No. 81,705

IN THE SUPREME COURT OF FLORIDA

UNITED STATES OF AMERICA,

Defendant-Appellant.

v.

LOREN DEMPSEY, ET AL,

Plaintiffs-Appellees.

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

BRIEF OF APPELLEES

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STATEMENT OF THE CASE AND OF THE FACTS

The Plaintiffs-Appellees accept the statement of the Case and the Facts in the Government's Brief with the following additions.

The District Court below found that Loren at the time of trial was 2 1/2 years old but severely developmentally delayed. The Court found that although Loren could see, her eyes did not always track; that Loren could not pick up or hold objects; that Loren would not likely ever learn to crawl, walk or talk or ever be able to feed herself; that Loren will probably be immobile and dependent on others for her care for all of her life (Appendix pp. 30-31).

SUMMARY OF THE ARGUMENT

ISSUE I

This Court in Yordon v. Savage, 279 So.2d 844 (Fla. 1973) extended to the mother the same right to recover loss of the companionship, society and services of a tortiously injured minor child that had been recognized for the father in Wilkie v. Roberts, 91 Fla. 1064, 109 So. 225 (1926). The Yordon case, contrary to the Government's argument, was a tort case involving medical negligence and, therefore, the Court's ruling therein was not dicta.

The holding in Yordon properly interpreted the Court's prior decision in Wilkie. In Wilkie, this Court had found that the father's right to the custody, companionship and services of his minor child were a valuable property right. This valuable property right, and the father's right to recover for tortious injury thereto, were also discussed in Ripley v. Ewell, 61 So.2d 420 (Fla. 1952).

Further, this Court is certainly in a better position to interpret its prior decisions than is the Government. See, e.g., Commissioner of Internal Revenue

v. Estate of Bosch, 387 U.S. 456, 465, 87 S.Ct. 1776, 1782-83, 18 L.Ed.2d 886 (1967); Pressley v. Sears, Roebuck & Co., 738 F.2d 1222, 1224 (11th Cir. 1984); Shaw v. McCorkle, 537 F.2d 1289 (5th Cir. 1976). The Government's argument that this Court in Yordon was confused by its decision in Wilkie is pure speculation. See, e.g., Shaw v. McCorkle, supra.

The Government's reliance on Youngblood v. Taylor, 89 So.2d 503 (Fla. 1956); City Stores v. Langer, 308 So.2d 621 (Fla. 3d DCA), cert. dism'd, 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), is misplaced. None of those cases addressed the issue of the parent's right to recover consortium damages.

Moreover, to overrule Yordon would return to an archaic rule that harkens back to a time before child labor laws and compulsory education laws made it almost certain that children would not be an economic asset to their parents. The rule set forth in Yordon recognizes the fact that the emphasis in the modern family is upon the relationship of mutual love and comfort. See, e.g.,

Howard Frank, M.D. P.C. v. Superior Court, supra at 958-960.

ISSUE II

In Gresham v. Courson, 177 So.2d 33, 37 (Fla. 1st DCA 1965), the Court in a wrongful death action denied recovery for loss of services on the basis that any loss was exceeded by the savings of not having to pay the costs of maintaining the child to majority. That decision has not been expanded to cases involving tortiously injured children by a court in Florida. The rationale is lacking since in the injury context, the parents still must pay the costs of rearing the child.

To require the parent to prove some extraordinary income producing ability of the child would be to mix apples with oranges. A separate category of recoverable damages by a parent is the child's loss of earnings during minority. That right has always been recognized. Wilkie, supra at 227. No basis exists for expanding the Gresham decision to injury as opposed to death cases.

ARGUMENT

ISSUE I

DOES FLORIDA LAW PERMIT PARENTS TO RECOVER FOR THE LOSS OF A CHILD'S COMPANIONSHIP AND SOCIETY WHEN THE CHILD IS SEVERELY INJURED?

This Court in Yordon v. Savage, 279 So.2d 844 (Fla. 1973), interpreted its prior decision in Wilkie v. Roberts, 91 Fla. 1064, 109 So. 225 (1926), as establishing the right of the father to recover for the loss of his ". . . child's companionship, society, and services. . ." for injuries to his child and extended that same right to the mother. The Court divided six to one with the dissent not questioning the right of the father to recover those elements of damages only with the wisdom of extending that same right to the mother. That decision has not been questioned by any Florida appellate court nor have the appellate courts of Florida been faced directly with this issue in any appellate decision since.[1]

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[1] However, the decision has been cited in other jurisdictions for the proposition that Florida recognizes these elements of damages. See, e.g., Pierce v. Casas Adobes Baptist Church, 782 P.2d 1162, 1164 (Ariz. 1989); Howard Frank, M.D., P.A. v. Superior Court, 722 P.2d 955, 956 (Ariz. 1986). The decision is also recognized as allowing for recovery by the parents of consortium damages in Burden v. Dickman, 547 So.2d 170, 173 (Fla. 3d DCA 1989) and 25 Fla. Jur. 2d, "Family Law", §477.

