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 PITTSBURG, a New York corporation,

Petitioners,

vs. CASE NO. 65,239

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 friend, MICHAEL ROSEN,

Respondents.

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

PETITIONERS' BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

On August 15, 1980, an automobile accident occurred on the Courtney Campbell Causeway in Hillsborough County, Florida. (R. 28-30)[1] One automobile involved in the accident was owned and operated by Michael Rosen. His wife, Gayle Rosen, was a passenger in the automobile. (R. 28-30) The other automobile was operated by Michel Zorzos who had personal insurance with Royal Insurance of Canada. That automobile was owned by Champion Services Inc. d/b/a of Budget Rent-A-Car of Clearwater, Florida and was insured by National Union Fire Insurance Company. (R.28-30).[2]

As a result of the automobile accident, Michael Rosen sustained significant personal injuries and Gayle Rosen died. At the time of the accident, the Rosens had two children, Stephen Joel Rosen and Barbara Rosen. These children were not in the automobile and, thus, sustained no personal injuries themselves as a result of the accident.

In 1980, Michael Rosen, as personal representative of the estate of Gayle Rosen, filed a wrongful death action against Michel Zorzos, Royal Insurance Company of Canada, Champion Services Inc., d/b/a Budget Rent-A-Car of Clearwater, Florida and

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1 All references to the record on appeal will be indicated by the symbol "R." followed by the appropriate page from the record on appeal.

2 The Plaintiffs/Appellants/Respondents, Stephen Joe Rosen and Barbara Rosen, by and through their father and next friend, Michael Rosen will be referred to in this brief either by their specific names or collectively as the "Plaintiffs". The Defendants/Appellees/Petitioners, will either be referred to by their specific names or collectively as the "Defendants".

National Union Fire Insurance Company of Pittsburg. That action was filed in the Thirteenth Judicial Circuit in and for Hillsborough County, Florida as Case Number 80-16679. A true and accurate copy of the amended complaint filed in that action is attached hereto as Appendix "A". That case was tried before a jury and ultimately resulted in an amended final judgment in the amount of $400,137.84. A true and accurate copy of that amended final judgment is attached hereto as Appendix "B".[3]

A few days after the trial in the wrongful death action, Michael Rosen filed his personal injury action against Champion Services Inc., d/b/a Budget Rent-A-Car of Clearwater, Florida and National Union Fire Insurance Company of Pittsburgh. That action was also filed in the Thirteenth Judicial Circuit in and for Hillsborough County, Florida. A true and accurate copy of the complaint filed in that action is attached hereto as Appendix "C". In that action, Michael Rosen requested damages for his injuries, alleging that they were permanent, but he did not request any damages for his two children. Pursuant to an offer of judgment, that lawsuit was resolved by a final judgment in the amount of $350,000.00 on May 4, 1982. A true and accurate copy of that judgment is attached hereto as Appendix "D".

On August 13, 1982, Michael Rosen filed two separate lawsuits in the Ninth Judicial Circuit in and for Orange County, Florida, seeking damages for his two children, Stephen Joel Rosen

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[3] Although the judgment does not reflect the amounts awarded to the various survivors, each child, Stephen Joel Rosen and Barbara Rosen, was awarded $150,000.00 as a result of the death of their mother.

and Barbara Rosen. (R. 1-4) These cases were consolidated (R. 34-35), and the children filed an amended complaint seeking damages for the lost "care, comfort, society, and parental companionship, instruction and guidance of their father". (R. 28-30) A true and accurate copy of that amended complaint is contained in Appendix "E". Both Michel Zorzos and his insurance company, Royal Insurance Company of Canada and Champion Services, Inc. d/b/a Budget Rent-A-Car of Clearwater, Florida and its insurance carrier National Union Fire Insurance Company of Pittsburg filed motions to dismiss the amended complaint (R. 27, 38-39) The motion to dismiss of Budget Rent-A-Car and National Union requested dismissal on grounds that the court was without jurisdiction over the subject matter, on grounds that the alleged damages had already been satisified in the other lawsuits, and because the children had no cause of action in the state of Florida for such a consortium claim (R. 38-39).

The lower courts dismissed the amended complaint with prejudice on February 16, 1983. (R. 42) The plaintiffs took a timely notice of appeal to the Fifth District Court of Appeals. (R. 43-44).

Following briefing and oral argument, the Fifth District Court of Appeal reached its decision on April 12, 1984. That decision holds that children in the State of Florida do have a consortium claim arising out of injuries to a parent and holds that it would be unconstitutional under Article I, §21 of the Florida Constitution to rule otherwise. The court refused to rule upon a subject-matter jurisdictional issue--whether the

plaintiffs had failed to bring the action as a derivative action within their father's no-fault lawsuit pursuant to §627.7403, Florida Statutes.

The Fifth District Court of Appeal did certify this decision as being in direct conflict with the Second District's decision in Clark v. Sun Coast Hospital, Inc., 338 So.2d 1117 (Fla. 2d DCA 1976) and the Third District's decisions in Fayden v. Guerrero, 420 So.2d 656 (Fla.3d DCA 1982) and Ramirez v. Commercial Union Insurance Co., 369 So.2d 360 (Fla. 3d DCA 1979). Thus, these Defendants invoke this court's jurisdiction pursuant to Rule 9.030(a)(2)(A)(vi).

These Defendants did file a motion to stay the issuance of mandate in the Fifth District Court of Appeal pending review in this court. The Fifth District Court of Appeal entered an order on May 18, 1984 granting that motion and staying mandate in this case until final disposition by this court.

POINT ON APPEAL

WHETHER A NEW CAUSE OF ACTION FOR CHILDREN IN THE NATURE OF CONSORTIUM IS NOT SUPPORTED BY COMPELLING REASONS OF PUBLIC POLICY AND WOULD RESULT IN A DUPLICATION OF DAMAGES, INCREASED INSURANCE COSTS, DECREASED OPPORTUNITY TO SETTLE LAWSUITS, ADDITIONAL BURDEN UPON THE COURTS AND ADDED TENSION WITHIN THE FAMILY UNIT.

ARGUMENT

A NEW CAUSE OF ACTION FOR CHILDREN IN THE NATURE OF CONSORTIUM IS NOT SUPPORTED BY COMPELLING REASONS OF PUBLIC POLICY AND WOULD RESULT IN A DUPLICATION OF DAMAGES, INCREASED INSURANCE COSTS, DECREASED OPPORTUNITY TO SETTLE LAWSUITS, ADDITIONAL BURDEN UPON THE COURTS AND ADDED TENSION WITHIN THE FAMILY UNIT.

A. The Fifth District Avoided a Jurisdictional Issue in its Rush to Consider this Novel Cause of Action.

It is well established as a matter of statutory law that all derivative claims arising out of a no-fault motor vehicle accident should be brought with the primary claim. Section 627.7403, Florida Statutes states:

> "Mandatory joinder of derivative claim - In any action brought pursuant to the provisions of s. 627.737 claiming personal injuries, all claims arising out of the plaintiff's injuries, including all derivative claims, shall be brought together, unless good cause is shown why such claims should be brought separately."

This provision was first placed into the Florida Motor Vehicle No-Fault Law by Section 38 of Chapter 77-468, Laws of Florida.

