IN THE SUPREME COURT OF FLORIDA

MICHAEL ZORZOS, ROYAL INSURANCE COMPANY OF CANADA, etc., CHAMPION SERVICES, INC., d/b/a BUDGET RENT-A-CAR OF CLEARWATER, FLORIDA, and NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURG, etc.,

Petitioners,

v.

STEPHEN JOEL ROSEN, a minor by and through his father and next friend, MICHAEL ROSEN, and BARBARA BETH ROSEN, a minor, by and through her father and next friend, MICHAEL ROSEN,

Respondents.

CASE NO. 65,239

AMICI CURIAE BRIEF OF THE AMERICAN TRIAL LAWYERS ASSOCIATION (ATLA) -AND- THE ACADEMY OF FLORIDA TRIAL LAWYERS (AFTL) SUPPORTING POSITION OF RESPONDENTS

THE AMERICAN TRIAL LAWYERS ASSOCIATION

-and-

THE ACADEMY OF FLORIDA TRIAL LAWYERS

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PREFACE

Petitioners were the Defendants in the trial court and the Appellees in the District Court of Appeal. Respondents were the Plaintiffs in the trial court and the Appellants in the District Court of Appeal. Herein the parties will be referred to as "Plaintiffs" and "Defendants." Amici Curiae, The American Trial Lawyers Association and The Academy of Florida Trial Lawyers will be referred to as "ATLA" and "AFTL," respectively.

POINT ON APPEAL

WHETHER FLORIDA SHOULD ADOPT THE DERIVATIVE CAUSE OF ACTION OF LOSS OF PARENTAL CONSORTIUM ON BEHALF OF MINOR CHILDREN IN A PERSONAL INJURY CASE INVOLVING INJURY TO THE MINOR CHILD'S PARENT(S)?

STATEMENT OF THE CASE AND FACTS

Amici Curiae, ATLA and AFTL, do not have a copy of the Record on Appeal and must defer to the statement of facts set forth in the written opinion of the Fifth DCA and the statement of facts in the briefs which were filed with the Fifth DCA (which Amici Curiae do have copies of). According to the Fifth DCA, the only facts in the record are the allegations contained in the complaints, which were dismissed by the trial court.

Essentially, the plaintiffs are both the minor children of their father, Michael Rosen, who was seriously injured by an automobile operated by defendant, Zorzos. The childrens' mother, Gail Rosen, was killed in the same accident. This case only involves the personal injury action for the father's injuries and does not involve the wrongful death of the mother.

The minor children sued the defendants for the loss of care, comfort, society, parental companionship, instruction and guidance of their father. The children brought separate suits which were consolidated. The trial court dismissed the childrens' actions with prejudice on grounds that they had failed to state a cause of action against the defendants.

On appeal the Fifth DCA reversed the trial court and held, as a matter of public policy, that Florida should recognize a cause of action on behalf of minor children for loss of parental consortium when their parents are wrongfully

injured. Rosen v Zorzos, ___ So.2d ___ (Fla. 5th DCA Case No. 83-291, opinion filed April 12, 1984) [9 FLW 840]. (Included as appendix to this brief). The Fifth DCA certified that its opinion is in direct conflict with the Third DCA and the Second DCA. This court's discretionary jurisdiction was timely invoked and this Court ordered briefs on the merits to be filed.

The American Trial Lawyers Association (ATLA) is a large, national association; and The Academy of Florida Trial Lawyers (AFTL) is a large statewide association of trial lawyers specializing in litigation in many areas of the law, including personal injury litigation. Both ATLA and AFTL are very interested in this potentially landmark case because it involves, as a question of first impression for this court, the possible adoption of a cause of action for loss of parental consortium. The issue is one of great public importance with broad ramifications for other parties in Florida and perhaps eventually in other jurisdictions. ATLA and AFTL have sought leave to file this Amici Curiae brief in order to provide the Court with additional input on this important issue from a standpoint other than that of the immediate parties.

