IN THE SUPREME COURT OF FLORIDA

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CASE NO. SC00-1550

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LOWER TRIBUNAL NO: 4D98-2170

LUIS JOHN CRUZ, ETC., ET AL.

Petitioners,

-vs-

BROWARD COUNTY SCHOOL BOARD

Respondents.

RESPONDENT'S ANSWER BRIEF ON THE MERITS

ON REVIEW FROM THE FOURTH DISTRICT COURT OF APPEAL

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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.

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Introduction

Both the trial court and the *en banc* appellate court determined that a loss of filial consortium award to a parent was recoverable only to the end of the child's minority.[1] This is the majority rule and it makes good sense. What it means is that you don't get child damages for someone who is no longer a child. Since allowing a parent to recover virtually limitless filial consortium damages for an adult child is simply bad law and bad policy, we respectfully request this Court to agree with the *en banc* decision below and affirm.

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[1] The transcript of the trial, which is part of the record below is designated as T. The Supplemental Record filed in the Fourth District Court of Appeal is designated as SR. All other portions of the record are designated as R. Petitioners' Initial Brief on the Merits is designated as petitioners' brief. The Brief of the *Amicus Curiae* of Florida Trial Lawyers is designated as *amicus* brief.

With respect to the other points that petitioner tries to tack onto the certified question, this Court should either decline review or simply affirm the correct *en banc* ruling below.

Proceedings In The Trial Court

When Luis John Cruz ("Cruz"), a student, was pushed to the ground by another student at a high school, Cruz and his mother, the Petitioners, sued the Broward County School Board ("School Board"), the Respondent. It was undisputed that Cruz was born three months premature with significant brain damage (T. 776, 783, 1068, 1547-48) and one of the School Board's liability defenses was that the incident at school did not cause Cruz's condition and that all or most of Cruz's problems existed at birth or were due to problems unrelated to the incident (R. 7-9; T.35; 453-54, 4327).

1. The Loss of Filial Consortium Damages

Near the end of the trial, the School Board had multiple objections to the issue of loss of filial consortium going to the jury (T. 4513-14, 4668). The School Board argued that there was insufficient evidence to show what was required - - namely, that Cruz had a permanent total disability and that the School Board caused it (T. 4513-13, 4668). Also, the School Board pointed out that the filial consortium award had to be limited to the age of minority and that Cruz was already 19 years old (T. 4517-20,

4535-36). The judge ruled that the filial consortium issue would go to the jury and that the parties could argue it post judgment (T. 4513-14). The judge instructed the jury to determine the amount of damages sustained by Mrs. Cruz for the loss of her child's comfort, society and attentions(T. 4701).

The jury found the School Board to be negligent and awarded Cruz $2,697,725.00 and Cruz's mother $3,500,000.00 (R. 708-11; T. 4721). While the judge denied all of the School Board's other post trial motions, it remitted the mother's award to $1,000,000.00 (R. 706-7).

2. The Independent Neurological Exam

Before trial, the School Board scheduled Cruz for an independent neurological exam to be conducted by Dr. Brown, a pediatric neurologist (R. 156-59; T. 3773-74). Cruz at first agreed to this, but later canceled the appointment (R. 159-60). When the School Board filed a motion seeking an order compelling attendance, Cruz opposed it and stated:

> Plaintiff has not put his neurological condition at issue insofar as Plaintiff has not retained a neurologist. Thus, as Plaintiff is currently intending to present no testimony from a neurologist, there is no need for Defendants to subject Plaintiff, Luis John Cruz to such an examination (R. 159-60).

At a hearing, Cruz's counsel represented to the judge that Cruz's "neurological [condition] was not an issue," that they "were not claiming [that Cruz had] a neurological deficit," but

that his injuries were purely "psychiatric" (R. 159-60; SR. 1-6; 274-93). Further, Cruz's counsel argued that a neurologist would be "overbroad," and that the experts were "evenly matched" because the School Board had a psychiatrist that had examined Cruz (SR. 1-10). In reliance on these representations, the trial court barred the examination(R. 293).

Later, the School Board learned not just that Cruz's counsel's representations were false, but that neurological injury was the very heart of the Cruz case: Specifically, the School Board had received the report of Dr. Afield, Cruz's neuropsychologist, that showed that Dr. Afield had done neurological testing on Cruz in January (SR. 14-17). The report was dated January 2, 1997, but the School Board had not received it until a mediation attempt on May 28, 1997 (SR. 14). Consequently, the School Board sought sanctions and other remedies. At the hearing on its motion, the School Board presented the deposition of Dr. Appel, Cruz's other neuropsychologist, who indicated that she would be testifying about a neurological injury (SR. 18-29). The School Board also presented the court with Cruz's March 1997 answers to interrogatories in which Cruz's counsel represented that a summary of the grounds for each opinion of each expert was "unknown at present."(SR. 19-29). At that point, the School

Board asked the court to at least continue the trial and give them an opportunity to have an independent neurological examination (SR. 62-63).

Cruz's counsel, however, fought against the exam and against the continuance. She argued, among other things, that the defense request for the exam was just a trick to get a continuance (SR. 32).[2] The trial court refused to delay the trial to enable the School Board to have its own medical examination (SR. 70-80). The School Board renewed its request for this exam at every conceivable juncture(R. 1029-32, T. 3773-74, 3777-78).

At trial, Cruz asserted that he had neurological injuries and organic brain damage as a result of the accident (T. 3774). At trial, Dr. Appel, Cruz's neuropsychologist, offered neurological opinions (T. 983-1204). Dr. Afield, the other Cruz expert that had conducted neurological testing of Cruz, opined on these tests (T. 1545-52, 1596-97, 1648-62). While the School Board was detrimented in the cross-examination and rebuttal of such testimony, what made matters worse was that when the defense offered the testimony of Dr. Brown, Cruz's counsel was allowed to go ahead and question Dr. Brown about **his** failure to conduct his own exam (T. 4252-53, 4279-82). In an unsuccessful motion for a

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[2] The argument of Cruz's counsel is summarized in the decision below. Broward County School Board v. Cruz, 761 So.2d 388, 392 (Fla. 4th DCA 2000) (*en banc*).

new trial, the School Board asserted that the preclusion of the exam had impaired its ability to cross examine Cruz's experts and present its defense that the School Board did not cause Cruz's problems (R. 1029-32).