There can be no dispute that Mr. Rosen did not join his children's alleged derivative claims in his own lawsuit. This action, upon the face of the record, is an action against a Florida automobile owner who has insurance with National Union Fire Insurance Company of Pittsburg. Thus, it is obvious that the Fifth District has made a major change in the common law of this state and has reached a constitutional question in a case which the lower court should dismiss pursuant to Section 627.7403, Florida Statutes.

At this point, the plaintiffs have never been required in either Mr. Rosen's first lawsuit or in this lawsuit to show "good cause" why the children's claims were brought separately. There would appear to be no such good cause. The method utilized by the plaintiff merely allows for a double recovery of damages. Moreover, it is obvious that this action was brought in a circuit court within the Fifth District as compared to a circuit court within the Second District in order to avoid the Second District's decision in Clark v. Suncoast Hospital, Inc., 338 So.2d 1117 (Fla. 2d DCA 1976) and in hopes of creating a conflicting decision.

It is well established that the appellate courts of this state are not the "general conservators" of the Florida Constitution and should only reach a constitutional question out of unavoidable necessity. State ex.rel. Crim v. Juvenal, 118 Fla. 487, 159 So. 663 (Fla. 1935). Likewise, even if an appellate court disagrees with the reasoning of a lower court, it should affirm the lower court on any available ground. Moore v. St. Petersburg, 281 So.2d 549 (Fla. 2d DCA 1973), cert. den. 289 So.2d 730 (Fla. 1973). In this case, the Fifth District seems to have gone out of its way to reach a constitutional question and to create a new common law cause of action when it had no necessity to do so.

B. The Fifth District's Opinion Emphasizes Two Procedural Arguments Against Recognition of Children's Consortium Claims While Ignoring the Many Strong Public Policies Against Such Claims.

The Second District and many other courts have been convinced by numerous considerations of public policy that the common law which prohibits consortium claims by children should not be disturbed. Although the Fifth District's decision mentions "compelling" reasons of public policy to change the common law, it is curious that its decision openly avoids discussion of the numerous factors of public policy. That decision suggests that the Second District considered only two procedural arguments against children's consortium claims and then tries to justify the creation of the new claim - - not upon valid reasons of public policy - - but upon an artificial need for a perceived symmetry within the law. As discussed later, the Fifth District's proposal does not create symmetry. Both the two procedural arguments and the numerous other factors of public policy ignored by the Fifth District still support the common law rule against children's consortium claims.

In Clark v. Suncoast Hospital, Inc., 338 So.2d 1117 (Fla. 2d DCA 1976), the children of the injured plaintiff, Raymond Clark, sought damages for their alleged deprivation of their father's support, instruction and companionship which had resulted from the alleged negligence of the hospital. The hospital moved to dismiss the claim and the trial court certified the question of whether a dependent minor child had a derivative claim arising from an injury to a parent upon whom the minor

depends for support and companionship. The children had argued that it would be a manifest injustice to deny them the right of recovery for their own intangible losses arising from their loss of consortium. The argument was premised upon the fact that a derivative claim for loss of spousal consortium was recognized by this court in Gates v. Foley, 247 So.2d 40 (Fla. 1971). Likewise, the children argued that the Florida Wrongful Death Act provided children damages for loss of parental companionship when the parent ultimately died as a result of the injuries.

The Second District declined to create such a cause of action and stated:

> "We, in effect, are asked to judicially declare that there are derivative claims in favor of children as a result of injuries to their parents. Sensitive as we are to the claims of the Clark children and all others who may deprived of those intangible moral benefits which only parents can provide, we decline the invitation for a judicial intrusion into this area."

The court further explained that there were numerous reasons for its decision not to recognize such a cause of action. The court stated:

> "Numerous considerations weigh against formulation of children's right of action. Nine of these reasons are cited in a Note in 54 Mich. L.Rev. 1023 (1956): (1) the absence of any enforceable claim on the child's part to the parent's services, (2) the absence of precedent, (3) the uncertainty and remoteness of the damages involved (4) the possible overlap with the parent's recovery, (5) the multiplication of litigation, (6) the possibility of settlements made with parents being upset, (7) the danger of fabricated actions, (8) the

> increase of insurance costs, and (9) the public policy expressed in some jurisdictions in the ennactment 'heart balm' statutes."

Likewise, the court cited Duhan v. Milanowski, 75 Misc. 2d 1078, 348 N.Y.S.2d 696 (N.Y. Sup.Ct. 1973), wherein a New York court inquired as to whether such an alleged cause of action should accrue to children individually or collectively, and if collectively, how such a cause of action would be administered among several children. The Second District also noted that the proposed cause of action had been rejected by other jurisdictions with "virtual unanimity". Indeed, the only decision which had recognized such a cause of action had been reversed.[4] After evaluating a variety of considerations, the Second District concluded, that such a policy decision should be addressed by the legislature after a comprehensive study of the problem.

For whatever reason, the Fifth District seems to believe that the Second District was only impressed with two factors - - absence of judicial precedent and the propriety of a legislative solution. These factors have greater validity than the Fifth District suggests. Nevertheless, they are essentially procedural factors rather than substantive factors. These two factors consider who should decide to create a new cause of action. They do not consider the complex social and economic factors involved in the substantive decision to create a new cause of action.

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[4] See, Scruggs v. Meredith, 134 F. Supp. 868 (D. Hawaii 1955), rev'd. 244 F.2d 604 (9th Cir. 1957).

1. Absence of Supporting Precedent.

The Second District's observation that other jurisdictions have rejected this proposed cause of action with "virtual unanimity" is still an accurate statement.[5] The Fifth District's proposal is acceptable only to a small minority of jurists. This issue is not an issue which has been ignored by this country's courts. Instead, literally hundreds of judges have considered this issue within the last few decades.

The Fifth District is certainly correct that a court should not render a decision out of a sense of mere mindless conformity. Non-conformity, however, is rarely a guarantee of sound public policy. The common law system of justice is based upon the principle of stare decisis. We place our best legal minds upon our courts and we encourage those jurists to use their best efforts to reach a just decision. Thereafter, we follow that decision unless we become convinced that the judges made a mistake or our society has changed to such a degree that a change in the law is essential.

In this case, the Fifth District has declared that the hundreds of earlier jurists were incorrect. Indeed, in the Fifth District's opinion, this cause of action arises so strongly out of the common law that it would be unconstitutional under Article I, §21, Florida Constitution, to ignore this theory. With all due respect to the Fifth District, it simply has not examined all of the reasons of public policy considered by the earlier jurists. There has been no major change in American society

[5] See case law in footnote 9.

which would create a compelling reason of public policy to overrule the common law. Although the Fifth District cannot be faulted for its openness to new ideas, that court's tendency to overlook the value of stability within the law is disturbing.

2. The Propriety of a Legislative Solution.

The Second District and many other courts have regarded this issue as a complex, multi-faceted social and economic issue which could be more appropriately addressed by a legislature. Although the Fifth District has explained none of the details concerning this cause of action, that court obviously believes that this subject is appropriate for judicial solution.