The Government takes the position that the holding in Yordon is not a statement of the law of Florida because it is dicta from a nontort case. Alternatively, the Government argues that the Yordon decision should be overruled because it misinterpreted this Court's earlier decision in Wilkie. None of these arguments have merit.

The Government's initial position that Yordon was not a tort case is totally unsupported. In the Yordon opinion, this Court set forth the facts of the case as follows (279 So.2d at 845):

> "The facts of this case are as follows: A minor by and through his natural mother and natural father, and the mother and father individually, instituted this action against the appellee, a licensed pediatrician. Court One alleged that appellee, in the performance of her duties, negligently treated the child causing blindness and rendering him incapable of sensation, perception, motor control and reason. . . ."

Clearly, the case involved a tort claim for damages.

The Government's alternative argument that this Court in Yordon misinterpreted its own prior decision in Wilkie, assumes that the Government is in a better

position to determine what this Court held in Wilkie than this Court was itself in Yordon. That argument also assumes that the District Court below was free to question this Court's pronouncements of Florida law. No authority is cited for that argument and the Dempseys submit that none exists. Instead, there exists substantial authority to the contrary. Commissioner of Internal Revenue v. Estate of Bosch, 387 U.S. 456, 465, 87 S.Ct. 1776, 1782-83, 18 L.Ed.2d 886 (1967); West v. American Telephone and Telegraph Co., 311 U.S. 223, 61 S.Ct. 179, 183, 85 L.Ed. 139 (1940); Pressley v. Sears, Roebuck & Co., 738 F.2d 1222, 1224 (11th Cir. 1984); R. W. Murray & Co. v. Shatterproof Glass Corp., 697 F.2d 818 (8th Cir. 1983); Wansor v. George Hantscko Co., Inc., 595 F.2d 218, 220 n.7 (5th Cir. 1979); Bradley v. General Motors Corporation, 512 F.2d 602, 604-605 (6th Cir. 1975); Charney v. Thomas, 372 F.2d 97, 99 (6th Cir. 1967).

For instance, in Commissioner of Internal Revenue v. Estate of Bosch, 87 S.Ct. at 1783, the United States Supreme Court stated as follows:

> ". . . This is not a diversity case but the same principle may be applied for the same reasons, viz.,

> the underlying substantive rule involved is based on state law and the State's highest court is the best authority on its own law. . . ."

Even more to the point, the U.S. Fifth Circuit Court of Appeals considered similar arguments as those made by the Government in this case in Shaw v. McCorkle, 537 F.2d 1289 (5th Cir. 1976). In that case, the federal district court had applied a different rule of law than had been announced by the Mississippi Supreme Court in similar cases. The basis for the district court ruling was that the Mississippi court would change its law accordingly if given the opportunity to review its prior decisions. In reversing, the Fifth Circuit held as follows:

> "The District Court, however, is not free to second-guess the Mississippi Supreme Court contrary to its straight-forward previous decisions just because the District Court disagrees with that Court's reasoning or with the wisdom of its conclusion. . . . That the Mississippi Supreme Court was somehow 'misled' in Alexander by its reasoning in Smith is mere speculation on the part of the District Court. . . ."

Further, this argument illustrates the Government's lack of understanding of the common law in arguing that the use of the word "services" in Wilkie was limited to the actual provision of labor on behalf of the father. The Court in Wilkie, supra at 227, in discussing the common law stated as follows:

> ". . . 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. . . ."

One must measure the use of the terms "services" and "pecuniary loss" against the above statement of the common law in Wilkie. Clearly an injury to a valuable property right at common law was a pecuniary loss. The Government seeks to isolate terms and assign to them only the modern meaning rather than consider the terms against the backboard of the realities of that time.