Proceedings In The *En Banc* District Court

The School Board appealed the final judgment in the Fourth District Court of Appeal. Broward County School Board v. Cruz, 761 So.2d 388 (Fla. 4th DCA 2000). On appeal, the School Board had four points, three of which it argued required a new trial[3] and one, which it argued required an order on remand striking the filial consortium award in its entirety.[4]

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[3] Point I was a compound point, in which the School Board argued that the trial court erred in allowing Cruz to accuse the defense of discovery abuses, concealment and other nefarious acts. Point II, related to Point I, was based on Cruz's improper and inflammatory opening, closing and rebuttal argument. Point III, also a compound point, involved three independently reversible errors that gutted the School Board's defense that the incident did not cause Cruz's condition.

[4] Point IV dealt with the impropriety of the loss of filial consortium award. As the School Board pointed out, such a recovery is improper if there is no permanent total disability. The problem was that Cruz could not and did not satisfy that heightened standard and that that failure made the award itself improper. Since the *en banc* Fourth District remanded this case for a new trial on liability and damages, it deemed it unnecessary to address that issue, which could be reconsidered by the jury on re-trial if appropriate. Broward County School Board v. Cruz, 761 So.2d 388 (Fla. 4th DCA 2000).

The *en banc* Fourth District[5] agreed with the School Board that it should have been allowed to conduct an independent neurological examination of Cruz. In short, the appellate court stated that the trial court's refusal to afford the defense an opportunity to have its own expert conduct this examination was harmful and deemed the School Board entitled to a whole new trial. Id. at 393-94. In so doing, the Fourth District stated:

> Because the cause of Cruz's mental condition and specifically, the change, if any, in his neurological state, was the central issue in this trial, the School Board should have been allowed the opportunity to have its own expert conduct an independent examination. We have not overlooked the fact that, because Cruz had already undergone a neurological examination, a second one could not safely be performed on him prior to the date set for trial and without a continuance for a significant period of time. We nevertheless hold that, under the circumstances, it was an abuse of discretion not to grant the continuance. Further, we reject the argument that the error was harmless solely because neither party's neuropsychologist was able to conduct his own examination and both were called upon to testify by reviewing the data compiled by a third doctor.

Id. at 393-94.

In the Fourth District, Cruz had lodged a cross appeal based

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[5] A three-judge panel heard oral argument in this matter, but the Fourth District went *en banc* to decide the case because it wished to reexamine its own decision in Executive Car & Truck Leasing, Inc. v. DeSerio, 468 So.2d 1027 (Fla. 4th DCA), rev. denied sub. nom., Commercial Union Ins. Co. v. DeSerio, 480 So.2d 1293 (Fla. 1985)and decide whether a neuropsychologist is qualified to render an opinion about the cause of organic brain damage. Broward County School Board v. Cruz, 761 So.2d 388 (Fla. 4th DCA 2000).

on the trial judge's decision that a filial consortium award should be capped at the end of the child's minority years. Id. at 395-396. The School Board argued that Cruz's cross appeal should be rejected for two main reasons: first, Cruz's contention that the seminal filial consortium case, United States v. Dempsey, 635 So.2d 961 (Fla. 1994), supported a limitless award was simply wrong. Id. As the School Board pointed out, a responsible reading of Dempsey showed that Florida had already implicitly limited such damages to a permanently and totally injured child's minority years. Id. Second, the School Board asserted that allowing a parent to recover filial consortium damages for an adult child is simply bad law and bad policy. Id.

The *en banc* Fourth District agreed with the School Board on the cross appeal as well, declining to "interpret Dempsey as having either expressly or impliedly broadened the recovery to a time beyond the child's majority." Id. at 396. Consequently, the district court concluded that if the jury found on remand that Cruz suffered a severe, permanent injury that the filial consortium award to Cruz's mother should be calculated only from the date of the incident to the date that Cruz attained majority. Id. The Court also certified the following question as one of great public importance: "Whether the award for loss of filial consortium to a parent extends beyond the child's age of majority

when it has been determined that the child has sustained a permanent total disability?" Id. The petitioners sought a clarification and rehearing in the Fourth District, which was denied.

STATEMENT OF THE FACTS

This whole case began with a bump on the head at school ("the Incident").

Before the Incident

It was undisputed that Cruz was born three months premature with significant organic brain damage (T. 776, 783, 1068, 1547-48). According to various doctors, Cruz had, among other things, a right hemisphere deficit, cerebral palsy, developmental dyslexia, mental retardation, echolalia, visual field defects, and schizophrenic or schizo-affective disorder (T. 765, 866-76, 1116, 1156-60, 1437-58, 1651-52, 3744-45).

Before the 1993 incident, Cruz, as a mentally handicapped student, was in the exceptional student education cluster ("ESE") program at school (T. 479, 574-75). Although he was 15 at the time, his abilities had reached a plateau and he was functioning at about a second or third grade level(T. 554-55). While teachers found Cruz to be generally obedient(T. 483-84, 581-82), several teachers had noticed a number of serious escalating behavioral problems (T. 577-80,2091-96, 2099-2100, 3123-24, 3130,

3255).[6] According to Cruz's mother, however, her son was not retarded and had no real behavior problems before the incident (T. 2181, 2462-64).