A lengthy dissertation could be written upon the role of the courts versus the role of the legislature. These Defendants do not deny that this Court has the authority to create a new cause of action for children's consortium. This Court's power to create the cause of action is not questioned. Instead, the undersigned attorney and numerous earlier jurists have questioned the wisdom of a common law court's decision to tackle a complex, socio-economic question which should require changes in many areas of the law and which should only be made after extensive study and fact finding.

Although the common law system of justice allows for careful focus upon narrowed issues on a case-by-case basis, it has limitations when asked to decide a broad question involving many complex factors. The legislature has the resources and the procedural devices necessary to adequately consider such a topic.

Thus, it is not surprising that many jurists, as astute political scientists, have recognized these issues as issues which should more appropriately be considered by the legislature.[6]

Despite the strength of these two arguments, they are the weak procedural arguments rather than the strong substantive arguments against the creation of a new cause of action for children's consortium. The substantive factors of public policy which were not discussed by the Fifth District are discussed in a later section of this brief.

(C) The Fifth District's Opinion Erroneously Emphasizes Three "Related" Causes of Action Which Do Not Justify Creation of This New Cause of Action.

After discussing only the two procedural arguments against children's consortium claims and ignoring all of the remaining strong public policies against such claims, the Fifth District's opinion justifies the new cause of action in light of three existing "related" causes of action. Those three actions are: (1) spousal consortium claims; (2) A child's claim for wrongful death damages for the death of a parent; and (3) a parent's right to sue for "loss of companionship of his minor child". Since the Fifth District's opinion appears to emphasize these "related" causes of action in reverse order, they will be considered in reverse order in this brief.

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[6] Likewise, it is the legislature which typically considers the cause of action for wrongful death.

1. The Parent's Right to Sue for "Loss of Companionship" of a Child.

The Fifth District justifies a new cause of action for the child by, in fact, creating a new cause of action for the parents. That Court states:

> "Finally, the fact that Florida recognizes the right of a parent to sue for the loss of companionship of his minor child who is wrongfully injured when the child has no such right, seems illogical."

It would be illogical to give parents a consortium claim for injury to their children and then not give a comparable right to the children. Florida, however, along with the great majority of jurisdictions has refused to create a consortium claim for parents concerning injuries to their children.

The Fifth District's opinion overlooks a matter as basic as the Florida Standard Jury Instructions promulgated by this Court. Florida Standard Jury Instruction, 6.2(f) allows parents only the following damages for injuries to a child:

> "Any loss by [the parent] by reason of his child's injury, of the services, earnings or earning ability of his child in the past and in the future until the child reaches the age of [legal age]."

This instruction is obviously different from the standard spousal loss of consortium instruction which provide intangible damages for "comfort, society and attentions". Florida Standard Jury Instruction, 6.2(e).[7] In Wilkey v. Roberts, 91 Fla. 1064, 109

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[7] Even prior to the standard instructions, the typical instructions used in Florida did not provide the parents with a consortium claim for injuries to their children. Ussery, Instructions: The Law and Approved Forms for Florida, §425, p. 380 (1954).

So. 225 (Fla. 1926), Justice Terrell in writing the majority opinion held that a parent, under the common law, could recover only the following damages:

> "He could recover only his pecuniary loss as a result of the injury, and such loss was limited to two elements: (1) the loss of the child's services and earnings, present and prospective, to the end of the minority; and (2) medical expenses in effecting or attempting to effect a cure."

That decision does not purport to change the common law in any fashion.

The common law rule expressed in Wilkey is followed not only in the Florida Standard Jury Instructions but also in the case law. This Court in Youngblood v. Taylor, 89 So.2d 503 (Fla. 1956) reconfirmed that a father could not recover for the child's personal injury but could recover for loss of the child's services and earnings and for medical expenses incurred in treatment of the child's injuries. In City Stores Company v. Langer, 308 So.2d 621 (Fla. 3d DCA 1975), cert. dis'd., 312 So.2d 758 (Fla. 1975), the Third District reversed an excessive jury award because parents could only recover the two elements of pecuniary loss. In Hillsborough County School Board v. Perez, 385 So.2d 177 (Fla. 2d DCA 1980) another excessive jury verdict was remitted because the parents were only entitled to receive the two elements of pecuniary damage.

The Florida case law on this subject is consistent with the case law from most other jurisdictions. The Fifth District relies upon a general statement in 24 Fla.Jur., "Parent and Child", §20. If the Fifth District had checked the pocket part

to that outdated treatise or had checked the second edition of that treatise they would have found a relevant annotation. "Anno: Damages - - Loss of Child's Society", 69 A.L.R.3d, 553 (1976). As that treatise states:

> "Case law appears overwhelming to support the view that a parent may not recover,from a third-party tort-feasor, as an element of damages for injury to his child, for loss of the child's society and companionship attributable to the injury."
> 69 A.L.R.3d at 555

The Fifth District supports its argument concerning the parents' right to sue for loss of companionship in footnote 6. That footnote states:

> "At common law a father was entitled to these rights because they constituted a species of property in him. In Wilkey v. Roberts, the Court ordered a new trial in an action for lost services of an injured ten year old boy on the ground that the $2,500.00 verdict was excessive and directed the father to introduce evidence of the services actually rendered by his son. In Yordin v. Savage, 279 So.2d 844 (Fla. 1973) the Court stated that Wilkey authorized recovery for loss of the child's companionship, society, and services and further held that either parent could sue for these damages. However, some courts have limited Wilkey to apply only to recovery for damages ascompensation for lost services. Youngblood v. Taylor, 89 So.2d 503 (Fla. 1956); City Stores Company v. Langer, 308 So.2d 621 (Fla. 3d DCA 1975)."

This footnote frankly suggests a lack of objectivity. It is far from accurate to suggest that "some courts" have limited Wilkey to apply only to recovery for damages as compensation for lost services. The undersigned attorney is totally unaware of

any Florida case holding that a parent can receive intangible damages for loss of companionship of his minor child. Certainly, the Fifth District cited no such case in its opinion.

Other courts have restricted the parents' damages not because of their ignorance of the law but because of their ability to read the Florida Standard Jury Instructions promulgated by this Court and to read the discussion of the common law in Wilkey.

The Fifth District apparently focuses upon the statement in the Wilkey decision describing the father's "rights". The case states:

> "The father's right to the custody, companionship, services and earnings of his minor child are valuable rights, constituting a species of property in the father, a wrongful injury to which by a third person will support an action in favor of the father."
>
> 109 So. at 227.

This is a correct statement. The father does have a "right" which permits a cause of action. Had the Fifth District read the next paragraph in the Wilkey decision, however, it would have understood that the father's remedy or damages are limited to the two specific pecuniary losses. The Fifth District's reliance upon this Court's decision in Yordin v. Savage, 279 So.2d 844 (Fla. 1973) is simply an unjustified reliance upon obiter dicta.

At the present time, there is full consistency between the damages awarded to a parent for injuries to a child and the benefits received by a child for injuries to a parent. A parent is compensated for the child's medical expenses and for the value

of lost services. The child - - through the recovery given to his parents - - is protected from his parents' medical bills and is also guaranteed food, clothing, and other services provided by the parent's lost wages or lost earning capacity. Thus, rather than creating symmetry within the law, the Fifth District's new cause of action will add imbalance.

