No. 81,705

ORIGINAL

IN THE SUPREME COURT OF FLORIDA

UNITED STATES OF AMERICA,

Defendant-Appellant.

v.

LOREN DEMPSEY, ET AL.

Plaintiff-Appellee.

ON CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR APPELLANT

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STATEMENT OF THE ISSUES

1. Does Florida law permit parents to recover for the loss of a child's companionship and society when the child is severely injured?

2. Does Florida law permit parents to recover for the loss of the services of a severely injured child absent evidence of extraordinary income producing abilities?

STATEMENT OF THE CASE AND OF THE FACTS

1. Nature of the Case

This is a case of alleged medical malpractice which resulted in the award of over $4 million to a seriously brain damaged girl and to her parents.

On February 27, 1988, 36-year-old Pansy Dempsey, wife of an Air Force enlisted man, Lonney Dempsey, Sr., gave birth to her second child, Loren, at Eglin Air Force Base in Florida. Loren Dempsey was born with severe breathing difficulties. Opinion, p. 3, App. 21. The doctor who delivered Loren at 2:30 a.m., a first-year family practice resident at the hospital, attempted to resuscitate Loren by suctioning out her mouth and nose. He was joined by the staff obstetrician, another first-year Family Practice resident, and by a third-year family practice resident. The third-year resident orally inserted a tube into the child's throat to provide oxygen to her lungs. Nevertheless, Loren was unable to breathe on her own. Opinion, p. 4., App. 23.

About fifty minutes after Loren's birth, the Eglin doctors discovered that the tube that was meant to deliver oxygen to Loren's lungs had, in fact, been placed down her esophagus. The oxygen was going to her stomach. The error was corrected and Loren revived. Unfortunately, however, she is now severely retarded. Opinion, p. 5., App. 23.

2. Course of the Proceedings and Disposition Below

A lawsuit was brought by Loren and her parents in the United States District Court for the Northern District of Florida, Pensacola Division on February 9, 1989. The malpractice action was filed pursuant to the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b) and 2671 et seq.

The case was assigned to United States Magistrate Susan M. Novotny. In a pretrial ruling filed July 3, 1990, the magistrate

ruled that recovery was to be "provided according to the law of the state in which the action arose," which in this case was Florida. Pretrial Ruling, p. 1., App. 13. In her ruling, she also held that, under Florida law, Loren's parents had a cause of action for their loss of Loren's companionship, society and services. Id. at 2., App. 14. The magistrate held, however, that, in the absence of a child's "extraordinary income producing attributes," the parents had no right to recover for lost support and services. Id. at 3., App. 15.

A final decision and judgment was filed on November 13, 1991. The federal magistrate held that the Eglin doctors had breached the standard of care in their treatment of Loren by failing to put the oxygen tube down Loren's trachea (Opinion, p. 7, App. 25), and found that the failure to intubate properly, rather than the medical problems that led to the intubation, was the proximate cause of Loren's current handicaps. Opinion, p. 11, App. 29. Based on these findings, the United States was held liable for Loren's injuries.

The district court awarded $4,184,000.37 in damages, allocated among the following categories:

Past medicals and attendant care	$ 68,000
Future medical and care costs	1,497,000
Loren's loss of future earnings	319,000
Loren's pain and suffering	1,000,000
The parents' loss of society and affection of their child	1,300,000
TOTAL	$ 4,184,000

The magistrate agreed with the government that the parents were not "entitled to recover for pain, suffering and emotional

distress" under Florida law. Opinion, p. 33, n. 8, App. 51. However, she determined that loss of society and affection was distinguishable from "pain, suffering and emotional distress" and could be compensated by an award of damages. The specific compensible loss to the parents in this case was explained as follows:

> [I]nstead of joyously experiencing their newborn's first actions, mother Pansy and father Lonney, each approximately 37 years old at the time, endured having their limp and lifeless daughter, within hours of her birth, transferred to a distant hospital, where they could have only the most limited physical contact with her. Rather than a jubilant homecoming, Loren's eventual release from the hospital was "risky" and accompanied by a breathing monitor and feeding tube inserted in her stomach. They did not hear their child's cry for over a month. Pansy and Lonney will probably never feel their child's embrace; their only comfort seems to lie in Loren's apparent ability to, at most, distinguish them from strangers and occasionally smile. They have clearly been, and will continue to be, deprived of normal parental experiences as their daughter progresses from infancy through childhood and adolescence into adulthood.