Cruz's mother admitted, however, that her son was sensitive to family problems(T. 2514). There were in fact several major family troubles: Cruz's father, a doctor, who was the subject of a malpractice action in which a female patient had charged him with sexual molestation, had had his license suspended (R. 593-600;T.842, 2612-15) and domestic violence plagued the Cruz home (T. 2223-26, 2242, 2586-91).[7] In the trial, the School Board

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[6] By way of example, Ms. Siskind, one of Cruz's teachers, said that before the incident when Cruz would get agitated or anxious, he would repeat and talk to himself and that Cruz was regressing from an emotional standpoint (T. 577-80, 616-17) Ms. Carroll, a school administrator, said that before the incident Cruz had problems with communication, social skills, peer interaction, eye contact and head nodding (T. 2091-96). Cruz also had "great difficulty staying on task" and would get "frustrated" when "he didn't get immediate help" (T. 2099-2100). Ms.Peskin, a teacher, said that Cruz was vulnerable to other students being able to "push his buttons" (T. 3123-24). He noticed that when Cruz "got angry. . . he would take on the persona of a power ranger or one of his fictional characters" or "demonstrate his Tae-Kwon-do," which students saw as "antagonistic." (T. 3124). Cruz's anger would "escalate into a verbal battle" where Cruz would threaten to "smash and do some karate thing" to other students (T. 3130). Ms. Esposito, another teacher, had similarly observed Cruz "walking around the room talking about being a 'super hero'" (T. 3255).

[7] The trial judge, however, did not let all of the details pertaining to these matters go to the jury (T. 2612-15).

took the position that all or most of Cruz's problems were preexisting and that family turbulence had contributed to them (T. 842, 2586-91). Cruz's mother, however, asserted that the incident at school was what caused her son's problems (T. 2242).

The Incident

The Cruz incident occurred between classes on November 30, 1993 when Donny Velasquez, another student with a learning disability, came to the ESE area for part of the day (T.525, 555). No one disputed that Velasquez was where he was supposed to be at the time of the incident (T. 3079, 3136-37). No one disputed what one teacher said, that Velasquez was not considered a violent child (T. 525, 555).

According to Cruz, he went to shake Velasquez' hand and Velasquez pushed him (T. 2898-99). Velasquez and another boy, however, said that when Velasquez shook Cruz's hand, Cruz hit him with a karate chop and it was then that Velasquez pushed Cruz (T. 3039-42, 3067-71). Eye witnesses said that the whole thing took place in a matter of seconds (T. 717-18, 3076). One witness observed that Cruz was not unconscious and that he was screaming and holding his head (T. 726).

That day, Cruz's mother came to school and said that she saw a bump on her son's head (T. 2193-94). Mrs. Cruz then drove her son to a clinic and the X-rays looked normal (T. 2195, 2406-09).

After the Incident

According to Cruz's mother, her son was in bad shape after the incident, made weird sounds and had rages (T. 2197-99).

Doctor Schwartz, who examined Cruz the very morning after the incident, ordered a CAT Scan, which did not "show any acute abnormality" and an EEG, which was also normal (T. 776-77). According to Dr. Schwartz, Cruz's condition occurred either "at birth or shortly after birth" and was "potentially consistent with Cruz's three month premature delivery." (T. 776). Dr. Schwartz said that there was simply "no objective" or "outward manifestation of head trauma." (T. 778-79).[8]

Dr. Schwartz sent Cruz to Dr. Weiner, a psychiatrist, who, after treating him from December 1993 to June 1995, diagnosed Cruz with post traumatic stress disorder (T. 815-22, 3618-19). When Cruz's mother went to see Dr. Weiner in December of 1993, she reported that her son was "85 percent back to normal" and that he was riding his bike and sleeping well (T. 2644). About a year after the accident, Dr. Weiner, who had medicated Cruz, felt that Cruz could return to school on a trial basis (T. 850-

[8] When Dr. Weiner referred Cruz for another neurological work up with Dr. Hoche, the brain scan showed "the same changes that [Cruz] had as a result of his problems at birth" (T. 3578). Dr. Hoche ruled out subdural hematoma, found Cruz's spontaneous mobility to be normal and said that Cruz had post traumatic syndrome. (T. 3593-96).

51). In 1997, Cruz said at his deposition that he has fun, goes to the mall, shops for clothes and has his own checking account (T.2893).

Mrs. Cruz took her son to a different psychiatrist, Dr. Klass, who similarly diagnosed Cruz with "an adjustment disorder to a traumatic event"(T. 1443, 4117). He opined that Cruz had a schizophrenic disorder, but that was due to his preexisting condition and not attributable to the school incident (T. 1444).

Dr. Levitt, a psychologist who examined Cruz in April of 1995 and tested Cruz's IQ after the incident, said that he saw no difference between Cruz's scores before and after the incident (T. 869, 926-32). He also said that Cruz' motor functioning, learning and memory were the same in 1995 as they were before the accident (T. 930-32). Dr. Levitt concluded that there was no "neuropsychological impairment" and no permanent injury from the incident (T. 934-35, 940).[9] He said that the work prognosis for Cruz was that before the accident he could have done some simple jobs and that he could do the same simple jobs after the accident. (T. 942-43). Ms. Griffin, a rehabilitation counselor and Cruz expert, felt differently: she said that Cruz was no

[9] Similarly, Dr. Mutter a psychiatrist, who saw Cruz in March of 1997, said that Cruz was "cooperative and relatively coherent" and found no evidence of thought disorder and felt that Cruz had treatable post-traumatic stress disorder (T. 3722-29, 3802-5).

longer employable (T. 1873, 1960).

Dr. Russell, a neuropsychologist, who tested Cruz in 1997, opined that there was no permanent psychological injury and that Cruz would have manifested the same behavior even if the incident had not occurred (T. 3961, 3970-71, 4004-07). According to Dr. Russell, children born like Cruz, reach a plateau and develop more extreme psychiatric disturbances as they get older (T. 3979-4007). According to Dr. Russell, Cruz would have needed medication and therapy in the future even if he had not bumped his head at school (T. 4031-32).