If this Court affirms the Fifth District's opinion, it will be compelled not only to create a consortium claim for children, but also a consortium claim for parents. The common law provided for neither cause of action.

2. Damages Under the Florida Wrongful Death Act.

In comparing damages under the Florida Wrongful Death Act to damages in a personal injury action, the Fifth District's opinion overlooks the historical development of the Wrongful Death Act and its purpose. If the Fifth District's reasoning in this case is correct, it would be equally logical to argue that Article I, §21 of the Florida Constitution requires the re-creation of a survivorship action. See, Martin v. United Security Services, Inc., 314 So.2d 765 (Fla. 1975); Florida Clarklift, Inc. v. Reutimann, 323 So.2d 640 (Fla. 2d DCA 1975).

Historically, there was no common law cause of action for wrongful death. Traditionally, if a victim of a tort died as a result of the tort, the cause of action died with him. Prosser, Law of Torts, 4th Ed. p. 901 (1971). This common law rule created a policy under which it was more beneficial for a defendant to kill the plaintiff than to merely injure him. The most severe injuries left the surviving family without any remedy

against the tortfeasor. Prosser, Law of Torts, 4th Ed. p. 902 (1971). As noted by the California Supreme Court in Borer v. American Airlines, Inc., 138 Cal.Rptr. 302, 563 P.2d 858 (Cal. 1977), a wrongful death statute serves the logical and social need of closing this loophole in tort law. The statute is intended to guarantee that a person cannot escape damages for killing another person.

The Florida Wrongful Death Act eliminates any survivorship action when a parent dies. Thus, the parent receives no pain and suffering or intangible damages. Section 768.20, Florida Statutes. In exchange for these damages, the survivors are provided certain damages which the legislature has determined to be appropriate. Thus, minor children are essentially receiving a remedy in exchange for a remedy which the deceased parent has lost. This aspect of symmetry within Florida law is overlooked by the Fifth District's opinion.

If anything, the Florida Wrongful Death Act establishes that the legislature has considered the issue of children's consortium claims. The legislature has chosen to give children this element of damage in cases of wrongful death, but has not chosen to give the element in cases of personal injury. For all of the reasons discussed in this brief, that certainly is a rational, constitutional, legislative decision. If the Florida Wrongful Death Act is analyzed to determine its historical underpinnings

and the public policies which it serves, that statutory cause of action creates no justification for a new children's consortium claim.[8]

3. Spousal Consortium.

The Fifth District briefly suggests that the children's cause of action is justified because husbands and wives receive consortium. The Fifth District makes no effort to carefully analyze this "related" cause of action. In fact, there appear to be more dissimilarities than similarities between these legal theories.

Spousal consortium is based upon contractual rights. Modern consortium recognizes the right not as a pure property right vesting in the male, but rather as mutual rights arising out of a partnership contract. Gates v. Foley, 247 So.2d 40 (Fla. 1971). The contract has a beginning and, hopefully, lasts for the lives of its members. A contract creates legally enforceable expectations. As the Second District has noted:

> "Implicit in the concept of consortium is the notion that a party is entitlted to expect these benefits upon entry into the marriage relationship."
>
> Tremblay v. Carter, 390 So.2d 816 (Fla. 2d DCA 1980).

Thus, the wife has no cause of action for injuries sustained by the husband prior to the marriage relationship. Tremblay v. Carter, supra.

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[8] Technically, it should be observed that children are not given any separate cause of action under the Wrongful Death Statute. Instead, they are "survivors" who benefit from the cause of action given to the decedent's personal representative. Section 768.16, et al., Florida Statutes.

Although the sexual relationship is admittedly only an aspect of the relationship, the importance of that relationship is substantial in a healthy marriage. This obviously is a factor which is totally missing from the relationship with children.

The relationship between a parent and a child is not a contractual relationship. To the largest extent, it is a relationship which does not exist between the parties as a matter of mutual choice. If children are entitled to consortium it is not created by the expectations of a partnership contract, but rather by some other public policy. The right to consortium should exist for children born after the accident as well as children born before the accident. Unlike a marriage, the relationship between a parent and a child is intended to diminish. Typically, for legal purposes we assume that the relationship ends at the age of majority. That obviously is a legal artifice. The relationship probably diminishes from the early teenage years, but never completely disappears.

If the non-contractual family relationship between parents and children supports a claim for consortium, it is little different than the family relationship with grandparents, siblings, and other live-in relatives. If one creates a consortium claim on factors other than contractual or quasi-contractual expectations, the claim logically expands to a large number of interpersonal relationships. There is no valid public policy for this expansion.

D. The Majority Rule Which Prohibits The Cause Of Action Is Supported By Many Valid Public Policies.

Including Florida, courts in 25 jurisdictions have addressed the exact issue presented to this court.[9] Courts in 21 of these jurisdictions have refused to create this new cause of action

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[9] Alaska - Early v. United States, 474 F.2d 756 (9th Cir. 1973)
Ariz. - Jeune v. Dell E. Webb Construction Company, 77 Ariz. 226, 269 P.2d 723 (Ariz. 1954);
Cal. - Borer v. American Airlines, Inc., 19 Cal. 3d 441, 563 P.2d 858, 138 Cal. Rptr. 302 (Cal. 1977);
Priola v. Paulino, 72 Cal. App. 3d 380, 140 Cal. Rptr. 186 (Cal. Ct.App. 1977);
Suter v. Leonard, 45 Cal. App. 3d 744, 120 Cal. Rptr. 110 (Cal. Ct.App. 1977);
Conn. - Clark v. Romeo, 561 F.Supp 1209 (D. Conn. 1983);
Hinde v. Butler, 35 Conn. Sup. 292, 408 A.2d 668 (Conn. Super.Ct. 1979);
D.C. - Pleasant v. Washington Sand and Gravel Company, 262 F.2d 471 (D.C. Cir. 1958);
Hill v. Sibley Memorial Hospital, 108 F.Supp. 739 (D.C. 1952)
Ga. - Bremer Company, Inc., v. Graham, No. 66338, slip. op. (Ga. Ct.App. November 23, 1983), cert. den.: No. 40701, slip. op. (Ga. Jan 25, 1984)
Turner v. Atlantic Coast Line Railroad Company, 159 F.Supp 590 (N.D. Ga. 1958);
Hawaii - Halberg v. Young, 41 Hawaii 634, 59 ALR2d 445 (Hawaii 1957);
Scruggs v. Meredith, 134 F.Supp 868 (D. Hawaii 1955); rev'd. 244 F.2d 604 (9th Cir. 1957) (rev'd. decision of district court recognized cause of action in child for loss of parental consortium);
Ill. - Block v. Pielet Brothers Scrap and Metal, Inc., 119 Ill. App. 3d, 457 N.E.2d 509 (Ill. App. Ct. 1983);
Mueller v. Hellrung Construction Company, 107 Ill. App. 3d 337, 437 N.E.2d 789 (Ill. App. Ct. 1982);
Koskela v. Martin, 91 Ill. App. 3d 568, 414 N.E.2d 1148 (Ill. App. Ct. 1980);
Iowa - Weitl v. Moes, 311 N.W.2d 259 (Iowa 1981);
Audubon-Exira Ready Mix, Inc. v. Illinois Central Gulf Railroad Co., 335 N.W.2d 148 (Iowa 1983);
Kan. - Schmeck v. City of Shawnee, 231 Kan 588, 647 P.2d 1263 (Kan. 1982);
Hoffman v. Dautel, 189 Kan. 165, 368 P.2d 57 (Kan. 1962);
La. - Sabatier v. Travelers Insurance Company, 184 So.2d 594 (La. Ct. App. 1966);
Mass. - Ferriter v. Daniel O'Connell's Sons, Inc., 381 Mass. 507, 413 N.E.2d 690 (Mass. 1980);