Opinion, pp. 36-37, App. 54-55.

The magistrate denied the parents' demand for compensation for the lost services of their daughter, noting that "the evidence does not support a finding that, "prior to the injury the child had some 'extraordinary income producing attributes'." Opinion, p. 34, App. 52, citing Gresham v. Courson, 177 So.2d 33, 37 (Fla. 1st DCA 1965).

The magistrate's judgment was appealed to the United States Court of Appeals for the Eleventh Circuit. The government

challenged only the $1.3 million to the parents, not the award of $2,884,000 to Loren Dempsey. The parents appealed the magistrate's denial of damages to compensate them for the loss of Loren's services. In a per curiam order filed on April 30, 1993, the Eleventh Circuit certified the two issues stated above for resolution by this Court.

SUMMARY OF ARGUMENT

1. As we have explained, the only appellate issue raised by the United States is whether the Federal magistrate was correct in presuming that Florida courts will recognize, prior to legislative enactment, a claim for damages that has not previously been the basis for tort awards in the state: that parents may recover damages for their own loss of their child's companionship and society when the child has been severely injured.

While dicta in Yordon v. Savage, 279 So. 2d 844, 846 (Fla. 1973) appears to accept the existence of such a common law cause of action, we show that this remark in a non-tort case was in error, misstating this Court's position regarding common law torts in the earlier case of Wilkie v. Roberts, 109 So. 225 (Fla. 1926). We explain that a number of Florida appellate decisions since Yordon have followed Wilkie and have ignored the Yordon dicta. To date, no opinion from this Court or any Florida court of appeals has approved the award of damages to parents as compensation for loss of their injured child's society and companionship.

In the absence of a traditional common law right of action, we note that the state legislature has not given parents a right of action for such a loss when their child is injured, although it has granted a similar right of action when their child has died. Florida law (§ 768.21(4) Fla. Stat.)

We also note that this Court has stated that formulation of new rights to recover tort damages should await action by the state legislature. Florida law (§ 768.21(3) Fla. Stat.) does provide that children may recover for mental pain and suffering as well for loss of parental consortium as the result of the wrongful death of a parent. In the absence of a specific statute, this Court, in Zorzos v. Rosen, 467 So.2d 305 (Fla. 1985), ruled that Florida courts were not free to recognize a cause of action providing for a similar recovery for loss of parental consortium when an injury to a parent did not lead to death.

In the present case, the Federal magistrate has done, in the context of parental claims, exactly what this Court in Zorzos rejected in the context of children's claims. We oppose this state law innovation by the magistrate since it violates this Court's admonition that:

> . . . if the action is to be created, it is wiser to leave it to the legislative branch with its greater ability to study and circumscribe the cause.

467 So.2d at 307. After Zorzos was decided by this Court, the state legislature did, in fact, enact a law to benefit children of permanently disabled parents. § 768.0415 Fla. Stat. (1988).

No similar statute has yet been passed to benefit parents of permanently disabled children.

2. The parents have raised a second issue. They claim that the magistrate erred when she concluded that Florida permits parents to recover damages for lost support and services only if, prior to the child's injury, she had some "extraordinary income producing attributes." Pretrial Order, p. 3, App. 15. Gresham v. Courson, 177 So. 2d 33, 37 (FLa. 1st DCA, 1965). We argue that the magistrate correctly stated Florida law on this issue and that, in the absence of any evidence of Loren's "extraordinary income producing abilities," correctly denied recovery. Opinion, p. 34, n. 9, App. 52.