That the pecuniary loss language from Wilkie for services included all of these valuable property rights of companionship, services and earnings can be better understood against the backdrop of this Court's

further pronouncements concerning consortium and father's rights in Ripley v. Ewell, 61 So.2d 420 (Fla. 1952). In Ripley, this Court refused to alter the common law rule that a wife did not have a right to recover for the loss of consortium of her husband as did the husband for the wife.[2]

In discussing the basis for the distinction between husband and wife, this Court analogized to the same recoverability distinction between a father and a minor child in regard to tortious injuries as follows (Supra at 421-22):

> "A better perspective of the common-law rule can be obtained by recognizing that marriage was only one of several relationships in which one person was regarded as having a special property interest in the services, if not the person, of another. A father has a legal property interest in the services of his child. He still does. A master had a form of legal property interest in the services of his servant. This relationship in the common law form has largely disappeared at the present time. At common law the father or master could recover, in appropriate cases, for injuries to the child or servant

[2] Although Ripley was later overruled in Gates v. Foley, 247 So.2d 40 (Fla. 1971) the discussion of the common law rights of the father of a minor child are still apropos to this case.

resulting in a loss of these services. Frequently recovery was allowed far in excess of the monetary damage; the classic example being the recovery permitted to the father for the seduction of his daughter.

Blackstone, generally considered the most reliable authority on the common law, explains the reason for the rule as applied to these relationships as follows:

> 'We may observe that in these relative injuries notice is only taken of the wrong done to the superior of the parties related, by the breach and dissolution of either the relationship itself, or at least the advantage accruing therefrom; while the loss of the inferior by such injuries is totally unregarded. One reason for which may be this; that the inferior has no kind of property in the company, case or assistance of the superior, as the superior is held to have in those of the inferior, and therefore the inferior can suffer no loss or injury'. 3 Blackstones Commentaries, 143.

From the present viewpoint we would not hesitate to say that, insofar as measurable pecuniary damages are concerned, a greater loss is sustained by a child whose father is completely incapacitated

> than is sustained by a father whose child is seriously injured. The child loses far more than the financial assistance which the father might otherwise provide. The companionship, society, love, counsel and all the elements that go to make up the consortium of the marriage relationship except sex relations may be lost to the child. But the common law did not, nor does modern law, give the child, so long as the father survives, any cause of action against the stranger who negligently injures the father.
>
> The underlying process of thinking that evolved the common-law rule seems to be that the law would allow a recovery by one person having a special property interest in the services of another when such other was injured by the wrongful act of a stranger."

As can be seen from the above recitations, services at common law included society and companionship, which had pecuniary value for which a father had the right to recover but a child did not. The Court's Yordon decision was, therefore, a proper interpretation of its earlier decision in Wilkie and should not be overruled.

The Government's reliance upon Youngblood v. Taylor, 89 So.2d 503 (Fla. 1956); City Stores v. Langer, 308 So.2d 621 (Fla. 3d DCA), cert. dismissed, 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), is misplaced. In Youngblood, supra, this Court was faced solely with the issue of whether res judicata prevented the father of a minor from asserting a claim for the father's independent damages subsequent to an adverse decision in an earlier action brought by the father on behalf of the minor for the minor's independent damages. The Court did not have before it the issue of what constituted appropriate elements of damages.

Likewise, the other district court of appeal decisions cited by the Government also did not address the question of the parents' right to recover consortium damages for injury to their minor child. For example, City Stores v. Langer, 308 So.2d 621 (Fla. 3d DCA), cert. dism'd, 312 So.2d 758 (Fla. 1975) dealt with a father's right to recover for inconvenience and humiliation caused by the assault, battery, false imprisonment and malicious prosecution of his daughter. In Hillsborough County School Board v. Perez, 385 So.2d 177 (Fla. 2d DCA 1980), the sole issue before the Court was the excessiveness of the award for loss of services and medical expenses for

the one year between trial and the date the minor would reach his majority. In Brown v. Caldwell, 389 So.2d 287 (Fla. 1st DCA 1980), the only issue was the excessiveness of the award for future medical expenses for the minor child. Selfe v. Smith, 397 So.2d 348 (Fla. 1st DCA 1981), involved the operation of the "impact rule" when mental anguish is sought by a parent for the injuries to her child.

In Brown and Selfe, the Court did state that a parent's damages were restricted to pecuniary losses. However, in Wilkie, the Court recognized that the father had a valuable property right in the services, society and companionship of his child. Certainly, a damage to a property right has pecuniary value. Furthermore, in light of Yordon, the district courts do not have the authority to change the law as decided by this Court. In Hoffman v. Jones, 280 So.2d 431, 434 (Fla. 1973), this Court stated as follows:

> ". . . To allow a District Court of Appeal to overrule controlling precedent of this Court would be to create chaos and uncertainty in the judicial forum, particularly at the trial level. . . ."

