65,239

IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE

MICHAEL ZORZOS, ROYAL INSURANCE COMPANY OF CANADA, a foreign corporation, CHAMPION SERVICES, INC. d/b/a BUDGET RENT-A-CAR OF CLEARWATER, FLORIDA and NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, a New York corporation

Petitioners,

-vs-

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.

ON PETITION FOR DISCRETIONARY REVIEW OF A DECISION OF THE FIFTH DISTRICT COURT OF APPEAL

RESPONDENTS' BRIEF ON THE MERITS

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ARGUMENT

DOES A MINOR CHILD HAVE A CAUSE OF ACTION FOR LOSS OF PARENTAL CARE, COMFORT, SOCIETY, COMPANIONSHIP AND GUIDANCE WHEN A PARENT IS INJURED BY THE NEGLIGENCE OF A THIRD PARTY?

The question of whether children should be entitled to bring a claim for loss of parental consortium has been greatly debated by various courts and legal commentators in recent years.[1] A review of the numerous articles and judicial opinions on the issue reveal a substantial disagreement between the proponents and opponents. However, all parties seem to agree on one significant fact and that is the child whose parent has been seriously injured suffers a real and significant loss when deprived of that parents care, comfort, and companionship.[2]

In Hill v. Sibley Memorial Hospital 108 F. Supp. 739 (D.C. 1952), the Court upheld the dismissal of a minor's claim for loss of his mother's consortium. The Court felt obligated to follow prior decisional law. However, it said:

> "This Court confesses that it has been difficult for it on the basis of natural justice to reach the conclusion that this type of an action will not lie. When a child loses the love and companionship of a parent, it is deprived of something that is indeed valuable and precious.

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[1] A list of the citations are in footnotes 9 and 10 of Petitioners' Brief.

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[2] The loss in this case was enhanced by the fact that not only was the children's father seriously injured, but the mother was killed.

> The court should ever be alert to widen the circle of justice to conform to the changing needs and conditions of society."

Likewise is Hoffman v. Dautel 368 P.2d 57 (1962) where the Court after denying a minor child access to the Court said:

> "It is common knowledge that a parent who suffers serious physical or mental injury is unable to give his minor children the parental care, training, love and companionship in the same degree as he might have but for the injury. Hence, it is difficult for the court on the basis of natural justice, to reach the conclusion that this type of action will not lie. Human tendencies and sympathies suggest otherwise. Normal home life for a child consists of complex incidences in which the sums constitute a nurturing environment. When the vitally important parent-child relationship is impaired and the child loses the love, guidance and close companionship of a parent, the child is deprived of something that is indeed valuable and precious. No one could seriously contend otherwise."

The California Supreme Court in Borer v. American Airlines, Inc. 563 P.2d 858 (1977) said:

> "... we do not doubt the reality or the magnitude of the injury suffered by plaintiffs. We are keenly aware of the need of children for the love, affection, society and guidance of parents; any injury which diminishes the ability of a parent to meet these needs is plainly a family tragedy, harming all members of that community."

Dean William Prosser noted:

> "This is surely a genuine injury, and a serious one, which has received a great deal more sympathy from legal writers than from judges ...." W. Prosser Handbook of the Law of Torts, Section 125 pp. 986-987 (4th Edition 1971)

See also Gabrio, Actions For Loss of Consortium in Washington: The Children Are Still Crying, 56 Washington Law Review, 487-504 (1981); Comment, The Child's Cause of Action For Loss of Consortium, 5 U.San Fernando L. Rev. 449, 467, 468 (1977).

Likewise, in this case there is no debate about the fact that a child who is deprived of the love and affection of an injured parent suffers a real and significant injury. Rather, the debate is focused on the issue of whether that injury should be compensable. The appellants urge the injury should not be compensable for essentially two reasons:

1. That this Court is not the appropriate body to remedy this wrong; and

2. That the public policy considerations should prohibit this cause of action.

However, an analysis of these arguments demonstrate that they should not form a valid basis for denying to children access to the Courts.

As noted by the Fifth District in the decision under review, "it has never been the policy of Florida to abdicate their responsibility to the legislature when presented with such an important social issue." Rosen v. Zorzos 9 FLW 840 (1984). In fact, as social conditions have changed, this Court has always demonstrated a willingness to keep the common law moving. Bishop v. Fla. Specialty Paint Co. 389 So.2d 999 (Fla. 1980)(Abrogation of lex loci delicti principal); West v. Caterpillar 336 So.2d 80 (1976)(Adapting strict liability); Hoffman v. Jones 280 So.2d 431 (1973)(Abrogation of Contributory Negligence Rule); Gates v. Foley 247 So.2d 40 (1971)(Recognizing Wife's Claim for Consortium). Certainly, in this case there is no sound reason for this Court not to decide the question. The issues presented in terms of liability or damages are neither novel nor complex.

