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

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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-

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

COMBINED REPLY BRIEF FOR APPELLANTS

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CERTIFICATE OF SERVICE

It is hereby certified that a copy hereof was this 15th day of November, 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 Ronald L. Green, 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

STATEMENT OF POINTS AND AUTHORITIES

ARGUMENT

Appellees state as if it were a given that Mary Kay Giuliani died of amniotic fluid embolus, and that it was an event beyond their control. The Giulianis do not agree, and have introduced proof below to the contrary. This appeal is presented on a motion to dismiss, so there is no place for allegations that Appellees were simply not at fault.[1]

Appellees' Briefs all start with the premise that the Legislature created wrongful death damages and consortium claims, Appellees next make the assumption that all claims of anyone following a death are only wrongful death claims and Appellees end with the conclusion that only the Legislature can grant Appellants the relief requested. Appellees are wrong in their premise, their assumption is misfounded and their conclusion is then based on nothing.

I. Damages For Loss of Parental Consortium Are Separate And Independent From A Wrongful Death Claim. In Any Event, Both Wrongful Death Damages And Consortium Are Creations Of The Courts And Under Their, Not Legislative, Supervision.

Appellees must not have read *Kotsiris v. Ling*, Ky., 451 S.W.2d 411 (1970), where the Kentucky Supreme Court, and not the Legislature, recognized the theretofore unrecognized cause of action of a wife for loss of her husband's consortium:[2] "The Court also finds that the changing of the rule is fully within the competence of the judicial function," *id* at p. 412. That

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[1] Despite Dr Guiler's characterization of Appellants' Statement of the Case (a "shamefully inaccurate portrait," Guiler Brief, p. 1), it was limited to neutral and undisputed facts, and was devoid of any attempt to paint the Appellees as wrongdoers on disputed facts.

[2] *Kotsiris* is instructive also on the distinction between the economic loss of the husband, which is part of his claim, and his wife's separate claim for the intangible losses suffered by her, just as here where these children have losses distinct from the estate's economic loss. *Kotsiris* also discussed and rejected the argument of duplication of damages and double recovery.

the Legislature later codified this decision in KRS 411.145 does not make the claim one created by the legislature, as Appellees have represented.

Appellees are similarly misinformed about the legislative role in wrongful death actions, arguing (without citation) that "...the wrongful death statute, and what it does or does not allow as elements of damage, is exclusively within the province of the Kentucky General Assembly." Guiler Brief, p. 6. *See also* Taormina, et al, Brief, p. 10. The Kentucky Constitution established the cause of action for wrongful death ("damages may be recovered for such death," Ky. Constitution §241), the Courts have established the elements of the damages (see Appellants' Brief, pp. 23-4), and it is within the province of the Legislature only to provide to whom the recovery shall be disbursed, *id.*

It is Appellants' position that loss of parental consortium is separate and distinct from the economic loss to an estate encompassed in a wrongful death claim. This Court expressly held in *Department of Education v. Blevin,* Ky., 707 S.W.2d 782 (1986), that the parents' claims for loss of their children's consortium are independent and separate from the economic damages awarded in a wrongful death action and shall not be treated as a single claim. *Id.* 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.* There is no significance that the consortium claim there was statutory (KRS 411.135) and the one sought here is based on the common law. Either way, wrongful death and loss of consortium claims are two different beasts, and different injuries suffered by different parties. The right of one injured party (the estate) to recover its damages does not and should not preclude the other (the children) from recovering for their separate

injuries. The *Blevin* reasoning applies no matter the origin of the loss of consortium cause of action. Appellees' argument that all claims "precipitated" by a death can be made only under the wrongful death statute in specious. The Legislature has made one blatant exception for parents whose children die (KRS 411.145), and this Court has the power, and the obligation, to provide its analog to innocent children.

If this Court were to believe that this claim should be under the wrongful death claim of the estate, it has the full power to articulate more comprehensive and equitable factors which should comprise the "damages [which] may be recovered for such death...," Ky. Constitution §241, *see also* Appellants' Brief, pp. 23-4.

Appellees also argue that children are entitled to recovery under the wrongful death statute and, therefore, they are not without remedy. That is a different claim, a different cause of action and a different remedy than is provided under the wrongful death statute which is brought by the personal representative of the estate. It is facile to continue to ignore the difference between wrongful death damages to the deceased parent and damages to the child due to the loss of the parent. That the children are statutory beneficiaries of one half of their dead mother's earning power does nothing to address their daily loss of her love, nurture and guidance. It would be as if Appellees are arguing that a plaintiff's recover for economic loss - destruction of earning power - is good reason to deny recovery for the intangible elements of recovery such as pain and suffering. Parents have both a wrongful death cause of action and a loss of consortium claim when their young children die due to a defendant's negligence. Children should as well.