ARGUMENT

WHETHER FLORIDA SHOULD ADOPT THE DERIVATIVE CAUSE OF ACTION OF LOSS OF PARENTAL CONSORTIUM ON BEHALF OF MINOR CHILDREN IN A PERSONAL INJURY CASE INVOLVING INJURY TO THE MINOR CHILD'S PARENT(S)?

Until the Fifth DCA's opinion in this case, the only two Florida appellate courts which had addressed this issue had declined to recognize an independent derivative cause of action in favor of minor children whose parent had been injured, but not killed, as a result of a tortfeasor's wrongful act. The Second DCA noted that such a cause of action was not known at common law nor provided for by statute, and the Court "decline[d] the invitation for a judicial intrusion into this area." Clark v Suncoast Hospital, Inc., 338 So.2d 1117 (Fla. 2d DCA 1976). The Second DCA stated that the plaintiffs' contentions should be addressed by the legislature. The Third DCA has issued two summary opinions which, in a single sentence, simply cited and followed Clark, supra, without any statement of reasoning. Fayden v Guerrero, 420 So.2d 656 (Fla. 3d DCA 1982); Ramirez v Commercial Union Ins. Co., 369 So.2d 360 (Fla. 3d DCA 1979).

This court has never before considered the policy arguments and addressed this issue. Neither has the First DCA nor the Fourth DCA. ATLA and AFTL, as Amici Curiae, submit that a child's independent derivative action for

loss of parental consortium should be examined by this Court in a fresh environment, unshackled by outmoded historical English precedent. It is an idea whose time has come and is beginning to emerge now in other American jurisdictions.

Although there were no other jurisdictions which recognized loss of parental consortium at the time Clark, supra, was decided (eight years ago), there are now four other jurisdictions which do recognize the child's derivative cause of action. These jurisdictions include Iowa, Massachusetts, Michigan and Wisconsin. Weitl v Moes, 311 N.W. 2d 259 (Iowa 1981);[1] Ferriter v Daniel O'Connell's Sons, Inc., 381 Mass. 507, 413 N.E. 2d 690 (1980); Berger v Weber, 411 Mich. 1, 303 N.W.2d 424 (1981); Theama v City of Kenosha, 344 N.W. 2d 513 (Wis. 1984).[2] These jurisdictions have judicially examined and updated the common law

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1. As the Fifth DCA in the present case noted at footnote 4 in its opinion, the Iowa Supreme Court later retracted the child's right to maintain an independent claim for loss of parental consortium in Aubudon-Extra Ready Mix, Inc. v Illinois Central Gulf R.R. Co., 335 N.W. 2d 148 (Iowa 1983). However, the rationale of Weitl, supra, and the public policy discussed therein was not retracted; rather, the Court merely reinterpreted an Iowa statute as procedurally requiring the parent to bring the entire action and recover for the child's loss of consortium rather than allowing the child to prosecute his or her own action. The public policy expressed in Weitl was still left intact as was the child's ultimate recovery for loss of parental consortium.

2. The Theama, supra, case from Wisconsin was not mentioned by the Fifth DCA in the present case. Theama was just decided by the Wisconsin Supreme Court about one month before the Fifth DCA's opinion. It offers further support.

rule to conform with modern principles of equality and the societal importance placed upon nuclear family (parent-child) relationships.

As the Fifth DCA in the present case noted in its opinion, the continued non-recognition of a consortium claim for minor children will perpetuate an obviously anomalous situation in the law of this state.

In Florida, an injured spouse of either sex in a personal injury case can maintain an independent derivative action for loss of the care, comfort and society of the injured spouse; but the minor child cannot. This court did not await legislative action to abrogate the common law rule which prevented a wife from suing for loss of spousal consortium. Gates v Foley, 247 So.2d 40 (Fla. 1971). A minor child's loss of parental consortium is just as foreseeable to a tortfeasor and is essentially the same as a loss of spousal consortium. This Court has noted that spousal consortium encompasses much more than just sexual relations; it includes that companionship and fellowship, comapny, cooperation, aid, affection, solace, comfort, society and assistance so necessary to a successful marriage. Gates, supra at 43.