(footnote continued)

even though many law school journals and periodicals have supported this notion.[10] In fact, only the courts in Iowa[11], Massachusetts[12], Michigan[13], and most recently Wisconsin[14] have recognized the cause of action. As with the Fifth District, these courts have looked to existence of related causes of action

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(footnote continued from previous page)
1981);
Minn. - Salin v. Kloempken, 322 N.W.2d 736 (Minn. 1982);
Plain v. Plain, 307 Minn. 399, 240 N.W.2d 330 (Minn. 1976);
Eschenbach v. Benjamin, 195 Minn. 378, 263 N.W. 154 (Minn. 1935);
Mo. - Bradford v. Union Electric Company, 598 S.W.2d 149 (Mo. Ct. App. 1979);
Klein v. Abramson, 513 S.W.2d 714 (Mo. Ct. App. 1974);
Neb. - Hoesing v. Sears Roebuck and Company, 484 F.Supp. 478 (D. Neb. 1980);
Nev. - General Electric Company v. Bush, 88 Nev. 160, 498 P.2d 366 (Nev. 1972);
N.J. - Russell v. Salem Transportation Company, Inc., 61 N.J. 502, 295 A.2d 862 (N.J. 1972);
N.Y. - De Angelis v. Lutheran Medical Center, 58 N.Y. 2d 1053 449 N.E.2d 406, 462 N.Y.S.2d 626, (N.Y. 1983);
N.D. - Morgel v. Winger, 290 N.W.2d 266 (N.D.1980);
Ohio - Gibson v. Johnston, 144 N.E.2d 310 (Ohio Ct. App. 1956);
Or. - Norwest v. Presbyterian Intercommunity Hospital, 52 Or. App. 853, 681 P.2d 1377 (Or. Ct. App. 1981), aff'd., 293 Or. 543 652 P.2d 318 (Or. 1982);
Wash. - Erhardt v. Havens, Inc., 53 Wash. 2d 103, 330 P.2d 1010 (Wash. 1958);
Roth v. Bell, 24 Wash. App. 92, 600 P.2d 602 (Wash. Ct. App., 1979);
Wis. - Theama By Bichler v. City of Kenosha, 344 N.W.2d 513 (Wis. 1984).

10 Almost all of the articles rely upon the arguments made by the Fifth District in reaching its decision in the present case. Generally, the articles have taken a simplistic legal approach, basing their justification for recognition of such a cause of action on a type of logical unity and sympathy. Typically, the arguments are focused on what the law should be and how judicial activism should be employed to reach the "desired" result. See, e.g., Belli and Wilkinson, "Loss of Consortium; Academic Adendum or Substantial Right?", Trial, Feb. 1980, 20; Cooney and Conway, "The Child's Right to Parental Consortium", 14 J.Mar.L.Rev. 341 (1981); "Love,
(footnote continued)

in their respective states to create a right of recovery for loss of parental consortium. Since that analysis has previously been addressed, the petitioners will not duplicate that analysis.

(footnote continued from previous page)
Tortious Interference with the Parent-Child Relationship: Loss of an Injured Person's Society and Companionship", 51 Ind. L.J. 590 (1976); Note, "The Child's Right to Sue for Loss of a Parent's Love, Care and Compansionship Caused by Tortious Injury to the Parent", 56 B.U.L. Rev. 722 (1976); Note, "Child's Right to Sue for Negligent Disruption of Parental Consortium", 22 Washburn L.J. 78 (1982); Note, "Actions for Loss of Consortium in Washington: The Children are Still Crying", 56 Wash. L. Rev. 487 (1981); Note, "Loss of Consortium-Right of a Child to a Cause of Action for Loss of Society and Companionship When the Parent is Tortiously Injured", 28 Wayne L. Rev. 1877 (1982); Comment, "Recovery for Loss of the Injured Parent's Society: Ferriter v. Daniel O'Connell Sons, Inc.", 3 Det. C. L. Rev. 987 (1981); Comment, "A Child's Independent Action for Loss of Consortium - A Change in the Iowa Tort Scheme", 67 Iowa L. Rev. 1081 (1982); Comment, "Infants Denied Recovery for Loss of Services of Injured Parent", 20 N.Y.L.F. 406 (1974); Comment, "The Child's Claim for Loss of Consortium Damages: A Logical and Sympathetic Appeal", 13 San Diego L. Rev. 231 (1975); Comment, "Negligent Injury to Parents - The Case for the Child's Right to Recover for Loss of Parental Society and Companionship", 4 S.Ill, L.J. 557 (1982); "Comment, Recognizing a Child's Action for Loss of Parental Consortium; Reconcilling Cognate Actions with Workman's Compensation Provisions", 15 Suffolk U.L.Rev. 1082 (1981); Comment, "Loss of Parental Society and Companionship: Infant's Action Against Person Who Negligently Injured Father", 7 U.Dayton L. Rev. 495 (1982); 12 Cu. L. Rev. 211 (1981); 54 Mich. L. Rev. 1023 (1956). But see, Note, "Recovery for Loss of Parental Consortium: An Undue Extension of Liability", 43 U.Pitt. L.Rev. 285 (1981).

11 See, Weitl v. Moes, 311 N.W.2d 259 (Iowa 1981). But see, Audobon - Exira Ready Mix, Inc., v. Illinois Central Gulf Railroad Company, 335 N.W.2d 148 (Iowa 1983) (court rescinded from its decision in Weitl v. Moes due to amendment of statute construed); Madison v. Colby, ___ N.W.2d ___ slip op. (Iowa April 11, 1984)

12 See, Ferriter v. Daniel O'Connell's Sons, Inc., 381 Mass. 507, 413 N.E.2d 690 (Mass. 1980)

Causes of action are not properly created to produce logical symmetry. They are created when the economic and social good to be achieved by the creation of a new duty or right outweighs the harms and expenses resulting from the new creation. See, e.g., De Angelis v. Lutheran Medical Center, 58 N.Y.2d 1053, 449 N.E. 2d 406, 462 N.Y.Supp.2d 626, (N.Y. 1983). In this case, children's tangible losses are already protected by the award to the parent. The intangible losses which this cause of action are designed to monetarily compensate do not overcome the social and economic costs of this new cause of action.

1. This Cause of Action For Intangible Damages is Speculative, Remote, Uncertain, and Would Allow for Prejudicial Factors to Influence a Jury.

A consortium claim is unusual because it provides a monetary award for intangible damages to a person who has sustained no tangible monetary or financial damages. In the case of a child, his lost financial support has always been recoverable by the parent simply as a part of the parent's lost wages and earning capacity. Thus, the child's claim is merely a claim for non-financial, intangible losses in the nature of mental suffering.