The Government has argued that the absence of appellate decision subsequent to Yordon shows that Yordon did not accurately state the law. A more plausible argument is that with the clear pronouncement of the law in Yordon, defendants have decided not to raise the issue on appeal. Since a relatively few cases involving serious, devastating injuries to children would justify parents seeking these damages, and even fewer of those are involved in damage appeals, it is not surprising that a paucity of appellate decisions exist.

Furthermore, the Government's argument concerning the impact rule and mental anguish damages is disingenuous as opposed to the Magistrate's decision to award these damages in accordance with clear precedent from the Supreme Court in Yordon and Wilkie. What has apparently confused the Government (and some members of the Standard Jury Instructions Commission), is the distinction between mental anguish damages and consortium damages. Although Florida has always adhered to the impact rule as to mental anguish damages (with limited exceptions), Florida has also always recognized consortium damages for injury to the marital relationship without any need for physical impact to the uninjured

spouse.[3] Therefore, all of the decisions dealing with the "impact rule" have no relevance to this argument.

The Government also mistakenly relies upon this Court's decision in Zorzos v. Rosen, 467 So.2d 305 (Fla. 1985). It is not the Dempseys who are asking this Court to overrule prior precedent, it is the Government. Zorzos is a prime example of the long standing legal principle that this Court will tread cautiously in changing long accepted legal principles, especially when it means creating or limiting a cause of action.

Further erosion of Zorzos support for the Government's position is that the recognition of the right of a parent to recover consortium damages did not involve creating a new cause of action. A parent has long had a cause of action for damages when a minor child is wrongfully injured. Rather, consortium is simply an element of damages. Florida has always held that for a wrongful act, the person with a cause of action has the right to recover all damages that naturally flow from the

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[3] The Arizona Supreme Court in an en banc decision in Pierce v. Casas Adobes Baptist Church, supra, at 1165, provides an excellent discussion of the distinction between these types of damages. The Court points out that emotional distress from experiencing the injury to the child is very different from loss of consortium which is defined "as a loss of capacity to exchange love, affection, society, companionship, comfort, care and moral support."

injury. See, e.g., King v. Cooney-Eckstein Company, 63 So. 659 (1913). Consortium damages, i.e. loss of services, society, companionship, attentions, have been long recognized as flowing from an injury to the analogous family relationship of marriage. See, Gates v. Foley, supra. Therefore, it can be said the Court in Yordon was simply recognizing that long standing element of damages which legally flowed from the injury to the family relationship of parents and child.

The argument made that this Court should overrule the Yordon decision because the legislature has not seen fit to pass a statute recognizing this element of damages for the parents as it did in creating a cause of action for children immediately after the Zorzos decision begs the question. Since Yordon stated that parents have this element of damages available for tortious injuries to their minor child, there was no reason for the Legislature to redundantly pass a statute saying the same thing. The Government cannot, therefore, take solace in that omission. Further, this Court has never been bashful in rejecting unsound principles of law in the tort area without the necessity of legislative action. See, e.g., Waite v. Waite, _____ So.2d _____, 18

FLW S311 (Fla. 1993); Hoffman v. Jones, supra at 434; Gates v. Foley, supra at 43.

The Legislature's action after Zorzos, this Court's holding in Gates v. Foley, supra, and the Legislature's inclusion of consortium type damages in the Wrongful Death Statute indicate how the Government's contention in this case runs counter to the public policy of this state. It is clear that Florida favors the recoverability of damages for losses occasioned by wrongful injuries that effect the familial relationship in all of its aspects. This Court's holding in Yordon interpreting the earlier decision in Wilkie simply recognizes that public policy.

Finally, to retreat from Yordon would be to return to, as the Government termed it at page 10 of its brief, ". . . a concept that has a very archaic ring to most modern parents. . .". To say that a parent's damages are limited to earnings or actual physical services would only have meaning if we were back in the Dickensian era of brutal child labor where "ample work could be found for the agile bodies and nimble fingers of small children. . . ." Wycko v. Gnodtke, 361 Mich, 331, 335, 105 N.W.2d 118, 120 (1960). Instead of the

atmosphere of children (and wives), as being servants of the father and husband, modern society places much more emphasis and value on the family relationship and the comfort, love, society and attentions shared therein. A plethora of child labor laws and compulsory education laws virtually guarantee that, except in unusual circumstances, children will not be an economic asset to their parents, and properly so. Therefore, Yordon properly recognizes the modern family relationship between parents and their children and assigns proper recognition of the impact of wrongful injuries to a child on that relationship. No good reason exists to turn back the clock.