A minor child's damages from loss of parental consortium are just as great, if not greater, than a spouse's claim. There is, perhaps, no greater loss to a child than the physical and emotional society and companionship of a parent. What more can be taken away from a little girl

than to deprive her of her mother's companionship in a shopping spree for a little dress just before Easter or some special occasion? What could be worse for a young boy whose father was the little league baseball coach than to deprive him of the joy of seeing the two of them play together now that the father is a paraplegic due to someone's tortious act? A minor child's love for his or her parent and need for parental companionship and guidance is virtually indistinguishable from the similar needs of the spouse. A minor child's interests are the same as the spouse and minor children certainly deserve "equal protection under the law" (a concept alien to common law England). Cf. Gates v Foley, supra, addressing the equal protection issue in a consortium case.

The Fifth DCA in the present case also noted that a minor child can recover under Florida's wrongful death statute for loss of consortium if the child's parent is killed; but not if the parent is only injured, no matter how seriously injured. The fact that there is a statutory cause of action for loss of parental consortium when a parent dies shows that the legislature recognizes that such a loss is significant to a minor child.[3] But it is a glaring anomaly that a child suffers a compensable loss of consortium

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3. In fact, under our wrongful death statute, §768.21, a child is allowed to recover for lost parental companionship and mental suffering from the date of injury (not just from the date of death).

when a parent is biologically killed but not when the living parent suffers such irremediable injuries (eg. irreversible brain damage, blindness, quadraplegia, etc.) as to leave him among the living dead.

Has a minor child lost any less parental consortium when his injured parent languishes in a comatose condition than when the parent dies? Clearly a severe personal injury to a parent resulting in a lifetime disability such as paralysis or brain damage can often cause even more intense and enduring mental anguish to the minor child than would the parent's death. Is there a rational basis to justify this anomaly in the law? Why should children of parents who have been wrongfully killed be classified differently than children of parents who have been profoundly injured? The spouses are not classified differently since their loss of consortium is compensable whether the injured spouse lives or dies. Why should the children be classified differently? Can this classification survive an equal protection challenge? Even if it could, should this court perpetuate such an anomolous result as a matter of public policy?

The facts of the present case illustrate the anomaly. Both parents were involved in the automobile accident. The mother was killed and the father very seriously injured, although not killed. Should the courts of this state tell these minor children that all their mental suffering and loss of parental consortium for the mother is compensable but not for their father who was injured in the same accident?

The Fifth DCA in the present case also noted another anomaly in the law. In Florida if a minor child is the one who is wrongfully injured, the parent of the child is allowed to recover for the loss of the child's companionship, society and services. Yordon v Savage, 279 SO.2d 844 (Fla. 1973). But while the parent may recover for loss of companionship of his minor child who is wrongfully injured, the minor child has no such reciprocal right to recover when the parent is wrongfully injured. Does this make any sense when the parent-child relationship is a symbiotic relationship, just like the spousal relationship; each party offering and receiving from the other the familial companionship, affection and society characterizing such a relationship? In Gates v Foley, supra at 44, this Court stated that no reasonable distinction may be made between the wife's claim for negligent impairment of consortium and a similar claim by the husband. Is not the same true of the parent-child relationship which is also symbiotic? Should that not also cut both ways?

To 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. Blind adherence to a practice which was followed in 18th century England without re-examination under modern concepts of equality and justice (rather than English concepts of property rights) would be

an abdication of judicial responsibility.

There is no reason in logic or public policy to perpetuate a rule which denies any recovery to minor children who have lost the invaluable care, comfort, society, parental companionship, instruction and guidance of their mother and/or father due to the tortious act of a third party.