ARGUMENT

I. FLORIDA LAW DOES NOT PERMIT PARENTS TO RECOVER FOR THE LOSS OF A CHILD'S COMPANIONSHIP AND SOCIETY WHEN THE CHILD IS SEVERELY INJURED.

In this brief, the government challenges only whether FLorida law supports the twin awards of $650,000 each to Loren Dempsey's mother and father for "loss of affections and companionship of a normal, healthy daughter from the moment of her birth." Opinion, p. 36, App. 54. We do not question the parents' very real emotional distress, pain and suffering due to Loren's handicaps, losses which the magistrate correctly recognized to be non-compensable. Opinion, p. 33, n. 8, App. 51. We challenge only whether, as a matter of Florida law, the magistrate could allow the parents to recover for their "loss of companionship, society and affections" due to Loren's handicaps,

in the absence of a statutory cause of action. Opinion, p. 37, App. 55.

First, it is important to note that the $1.3 million awarded to Loren's parents does not include either loss of Loren's future services to them or medical costs for dealing with Loren's afflictions. The magistrate noted in her opinion that loss of services by the child to the parents would never equal the normal expenditure of rearing the child and, thus, could not be the basis for an award. Opinion, p. 34, n. 9, App. 52. Also, Loren's medical costs are covered by other categories of awards here, specifically the nearly $1.5 million awarded for future medical and care costs and the more than $68,000 awarded for past medical and care costs. See Opinion Appendix #2, App. 67. Clearly, the $1.3 million awarded here covers only the parents' "loss of companionship [and] society." Opinion, p. 33, 37, App. 51, 55.

A. The Magistrate Erred In Concluding That Florida Currently Recognizes A Parent's Right Of Action For Loss Of Consortium With An Injured Child.

The federal magistrate, based on her review of Florida cases, concluded that the Florida courts had previously allowed parents, under the common law, recovery for loss of consortium of their children, stating that: "Florida law provides for recovery by the parents of a minor child who has been wrongfully injured by another for the 'loss of the child's companionship [and] society * * * '.Yordon v. Savage, 279 So. 2d 844, 846 (Fla. 1973), citing Wilkie v. Roberts, 109 So. 225 (Fla. 1926)."

Opinion, p. 33-34 (footnote omitted), App. 51-52. We suggest that the magistrate erred in her analysis of Florida precedent.

The confusion is somewhat understandable since this Court, in Yordon, a case that did not involve a damages claim at all, mentioned as dicta that the 1926 case, Wilkie v. Roberts, had held that a parent could claim damages:

> . . .for medical, hospital, and related expenditures, indirect economic losses such as income lost by the parent in caring for the child, and for the loss of the child's companionship, society, and services, including personal services to the parent and income which the child might earn for the direct and indirect benefit of the parent.

279 So. 2d at 846 (emphasis added). In fact, however, this Court's description of the Wilkie case was incomplete. Wilkie, in fact, had not recognized anything more than a father's common law right to recover expenses for loss of his son's services during minority and for medical treatment. As is clear from a reading of the entire Wilkie decision, this Court certainly had not recognized, in 1926, a right similar to that on which the magistrate based her $1.3 million award to the parents in the present case.

In Wilkie, Holstead Roberts' 10 year-old son, Waller, had been permanently injured by an automobile driven by L.N. Wilkie. This Court recognized that the Florida statutes provided for "loss of services and for mental pain in the event of the death of a minor child. . ." (109 So.2d at 227), but explained that no similar provision covered an injured child. Id. In the latter

case, the court explained that a common law remedy could be the only possible basis for recovery. Id.

This conclusion led the Court to a brief discussion of the state of the common law covering parental recoveries. It was in this context that this Court mentioned "[t]he father's right to the custody, companionship, services, and earnings of his minor child" (id.), language which was apparently, and incorrectly, paraphrased in Yordon.