Because the tangible damages are already protected, many courts have been concerned that this new cause of action would allow for jury speculation and for damage awards predicated upon prejudicial factors. Admittedly, jury's do handle issues

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13 See, Berger v. Weber, 411 Mich. 1, 303 N.W.2d 424 (Mich. 1981).

14 See, Theama By Bichler v. City of Kenosha, 344 N.W.2d 513 (Wis. 1984).

concerning intangible damages. Those damages, however, are typically awarded to the primary plaintiff and relate to the plaintiff's tangible, demonstrable injuries.[15] The fact that juries do consider such elements of damage should not make those elements a matter of judicial necessity. It is obvious to any person with courtroom experience that juries do vary tremendously in their analysis of intangible damages. It is difficult to argue that our judicial system will be improved if juries are allowed to consider more intangible issues.

Intangible damages are, by their very nature, speculative and uncertain. The courts have had a difficult time defining any meaningful rules to determine when such damages are excessive or inadequate. See, Bould v. Touchette, 349 So.2d 1181 (Fla. 1977). Despite jury instructions to the contrary, most people with courtroom experience are concerned that these intangible damages are influenced by race, color, creed, sex, and other inappropriate factors. Given that the child's tangible damages as a result of the parents' wage loss are already protected under our system, would we actually improve our system of justice by creating new speculative claims concerning which the jury would be tempted to use their emotions rather than their logic?

2. Duplication of Damages.

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15 In fact, under motor vehicle no-fault provisions the intangible damages are prohibited absent demonstrable permanent injuries. Section 627.737, Florida Statutes. It is unclear how the no-fault provisions would mesh with the Fifth District's new proposal.

In addition to the possibility that the child will receive damages which duplicate the parents' lost wages and earning capacity, the new cause of action should also result in a duplication of intangible damages. Under this Court's standard instructions, a parent who is permanently injured receives monetary damages for pain and suffering and for the loss of the enjoyment of life. For a father with a three-year old daughter, for example, there can be no doubt that his loss includes the mental anguish caused by his inability to play with his child - - to teach her to ride a bicycle. The new cause of action will also give the child damages because father cannot play with her and cannot teach her to ride a bicycle. While these damages are theoretically different, as a practical matter it is virtually impossible to separate them. Several courts have considered this probability of double recovery as one of the primary public policies weighing against the recognition of the child's claim for loss of parental consortium. See, e.g., Borer v. American Airlines, Inc., 563 P.2d 858, 863, (Cal. 1977), Koskela v. Martin, 414 N.E.2d 1148, 1151 (Ill. App. 1980), Hoesing v. Sears, Roebuck and Company, 484 F.Supp. 478, 479 (D. Neb. 1980).

It is significant to note that even the law school journals which advocate recognition of a cause of action in a minor child for loss of parental consortium recognize that most juries already compensate the injured parent for any loss the child might have. See, e.g., "Love, Tortious Interference with the Parent-Child Relationship: Loss of an Injured Person's Society and Companionship", 51 Ind. L. J. 590 (1976); Note, "The Child's

Right to Sue for Loss of a Parent's Love, Care and Companionship Caused by Tortious Injury to the Parent", 56 B.U. L.Rev. 72 (1976). See also, Salin v. Kloempken, 322 N.W.2d 736, 740 (Minn. 1982): Russell v. Salem Transportation Company, Inc., 61 N.J. 502, 295 A.2d 862, 864 (N.J. 1972).

Some proponents of this cause of action argue that the jury can be instructed to award separate damages to the child which are not to duplicate the parents' damages. It is difficult to see how jurors could perform this function when law students and other legal commentators cannot explain in any specific matter how the injuries are to be distinguished.[16]

If in fact this cause of action is a new cause of action, it should undoubtedly result in larger jury verdicts. Given that juries are very human, it should also result in a duplication of damages which are already permitted under this Court's standard instructions. Given that the cause of action is only for the child's intangible damages, are there compelling reasons of public policy to override these problems?

3. Economic Costs of the New Cause of Action.

In order to give children a monetary award for their intangible suffering caused by a parent's personal injury, our society will have to pay money. Initially, most of that money

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16 If this decision were being made by the legislature, experimentation could be performed to determine the expected cost of this duplication. Unfortunately, the common law appellate system does not allow for this type of sophistication.

In order to give children a monetary award for their intangible suffering caused by a parent's personal injury, our society will have to pay money. Initially, most of that money will come from insurance companies or from self-insurers. Ultimately, that money will be paid by all of the citizens of Florida.

It would be easier to evaluate this new cause of action if someone could estimate its cost. The undersigned attorney cannot and the Fifth District made no attempt to evaluate the cost. The several maverick jurisdictions which have recently created this cause of action do not yet have enough experience with the cause of action to provide us with any meaningful information.

Merely by way of personal observation, a wife's consortium claim in Florida is typically worth about 10% of the husband's personal injury claim. Presuming that juries will handle children's claim in a fashion similar to wife's claims - - and forgetting that most families have more children than wives - - we should anticipate at least a 10% increase in the cost of personal injury litigation. Does this nebulous benefit justify that expense for the citizens of Florida?

If the value of personal injury cases increases 10%, the cost of Florida automobile insurance will go up accordingly. The natural laws of economics establish that fewer people purchase liability insurance as its cost increases. Each time we create a new cause of action for intangible damages, we must recognize that more people in Florida will choose to be uninsured. Uninsured people have no money to pay judgments either for

tangible or intangible losses.[17]

4. The Effect Upon Amicable Settlements.

It should be a primary goal of every judicial system to encourage voluntary, amicable settlement among the litigants. Amicable settlements are not only more economical for the judicial system, but they are results agreed to by all parties and are not results forced upon the litigants by a judge or jury. The creation of a children's consortium claim will increase the number of cases in which settlement is prohibited and will also increase the court's labors in the efforts to achieve amicable settlement.

A spousal consortium claim is a far simpler concept than a child's consortium claim. A spouse is entitled to a claim if, and only if, the spouse is married to the primary plaintiff at the time of the accident. Typically, if a divorce occurs thereafter, the consortium claim is not pursued. The marital union between the husband and wife typically allows one attorney to resolve both claims simultaneously without conflict.

In contrast, children give no legal or religious vows to one another. They do not ask to be members of the same family. Although most siblings do achieve a separate peace with one another, the story of Cain and Abel has been repeated more than once since biblical times. Although one attorney hopefully will

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[17] Again, if this were a legislative proceeding, hearings involving the Insurance Commissioner and the various insurance carriers would be helpful in making a rational decision.

be able to handle all consortium claims for a family with several children, such a practice could easily create legal and practical conflicts. It is not inconceivable that many cases will require separate attorneys for the various children.

Conflict among the children will occur even if there is no animosity among the children. When a father is hurt, should a five-year old daughter and a nineteen-year old son receive equal amounts of money?[18] Should step-children be treated the same as other children? What about future children? If anything, future children's claims should be more valuable because they will be faced with the parent's personal injury for the entirety of their minority.

Creating a single joint cause of action for the children is not a solution. That is merely refusing to decide. If a lump sum is given to the children, it will eventually be the obligation of someone to divide the money. One has to honestly ask whether this money will be a solution to the children's anxieties or merely another factor creating anxiety within the family setting.