The main reason advanced by the courts in other jurisdictions which have declined to change the common law is that the creation of a child's right of action should be brought about by the legislative process rather than being judicially pronounced. However, this court has been ever vigilant in the past to re-examine judicially created anachronisms. It has not been the past policy of this court to abdicate its responsibility to the legislature when presented with such an important social issue. This court did not await legislative action to extend the common law rule which only allowed the male spouse to bring a consortium claim. Gates v Foley, supra. Nor did the "legislative issue" argument stop this court very recently from adopting the seat belt defense in Florida as a matter of public policy. Insurance Co. of North America v Pasakarnis, ___ So.2d ___ (Fla. Case No. 63,312, opinion filed April 12, 1984) [9 FLW 128]. This court also recently partially abrogated the traditional parent-child immunity to the extent of insurance policy limits; again as a matter of public policy and changing social attitudes. Ard v Ard,

414 So.2d 1066 (Fla. 1982).

There are many other examples where this Court has modified an old common law or traditional rule which was no longer considered satisfactory in modern society. Eg. Hoffman v Jones, 280 SO.2d 431 (Fla. 1973) (abrogation of contributory negligence rule); Bishop v Fla. Speciality Paint Co., 389 So.2d 999 (Fla. 1980) (abrogation of traditional lex loci delicti conflict principles); West v Caterpillar Tractor Co., 336 So.2d 80 (Fla. 1976) (adopting strict liability in tort in products cases); Randolph v Randolph, 146 Fla. 491, 1 So.2d 480 (1941); Banfield v Addington, 104 Fla. 661, 140 So. 893 (1932); Waller v First Savings & Trust Co., 103 Fla. 1025, 138 So. 780 (1931); Hargrove v Town of Cocoa Beach, 96 So.2d 130 (Fla. 1957).

"The genuis of the common law is its ability to adapt itself to the changing needs of society." Theama v City of Kenosa, supra at 515. The continuing development of the common law falls within the judicial prerogative. Recognition of the minor child's claim for loss of parental consortium does not require an enabling act of the legislature.

This Court has stated in the past:

> "The law is not static. It must keep pace with changes in our society, for the doctrine of stare decisis is not an iron mold which can never be changed. . . It may be argued that any change in this rule should come from the legislature. . . but we abdicate our own function, in a field

> peculiarly non-statutory [common law consortium], when we refuse to consider an old and unsatisfactory court made rule.
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> Gates v Foley, supra at 43.

> "Medieval concepts which have no justification in our present society should be rejected."
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> Gates, supra at 44.

> "This court has never hesitated to revisit the common law when it becomes an anachronism and ceases to serve the cause of justice."
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> Stephen Bodzo Realty, Inc. v Willits Int. Corp., 428 So.2d 225, 227 (Fla. 1983).

Most recently it was stated in Pasakarnis, supra (the seat belt case), that this court will not abdicate its continuing responsibility to the citizens of Florida to ensure that the law remains fair and realistic as society and technology changes. This court stated it would overturn unsound precedent in the area of tort law and reconsider an old and unsatisfactory court made rule. In fact, this Court noted in Pasakarnis that tort law in Florida has been modernized for the most part through the courts.

Several other reasons have been asserted by the defendants and by some other jurisdictions for not recognizing the minor child's right to be compensated for loss of parental consortium. But in any case where a new cause of action is advocated, an alleged parade of horribles is always argued in opposition. In this case they can be

disposed of quickly.

One reason advanced by some other jurisdictions is the absence of any enforceable claim on the child's part to the parent's services or companionship. However, neither does a spouse have an enforceable claim for companionship or services, or anything beyond monetary support (which a child can also claim and enforce. See Ard v Ard, supra at 1067). Nor does a parent have an enforceable claim against his own child for companionship and services. Such involuntary servitude cannot be compelled by a court. But this has not precluded a spouse's claim against a third person for loss of services of a husband or wife, nor a parent's claim against a third person for loss of his child's services. Why should it preclude a child's claim for loss of his parent's services? A child has no less a right to the comfort, companionship, love, aid and affection of a father than a wife has to a husband or a husband has to a wife.