This Court in Wilkie, however, actually had limited the parent's loss due to his son's permanent injuries to the extent this "affected the earning capacity or ability of the injured [son] to serve the father," and explicitly had held that an award could include only "loss of the child's services and earnings, present and prospective, to the end of the minority." 109 So. at 227. Citing with approval several cases that refused to permit a jury "to consider the mental anguish or suffering which the injury caused the father," the Court held that evidence of the child's condition and suffering in the case before it was immaterial to the father's recovery "except as it affected [the son's] ability to serve his father." Id. Finally, the Court explained that the common law allowed the father to "recover only his pecuniary loss as a result of the injury." Id. (emphasis added.)

Wilkie's right of recovery due to a father for his child's earnings and services (a concept that has a very archaic ring to most modern parents) simply cannot be twisted to provide for a

non-pecuniary loss, the loss of consortium, for parents who are saddened, indeed bereft, due to their child's handicaps. In the 1926 decision, the court cited with approval a Pennsylvania case which limited recovery to:

> the services of [the father's] child during minority, and by just as much as this injury impaired the value of the right [to services]. . . .

Id.

On the other hand, the magistrate in this case described the damages to the parents ("Pansy and Lonney Dempsey suffered the loss. . ."; "[I]nstead of joyously experiencing their newborn's first actions. . ."; "[they] endured having their limp and lifeless daughter. . ."; "Rather than a jubilant homecoming. . ."; "Pansy and Lonney will probably never feel their child's embrace. . . ." Opinion, pp. 36-37, App. 54-55) as something quite different. Since the magistrate recognized that Loren's capacity to produce income for her parents was not compensable (Opinion, p. 34, n. 9, App. 52), she awarded damages that were, in fact, based on Loren's parents' emotional suffering and loss, for injuries that were not recognized as being compensable in Wilkie and which had been virtually acknowledged as noncompensable in a pre-trial ruling by the magistrate herself.[1]

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[1] As the magistrate explained:

> Parent-plaintiffs in the state of Florida, however, are not able to recover for pain and suffering and/or infliction of emotional distress in a case in which the surviving child was tortiously injured when they

(continued...)

While the magistrate has granted this award of damages for "depriv[ation] of normal parental experiences as their daughter progresses from infancy through childhood and adolescence into adulthood" (Opinion, p. 37, App. 55), she has cited no Florida case where such an award has ever been made. Instead, the magistrate was forced to rely on decisions in wrongful death cases (Johnson v. United States, 780 F.2d 902 (11th Cir. 1986), Williams v. United States, 681 F. Supp. 763 (N.D. Fla. 1988), and Grayson v. United States, 748 F. Supp. 854 (S.D. Fla. 1990)) to establish the appropriate range of damages in this "wrongful injury" case. Opinion, p. 36, App. 54. However, in those three cases, § 768.21 Fla. Stat. specifically was held to provide recovery based on the parents' mental pain and suffering, categories of loss which, as the magistrate noted, are not compensable in an injury case. "Mental pain and suffering" resulting from the death of a child amounted in a "per parent" award for each deceased child of $850,000 in Grayson, 748 F. Supp. at 863 and $900,000 in Williams, 681 F. Supp. at 766. See also Johnson, 780 F.2d at 908 (remanding a case for rehearing on damages). In none of these cases was a claim for "lost companionship and society" -- separate and apart from mental anguish -- ever even mentioned. The parents' anguish at the loss

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[1](...continued)
themselves suffered no discernible or demonstrable physical injury. Champion v. Gray, 478 So. 2d 17, 19 (Fla. 1985).

Pretrial Order dated July 3, 1990, p. 3, App. 15.

of a child clearly covered this loss as well. While we may agree that an award of $650,000 to each parent for loss of a child would have been appropriate under the terms of Florida's Wrongful Death Statute, such an award cannot be justified when the operative statute does not provide a right to compensation. To admit that "damages for the parents' pain and anguish are not available in the instant action," and then to give an equivalent award using a different name for what is actually the identical loss is simply disingenuous.