II. Given Changes In The Social and Legal Landscape Since *Brooks v. Burkeen,* This Court Should Recognize A Child's Claim For Loss of Parental Consortium.

In 1977, this Court refused to recognize a loss of parental consortium solely because "no court or legislature in the United States has yet seen fit to recognize such an action. *Brooks v. Burkeen,* Ky., 549 S.W.2d 91, 92 (1977). Since 1980, fifteen state supreme courts and two state legislatures have now recognized such a claim, sometimes in the context of death and sometimes in the context of injury. Since 1980 there has been a dramatic shift in legal jurisprudence on this issue.[3] It is indisputable that a cause of action for loss of parental consortium has now been recognized by a significant number of state supreme courts, and continues to be recognized in new jurisdictions as courts readdress the issue in light of new understanding about parent- child relationships.

Appellees state that "the Supreme Courts of no less than twenty states" have denied this claim, Baptist Brief, p. 2. The list provided shows on its face that trial courts and intermediate appellate courts make up some of that "twenty," and in any event the point is that many courts, on well reasoned opinions, have allowed these claims to be made. Dr. Guiler relies on the 1977 California case, *Borer v. American Airlines,* 563 P.2d 859 (Cal. 1977), and argues that this Court should not recognize loss of parental consortium claims because the California Supreme Court, which refused to recognize such an action, is "considered by many to be on the cutting edge of new causes of action." Appellee Guiler's Brief at 8. Twenty years ago was not

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[3] Appellees quarrel with use of the word "trend." The irrefutable fact remains that the premise of *Brooks v. Burkeen* is no longer valid.

"the cutting edge." *Borer* was decided in 1977, the same year *Brooks v. Burkeen* was decided. Since that time fifteen state courts, as well as federal courts which have ruled upon federal common law, have recognized claims for loss of parental consortium in injury or death. Loss of parental consortium can no longer be viewed as new or radical. It has become an established part of America's jurisprudential landscape.

Appellees state that "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." Baptist Brief, p. 5. It is misleading to imply that these courts have simply been following statutes where the legislature had already granted the cause of action. None of these cases recognizing loss of consortium are statutory, they are all based on the common law, where the supreme courts, as the stewards of the common law, modified and adapted the common law to keep pace with evolving understandings of human relations and needs. Those courts did sometimes look to the legislative recognition of consortium claims in other contexts, such as in wrongful death statutes, as a reason to support their decision to update the common law and allow children a claim for loss of parental consortium. This Court is urged to do the same. Kentucky has legislatively recognized consortium claims in other contexts. While KRS 411.130 does not include a loss of consortium claim, parents' loss of consortium claims upon their children's death are recognized in a separate statute, KRS 411.135. Many of the cases relied upon by Appellants used the statutory recognition of loss of consortium claims in other contexts as support for adapting the common law to allow other claims under loss of consortium doctrine. That is exactly what this Court can and should do here in Kentucky.

Appellees have acknowledged that Appellants' argument is "logically appealing,"

Guiler Brief at 8, but complain that Appellants' case is a camouflaged emotional plea from the Giuliani children. The childrens' claim, as Appellees have acknowledged, presents a logical, natural, common sense progression in the development of the common law, and the fact that Appellees cannot be insulated from the emotional context of the picture of four little children who have lost their young mother is no reason to ignore the legal worth of their position.

III. Appellees' Reasons For Not Recognizing These Claims Are Based on Speculative Fears Which Are Outweighed By The Compelling Legal, Equitable and Policy Reasons In Favor of Recognizing Such Claims.

As predicted, all Appellees relied extensively on proverbial "can of worms" arguments. *See* Baptist Brief at 7. Appellees fears are all remedy based, i.e., the danger of double recovery; the fear of multiplicity of actions; the alleged difficulty in assessing damages; the likelihood that a jury will already compensate the child; and the risk of increased litigation. In so arguing, Appellees rely on older case law[4] whose arguments have been resoundly refuted in more recent decisions by courts which have since recognized loss of parental consortium claims.

