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' REPLY BRIEF ON THE MERITS

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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.

REPLY ARGUMENT

I

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.

One frequently learns more from an argument by examining the issues which have not been addressed. The plaintiffs' argument in this case is such an instance. First, the plaintiffs' argument conspicuously avoids the analysis relied upon by the Fifth District in its opinion. The plaintiffs do not even attempt to defend the Fifth District's proposition that parents have a cause of action for loss of a child's comfort and society under Wilkie v. Roberts, 91 Fla. 1064, 109 So.225 (Fla. 1926). Indeed, that precedent is not even mentioned in their brief.

Secondly, the plaintiffs have not responded to a number of arguments made by the defendants in their brief. The creation of a cause of action is a major judicial step which should be taken carefully. Any rational decision must be based upon an analysis of the costs and benefits of the new cause of action. The law is not an abstract painting to which one adds a cause of action for balance or symmetry. The law is based upon the realities of our society. New legal theories should only be created when they provide a benefit which clearly outweighs their cost.

The plaintiffs dismiss the defendants' analysis of the costs of the new cause of action as a parade of "horrors". That label is of little assistance to this court. They are costs--simply significant expenses which society must pay if the new cause of action is created. Some of them are small costs and some of them are great costs. Several of them are very difficult to quantify within a judicial system. It is submitted, however, that these costs outweigh the very limited benefits which would be received if children were given a cause of action in the nature of consortium for their intangible damages in addition to the cause of action in which their parents already possess for lost income to support the child.

The plaintiffs have intimated that there are amorphous "children's rights" which would be violated if the new cause of action is not created. These "rights" have not been identified nor have their constitutional sources been adequately explained. The plaintiffs do argue that the failure to create a new cause of action for loss of parental consortium violates Article 1 §2, 9 and 21 of the Florida Constitution. The heavy burden of establishing a constitutional violation has not been met by the plaintiffs in this case. Predictably, they rely upon Gates v. Foley, 247 So.2d 40 (Fla. 1971). As discussed later, however, that case is clearly distinguishable and does not support the plaintiffs' argument.

Of the several constitutional provisions cited to this court by the plaintiffs in support of their position, only Article I §21 was used as a basis for argument in the briefing done to the

Fifth District. Indeed, it was the sole constitutional provision addressed in the Fifth District's opinion. Thus, that provision appears to be the logical starting place for any analysis.

While the plaintiffs do not provide a great deal of discussion concerning Article I, §21, they do allege that the failure to recognize this new cause of action would be an unconstitutional denial of the children's access to the courts. There is no analysis provided by the plaintiffs which even remotely demonstrates how the alleged violation occurs. One must wonder whether the analysis was omitted for the sake of brevity or simply because a rational analysis which supports the argument does not exist. Indeed, a traditional Article I, §21 analysis demonstrates that no such violation has occurred.

Typically, Article I, §21 of the Florida Constitution is used as a method of legislative control. It prohibits curtailment or elimination of rights which existed at common law or by statute, when Florida adopted its declaration of rights. See, Kluger v. White, 281 So.2d 1 (Fla. 1973); Bahl v. Fernandina Contractors, Inc., 423 So.2d 964 (Fla. 1st DCA 1982). There is no question that the provision has never been intended to be used by plaintiffs or the courts as a spring board by which to independently launch 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).

The Fifth District admitted that there was no cause of action for loss of parental consortium at common law. Likewise, that court admitted that no such action had been provided by statute. The plaintiffs have not addressed those facts in their brief. Nevertheless, both the plaintiffs and the Fifth District reason that Article I, §21 of the Florida Constitution compels the creation of this new cause of action. Unless the traditional Article I, §21 analysis is radically altered, this argument must fail.

The plaintiffs maintain that the constitutional issues which this court found compelling in Gates v. Foley also apply to the present case. The undersigned attorney finds such an argument confusing. In Gates v. Foley, this court recognized that a married woman was a partner with her husband in the marital relationship. By recognizing that partnership, this court removed vestiges of common law gender based disabilities of coverture. This court did not find that there existed constitutional violations which dictated its decision. Instead, this court relied upon changes in the wording of the Florida Constitution, state statutes which secured property rights to married women and the 1964 Civil Rights Act (42 U.S.C Chapter 21) as evidencing a sufficient change in society by which to amend the common law.

While those arguments were found to be compelling in Gates, they do not apply to the present case. There have been no recognized significant changes in our society as there were in Gates v. Foley, which compel the creation of this new cause of

action. In Gates v. Foley, this court recognized that there were serious constitutional concerns when traditional equal protection and due process analyses were applied to the facts of that case. However, those same concerns under the appropriate analysis have not been raised by the plaintiffs in the present case. In the absence of meeting those burdens under the appropriate analyses, the argument should be rejected.[1] See, Pinillos v. Cedars of Lebanon Hospital Corporation, 403 So.2d 365 (Fla. 1981).

Other plaintiffs have also argued that failure to create a cause of action for loss of parental consortium would deny due process and equal protection to children of injured parents. Those plaintiffs have maintained that their respective state's wrongful death statutes were unconstitutionally underinclusive. The alleged constitutional violations arose because the statutes were said to arbitrarily deny children of injured parents a cause of action. Courts which have addressed the due process and equal protection challenges have rejected the arguments. See, e.g., Borer v. American Airlines, Inc., 19 Cal.3d 441, 563 P.2d 858, 138 Cal.Rptr. 302 (Cal. 1977); Suter v. Leonard, 45 Cal. Ap. 3d 744, 120 Cal.Rptr. 110 (Cal.Ct.App. 1977); Russell v. Salem Transportation Co., Inc., 61 N.J. 502, 295 A.2d 862 (N.J. 1972).