The question of whether existing common law rules need revision is clearly a proper determination for this Court. As was noted in Gates:

> "No recitation of authority is needed to indicate that this Court has not been backward in overturning unsound precedent in the area of tort law. Legislative action could, of course, be taken but we abdicate our own function, in a field peculiarly nonstatutory, when we refuse to reconsider an old and unsatisfactory court-made rule." p.43

Furthermore, to decide this issue is in keeping with the finest tradition of the common law system as noted by Justice Glenn Terrell in State ex. rel Pooser v. Wester 170 So. 736 (1936) where he said:

> "One of the high prerogatives of a court of justice is to keep this principle of the law dynamic by construing it to provide a remedy for every new wrong that arises. The test of whether or not old remedies will be extended to the wrongs that constantly rise from new conditions is not what the remedy extended to in the time of Edward the First or George the Third, but whether or not the one complaining has suffered an injury in his 'lands, goods, person, or reputation' that should in right and justice be atoned for. If this is not the rule, then the equitable maxim and Section 4 of the Declaration of Rights are nothing more than a gesture and had as well be consigned to the pictograph corner in the museum along with the Code of Hammurabi and the tablets that Moses brought down from the mountain." (pp. 737, 738)

The threshhold question is whether the rule announced in Clark v. Suncoast Hospital, Inc. 338 So.2d 1117 (2DCA 1976) violates the provisions of Article 1, Sections 2, 9 and 21 of the Constitution of the State of Florida. These provisions provide:

> "All natural persons are equal before the law." Article 1, Section 2.
>
> "No person shall be deprived of life, liberty or property without due process of law." Article 1, Section 9.
>
> "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." Article 1, Section 21.

In Gates v. Foley this Court found that the common law rule denying to women a claim for loss of consortium to be an unreaonable and arbitrary classification based upon sex. Id. at 45. Even though this Court specifically found that the wife could not have maintained such an action at common law the Court was not deterred in finding such a denial to be a violation of the women's constitutional protection. The constitutional arguments which the Court found compelled a change in Gates apply with equal vigor to the issues presented by this appeal.

The Gates Court felt compelled to initiate change and provide a remedy where none existed at common law because:

> "The recent changes in the legal and societal status of women in our society forces us to recognize a change in the doctrine with which this opinion in concerned. Id. at 44.

Similarly as has been noted dramatic and dynamic changes have been occurring with respect to the question of children rights. The Courts have in recent years demonstrated an unwillingness to be silent observers where the constitutional rights of children were at stake. See for example: Carey v. Population Services International 431 U.S. 678, 692 (1977) (contraceptives); Breed

v. Jones 421 U.S. 519 (1975) (double jeopardy); Goss v. Lopez 419 U.S. 565 (1975) (due process in civil matters); In re Winship 397 U.S. 358 (1970) (due process in criminal matters); In re Gault 387 U.S. 1 (1967) (right to counsel, cross-examination, and not to incriminate self); Tinker v. Des Moines Independent Community School District 393 U.S. 503 (1969) (free speech); Brown v. Board of Education 347 U.S. 483 (1954) (equal protection).

In Gates the Court found that the recent changes in the legal and societal status of women forced a change in doctrine. That reasoning applies with no less force to the rights of children. It is significant that the Clark Court did not address the constitutional issues before rendering its decision. There can be no logical or just basis for denying children access to the Court to redress what all concede to be a serious injury.

As was noted by the Court in Gates:

> "... if the inability of the wife to recover in a case of this kind is due to some reason of the common law which has disappeared, the rule denying her the right to maintain the action may have disappeared with it. This principle is a part of the common law which was adopted by the Florida Statute. Id. at 43.

Similarly, in this case if the reason for the common law prohibition against maintenance of a loss of consortium action by children has disappeared then the reason denying them the right to maintain the action has disappeared.