It is not necessary that an interest be based on a legally enforceable entitlement in order to be compensable. One need only show there was reasonable certainty of receiving benefits with which the tortfeasor wrongfully interfered. For example, compare the requirements for a cause of action in tort for wrongful interference with an expected bequest or wrongful interference with an advantageous business relationship. See United Yacht Brokers, Inc. v Gillespie, 377 So.2d 668 (Fla. 1979); Davison v Feuerherd, 391 So.2d 799 (Fla. 2d DCA 1980).

Another reason advanced in some jurisdictions is the potential for multiplicity of litigation. But this argument would have applied to spousal consortium also. Multiplicity of actions arising out of the same tortious act are a present reality in tort law and can result whenever a single tortious act injures more than one person. Presently spousal consortium claims are almost always joined with the main claim.

Parental consortium claims can be treated just as this court treated spousal consortium in Gates v Foley, supra. In Gates this court held that when an injured party is suing and his spouse has separately filed suit, the consortium claim can be consolidated and, if it is not yet filed the defendant has the right to request joinder of the spouse as a property party. Gates, supra at 45. This has worked fine for spouses and can work just as well for minor children.[4]

Another fear expressed by the courts of some jurisdictions

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4. In the present case the defendants mentioned parenthetically in a footnote in their Fifth DCA brief that the plaintiff, minor children, had not joined in the same action with their father, contrary to section 627.7403, Fla. Stat. The Fifth DCA did not pass on this point since the trial court had not addressed it. The trial court dismissed the children's action with prejudice for failure to state a cause of action recognized in Florida for loss of parental consortium. The record also does not show what statute the father's lawsuit was brought under. Nor does the record show whether the defendants may have waived the statute or whether the minor children may have good cause to show why their claims were brought separately, in which case the statute would not bar their action. The Fifth DCA stated that this issue could be presented to the lower court on remand and ruled on. It should not distract this court from addressing the real issue that has been certified by the Fifth DCA to be in conflict and in need of resolution by this court.

is that recognition of a minor child's claim might not end there and may open a floodgate for other more distant relatives to come in and claim loss of services if they were also dependent on the injured plaintiff. The "floodgate" argument is probably raised in opposition whenever a new cause of action is advocated. But the rights of a new class of tort plaintiffs should be judged on their own merits, rather than engaging in gloomy speculation as to where it will all end. That the law might be urged later to move too far is an unacceptable excuse for not moving at all now.

The recognition of a derivative consortium claim for minor children does not, ipso facto, lead to the same for siblings, friends, relatives, in-laws, etc. The case at bar involves the traditional nuclear family relationship. How foster parents, illegitimate children and other boarderline cases may fit into this whole scheme can be addressed in a later case which may involve such facts. This case does not and no one has suggested that remote relatives or anyone other than immediate family members should be compensated. The only question here is whether natural, legitimate minor children should have a derivative remedy.

The distinction between the interests of minor children and other relatives is obviously rational. The importance of the nuclear family in present day society as well as the factor of foreseeability is clear. Spousal and parent-child relationships are the two most likely relationships to be most severely affected by negligent injury to a parent. The

issue should logically be analyzed from the point of view of the tortfeasor and what may be reasonably foreseeable to him.

Another "horrible" in the parade is the argument that there may be overlapping recovery if a child recovers for loss of support at the same time that the injured parent recovers for lost wages. However, this is no problem if a child's derivative action is confined to loss of society and companionship of the parent but not loss of financial support. Here again, this issue should be treated the same way it was treated by this Court in Gates v Foley, supra. In Gates this Court held that in actions by a wife for loss of consortium, the trial court should carefully caution the jury that any loss to the wife of her husband's financial support is fully compensated by any award to the husband for loss of earnings and that the wife is entitled to recover only for loss of consortium.

Another argument sometimes raised is the uncertainty of the damages involved. However, assessing damages for the child's loss of parental consortium would seem no more difficult than measuring a spouse's identical loss, or measuring a parent's loss of services when a child is injured (or, for that matter, measuring pain and suffering in any case.) Trial courts and juries have for years been assessing intangible damages with apparent success.

