The court stated, "permitting a husband or wife but not children to recover for loss of consortium erroneously suggests that an adult is more likely to suffer emotional injury than a child." *Ibid.* *See Ferriter v. Daniel O'Connell Sons, Inc.*, *supra*, and other cases which conclude similarly. Like other jurisdictions, the parent's cause of action allowed by KRS 411.135 supplies analogous precedent to recognize the child's reciprocal cause of action.

The Florida courts have addressed this reciprocity issue in reverse. There, the state legislature had recognized a child's right to recover for loss of parental consortium but had refused to recognize the parent's right to recover for the loss of the child's consortium. *See U.S. v. Dempsey*, 635 So.2d 961, 964 (Fla. 1994). Nonetheless, the Florida Supreme Court recognized the parents' loss of consortium claim for a child, holding:

> These legislative and judicial pronouncements make clear that it is the policy of this state that familial relationships be protected and that recovery be had for losses occasioned because of the wrongful injuries that adversely affect those relationships.

*U.S. v. Dempsey*, 635 So.2d at 964-65. Conversely, here in Kentucky, our legislative and judicial pronouncements similarly make clear that familial relationships should be protected, whether it be those of the husband, the wife, or the minor child for injury to consortium interests.

### D. None of Appellees' Arguments Can Withstand The Compelling Legal, Equitable And Policy Reasons In Favor Of Allowing A Child's Claim For Loss Of Parental Consortium.

In the jurisdictions where a child's claim for loss of parental consortium has been denied, the courts have all based their decisions on administrative and remedial concerns. *Parental Consortium*, 64 Miss. L.J. at 52. In effect, those courts have "utilized the means (the difficulty of fashioning a remedy) to defeat the ends (the recognition of the legitimate substantive interest)." *Ibid.* And indeed, those are the only type of arguments available to Appellees here. For example, Appellees have used the predictable "can of worms" argument of the so-called "dramatic increase in litigation and multiplicity of actions" so much the favorite of tort reformers and so often not proven by statistics. They will argue that insurance costs will rise. This is hardly an issue for a court in addressing the fundamental question of whether a duty exists, whether it has been breached and whether damage has occurred. Indeed, as stated in *Ueland v. Reynolds Metals Company*, 691 A.2d 190 (Wash. 1984):

> Petitioners' final argument is that we should reject the child's cause of action since the public will bear the cost through increased insurance rates. This is a standard argument raised against expanding any area of tort liability. When considering the recognition of a new cause of action, the specter of increased insurance rates is one of our least concerns.

*Ueland*, 691 A.2d at 195. Even cases cited by Appellees so recognize. As stated in *Norwest v. Presbyterian Intercommunity Hospital*, 652 P.2d 318 (Ore. 1982):

> A person's liability in our law still remains the same whether or not he has liability insurance; properly, the provision and cost of such insurance varies with potential liability under the law, not the law with the cost of insurance.

*Norwest*, 652 P.2d at 323.

Appellees also might argue that double recovery will supposedly occur since the children are statutory beneficiaries under the wrongful death statute, KRS 411.130. The permanent destruction of Mrs. Giuliani's power to labor and earn money, or her conscious pain and suffering are different from duplicate the children's independent claims for their loss of the nurture, care, love, affection and guidance of their mother during their minority. Under proper instructions, a jury is quite capable of making this distinction. All of these concerns were convincingly answered by Justice Wintersheimer:

> Recognition of a parental consortium claim is in accord with the public policy goals behind permitting claims for loss of consortium. The balance of public policy concerns weighs heavily in favor of the interests of the child rather than in favor of the interests calling for a bar to recovery. Jurisdictions which have refused to recognize recovery for loss of parental consortium have usually done so out of a fear of multiplicity of actions, the difficulty of assessing damages, the fear of double recovery or the burden which might be placed on society. However, all of these concerns are outweighed by the need to protect children. Logic, justice, and public policy demand protection of their interest in the family relationship.
>
> Courts which have accepted a cause of action for loss of parental consortium have found the concerns of double recovery and speculation on the appropriate amount of damages recoverable to be unfounded. The injury in a loss of parental consortium claim is no more remote than the injury in a spouse's cause of action for loss of consortium, which Kentucky already recognizes. Additionally, the injury is no more remote than in a claim for damages for wrongful death of a child, which is also recognized in Kentucky. Moreover, courts have recognized that duplicity of recovery can be easily avoided by a proper jury

instruction that the child's damages are separate and distinct from the parent's injury.

*Adams v. Miller*, Ky., 902 SW 2d at 118-119 (Wintersheimer, J., dissenting).

## II. The Childrens' Claim For Loss of Parental Consortium Is Independent From And Not Precluded By The Wrongful Death Damages. Alternatively, The Court Should Reexamine The Judge-Made Measure Of Damages In Wrongful Death Actions

### A. The Children's Claims Are Independent From And Not Precluded By The Wrongful Death Damages.

James, Katie, David and Mary Kay Giuliani have stated their claims for loss of their mother's care, love and affection as claims independent and separate from the wrongful death statute. They have joined their claims with the Administrator's wrongful death action. Their damages are not sought under the wrongful death statute.

Appellees have argued below that Appellants' claims, if they were to be made, could only be made as part of a wrongful death claim. Since the damages for wrongful death are established, by much precedent, as the funeral expenses and the destruction of the power to labor, Appellees reason that no claim for loss of consortium can be made for wrongful death.

In *Department of Education v. Blevins,* Ky., 707 S.W.2d 782 (1986), this Court expressly held that parents' claims for loss of their child's consortium are independent and separate from a wrongful death action and shall not be treated as a single claim. In *Blevins*, the parents brought a loss of consortium claim for the death of their child under KRS 411.145. The Court held that:

> KRS 411.130 authorizes the personal representative of a decedent to bring a wrongful death action, but gives them neither the right nor the authority to assert the parents' separate statutory claim for loss of affection and companionship that would have derived from their child during its minority. The parents have such a claim without regard to whether the personal representative of the decedent ever asserts a claim for wrongful death, and, indeed, without regard to whether a personal representative is ever appointed.

*Department of Education v. Blevins*, 707 S.W.2d at 785. The Court reasoned that even though a wrongful death action and a loss of consortium claim arise from the same injury, they belong to separate legal entities, are separately asserted and therefore should not be treated as a single claim. *Ibid.* Similarly in *Adams v. Miller, supra,* this Court held that wrongful death damages were not meant to include the family's loss:

> Damages in wrongful death statutes compensate for loss of decedent's earning power as is reflected in the following statement of this court:
>
> > 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.
> >
> > *Louisville and N.R. Co. v. Eakins' Adm'r.*, 45 S.W. 529, 530 (1898) (emphasis in original).

*Adams v. Miller*, Ky., 908 S.W.2d at 116.[9] The exact same reasoning applies here.

The Kentucky Constitution §241 provides:

Whenever the death of a person shall result from an injury

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[9] This holding here and in other cases cannot be harmonized with certain language in other appellate decisions that spousal consortium post-death is somehow "merged" into the wrongful death damages. *McGuire v. East Ky. Beverage Co.*, Ky., 238 S.W.2d 1020, 1022 (1951).

> 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.