Dr. Brown, a pediatric neurologist, who reviewed the records, concluded that Cruz did not suffer organic brain injury from the incident, but had post traumatic stress syndrome (T. 4210-15). Further, Dr. Brown said that if there had been a lump on the back of Cruz head, as Cruz's mother had indicated, the CAT scan would have picked it up (T. 4226).

Cruz's expert, Dr. Afield, a neuropsychiatrist, said that Cruz, who already had brain damage before the incident, had suffered an additional "pugilistic insult" (T. 1545-52). Dr. Afield opined that Cruz's EEG after the incident was abnormal and that Cruz would not get well (T. 1648, 1662). Dr. Appel, another Cruz expert, a neuropsychologist, opined that Cruz had organic brain damage as a result of the incident and that Cruz would get

worse and need to be institutionalized (T. 1146, 1170, 1180-1204).

SUMMARY OF THE ARGUMENT

In Point I, Cruz invites this Court to upset the *en banc* decision that the filial consortium award should be limited to a child's minority years. We submit that such an invitation should be rejected for multiple reasons.

First, as a preliminary matter, we show that a reasonable reading of United States v. Dempsey, 635 So.2d 961 (Fla. 1994), the seminal Florida filial consortium case, and this Court's approach to cases that precede Dempsey establish that this Court has unwaveringly disfavored the expansion of filial consortium awards to include recovery for adults.

Second, we address policy and explain that there is no reason now to either expand Dempsey or change the law to give parents essentially limitless filial consortium awards. That is, limiting filial consortium awards to minority years comports with our modern concept of family relationships. Specifically, in the modern world, once majority is attained, the parent-child relationship changes. Thus, today's adult children typically leave their parents and live independently.

Also, we show that some states that have declined to allow filial consortium recovery for adult children, have considered

the fact that the law imposes no obligation on parents to support adult children. We submit that the same rationale applies in our state as well. Further, as other states have recognized, because loss of parental consortium is limited to minor children, loss of filial consortium should be treated similarly. Again, we submit that the same rationale applies in our state as well.

Further, in connection with the policy analysis, we explain that while there are multiple reasons to affirm the *en banc* court below, there are no legitimate reasons to overrule it. In this regard, we emphasize that filial consortium deals with indirect recovery by individuals who are not the direct victims of the tort. As such, allowing awards to parents of adult children creates a whole new class of plaintiffs, spawns litigation, invites virtually limitless liability for tort defendants and raises insurance costs. We demonstrate, moreover, that the eradication of the filial consortium cap here would only encourage excessive awards and that keeping the cap where it is would not prevent a jury from making plaintiffs whole.

Third, we examine the few cases that the *amicus* and petitioners have cited and show that they are either inapplicable or just poorly reasoned.

In addition, we respond to Cruz's second point, the one that attempts to piggyback on the certified question, and explain that

this Court should not reconsider the *en banc* courts record-based determination that the trial court abused its discretion in denying the School Board's request to permit its expert neurologist to conduct an independent neurological examination of the plaintiff. In any event, that determination below was clearly correct because the trial court's ruling significantly impaired the School Board's ability to defend on the critical issue of whether the alleged damages were caused by the bump on the head or were pre-existing.

Finally, we respond to Cruz's putative fall-back third point, that the new trial should be limited to damages. As the *en banc* court found, a new trial is required on liability as well as damages because the denial of the requested independent neurological examination hampered not only the School Board's defense on damages, but also its principal defense on the merits - - namely, that Cruz's alleged condition was pre-existing and not caused by any breach of the duty of care that the school owed to Cruz.

ARGUMENT

I.

THIS COURT SHOULD AFFIRM THE *EN BANC* DECISION LIMITING THE FILIAL CONSORTIUM AWARD TO THE MINORITY YEARS

The *en banc* decision capping the filial consortium award at

the point at which a child attains the age of majority is correct. Not only is it consistent with this Court's decision in United States v. Dempsey, 635 So. 2d 961 (Fla. 1994) and the vast majority of courts that have considered the issue, but it is also better policy for multiple reasons.

A.

THIS COURT HAS ADOPTED A RULE LIMITING FILIAL CONSORTIUM DAMAGES TO THE MINORITY YEARS

United States v. Dempsey, 635 So.2d 961 (Fla. 1994) is the seminal filial consortium case in Florida. Contrary to what appears to be Cruz's contention, the correct reading of Dempsey and this Court's approach to the cases preceding Dempsey indicate that this Court has consistently disfavored expanding filial consortium awards to include recovery for adults.

Before the Dempsey decision, there was a case Wilkie v. Roberts, 91 Fla. 1064, 109 So. 225 (1926), in which this Court recognized a father's right to recover the pecuniary loss suffered as a result of a **minor child's** injury. Somewhat later, in Yordon v. Savage, 279 So.2d 844 (Fla. 1973), this Court explained the Wilkie decision as follows:

> In Wilkie[,] . . . this Court held that the parent or guardian of an **unemancipated minor child**, injured by the tortious act of another, has a cause of action in his own name 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.

Id. at 846 (emphasis added).

In Yordon, this Court, following Wilkie, made the action available to mothers as well as fathers. As such, the award was still unequivocally capped at the point at which a child attains the age of majority. It is significant that this Court used the modifier "unemancipated" before the phrase "minor child." In so doing, this Court was saying that filial consortium damages would not be recoverable even for the period of a child's minority if that child were emancipated. A fortiori, this Court surely did not contemplate the availability of such damages after minority ends.