As discussed later, these factors will create problems within the family unit. They will also create problems for out-of-court settlements. If only 10% of the cases which now settle must be tried because of the additional consortium claims, that will be a significant burden upon the courts and a significant societal cost.

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[18] It is unclear to the undersigned attorney whether the Fifth District intends to use 18 or 25 as the age of majority for this new cause of action.

Without admitting that this cause of action is retroactive, the Defendants would note that the Fifth District has merely "recognized" a cause of action which apparently has been hiding unnoticed within the common law for all these years. The legislature could create a prospective claim for relief. As things now stand, the Fifth District's proposal may well act in a retroactive fashion. See, e.g., Hoffman v. Jones, 280 So.2d 431 (Fla. 1973). If this cause of action is retroactive, it will upset and destroy literally thousands of settlements which have been achieved in the last four years.[19]

5. Increased Burden on the Courts.

Any judge who refused to create a cause of action merely because it would increase his workload does not deserve to be a judge. Any judicial system, however, which does not recognize that the taxpayers will pay a cost for increased utilization of the judicial system is simply ignoring an aspect of its responsibility to the citizens of the state. As described above, the new cause of action will undoubtedly encourage increased litigation and will probably result in fewer settlements. One of the costs which our society must endure in order to give children monetary damages for these intangible losses is the cost of a more expensive judicial system. The Fifth District has made no effort to estimate that cost and the undersigned attorney simply

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[19] This case is a classic example. The Defendants have already paid two judgments. One of these judgments was achieved by offer of judgment. Justice is not achieved in a system that allows people to return to court after an action should be regarded as resolved. See, e.g., Variety Children's Hosptial v. Perkins, 445 So.2d 1010 (Fla. 1983).

has no ability to estimate that cost. Considered as an isolated factor, this cost undoubtedly would not weigh against the new cause of action. Considered in conjunction with the other factors, however, the benefit of this new cause of action for the citizens of this state is very dubious.

The cost to the judicial system are not merely costs arising out of increased civil lawsuits. Currently, all settlements on behalf of minors in excess of $5,000.00 must be approved through a guardianship proceeding. Section 744.387, Florida Statutes. Since the Fifth District's decision in this case, the undersigned attorney has received numerous calls from insurance carriers and defense attorneys who are confused and concerned about the procedures necessary to settle a typical personal injury action. Insurance carriers who could previously settle claims without the involvement of an attorney will now be afraid to settle claims without attorneys and guardianship proceedings. That is great for attorneys, but that cannot conceivably be good for the citizens which this Court represents.[20]

6. Increased Tension Within the Family.

There can be no question that this Court should favor policies which foster the family unit. The past several decades have established that the family unit has become far more fragile in our modern society. As discussed earlier, providing a new pot of money for the children's intangible damages will not diminish the tension and pressure upon the family unit. Families will

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[20] As discussed earlier, if this cause of action is retroactive the burden upon the court at all levels will be enormous for several years.

perceive that the dollars measure "love". A ten-year old daughter who receives less money than a five-year old son for her father's injury will know that she is "loved less". If the process of dividing this money is left to the parents, one somehow suspects that it will create as many permanent, unresolved problems as it does solutions.

Those of us who were blessed with both a mother and father, as well as other siblings, tend to forget that the modern family unit includes many fatherless families and some motherless families. A child without a live-in father undoubtedly should receive less for his father's personal injury. Even without considering prejudices and emotional factors, these intangible monetary statements are painful both to the decider of fact and to the child.

This Court must also remember that the lines of inter-family and inter-spousal immunity have undergone change. Shor v. Paoli, 353 So.2d 825 (Fla. 1977); Joseph v. Quest, 414 So.2d 1063 (Fla. 1982); Ard v. Ard, 414 So.2d 1066 (Fla. 1982). It will be possible for a child to have a consortium claim for injuries to his parents caused by his siblings. It may be possible for a defendant to seek contribution from the child's father to pay a pro-rata portion of the child's consortium claim for injuries to his mother. Perhaps the undersigned attorney is old fashioned, but these intrusions upon the family unit in 1984 are suggestions of a "Brave New World" which is neither brave, new, or improved.

The Fifth District desires a new cause of action to create symmetry. In light of the questionable benefits created by that cause of action, the above-described policies and the costs to society defy the Fifth District's statement that there are "compelling" reasons to adopt the minority rule. There are in fact compelling reasons to retain the well-established majority decision.

E. Forseeability of Damages as an Isolated Factor is an Insufficient Basis for the Creation of a New Cause of Action.

There is an understandable temptation to allow a plaintiff to recover and to create a legal duty wherever any damage is forseeable to any person. Unless used with care, this concept of forseeability allows duties to exist for third persons and concerning various damages which cannot be justified by a full examination of public policies. Both in this case and in Champion v. Gray, 420 So.2d 348 (Fla. 5th DCA 1982) [discarding both the impact doctrine and the zone of danger doctrine for relatives who sustained injuries as a result of injuries to another relative], the Fifth District has demonstrated a tendency to create causes of action based primarily upon extended concepts of forseeability. Philosophically, these decisions are in conflict with Judge Cardozo's decision in Palsgraf v. Long Island Railroad Co., 248 N.Y. 339, 162 N.E. 99 (N.Y. 1928). Instead, these decisions are more in tune with the rejected Andrews dissent. While these decisions can be analyzed as modest changes in Florida tort law, the effect which they have upon the underpinnings of modern tort law should not be underestimated.

If the Fifth District's forseeability analysis were used to create this cause of action, then it unquestionably could be used to support a cause of action in a multitude of other persons. There is little question that children receive support and companionship from a variety of sources other than their parents. Grandparents, aunts, uncles, siblings, step-parents, school teachers, dance instructors, coaches, scout masters, baby sitters, ministers, priests and good friends, just to name a few, all provide some degree of support to a child. To this extent, children are no different than adults. Each person's life is comprised of a multitude of relationships with a great number of different people. Each of those relationships contributes differently to ones personality.

For virtually every child, it is <u>forseeable</u> that one or more persons will provide support and comfort to the child which equals or even exceeds the support provided by the parents.

Likewise, adult parents give support to a variety of persons other than their children. Often they lend support to their own parents, step-children, aunts, uncles and a variety of other people. Financially, adults provide forseeable support to churches, charities and other worthy institutitions. It is also forseeable that adults contribute financial support to the grocer, barber, plumber, television repair man and many other people. All of these institutions and people sustain an economic impact when an adult sustains a serious personal injury. The "multiplier effect" as a principle of economics is merely a

scientific expression of this observation. The mere fact that these damages are forseeable is not a sufficient public policy justification to make them recoverable.

