IN THE SUPREME COURT OF FLORIDA

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CASE NO: SC 00-1555

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LUIS JOHN CRUZ, by and through his Parent, JANE ALICE CRUZ and JANE ALICE CRUZ, individually,

Petitioners,

v.

BROWARD COUNTY SCHOOL BOARD,

Respondents.

BRIEF OF AMICUS CURIAE ACADEMY OF FLORIDA TRIAL LAWYERS

RICHARD A. BARNETT, P.A.
121 S. 61st Terrace, Suite A
Hollywood, FL 33023
Telephone: 954/961-8550
Telefax: 954/961-1810

CERTIFICATE OF FONT

I hereby certify that the size and style of type used in this brief is 12 Point Courier New, a font that is not proportionately spaced.

TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

Statutes

SUMMARY OF ARGUMENT

The development of the claim for loss of consortium has paralleled the demise of the master-servant doctrine as applied to the family. As servants of the master, the wife and the child were considered chattel of the husband. Their only value to the master was a pecuniary value, which, in the case of the child, ended with majority along with the right of the father to recover for services and earnings if the child was injured or killed.

Since the turn of the century, Courts have discarded the master-servant relationship as a rationale for limiting consortium claims. In 1926, this Court was one of the first in the nation to reject the notion of child as chattel, holding that fathers could recover for lost care and companionship of a minor child. In 1973, this Court accorded the same right for mothers.

This same historical process of experience and justice overcoming logic and injustice ought to result in the parent's right to sue for the lost care and companionship of their child regardless of age. The reality of relationships of families, who care for each other, are such that they are inevitably and

inextricably, interconnected such that the biological fact of the
child reaching a certain age has no relationship whatsoever to the quality of love and caring he or she feels for his or her

parents or the parents for the child. The legislature of Florida
has recognized that fact by amending its Wrongful Death Act to permit a claim for loss of care, comfort, society and companionship sustained by the parent for the death of his or her adult child. In extending the right of consortium for adult children who have suffered a severe injury, e.g. paralysis, amputations, disfigurement, brain damage, traumatically induced mental illness and the like, the emotional torture to parents can exceed that of parents of a deceased child.

Eighteen is not a magic number. Family love and caring does not stop at the child's birthday. In fact, if the family is loving, that love will continue and grow stronger. Juries can evaluate the validity of consortium claims as they have for many years. Cutting off consortium rights at majority, is illogical and inconsistent with common sense and experience.

This Court should recognize the right of a parent to recover for lost comfort and companionship of a severely injured adult child.

ARGUMENT

PRESENT DAY FAMILY LIFE AND THE HISTORICAL DEMISE OF THE MASTER-SERVANT RELATIONSHIP PROVIDE THE FOUNDATION FOR THE EXTENSION OF CONSORTIUM RIGHTS TO PARENTS OF SEVERELY INJURED ADULT CHILDREN. THE LEGISLATURE HAS RECOGNIZED THE RIGHT FOR THE WRONGFUL DEATH OF AN ADULT CHILD. THE REASON IS SIMPLE. THERE IS NO AUTOMATIC SHUT OFF SWITCH ON FAMILIAL LOVE AT AGE EIGHTEEN. CUTTING OFF CONSORTIUM RIGHTS AT MAJORITY IS ILLOGICAL AND INCONSISTENT WITH COMMON SENSE AND EXPERIENCE. THIS TRUTH SHOULD COMPEL THIS COURT TO RECOGNIZE A CAUSE OF ACTION FOR LOSS OF CONSORTIUM DUE TO SEVERE INJURY TO AN ADULT CHILD.

INTRODUCTION

Judge Oliver Wendell Holmes once stated, “The life of the law is not logic but experience.”

In evaluating whether to extend filial consortium claims to parents of severely injured individuals who have reached the age of majority, Holmes’ observation could not ring more true.

HISTORY OF CONSORTIUM CLAIM

The existent doctrinal obstacle to extending filial consortium to adult children is the notion that emancipation frees parents and children from their reciprocal obligations of support and obedience. At majority, the historical parental right to services and earnings ends, but so does the right to recover for them upon injury to the adult child. Wilkie v. Roberts, 109 So. 2d 225, 227 (Fla. 1926), Frank v. Superior Court of the State of Arizona, (Ariz. 1986).