For example, Appellees argue that since there is a right of recovery under the wrongful death statute, the Giuliani children would gain double recovery if they were allowed to assert their own claim for loss of parental consortium. Appellees studiously ignore the fact that wrongful death damages, as currently set by the court, are exclusively economic, e.g. the

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[4] Guiler relies on cases decided in 1972, 1977, 1980 and 1984. Baptist relies on cases decided in 1963, 1980 and 1982. Taormina and UK Med Center rely on cases decided in 1972, 1977 and 1982.

permanent destruction of the deceased parent's earning power. That the child is a statutory beneficiary of the dead parent's economic loss goes nowhere toward compensating the child for ***his*** loss of all of their other elements of a parent-child relationship. The so-called double recovery argument also overlooks one crucial aspect of a jury trial - that jury instructions can and will prevent any double recovery. As the Oklahoma Supreme Court stated:

> Duplicity of recovery is probably the most tacit reason for denying recognition of the cause of action. However, it is also the most easily disposed of once the nature of the cause of action for the loss of parental consortium is understood. Pecuniary damages such as lost income which might be used for the benefit of a child of the cost of substitute child care services are damages recoverable in the parent's action....A cause of action for loss of parental consortium is limited primarily to an award based on the emotional suffering of the child, and recovery is limited to loss of the parent's society and companionship....There is no need for the child to recover for the economic disadvantages it might suffer due to the parent's injury. That item is recoverable by the parent. A proper jury instruction that the child's damages are separate and distinct from the parent's injury will prevent double recovery and items considered in the parent's award.

Williams v. Hook, 804 P.2d 1131, 1135 (Okla. 1990); *see also, Theama v. Kenosha*, 344 N.W.2d 518, at 521-22 (Wis. 1984); *Hibpshman v. Prudhoe Bay Supple, Inc.,* 734 P.2d 991, 996 (Ak. 1987). As for the speculative nature of the child's loss of parental consortium, it is no more speculative nor anymore difficult to calculate than damages for pain and suffering or emotional distress, matters always considered to be well within a jury's capabilities. *Hibpshman,* 734 P. 2d at 996. If Appellees' were to prevail on the speculative damages argument then no damages other than special damages should ever be allowed.

This Court has for years rejected arguments that attempt to justify denial of fair compensation to those injured by another's negligence on the basis of real or imagined fears that

the judicial system cannot assure the integrity of the proceedings, see *Brown v. Gosser*, Ky., 262 S.W.2d 480 (1953) where the Court invalidated interspousal immunity in the face of fears of fraud and collusion, *Rigdon v. Rigdon*, Ky., 465 S.W.2d 921 (1971), where parental immunity was abrogated despite claims of fraud and collusion, and *Chaffin v. Kentucky Farm Bureau Ins. Co.*, Ky., 789 S.W.2d 754 (1990) where anti-stacking provisions were invalidated because our trial courts were well equipped to sort out fraud and collusion, and test the truthfulness of claims. Appellees' arguments here similarly provide insufficient reason to deny innocent plaintiffs the opportunity to seek full compensation for their losses.

Appellees Taormina and UK Medical Center argue that this Court has been reluctant to expand the scope of foreseeable plaintiffs, citing to negligent infliction of emotional distress cases where this Court has followed the contact rule and not recognized a "zone of danger." Taormina Brief at 8. Taormina does not argue, as well she shouldn't, that loss of parental consortium claims are functionally equivalent to negligent infliction of emotional distress. A child loses all of the elements of the relationship with the parent regardless of where, when or how the parent dies, or where the child was when that death occurred. The Supreme Court of Arizona rejected this argument in *Villarel v. Dept. of Transportation,* 774 P.2d 213 (1989), where it held:

> We emphasize that a child's claim for loss of parental consortium is different from a claim for negligent inflection of emotional distress. Negligent inflection of emotional distress requires that the plaintiff witness an injury to a closely related person, suffer mental anguish.

Villarel, 774 P.2d at 220. Moreover, the analog claim (that of the parent under KRS 411.135) and spousal consortium claims make no requirement of "zone of danger." The issue, if there is

one, is foreseeability and there should be no question but that a young child's loss due to his mother's death is easily foreseeable. "The Foreseeability of harm to a victim's child is as equally foreseeable as harm to a victim's spouse." *Villarel,* 774 P.2d at 218.

Appellees Taormina and UK Medical conclude that "the attendant burdens are too great for the minimal benefit" if a loss of parental consortium cause of action were recognized by this Court. Taormina Brief at 9. It is callous to label the recognition of a child's loss of her parents' care, love and affection as a "minimal benefit," and cynical to contrast that to the "burden" placed on insurance companies and those defendants who are found to be been wrongdoers. This is a classic case where the cost should not be placed on the victims, especially when the victims are children.

CONCLUSION

This Court, following in the tradition of *Hilen v. Hays,* Ky., 673 S.W.2d 713 (1984) should adapt the common law to reflect the recognition of the importance of parent-child relationships in which children are independent human beings with their own individual needs and rights. Loss of consortium is a common law doctrine, created and protected through the stewardship of this Court. James, Katie, David and Mary Kay Giuliani have lost their mother through the alleged negligent acts of Appellees and they respectfully request that this Court hold that they have a cause of action for the loss of her consortium.

Respectfully submitted,

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