The magistrate is not alone in having been confused by the Yordon court's dicta about Wilkie. While the Florida Standard Jury Instructions in Civil Cases do not recognize a cause of action for the claim recognized by the magistrate in this case,[2] a comment on this Instruction notes that Yordon ("citing Wilkie") now clouds the established precedent. The comment notes that:

> The Committee [on Standard Jury Instructions] expresses no opinion concerning whether there also is a cause of action for a parent's recovery due to loss of a child's companionship and society. Compare Yordon v. Savage, 279 So. 2d. 844 (Fla. 1973), citing Wilkie v. Roberts, 91 Fla. 1064, 109 So. 225 (1926), with language in Wilkie and other cases interpreting Wilkie, including

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[2] In those instructions, judges are permitted to inform juries that they may award damages to a parent covering:

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

Florida Standard Jury Instructions, 6.2f.

> Youngblood v. Taylor, 89 So.2d 503 (Fla. 1956); City Stores Co. v. Langer, 308 So. 2d 621 (Fla. 3d DCA), cert. dism., 312 So. 2d 758 (Fla. 1975); Hillsborough County School Board v. Perez, 385 So. 2d 177 (Fla. 2d DCA 1980); and Brown v. Caldwell, 389 So. 2d 287 (Fla. 1st DCA 1980).

In re Standard Jury Instructions Civil Cases, 503 So. 2d 319 (Fla. 1987). All of these cited cases, in fact, follow Wilkie, e.g., Youngblood, 89 So.2d at 506; and ignore Yordon, e.g., City Stores Co., 308 So.2d at 622; Hillsborough, 385 So.2d at 178; and Brown, 389 So.2d at 288.[3] If these cases, rather than the vague, twenty year-old dicta in Yordon, represent current Florida law, as seems evident, then the magistrate's award of $1.3 million is clearly incorrect.

B. The Zorzos Decision Shows That Florida Courts Have Not And Will Not Adopt A Right Of Action To Compensate Parents For Loss of Consortium With An Injured Child.

In a 1984 decision, the Florida Court of Appeals concluded, as the federal magistrate did in this case, that loss of parent-child consortium in an injury case was compensable under Florida law. In that case, however, it was the children, not the parents, who sued for lost consortium. The plaintiffs in Rosen v. Zorzos, 449 So. 2d 359 (Fla. 5th DCA), were the minor children

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[3] The last two cases, Hillsborough and Brown, were decided in 1980, seven years after Yordon was decided. An even later case, Selfe v. Smith, 397 So.2d 348, 350 (Fla. 1st DCA 1981) (petition denied, 407 So.2d 1105 (Fla. 1981)), which was not cited in the Comment, is in agreement with Hillsborough and Brown. Burden v. Dickman, 547 So. 2d 170, 173 (Fla. 3rd DCA 1989), on the other hand, which was cited as a "see also" by the magistrate was not a tort action and did not involve damages. It merely quoted the same incorrect Yordon view of the holding in Wilkie for unrelated purposes.

of Michael Rosen, who had been severely injured when his automobile collided with one driven by the defendant Zorzos. Mr. Rosen's children sued for the lost care, comfort, society, parental companionship, instruction and guidance of their injured father. The appellate court noted that the children would have had a statutory right to recover under the Florida Wrongful Death Act if their father had died. § 768.21(3) Fla. Stat. Based on the statute, the court asked:

> Has a child lost any less parental consortium when his injured parent lies comatose than when he actually dies?

449 So. 2d at 362. Since the answer to this question was so obviously, "No!", the appellate court allowed the claim.

Certainly, if the decision in Rosen v. Zorzos were binding precedent in Florida, we would have recognized the analogous cause of action that parents would have to recover for lost consortium when their children are severely injured. In that case, we would not have brought an appeal in the Eleventh Circuit and would not be before this Court now.

However, the appellate court decision in Rosen v. Zorzos is not binding precedent in Florida because it was explicitly overruled on appeal by this Court. Zorzos v. Rosen, 467 So. 2d 305 (Fla. 1985). In its decision, this Court asked basically the same question that had been previously asked by the appellate court:

> . . . whether Florida should recognize a cause of action for loss of parental consortium resulting from injuries

> negligently caused by a third party to a parent where death does not occur.