ISSUE II

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?

The District Court correctly noted that the law of Florida allows parents to recover for the loss of services of a tortiously injured minor child. However, the Court found that no such damages should be awarded in this case because "the cost of maintaining [a child] to maturity would normally exceed the value of any services which might likely be rendered by the child to the parent", citing Gresham v. Courson, 177 So.2d 33, 37 (Fla. 1st DCA 1965); Johnson v. United States, 780 F.2d 902, 908 (11th Cir. 1986) and Williams v. United States, 681 F.Supp. 763 (N.D.Fla. 1968). The Government now relies on these cases to say that although Florida law allows the recovery for loss of services, such recovery can only be had if the child has shown extraordinary income producing ability. In no injury case in Florida is it ever mentioned that the plaintiff is entitled to only recover under those circumstances.

The cases cited by the lower court and the Government were all cases involving the death of a minor

child. In those circumstances, one Florida court has recognized the offset rule because the cost of maintaining the child to majority will not be borne by the parents. However, no Florida case has recognized that rule in cases in which the minor is injured as opposed to killed. See, e.g., Yordon v. Savage, supra at 846; Selfe v. Smith, supra at 350; City Stores v. Langer, supra at 622. The logical reason that such a setoff has not been allowed in injury cases is that the parents of the injured child still must bear the costs of food, shelter, clothing, etc., to maintain the child until majority. The Dempseys will continue to face those costs in this case. Contrary to the Government's argument, the award made by the Court below for Loren's benefit did not include any amounts for food, normal shelter or clothing. Those awards covered only the costs of care and her loss of earning capacity after majority. In fact, the Court refused to award certain medical costs because she found those to be normal medical exams every child must have (Government App. p.49).

The certified question and argument of the Government truly misstates the issue. If the child has extraordinary income producing abilities, the award to

the parents would not be for loss of services at all. It would be an award for the child's loss of earning capacity during minority. See, Wilkie, supra at 227. Therefore, if Gresham correctly states the law of Florida as applied to injury as well as death cases, Florida does not recognize the parents' right to recover for loss of services as an element of damages for wrongful injury to a minor child.

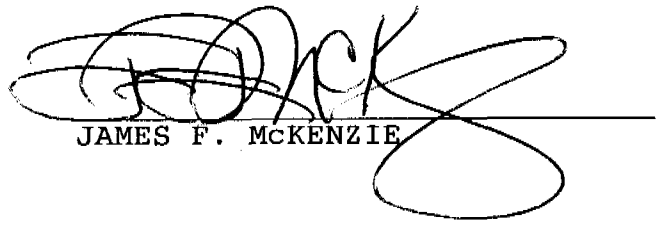
Therefore, the Court should answer the certified question affirmatively.

CONCLUSION

Based upon the foregoing arguments, both certified questions should be answered affirmatively. Yordon v. Savage, supra, states the appropriate rule as to parent's rights to recover for damage to the parent-child relationship in modern society. No logical basis exists for overruling that decision.

Additionally, the logic of offset of costs of rearing against lost services in a death case does not logically transfer to the injury situations when the costs of maintaining a child to majority continue to exist.

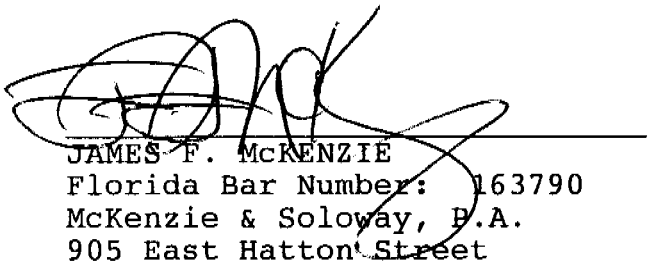
Respectfully submitted,



JAMES F. McKENZIE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and 7 copies of the foregoing have been furnished to Sid J. White, Clerk, Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida, 32399, and a copy to William G. Cole, Esquire, Appellate Staff, Civil Division, Room 3617, Department of Justice, Washington, D.C., 20530-0001, by United States First Class Mail, properly addressed and postage prepaid on this the 14th day of June, 1993.



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