Another argument sometimes raised is the supposed public policy expressed in some jurisdictions by the enact-

ment of "anti-heart balm" statutes. This argument is way off track since this is a case of severe negligently inflicted personal injuries rather than just alienation of affections. When a parent is enticed from the home by a seductive intruder he has abandoned his family voluntarily and the value of the parental companionship lost by such departure is dubious. The scenario often reveals a frustrated spouse who is as much hunter as quarry. This is clearly far different than the sudden loss of a parent's companionship due to total disability suffered from a grevious personal injury. This is not a "heart balm" situation at all.

Another argument sometimes raised is the possibility of prior settlements with parents now being upset. That depends on how this Court might apply a newly created right. Here again, the situation can be handled in the same way this Court handled it in Gates v Foley, supra. See Gates, supra at 45. If this Court adopts a derivative action for loss of parental consortium it should not be applied to cases already settled in reliance on what the law was at the time. We agree it would not be fair to allow new law to upset such settlements, but this does not militate against now adopting the child's cause of action and modernizing the common law. Just as this Court noted in Gates, supra at 45, the problem of retrospective application of a new consortium action can be easily resolved.

Another argument sometimes raised is the potential for

collusion and fraud between parent and child. But this same argument was made in Ard v Ard, supra, and it did not stop this Court from partially abrogating parent-child immunity. As this Court stated in Ard, supra at 1069:

> "We recognize that the possibility of fraud exists in every lawsuit but reject the contention that such possibility still forms a valid justification for denying a child compensation for injuries negligently inflicted. . . '. . . it cannot be presumed that juries will check their common sense at the courtroom door.'"

The arguments above are essentially the fears that have been expressed by the courts which have declined to recognize a child's cause of action for loss of parental consortium. As we hope the Court will agree, the parade of horribles is not so horrible.

The strongest point the defendants can make is that the weight of precedent is on their side. We cannot deny that. The majority of jurisdictions which have considered this have declined to modify the common law. Some of those are older cases and others are based on peculiarities of the law of that state which are not applicable here.

The trial lawyer members of ATLA and AFTL view this case as a potentially germinative decision which may influence other jurisdictions on a very important social issue. We hope this Court would agree that the volume of authority is not more important than the weight of reason. While the Courts in other jurisdictions have been reluctant,

the legal scholars and commentators who have studied and written on the subject have almost universally supported the recognition of an independent cause of action for loss of parental consortium. See footnote 8 of the Fifth DCA's opinion. (Appendix.) The reasons supporting recognition of the child's cause of action are, we believe, quite compelling. To the defendant's argument that the weight of authority around the country is on their side, we can only make one more concluding response. The mission of a forward-looking court is not to follow the crowd, when the crowd is marching in the wrong direction. Several State Supreme Courts have already shown the courageous conviction to break from the crowd and adopt the more equitable rule. We urge this Court to join them.

CONCLUSION

The opinion of the Fifth District Court of Appeal should be affirmed and the cases in conflict should be disapproved.

Respectfully submitted,

THE AMERICAN TRIAL LAWYERS ASSOCIATION (ATLA)

-and-

THE ACADEMY OF FLROIDA TRIAL LAWYERS (AFTL)

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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that a true copy of the foregoing has been furnished, by mail, this 18th day of June, 1984, to: WALTON B. HALLOWES, ESQ., of Wells, Gattis, Hallowes & Holbrook, P.A., 130 Hillcrest Street, P. O. Box 3109, Orlando, FL 32802; CHRIS W. ALTENBERND, ESQ., and MARTIN L. GARCIA, ESQ., of Fowler, White, Gillen, Boggs, Villareal & Baker, P.A., P. O. Box 1438, Tampa, FL 33601; and JAMES A. MURMAN, ESQ., of Barr, Murman and Tonelli, P.A., P. O. Box 2762, Tampa, FL 33601.

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