467 So. 2d at 306. This Court answered the question quite differently, however. While the Court explained that it was not legally precluded from recognizing a new cause of action just because the legislature had not acted, it declined, on prudential grounds, to create such a cause of action since:

> . . . if the action is to be created, it is wiser to leave it to the legislative branch with its greater ability to study and circumscribe the cause.

467 So. 2d at 307. This Court stated that, in denying recovery to the Rosen children, it was influenced by the fact that the Legislature had recognized a child's loss of parental consortium in a wrongful death action and that the Legislature "ha[d] not created a companion action for such a loss when the parent is injured but not killed." Id. While this Court admitted that this might have been the result of lawmakers' oversight, it concluded that the lack of such a companion action "strongly suggests that the legislature has deliberately chosen not to create such a cause of action." Id.

The same Florida Wrongful Death Statute on which this Court based its decision in Zorzos also allows claims for loss of consortium by parents of deceased children. In fact, the provision for parents of deceased children, and the one covering children of deceased parents are adjoining sections of the same statute, §§ 768.21(3) and (4) Fla. Stat. It would be logically appropriate, therefore, for this Court, which refused to expand

the wrongful death provisions to benefit children of those who are not deceased but are severely injured, similarly to refuse to expand that statute to benefit parents of children who are not deceased but are severely injured.

After the Court's Zorzos decision, the Legislature did pass a new law providing relief for children of permanently injured parents. This law held liable any person who:

> . . . through negligence, causes significant permanent injury to the natural or adoptive parent of an unmarried dependent resulting in a permanent total disability. . . .

and permitted awards for damages covering:

> loss of services, comfort, companionship, and society.

§ 768.0415 Fla. Stat. (1988). See Gomez v. Avis Rent-A-Car, 596 So. 2d 510 (Fla. 3d DCA 1992). However, this statute, which became effective on October 1, 1988, did not grant a right of action to parents of injured children. As this Court had explained earlier in Zorzos, it may have been that the Legislature had once again "deliberately chosen not to create such a cause of action."[4] 467 So. 2d at 307.

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[4] It is worth noting that the Legislature denied relief to married children of injured parents. This may be due to the lawmakers' view that compensation was due only to those who had no other close emotional support. At any rate, it is less than clear that the Legislature would view a married couple like the Dempseys in the same way that it viewed an unmarried child.

II. FLORIDA LAW DOES NOT PERMIT PARENTS TO RECOVER FOR THE LOSS OF THE SERVICES OF A SEVERELY INJURED CHILD ABSENT EVIDENCE OF EXTRAORDINARY INCOME PRODUCING ABILITIES.

In their brief before the Eleventh Circuit, the parents argued not only that an award to parents of an injured infant was permitted for under Florida tort law, but that the magistrate did not award enough money under this heading. Specifically, the parents claimed that the magistrate had erred by not including within her award an amount to compensate the parents for the loss of Loren's services. Eleventh Circuit App'ee Br., pp. 40-41, App. 70-71. The claim is baseless since plaintiffs introduced no evidence of a loss that is compensable under Florida law.

As we explained in Section I, Florida common law permits an award to the parents of an injured child only to compensate them for past medical expenses and loss of services and earnings. By statute, a parent of a deceased child may also recover for "future loss of support and services." § 768.21(1) Fla. Stat. Both the common law remedy for loss of an injured child's services and the statutory remedy for loss of a deceased child's services appear to be identical in scope.[5]

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[5] For example, in Youngblood, a common law injury decision, a father was held to be able to "recover for loss of the child's services and earnings * * * " (89 So.2d at 506), which ended with the end of the child's minority. Wilkie, 109 So. at 227. Similarly, in a statutory wrongful death case (Gresham v. Courson, 177 So. 2d 33 (1965)), recoverable damages were defined as covering "the father's loss of the services of his child until the child would have become 21 years of age." Id. at 37.