After Wilkie and Yordon, but before Dempsey, Florida courts did consider filial consortium issues. The cases consistently limited parental recovery to the child's minority years. See, e.g., Burden v. Dickman, 547 So.2d 170, 174 (Fla. 3d DCA), rev. denied, 577 So.2d 866 (Fla. 1989) (Award included "those special medical and educational expenses of raising [the child] **to majority**" and "detailed the prospective extraordinary medical and support expenses expected **during** [**the child's**] **minority**") (emphasis added); Caranna v. Eades, 466 So.2d 259, 265 (Fla. 2d

DCA 1985) (Award was for the "child's future medical expenses **during his minority**") (emphasis added); Brown v. Caldwell, 389 So.2d 287, 287 (Fla. 1st DCA 1980) ("[M]other's claim for medical expenses incurred on behalf of her daughter is limited to those expenses incurred **during the daughter's minority**")(emphasis added).[10]

In Dempsey, while this Court approved and clarified Wilkie and Yordon, it did not erase what had before been the filial consortium cap. As such, this Court implicitly approved what had worked satisfactorily for many years - - the limitation of parental recovery to a child's minority years. Also, significantly, the limitation existed for many years and the legislature never tampered with it.

Dempsey arose out of the federal appellate court asking this Court to resolve the question of whether parents may recover for the loss of a child's companionship and society when a child is severely injured. This Court concluded that "recognition of the loss of companionship element of damages clearly reflects our modern concept of family relationships." 635 So. 2d at 964. This Court simply felt that a rule that precluded recovery for the

[10] In Frank v. Superior Court of Arizona, 722 P.2d 955, 956 &n.2 (Ariz. 1986), the Arizona court listed Florida (citing the Yordon decision) as one of the states that restrict the loss of filial consortium actions to the parents of minor children.

loss of an injured child's companionship was "based on the outdated perception that children, like servants, are nothing more than economic assets to their parents" and that the "master-servant analogy no longer holds true." Id. Beyond that, this Court went no further. The Court did not change any other aspect of the filial consortium cause of action, and in all other respects, left the Wilkie and Yordon decisions intact did not extend child damages beyond the end of childhood.

Cruz attempts to avoid Dempsey's prohibition on the award of filial consortium damages beyond a child's minority by relying on the following sentence in Dempsey: "Accordingly, we hold that a parent of a negligently injured child has a right to recover for the permanent loss of filial consortium suffered as a result of significant injury resulting in the child's permanent total disability." Id. See petitioners' brief at 37. Cruz argues that the use of the words "child" and "permanent" before the phrase "loss of filial consortium" means that Dempsey authorized parents to recover for loss of consortium beyond a child's age of majority. But taken in context, this is not at all what Dempsey said.

By using the word "permanent" before the phrase "loss of consortium," Dempsey was qualifying the availability of consortium damages by limiting them to those that are permanent.

For example, if a child injured in an automobile accident is in a coma for one month but later recovers, the parents have lost the society and affection of the child for that one month, but may not recover for these damages because their loss of consortium was not "permanent." Only a "permanent loss of consortium" will be recoverable. But even though only such a permanent loss of consortium is recoverable, under Dempsey, it is not recoverable beyond the child's attainment of the age of majority. This is made perfectly clear by the Dempsey Court's description of its prior holding in Wilkie. According to the Dempsey Court, Wilkie had limited recoverable losses to "the loss of the child's services and earnings, present and prospective, to the end of minority. . ." Id. at 964 N.3. Upon the attainment of majority, those damages became no longer recoverable. Although Wilkie was limited to pecuniary losses, Dempsey expanded the common law in this area to encompass recovery for loss of society and affection. But nothing in Dempsey and certainly not in the language relied on by Cruz, further extended loss of consortium damages (both loss of the pecuniary value of the child and of the child's society and affection) beyond the age of majority.

On page 37 of their brief, petitioners quote a portion of the revised jury instruction 6.2(f) to support their position

that Mrs. Cruz should get damages for the rest of her son's life. But the jury instruction does **not** purport to adjudicate the issue *sub judice*; rather it properly leaves it to this Court. The Comment on 6.2(f) directly below the very instruction that Cruz quotes states, "Pending further developments in the law, **the committee takes no position on whether the recovery for loss of filial consortium extends beyond the child's age of majority**." Comment on 6.2f, Standard Jury Instructions - - Civil Cases, 25 Fla. L. Weekly S625, 626 (Fla. August 17, 2000) (emphasis added).

B.

LIMITING THE FILIAL CONSORTIUM AWARD TO THE MINORITY YEARS IS BETTER POLICY AND REFLECTS OUR MODERN CONCEPT Of FAMILY RELATIONSHIPS

In Dempsey, this Court expressed a valid concern: namely, that the filial consortium award should "reflect[] our modern concept of family relationships." United States v. Dempsey, 635 So.2d at 964. We submit that limiting such a filial award to the minority years better comports with our "modern concept of family relationships."

Here we emphasize what Cruz and the *amicus* avoid - - namely that a majority of courts that have considered the issue *sub judice*, have endorsed our position. See, e.g., Aurora v. Burlington Northern R.R.Co., 31 F.3d 724, 726-27 (8th Cir. 1994) (Nebraska would not recognize a claim by the parent of a

nonfatally injured adult child to recover for loss of consortium); Counts v. Hospitality Employees, Inc., 518 N.W.2d 358, 361 (Iowa 1994) (Parents could not recover loss of consortium damages for a child that had attained majority and was also emancipated); Schmeck v. City of Shawnee, 647 P.2d 1263, 1267 (Kan. 1982) (Parents of an adult child cannot pursue a consortium claim where State disallows loss of consortium claim for injuries caused by the negligence of another); Tynan v. Curzi, 753 A.2d 187 (N.J. Super. Ct. App. Div. 2000) (Parent could not maintain action for damages resulting from injuries to adult child); Michigan Sanitarium & Benevolent Ass'n v. Neal, 139 S.E. 841, 842 (N.C. 1927) (holding that parent of adult son who became deranged could not recover for loss of consortium because the damages were too remote); Cole v. Broomsticks Inc., 669 N.E. 2d 253, 256 (Ohio Ct. App. 1995), rev. denied, 663 N.E. 2d 1301 (Ohio 1996) (Ohio does not extend the loss of filial consortium action to the parents of adult children); Brower v. City of Philadelphia, 557 A.2d 48, 50 (Pa. Commw. Ct.1989), rev. denied 575 A.2d 569 (Pa. 1990)(Since child had attained majority, parents could not recover for loss of filial consortium); Morris v. State, 21 S.W. 3d 196, 200 (Tenn. Ct. App. 1999)("The majority rule in sister jurisdictions is persuasive that no . . . [parental] cause of action [for loss of society and companionship

of an emancipated adult child] is viable."); Boucher v. Dixie Medical Center, 850 P.2d 1179, 1183 (Utah 1992)(Court, following majority rule, declined to extend filial consortium damages to injuries involving adult or emancipated children); Estate of Wells v. Mount Sinai Medical Center, 515 N.W. 2d 705, 709 (Wis. 1994) (Court declined to extend the parent's filial consortium action to cover adult children). We respectfully request this Court to adhere to the Dempsey policy and align itself with the majority.