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[1] The plaintiffs have argued that somehow the Second District was mistaken in Clark v. Suncoast Hospital, Inc., 338 So.2d 1117 (Fla. 2d DCA 1976), by not addressing the constitutional issues before rendering its decision. There is no indication that any constitutional issues were ever raised in that case. Moreover, in light of the present discussion it is doubtful that any meaningful constitutional argument could have been made.

The plaintiffs advocate that this court align itself with the courts of four states that have recognized the new cause of action.[2] None of those decisions are representative of the mainstream of legal thought regarding a cause of action for loss of parental consortium. The plaintiffs ignore the decisions of the courts of the 21 states who have denied recognition to the cause of action because of the great social and economic costs and numerous adverse public policies. According to the plaintiffs, these concerns are imaginary "horrors" which have been fabricated by the defendants in an effort to support their case. The plaintiffs would also have this court ignore those factors, and make their decision based upon sympathy and some perception that the law will have an illusion of symmetry if this cause of action is recognized. In truth, recognition of such a cause of action without a sturdy foundation, rooted in strong social policy, will produce less symmetry in the law.

The plaintiffs cavalierly dismiss the concern of many courts regarding the intangible nature of the damages which would comprise an award under this new cause of action. The defendants do not suggest that this court repudiate the practice of awarding intangible damages in some instances. Rather, the intangible nature of the child's claim which has no relation to the primary plaintiffs tangible demonstrable injuries, is a factor to be considered in the overall equation. The issue is not whether

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[2] See, Weitl v. Moes, 311 N.W.2d 259 (Iowa 1981); Ferriter v. Daniel O'Connell's Sons, Inc., 381 Mass. 507, 413 N.E.2d 690 (Mass. 1980); Berger v. Weber, 411 Mich. 1, 303 N.W.2d 424 (Mich. 1981); Theama By Bichler v. City of Kenosha, 344 N.W.2d 513 (Wis. 1984).

juries have the ability to award intangible damages. Clearly, juries do address such matters. The issue is, however, whether our system of justice would be improved by the creation of a new speculative claim where the jury is left with little, if any, guidance upon which to base an award. The undersigned attorney respectfully submits that the system would not be improved.

The plaintiffs have asserted that mandatory joinder of the child's claim with that of the parents would reduce the risk of duplication of damages to "nil." (Respondents' brief page 9) While this proposal might prevent the splitting of claims, as was done in this case, it is difficult to understand how joinder of claims will prevent a double recovery. Even one of the law school journals that advocates joinder of the causes of action recognizes that in reality, most juries already compensate an injured parent for any loss the child may have. See, "Love, Tortious Interference with the Parent-Child Relationship: Loss of an Injured Person's Society and Companionship," 51 Ind. L.J. 590 (1976). Admittedly, there is a theoretical difference between the loss sustained by a parent and that sustained by a child when the parent is injured. However, the plaintiffs have not proposed any practical guideline by which the jury could sever the loss. When the plaintiffs and the student commentators cannot distinguish the losses sustained it is patently unreasonable to expect a jury to do so.[3]

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[3] It is not unreasonable to believe that closing arguments to juries, much like the argument of amicus curiae at p. 5-6 of the brief, will make it impossible for a jury to distinguish the claimed losses.

The plaintiffs also contend that they advocate only a limited expansion of remedies to minor children as opposed to an unlimited expansion of tort liability. However, the building block process of common law growth is ignored. If the reasoning of the Fifth District is used to create a new cause of action for loss of parental consortium in minor children, there is no analytical, logical, nor meaningful distinction that could be drawn which would limit this expansion of tort liability. Under the new cause of action, the basis of an award is not solely the status of an injured person as a parent. The basis of an award is the loss of companionship, supervision and a myriad of other contributions to a relationship with a child. It is unrealistic to argue that those relational elements exist only between a parent and child. Logic would compel expanded liability to any person whose meaningful relationship with a child was disrupted because of injuries to that person.

All of the issues which have not been addressed by the plaintiffs will not be unnecessarily duplicated here. As noted in the initial brief of the defendants, there are a multitude of societal and economic costs, strong public policies and legal analyses which support continued non-recognition of a cause of action for loss of parental consortium. Indeed, when placed in the balance against the dubious benefits to society the scales demonstrate that the necessary costs far outweigh the speculative benefits to be received by society. Thus, this court should

reverse the decision of the Fifth District and hold that there is no cause of action for loss of parental consortium by a minor in the state of Florida.

CONCLUSION

This court should reverse the Fifth District's decision which created a new cause of action for loss of parental consortium. There are no demonstrable compelling reasons of public policy which would justify this vast departure from the common law. Public policies and societal costs clearly outweigh any speculative benefit that might be provided in awarding money for this intangible loss to a child. The decisions of the Second and Third District regarding this issue should be followed and the Fifth District's analysis should be rejected.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed this 24th day of July, 1984 to: Walton B. Hallowes, Esquire, Wells, Gattis, Hallowes & Holbrook, P.A., P. O. Box 3109, Orlando, FL 32802; James M. Murman, Esquire, P. O. Box 2762, Tampa, Florida 33601.

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