These similarities between the Florida common law and statutory remedies for lost services caused the magistrate in this case to rely upon the state's wrongful death statutory precedent in denying an award under the common law in this injury of a child case. The magistrate correctly noted that the state courts had refused to award damages for future services in death cases when no evidence supported extraordinary income producing attributes in the deceased child. Opinion, p. 34, n.9, App. 52. The district court assumed that the same principle would apply to awards for lost services to parents in serious injury cases. This decision by the magistrate was both logical and convincing.

The magistrate relied greatly on the Florida appellate court's Gresham decision. Gresham, in turn, relies on this Court's decision in Florida Dairies Co. v. Rogers, 161 So. 85 (Fla. 1935). In that case, this Court explained:

> The responsibility of bringing up a child in the normal American home is made up of many years of antithetic responses. Pleasure, pain, gladness, sorrow, surprise, disappointment, exultation, humiliation, joy, grief, expense, and in rare cases profit, are the links that make the chain. In the cases of Jackie Coogan or Shirley Temple the profit element would be material, but these are exceptions to the rule. The rule is that the expense element far outdistances the profit one if reduced to the crass basis of a monetary consideration.

161 So. at 88. It was this commentary that led the Gresham court to conclude that "unless the deceased child had some extraordinary income-producing attributes, the cost of maintaining it to maturity would normally exceed the value of any

services which might likely be rendered by the child to the parent." 177 So. 2d at 37. The Eleventh Circuit relied on that statement of Florida law in Johnson v. United States, 780 F.2d 902 (11th Cir. 1986), in rejecting any award for services or parental support in another FTCA case. Id., at 908. See also Williams v. United States, 681 F.Supp. 763, 764 (N.D.Fla. 1988)

This Court's 1935 decision in Florida Dairies makes good sense today. Minor children still do not appear to be sources of profit for their parents, except in the rare case of a Michael Jackson or Macauley Culkin, whose childhood earnings are far greater even than Coogan's or Temple's. For the rest of Americans, the cost of raising a child is far, far greater than the income a child produces for the parent.

Plaintiffs suggested in their brief to the Eleventh Circuit that the Florida Dairies, Gresham, Johnson, and Williams wrongful death cases are inapplicable here since, "in injury cases, the parents of the injured child still must bear the costs of food, shelter, clothing, etc., to maintain the child until majority." Parents' 11th Cir. Opening Br., p. 41, App. 71. This argument is without merit because the magistrate explained that these expenses would be covered in her $2.8 million award to the Dempseys' daughter. The magistrate explained in her Pre-trial Order that:

> The court is not persuaded by plaintiff's argument that the presumption articulated in Gresham does not apply to the instant action since the child is alive and the parents shall not be spared the costs of child-rearing. Should parents succeed in

> establishing liability, they shall be justly compensated for their properly proven additional costs of child care, leaving the presumption intact.

Pretrial Order of July 3, 1990, pp. 3-4, App. 15-16. Here, where over $1.5 million has been awarded to provide for Loren's living and medical expenses (excluding the $1.3 million award to Loren for her lost wages and non-economic damages), "just compensation" has been provided. An additional "lost services" award to pay for Loren's "food, shelter, [and] clothing" until she reaches majority (Parents' 11th Cir. Opening Br., p. 41, App. 71) would unquestionably be duplicative under Florida law.[6]

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[6] In Florida, the measure of damages in a tort case is always "limited to the actual damages sustained by the aggrieved party." Hanna v. Martin, 49 So. 2d 585, 587 (Fla. 1951). Plaintiffs have a right to recover, and have recovered in the $2.8 million award, the damages incurred as a result of the accidental injury. However, the parents have no right to recover, additionally, all expenses that they have incurred and will incur by parenting a child.

CONCLUSION

For the reasons given, we submit that Florida does not permit recovery by parents in the two instances presented by this case when their child has been wrongfully injured.

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of May, 1993, I served the foregoing BRIEF FOR APPELLANT upon counsel for plaintiff-appellee by causing two copies to be mailed, by first-class mail, postage prepaid, to:

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