1. Today's Adult Children Are Independent.

The common law drew an analogy between a parent-child relationship and a master-servant relationship. As this Court recognized in Dempsey, the analogy derived from the agrarian model, which treated a child like a servant or "economic asset of the father." Id. at 963. In that agrarian society, people tended to be less mobile. Consequently, it was commonplace for adult children to either reside at home with their parents or live nearby and continue to "work the farm" or participate in the family business. The agrarian adult child was often expected to and indeed often did provide continuing services for his or her parents.

Yet, under the common law agrarian model, parental recovery was restricted to an "unemancipated minor child." Id. In those

days, it made **more** sense - - not less - - to allow pecuniary recovery for the adult child. That is, if ever there were a time to expand such recovery to adult children, it would have been in the past - - in that era under the aegis of the agrarian model that saw adult children as having achieved greater productivity and thus, as having maximized their value as an "economic asset" to their parents.

The agrarian model, however, no longer fits today. Today, the norm is for emancipated children to move away and live independently. In E.L.K., S.K., and R.K. v. Rohlwing, 760 F. Supp. 144 (N.D. Iowa 1991), a federal district court, concluding that Iowa law barred loss of consortium awards for adult children, explained why the legal distinction between a minor and an adult child makes sense in the modern world:

> Once emancipation or majority is attained, the [parent/child] relationship is different. The fact that there may be a continuing relationship between the parent and the adult child does nothing to diminish the fact that the relationship does change as the child becomes emancipated or reaches the age of majority.

Id. at 147, quoting Ruden v. Parker, 462 N.W.2d 674, 676 (Iowa 1990). Accord Counts v. Hospitality Employees, Inc., 518 N.W. 2d 358, 361 (Iowa 1994)(same).

The federal court is correct in this regard. Once a child attains majority, the parent-child relationship "is different"

and it is supposed to be that way. Id. In fact, today's parents tend to aspire to raise their children to be independent, not to be "servants" or parental "economic assets." Therefore, in the present time, it makes **more** sense - - not less - - to restrict parental recovery to the child's minority years.

2. A Parent Has No Obligation To Support an Adult Child.

The filial consortium concept, like so many others in law, reflects the adage that one must take the bitter with the sweet. Because the law imposes no obligation on parents to support adult children, courts in other states have not let parents recover such consortium awards for their children's adult years.

By way of example, in Cole v. Broomsticks, Inc., 669 N.E. 2d 253(Ohio Ct. App. 1995), the Ohio appellate court disallowed a mother's claim for filial consortium damages for her eighteen year old son who was seriously injured in an accident. In concluding that "Ohio recognizes loss of consortium between parents and children only if the child is a minor," the court said:

> This cause of action has not been extended by Ohio courts to the parents of adult children. The rationale given by other Ohio courts is that parents bear a natural and legal burden of care for minor children, but not for adult children.

669 N.E. 2d at 256. The same rationale applies in Florida. Since parents have no "natural and legal burden of care" for

emancipated children, the law should not give filial consortium awards to parents of emancipated children.

3. The Analogous Loss of Parental Consortium Award is Limited to Minor Children

Because loss of parental consortium is limited to minor children, loss of filial consortium should be treated similarly. In this respect, Estate of Wells v. Mount Sinai Medical Center, 515 N.W. 2d 705 (Wis. 1994), is illustrative.

In Wells, the Wisconsin Supreme Court concluded that a parent could not recover damages for loss of society and companionship of an adult child. In its reasoning, the court considered cases allowing only minor children to recover parental consortium awards:

> Specifically, we limited recovery for the loss of an injured parent's society and companionship to the period of a child's minority. . . Thus, . . ., this court refused to extend recovery for the lost society and companionship of an injured parent beyond the confines of the "nuclear family," a term we defined in that context to encompass parents and their minor children.

Id. at 709.

This Court's language in Dempsey suggests that Florida should approach the issue the way the Wells court did. Like the Wells court, this Court in Dempsey said that "recovery for loss of filial consortium should be limited in the same manner in which recovery for the loss of parental consortium has been

limited by the legislature." United States v. Dempsey, 635 So.2d at 965. Indeed Dempsey suggested that it might be unconstitutional if real disparities existed concerning the availability and limits of consortium damages in the these differing circumstances. Id.

In the brief at 39, petitioners make much of § 768.0415 of the Florida Statutes (1999), which allows a child to recover for loss of parental consortium where the parent does not actually die, but incurs permanent total disability. While the statute says that this cause of action applies to "unmarried dependents," case law has interpreted this language to mean minor children. See, e.g., United States v. Dempsey, 635 So.2d at 964 ("Our legislature has recognized that recovery for loss of companionship is necessary to compensate the **minor** child of a permanently injured parent.") (emphasis added); Gomez v. Avis Rent A Car System, 596 So.2d 510, 511 (Fla. 3d DCA 1992) ("We hold that section 768.0415 provides **minor** children with a cause of action for derivative damages. . .") (emphasis added).[11]

[11] Section 768.21(3) of the Florida Statutes (1999) is similar. It limits parental consortium recovery to minor children with one narrow exception. Where one parent has died, the children may recover loss of parental consortium as along as the children are still in their minority years. Adult children, however, may recover for the death of a parent as long as that parent's spouse has already died. See Weimer v. Wolf, 641 So.2d 480, 481 (Fla. 2d DCA 1994) (Commenting that the 1990 revision of the statute barred adult children

4. Unlimited Recovery Would Needlessly Spawn Litigation, Expand Liability And Raise Insurance Costs

In addition, it is basic that a contrary rule, one allowing filial consortium awards to parents of adult children, creates a whole new class of plaintiffs. All this does is expand tort liability, spawn litigation and raise insurance costs.