To date four states, Iowa[3], Massachusetts[4], Michigan[5] and Wisconsin[6] have found that the changing social climate compelled recognition of the right for children to maintain an action for loss of parental consortium. There are many strong social policies favoring recognition of the child's right to compensation for the loss of parental consortium. Some of these sound policy considerations were discussed in Tortious Interference With the Parent Child Relationship; Loss of An Injured Person's Society and Companionship 51 Ind. L.J. 90 (1976). The author said:

> "The loss of a parent's love, care, companionship and guidance has a detrimental effect on the child's development, a consequence that can have serious ramifications for society. The benefits that would accrue from compensating the loss outweigh the burden of extending the defendant's liability. Moreover, the child has an equal interest with his parents in the emotional benefits that flow from the family; therefore, he should be equally entitled to maintain an action to protect that interest. Finally, extension of this action to the child would be consistent with the emerging recognition of new rights and remedies for children in other areas of the law."

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[3] Weitl v. Moes
311 N.W.2d 259 (Iowa 1981)

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[4] Ferriter v. Daniel O'Connel's Sons, Inc.
381 Mass. 507, 413 N.E.2d 690 (1980)

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[5] Berger v. Weber
411 Mich 1, 303 N.W. 2d 424 (1981)

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[6] Theama v. City of Kenosha
344 N.W.2d 513 (Wis. 1984)

Finally, the appellants would argue that for the Court to change the law as suggested by the Fifth District Court would be tantamount to unleashing the four horsemen of the Appocalypse on society and the Courts. Needless to say each of the supposed "horrors" conjured up by appellants were considered and found wanting by the Supreme Courts of Iowa, Massachusetts, Michigan and Wisconsin.

The Courts of Florida have on occasions too numerous to require citation found that jurors in this State are quite capable after proper instruction of assessing intangible elements of damage. Thus the argument that "this cause of action for intangibles is speculative, remote, uncertain and would allow for prejudicial factors to influence the jury" totally ignores the decisional law governing contemporary trial practice in Florida.

By making its decision prospective, excepting of course the present case, the Court eliminates the risk of interfering with past or present settlements. Other practical problems could be solved with the same procedure outlined in Gates.

Fla. Stat. §627.737 presently requires in auto accidents that all derivative claims shall be brought together.[7] This statute could govern claims of children. By bringing their

[7]The question of whether these minors' claims are barred by Fla. Stat. §627.737 was not passed upon by the Fifth District Court or the Trial Court. The question of whether good cause exists for their failure to join their action with their father's has yet to be decided by the Trial Court pending a decision on the jurisdictional issue.

claims in conjunction with their parents' action, the risk of a duplication of damages would be nil. Likewise such a procedure would not significantly increase the burden on the Court system. Even in those case not governed by Fla. Stat. §627.737 it has been this attorney's observation that the derivative claim of the spouse is generally made a part of the main case. Furthermore, if the joinder question is a matter of great concern, this Court could mandate by Court rule that such claim be brought as part of the principal claim.

What is being advocated here is not an unlimited expansion of tort liability which "could be used to support a cause of action in a multitude of other persons." [Appellants Brief p.36] Rather, what is being advanced is a limited expansion of remedies to include minor children whose parents have been injured by the negligence of third parties. This class of persons is well defined and easily identifiable. To offer children their just due would not lead to the development of viable claims on behalf of "grandparents, aunts, uncles, siblings, step-parents, school teachers, dance instructors, coaches, scout masters, baby sitters, ministers, priests, and good friends ..." [Appellants Brief p.36] It would, however, provide a long overdue means of redress to children who have suffered a real and significant injury in the loss of their parent's love, companionship and guidance.

Sixty-eight years ago Dean Pound wrote:

> "As against the world at large a child has an interest ... in the society and affection of the parent, at least while he remains in the household.

> But the law has done little to secure these interests .... It will have been observed that legal securing of the interests of children falls far short of what general considerations would appear to demand." Pound, Individual Interests in the Domestic Relations 14 Mich.L.Rev. 177, 185-186 (1916).

The time has come for this Court to legally recognize the vital interests of the child in the love and affection of his parents by offering to that child a remedy when those interest have been unlawfully invaded by others.

CONCLUSION

The rule announced in Clark v. Suncoast 338 So.2d 1117 (2DCA 1976) and followed in Fayden v. Guerrero 420 So.2d 656 (3DCA 1982); and Ramirez v. Commercial Union Ins. Co. 369 So.2d 360 (3DCA 1979) should be rejected as out of step with contemporary social thought regarding children's rights. Instead the Court should adopt the view expressed by the Fifth District in the decision under review and affirm it.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof has been furnished by U.S. Mail to Chris W. Altenbernd, Esquire, Post Office Box 1438, Tampa, Florida 33601, James A. Murman, Esquire, Post Office Box 2762, Tampa, Florida 33601 and Peter N. Smith, Esquire, Post Office Box 367, Orlando, Florida 32802 this 2nd day of July, 1984.

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