Kentucky Constitution, §241. The last clause makes it plain that the damages due to the death are the damages ***to the person killed*** otherwise the distribution would not go to the estate of the deceased. If the section meant to include damages for the losses suffered by others but due to the death, the framers would not then have passed that person's loss on to the estate.[10]

### B. The Court Should Reexamine The Judge-made Measure Of Damages In Wrongful Death Actions.

If, despite the ruling in *Department of Education v. Blevins* and *Adams*, and despite the fact that the Giuliani children claim their loss of parental consortium separately and independently from the Administrator's wrongful death claim, this Court nonetheless decides that a loss of parental consortium is to be regarded as part of the wrongful death recovery, then this Court should reconsider what constitutes appropriate wrongful death damages and should allow the childrens' loss of consortium claims as part of the wrongful death recovery because their claim, if it were within the scope of §241, is constitutionally protected and must therefore be recognized. The Constitution protects "all damages" from death due to negligence. The elements of a wrongful death action are established not by the

[10] "Kentucky's wrongful death statute is not a survivor's loss statute..." *Adams v. Miller*, Ky., 908 S.W.2d at 117 (Leibson, J, dissenting).

legislature but by the courts. In 1898, in *Louisville & N.R. Co. v. Eakins' Adm'r*, 103 Ky. 465, 45 S.W. 529 (1898), the court set forth the measure of damages in a wrongful death action as being "such sum as will reasonably compensate his estate for the destruction of his power to earn money." *Id.* at 532. The courts have also determined the elements necessary to determine compensatory damages suffered by an estate, *Temperly v. Sarrington's Adm'r*, Ky., 293 S.W.2d 863, 869 (1956), and determined that the wrongful death actions may be had for the death of a minor. *McCallum v. Harris*, Ky., 379 S.W.2d 438, 443 (1964).

It was the Kentucky Supreme Court in 1898, that established the type of damages held to be recoverable in wrongful death actions. If this Court determines that the child's claim for loss of parental consortium is ***not*** independent of the wrongful death claim, then this claim is protected by §241 since it cannot be disputed that it is a "damage" caused by the death. It is well-established in Kentucky that one injured by another's negligence is entitled to recover full compensation for all damages proximately resulting from that negligence. *Field Packing Co. v. Denham*, Ky., 342 S.W.2d 524, 526 (1961). It is within the power of the courts to allow recovery under a wrongful death action for the sort of damages claimed here by the Giuliani children.

## CONCLUSION

The social primacy of the family unit and children's dependence on their parents is unquestioned in today's society. The death of a parent profoundly and irreparably effects a child's mental and emotional development into adulthood. The child who experiences the death of a parent is deprived of significant essentials for healthy development, suffers emotional trauma and developmental damage and is at increased risk for physical and mental

illness. R. Karen, *Becoming Attached*, The Atlantic Monthly 42 (Feb. 1990). Children need their parents for protection, care, unconditional love, comfort, solace and companionship and it is their initial bond with their parents which enables them to then become separate, independent and healthy human beings.

The state has an interest in having a child's character develop so that the child is able to participate fully in society. When a child is deprived through the negligent act of another from receiving such essential parental care and love, the child should have a right to recover from that negligent actor. Loss of consortium is a common law cause of action and this Court has the power and indeed the duty to modify that law to reflect changing societal understandings of familial and child-parent relationships and the role and value of the family unit in society. "The importance of the child to our society merits more than lip service." *Berger v. Weber*, 303 N.W.2d at 427. It is for this Court, not the legislature, to fashion the common law. When it comes to the rights of children, this Court should act with courage and conviction, as children, perhaps more than any other group of people, need their rights legally protected and they lack the voice or political power to protect themselves.

"Logic, justice and public policy demand protection for a child's interests in the family relationship." *Williams v. Hook*, 804 P.2d 1131, 1136 (Okla. 1990). Wrongdoers should be held accountable for the natural and probable consequences of their actions when they devastatingly harm children by depriving them of a parent's love, nurturing and protection. The legislature has already established the public policy that each child should be provided a safe and nurturing home, and that the parent's side of the parent-child relationship is worth protecting. In keeping with that public policy and with the recognized appreciation

of the parent-child relationship, this Court should conform and adapt the common law to protect the interests of children by reversing the courts below and holding that children do have a cause of action for loss of parental consortium.

Respectfully submitted,

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