We acknowledge that the Arizona court in Frank v. Superior Court of the State of Arizona, 722 P.2d 955 (Ariz. 1986), rejected similar arguments as grounds for restricting filial consortium awards to parents of minor children. We, however, submit that overcrowding of dockets and increased insurance costs are indeed valid considerations. And, we submit, that these considerations do not stand alone, but rather add to all of the other separate solid reasons for restricting such an award to the minority years. Further, the Frank decision, issued in the mid-eighties, may be somewhat outdated. Crowded dockets and sky-rocketing insurance costs are more weighty concerns in today's increasingly litigious society.

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from recovering for loss of parental consortium when there is a surviving parent). Significantly, what such provisions show is careful line-drawing, well suited to the legislative branch. See also Mizrahi v. North Miami Medical Center, Ltd., 761 So.2d 1040 (Fla. 2000) (Legislature may properly treat adult children of a person who dies as a result of medical malpractice differently than adult children whose parent dies as a result of a cause other than medical malpractice).

Petitioners and the *amicus* here appear to broach one seemingly serious countervailing consideration - - the risk that some parent will not be adequately compensated for the total and permanent injuries of his or her child. That concern, however, is illusory and this is why. Expanding the filial consortium award to include adult children does not eradicate the risk of inadequate compensation or really affect that risk in any way. Basically, a jury is a jury: it can undercompensate, adequately compensate or overcompensate any plaintiff. If a jury is of the view that there is an extremely serious total and permanent injury to a minor child warranting a large filial consortium award, it can, of course, respond by awarding a generous amount. Eradicating the filial consortium cap here would only encourage excessive awards, but keeping the cap where it is would not prevent a jury from issuing an adequate (or even excessive) award.

Although it is apodictic that common law certainly should "keep pace" with modern developments, Stone v. Wall, 734 So.2d 1038, 1043 (Fla. 1999); Dempsey, 635 So.2d at 964, any further expansion of filial consortium damages - - especially such a radical one that Cruz urges on this Court - - should be for the legislature.

The core problem here is the one that the Wisconsin Supreme Court identified in Wells, that loss of consortium damages are awarded to individuals who have been only indirectly injured as a result of the tort in question. That court said:

> [S]ound public policy dictates that some limit be placed on the liability faced by negligent tortfeasors.
>
> As the law currently stands, a negligent torfeasor may be liable not only to the victim herself for injuries sustained, but also to the victim's spouse and minor children for loss of society and companionship.
>
> The torfeasor may in some instances also be liable to third parties for the negligent infliction of emotional distress. To hold that same tortfeasor potentially liable to the parents (both parents, when applicable could presumably bring separate claims) for the loss of an adult victim's society and companionship, is, we believe, excessive and contrary to public policy.

515 N.W. 2d at 709.

The Wells court explained why allowing parental recovery for minor but not for adult children was better policy and sensible line-drawing:

> As compared to adult children, minors are significantly less likely to have spouses or children of their own. Thus, in most cases, a tortfeasor who injures a minor child will not also be liable to persons having such relationships to the victim. In addition, the period of minority is limited, lasting just 18 years. Today, with increasing life expectancy, it is not uncommon that persons 60 or even 70 years of age may still have surviving parents. Extending the parents' cause of action to their adult children, therefore will in many cases extend the parents' potential period of recovery by as much as 40 to 50 years.

Id. at 710. Consequently, such viable concerns prompted the Wisconsin court to align itself with "the vast majority of other jurisdictions" that prohibit parental recovery for the lost society and companionship of an injured adult child. Id.

The reasoning in Wells is sound: while the direct victim of the tort should receive full compensation for all damages sustained, when damages are sought for those who themselves are not the victims of the tort, the extent to which such indirect damages should be the subject of tort law recovery is a more controversial policy issue. A large number of people may sustain such indirect damages. Not only parents whose minor children are injured or minor children whose parents are injured may suffer such indirect damages, but so may parents of adult children and adult children of aged parents. Moreover, grandparents sustain such an indirect damage when their grandchildren are injured or killed, as do siblings of the tort victims, aunts, uncles, cousins and even friends. There are even employers or employees, landlords, shopkeepers and other merchants with whom the individual customarily dealt, who have also arguably sustained injury. Further, there are business associates, customers and an ever-expanding circle of classes of individuals who may sustain such indirect damages.

The costs of compensating all of these "secondary victims"

could be staggering, as could the impact on insurance rates. The economic and social impact of extending recovery to those who are merely secondary victims is not a real agenda for the judiciary. Because the legislative branch can hold legislative hearings to inform itself concerning the consequences of extending consortium damages and is institutionally better equipped to make the kinds of political accommodations and compromises that might be called for, it is the appropriate branch to ascertain these consequences and assess where and how lines should be drawn.[12]

This is particularly true with respect to areas that have recently been the subject of legislative attention and action. Because the legislature has acted in the area of consortium damages, specifying when children may recover for the loss of

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[12] In its brief at 38, Cruz cites a garnishment case, Mazzella v. Bonis,617 So. 2d 1156 (Fla. 4th DCA), rev. dismissed 626 So.2d 203 (Fla. 1993), which is completely irrelevant. In that case, a debtor argued that "child" can include an adult child with respect to the statute prohibiting attachment or garnishment of wages for the head of a family. In siding with the debtor, the Fourth District made it clear that this was a unique statute and that it was abiding by this Court's mandate "that the exemption is for the benefit of the debtor and should be liberally construed in the debtor's favor." Id. at 1157. There is no such policy here. In fact, with respect to filial consortium awards, this Court has not opened the doors wide and ushered in a flood of plaintiffs. The heightened Dempsey standard that requires "a significant injury resulting in the child's permanent total disability," United States v. Dempsey, 636 So.2d at 965, is indicative of a policy to make filial consortium a limited cause of action.

their parents' consortium, this is an area that should be presumptively left to legislative judgment. See generally Elgin v. Bartlett, 994 P.2d 411, 419(Co. 1999) ("[M]any courts articulate deference to the legislature in this arena [of filial consortium].").