The Supreme Court of Hawaii in Masaki v General Motors,780 P. 2d 566, 576-577 (Haw. 1989), concluded that the master-servant doctrine was outmoded and illogical in regard to ending filial consortium at majority. At common law, the child, like the wife, was relegated to the role of a servant

and considered an economic asset of the family. In the modern family, children are more of an economic burden than asset. Today, children are valued for their love, comfort, society and companionship, services have

become only one element of the consortium action. These emotions do not end at majority.

This same historical process of experience and justice overcoming logic and injustice, finally resulted in consortium rights for women. For just as the child was chattel so too was his mother. 3 W. Blackstone, Commentaries of the Law of England 433-35 (Ord ed.1884) It was not until 1950 that the Court of Appeals for the District of Columbia Circuit became the first court in this country to hold that wives, like husbands, could sue for loss of consortium caused by negligent injury. Hitaffer v. Argonne Co., 183 F. 2d 811 (D.C. Cir. 1950) cert. denied 340 U.S. 852 (1950).

Nearly all states have extended the consortium cause of action to wives rather than abolish it for husbands. This approach demonstrates the evolution of the right of action from its common law origins. Frank, supra 959 (1986).

In Wilkie v. Roberts, 109 So. 225 (Fla. 1926), this Court, was one of the first in the United States to reject the antiquated common law theory that the child was a chattel and recognized a father’s right to the minor child’s companionship.

Then in 1973, in Yordon v. Savage, 279 So. 2d 844 (FL) this

Court recognized the mother’s right to recover losses sustained

as a result of a negligent injury to her minor child. The court
specifically included companionship, society and services.

DEMISE OF MASTER-SERVANT DOCTRINE RELATION TO CONSORTIUM

The Arizona Supreme Court in Frank, supra p. 959-960 (1986) observed that, even states which recognize the parent's action for injuries to a child restrict the action to minor children.

The doctrinal basis of master-servant is clearly long overdue for judicial burial. The emergence of companionship and society as the primary components of the action, has vitiated the legitimacy of any age distinction in filial consortium actions.

In USA v. Dempsey, 635 So. 2d 961,(Fla. 1994) the government alleged that the prior decisions of this Court did not specify the damages allowed for lost consortium of a minor child. Thus, the Court stated that a parent may recover not only for loss of a child's services and earnings, present and future until the end of minority, but also for companionship and society.

The Dempsey court explained its understanding of the common

law basis for rejecting filial consortium claims for the minor child that companionship was not recoverable because the parent child relationship was a master-servant relationship in which the child was considered chattel. This Court reaffirmed the rejection of what it characterized as “this antiquated

perception."

Dempsey, supra p.964 (1994)reiterated the framework used by the Yordon Court in extending the common law rule of filial consortium to women.

> "...when our common law rules are in doubt, this Court considers the 'changes in our social and economic customs and present day conceptions of right and justice.' (cites omitted)"

In 1973, when Yordon was decided, it was apparent that a child's companionship and society were of far more value to a parent that services. Their recognition as elements of compensation reflect our modern concept of family relationship. Dempsey, p. 964 (1994).

MODERN DAY FAMILY AND EXTENSION OR CONSORTIUM PAST MINORITY

Amicus submits that applying this Court's criteria, modern concepts of family relationships does not stop at majority. In this complex economy, interdependence extends through out the lives of parents and children. At majority, many children are entering college and maintain close familial relations with their parents. Whether they attended college locally or simply go to work, it is not uncommon for them to live with their parents.

This arrangement may persist through early adulthood as the child saves money for his or her own home. When children marry,

weekends, holidays and baby-sitting days are all times of mutual dependence. In later years, when one or both parents may need financial or medical support, the dependencies may reverse but not the care, comfort, companionship and society.

In our modern day postindustrial culture, which emphasizes "family values", it is impossible not to see the inevitable, inextricable, interconnection between parents and adult children. There is no more compelling argument for the recognition of a cause of action for filial consortium for adult children that the one established by this Court that earlier expansions of the doctrine were supported by the "changes in our social and economic customs and present day conceptions of right and justice."

LEGISLATIVE INTENT SUPPORTS EXTENSION OF CONSORTIUM

The Dempsey Court, in affirming a cause of action for loss of consortium for an injured minor, argued that it was not precluded from recognizing a right of action simply because the legislature has not done so.