As noted by the New York Court of Appeals in Tobin v. Grossman, 14 N.Y.2d 609, 301 N.Y.S.2d 545, 561:

> "While it may seem that there should be a remedy for every wrong, this is an ideal limited preforce by the realities of this world. Every injury has ramifying consequences like the ripplings of the waters, without end. The problem for the law is to limit the legal consequences of wrongs to a controllable degree. The risks of indirect harm from the loss or injury of loved ones is pervasive and inevitably realized at one time or another. Only a very small part of that risk is brought about by the culpable acts of others. This is the risk of living and bearing children. It is enough that the law establishes liability in favor of those directly or intentionally harmed."
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> See also, Borer v. American Airlines Inc., 19 Cal. 3d 441, 563 P.2d 858, 138 Cal. Rptr. 302 (Cal. 1977)

Just as the legislature must weight the benefits and associated costs of a welfare program when considering its creation, a court should weigh the benefit of providing monitary awards for these intangible damages versus the social and economic costs of creating a new source of economic entitlement. Under this analysis, the new cause of action must fail.

F. A Florida Court Has No Constitutional Obligation to Create a Cause of Action Which Has Never Been Previously Recognized as a Matter of Statutory or Common Law.

The Fifth District's opinion appears to rule that children must receive a new cause of action for loss of parental consortium because such an action "must be redressable" under Article I, §21 of The Florida Constitution. This argument is confusing to the undersigned attorney.

Article I, §21 of The Florida Constitution is typically utilized to rule upon the constitutionality of statutory provisions which restrict common law rights or remedies. It is well established that the legislature cannot consitutionally eliminate a right which existed at common law or by statutory law when Florida adopted its Declaration of Rights. Kluger v. White, 281 So.2d 1 (Fla. 1973). On the other hand, the provision was never intended to be used as a mechanism by which to independently create new causes of action. Kirkpatrick v. Parker, 136 Fla. 689, 187 So. 620 (Fla. 1939); Harrell v. State Department of Health and Rehabilitative Services, 361 So.2d 715 (Fla. 4th DCA 1978).

At the beginning of the Fifth District's opinion that Court states:

> "At common law, there was no right of action to a child for loss of parental consortium resulting from tortious injury to a parent and such an action has not been provided by statute."

One would think this admission would end the constitutional analysis necessitated by Article I, §21, Florida Constitution. See, e.g., Caloosa Property Owners Association, Inc. v. Palm Beach County Bd., 429 so.2d 1260 (Fla. 1st DCA 1983).

In footnote 9 of its opinion, the Fifth District ignores its earlier admission and states:

> "However, we deem parental consortium claims as arising out of the common law right to spousal consortium and the right of a parent to the services and companionship of his or her child. Therefore, as in the case of the wife's right to spousal consortium, the child's right to parental consortium has become a part of the common law pursuant to Section 2.01, Fla.Stat. See, Harrell v. State Dept. of Health, etc."

The undersigned attorney has seen the Harrell decision. It would not appear to support footnote 9, but would appear to be good case law in opposition. Likewise, this Court did not "deem" the wife's right to spousal consortium to be a matter of common law as the common law existed on July 4, 1776. Gates v. Foley, 247 So.2d 40 (Fla. 1971). Indeed, the Gates decision changed the common law on April 7, 1971 noting that: "The law is not static", 247 So.2d at 43. In the Gates decision, this Court found that it could change the common law if the reason for the common law had disappeared. As described in earlier portions of this brief, the policies discouraging a cause of action for parental consortium are still very much alive.

The Fifth District's reasoning concerning Article I, §21 of the Florida Constitution is a dangerous precedent. If that reasoning is followed in the future, any new creation in the law

becomes a constitutional necessity if a panel of judges believe it is a good idea and it can in some extenuated fashion be "deemed" a part of the common law. This is apparently true even in cases when the law of 1776 is in direct opposition to the proposed change.

G. A Similar Intentional Tort - - Alienation of Affections - - Has Previously Been Statutorily Overruled.

In 1945, the Florida Legislature enacted a "heart balm" statute which abolished actions for alienation of affections, criminal conversation, seduction, and breach of contract to marry. Chapter 771, Florida Statutes. Those actions have not only been overruled, but it is unlawful for any person to file such a cause of action in Florida. Section 771.05, Florida Statutes.

Although the Fifth District intended to create some logical symmetry within the law by creating the new children's consortium claim, the new cause of action will be in logical conflict with Chapter 771. A child may now be able to sue for negligent alienation of affection when the child cannot sue for intentional alienation of affection. Typically, the law determines that a person has a right or interest which should be protected under the law and then protects it both from intentional acts and negligent acts. Indeed, the historical development of the law generally protects an interest first from intentional violations and only later from acts of negligence.

In many respects, the controversy immediately following the Second World War concerning alienation of affection is similar to the discussion concerning children's consortium claims. A minority of jurisdictions declared that a child did have a cause of action against women who caused their fathers to wrongfully leave the family. Dailey v. Parker, 152 F.2d 174 (7th Cir. 1945); Miller v. Monson, 37 N.W.2d 543 (Minn. 1949); Johnson v. Looman, 330 Ill.App. 598, 71 N.E.2d 810 (Ill. App. 2d Dist. 1947); Russick v. Hicks, 85 Fed. Supp. 281 (W.D. Mich. 1949). For many of the same reasons which are discussed in cases which refuse to expand consortium rights to children, the great majority of courts refused to recognize a cause of action in a minor for intentional interference with family relationships. Morrow v. Yannantuono, 273 N.Y.Supp. 912 (N.Y. Sup. Ct. 1934); Edler v. McAlpine-Downy, 180 F.2d 385 (D.C. Cir. 1950); McMillan v. Taylor, 160 F.2d 221 (D.C. Cir. 1946); Lucas v. Bishop, 273 S.W.2d 397 (Ark. 1954); Gleitz v. Gleitz, 98 N.E.2d 74 (Oh. Ct.App. 1951); Henson v. Thomas, 321 N.C. 173, 56 S.E.2d 432 (N.C. 1949); Taylor v. Keith, 134 Conn. 156, 56 A.2d 768 (Conn. 1947).

Florida's "heart balm" statute was enacted because the abuses associated with the cause of action outweighed the benefits. This Court upheld the constitutionality of that decision. Rotwein v. Gersten, 160 Fla. 736, 36 So.2d 419 (Fla. 1948). The damage to the family unit caused by children's consortium claims will be different from the damage caused by

alienation of affection lawsuits. Both causes of action, however, have the potential for abuse and both create a greater risk of harm to the family unit than benefit.

Thus, the lessons of history and even the desire for logical symmetry within the law argue against the Fifth District's new creation.

CONCLUSION

The Fifth District's decision creating a new cause of action for parental consortium should be reversed. Public policies against such a cause of action clearly outweigh the limited benefit which would be provided by permitting monetary awards for children's intangible losses. Contrary to the Fifth District's decision, there are no compelling reasons of public policy to depart from the common law. This Court should follow the prior decisions of the Second and Third District on this issue and should reject the Fifth District's analysis.

Respectfully submitted,

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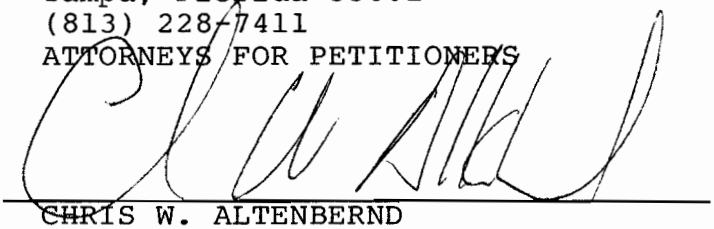
By: 
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