Today, the legislature has recognized a right to recover for a loss of adult filial consortium for wrongful death.

FLA. STAT. §768.21(4) (1999)

> "Each parent of an adult child may also recover for mental pain and suffering if there are no other survivors."

This legislative recognition occurring after the Dempsey decision, can only be interpreted as supporting this Court's recognition, in the context of personal injury, what the legislature has recognized, through the Wrongful Death Act, that a parent should recover for lost companionship, pain and suffering due to the death of an adult child. There is a legislative intent to approve consortium damages for an adult child. See also: Frank, supra p. 960 (1986).

DEATH VERSUS SEVERE INJURY

One must wonder, as did the Superior Court of New Jersey, in Mealy v. State Farm, 744 A. 2d 1226 (N.J.Sup.Ct.1999). Whether there is a meaningful distinction between death and severe injury where the effect on consortium is concerned?

Often, the difference between the two is a mere fortuity. There is no question that death is a total deprivation of society and companionship.

Yet, consider the loss at bar in which the child has been

retarded but a kind, loving, happy boy who, by all accounts is a

now a demonic danger to himself and others. A permanent reversal from Dr. Jekyll to Mr. Hyde, if you will. He is still alive to

love, but can he be loved, and will he remain at home or be institutionalized. Imagine lifetime visits during which time the parents will have to watch their once happy little boy suffer as a tormented soul.

Could it not be said that sometimes the loss of companionship and society experienced by the parent is even worse for a severely injured child than for the deceased child? Frank, supra 957-958 (1986).

MINORITY VERSUS MAJORITY

As so articulately stated by the Arizona Supreme Court in Frank, p. 960 (1986)

> "Surely nature recoils from the suggestion that the society, companionship and love which compose filial consortium automatically fade upon emancipation; while common sense and experience teach that the elements of consortium can never be commanded against a child's will at any age. The

> filial relationship, admittedly intangible is ill-defined by reference to the ages of the parties and ill-served by arbitrary age distinction. Some filial relationships will be blessed with mutual caring and love from infancy through death while others will always be bereft of those qualities.
>
> Therefore, to suggest as a matter of law that compensable consortium begins at birth and ends at age eighteen is illogical and inconsistent with common sense and experience. Human relationships

> cannot and should not be so neatly boxed. "The law does not fly in the face of nature but rather acts in harmony with it." Harper v. Tipple, 184 P. 1005,1006 (1919).

INCREASED LAW SUITS

Opponents will argue that an expanded class of Plaintiffs will increase litigation. This objection has been raised with every argument for a new cause of action. In fact, the function of trial courts is to evaluate and process lawsuits. These fears have been likened to the "boy who cried wolf" and have proven groundless. Ingber, Rethinking Intangible Injuries: A Focus on Remedy, 73 Calif. L. Rev. 772, 817 (1985). In these cases, because the injury must be so severe as to constitute a permanent total disability, there should not be a substantial increase in litigation.

CONCLUSION

Amicus believes that based on the "changes in our social and economic customs and present day conceptions of right and justice" this Court should reach the conclusion of the Supreme Court of Arizona as cited by the Fourth District Court of Appeals in its opinion certifying this case, Broward County School Board v. Cruz, 761 So. 2d 388 (Fla. 4th DCA 2000) to you:

> “In particular, we can find no reason for limiting the class of plaintiffs to parents of minor children when the parents of adult children may suffer equal or greater harm. Why

should the parents of an injured seventeen year old be allowed to recover for loss of consortium, but not the parents of an injured eighteen year old?" Frank, supra, 961 (1986).

CERTIFICATION

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to Counsel for Appellee, Gale Ciceric Payne, Esquire, at Gale Payne and Associates, 1220 East Broward Boulevard, Fort Lauderdale, Florida 33301 and counsel for Appellants, Amy D. Ronner, Esquire, 16400 N.W. 32nd Avenue, Miami, Florida 33054 and Bruce J. Winick, Esquire, Pro Hac Vice, 1311 Miller Driver, Coral Gables, Florida 33134 on this 9th day of October, 2000.

RICHARD A. BARNETT, P.A.
121 S. 61st Terrace, Suite A
Hollywood, Florida 33023
Telephone: 954/961/8550
Telefax: 954/961-1810

By:_____
RICHARD A. BARNETT, ESQUIRE
Fla. Bar Number: 257389