Since tort law generally has been of legislative interest,[13] the wisdom of what unquestionably would be a significant expansion of tort law to include the indirect damages of those who are merely secondary victims should therefore be trusted to the democratic process. While there may be a special role for the judiciary in protecting the rights of discreet and insular minorities who lack power in the legislative process, or in the protection of fundamental rights, see United States v. Caroline Products Co., 304 U.S. 144, 152-53 n.4 (1938), no special need

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[13] There has been a flurry of recent legislative activity on the subject of tort reform. See, e.g., §381.0056, Fla. Stat. (1999 amendment) (providing limitations on tort actions for providers of school health services); S.B. 2106, 2000 Leg., Reg. Sess (2000)(limiting availability of punitive damages in suits against automobile liability insurers that exceed policy limits) (not enacted); H.B. 1537, 2000 Leg., Reg. Sess. (2000) (providing tort liability for injuries resulting from defects in design or manufacture of guns) (not enacted); S.B. 378, 1999 Leg., Reg. Sess. (1999) (limiting liability for owner of business premises) (not enacted); S.B. 378, 1999 Leg., Reg. Sess. (1999) (requiring clear and convincing evidence of gross negligence or intentional misconduct as a condition for recovery punitive damages and imposing monetary limits thereon) (not enacted).

exists in this context for the judiciary to preempt the political process. Cf. Mizrahi v. North Miami Medical Center, Ltd., 761 So.2d 1040, 1043 (Fla. 2000) ("[S]tatute which created a right of action for many while excluding a specific class from such action, and which exclusion is rationally related to controlling healthcare costs and accessibility, does not violate . . .equal protection guarantees.). Separation of powers concerns and basic principles of democracy thus strongly augur against judicial activism in this area.

C.

THE AMICUS AND PETITIONERS' CASES ARE EITHER INAPPLICABLE OR WRONG

We, of course, do not deny that there are other jurisdictions that either implicitly or explicitly let parents of adult children recover filial consortium awards. See, e.g., Frank v. Superior Court of the State of Arizona, 722 P.2d 955 (Ariz. 1989); Masaki v. General Motors Corp., 780 P.2d 566 (Haw. 1989); Rosario v. United States, 824 F. Supp. 268 (D. Mass. 1993) (applying Massachusetts law). Since these cases are either inapplicable or just plain wrong, this Court should decline to follow them.

Rosario, 824 F. Supp. 268, is inapposite because it rests on a state statute that allows parents to recover for injured adult

children. That is, the Rosario court deferred to the Massachusetts legislature that enacted a statute providing:

> The parents of a minor child **or an adult child** who is dependent on his parents for support shall have a cause of action for loss of consortium of the child who has been seriously injured against any person who is legally responsible for causing such injury.

Id. at 288, quoting Mass. Gen. Laws Ann. Ch. 231,§85X (West Supp. 1993) (emphasis added).[14] Rosario is a legislative deference case and it is inapplicable because Florida, unlike Massachusetts, has no express statute allowing recovery of filial consortium damages for adult children.

The *amicus* brief at 6 recites a portion of the wrongful death act, section 768.21(4) (1999) which states that "Each parent of an adult child may also recover for mental pain and suffering if there are not other survivors." Obviously, this provision, which does not deal with consortium, but rather recovery for wrongful death, is inapposite. But if somehow this narrow statutory exception has any bearing on filial consortium

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[14] Harbeson v. Parke-Davis, Inc., 656 P.2d 483 (Wash. 1983) is a similar case in which the Court deferred to a statute that allowed parental recovery for non-minors under certain circumstances and provided that "[t]he mother or father or both may maintain an action as plaintiff for the injury or death of a minor child, or a child on whom either, or both, are dependent for support. . ." Id. at492 n.9, quoting RCW 4.24.010. Once again, the state legislative process resulted in line-drawing.

damages at all, it really endorses our position, not theirs. What it indicates is that when our legislature wishes to expand the reach of a law beyond the norm, beyond the age of majority, it indeed says so. That is, it does so explicitly.[15] The fact that the legislature has been silent with respect to the present filial consortium issue, despite the fact that Florida courts have for so long applied such awards only to minors, indicates that the legislature acquiesces in and does not wish to raise the filial consortium ceiling.

The *amicus* brief offers this Court the New Jersey case, Mealey v. Marella, 744 A.2d 1226 (N.J. Super. Ct. Law Div. 1999). This case, however, has been expressly overruled. In Tynan v. Cruzi, 753 A.2d 187, 187 (N.J. Super. Ct. App. Div. 2000), the court, declining to extend the common law, precluded a parent from "maintain[ing] an action for per quod damages, including loss of society and companionship, as a result of injuries sustained by her child after the child has reached the age of majority." The Tynan court expressly "overrul[ed] the holding[] [in] Mealey to the extent that [it] extend[s] a parents right to

[15] Section 768.18(2) of the Florida Wrongful Death Act defines "minor children" as those under the age of 25 regardless of the age of majority. Again, all that indicates is that when our legislature wishes to expand the reach of a law beyond the norm, beyond the age of majority, it indeed says so.

seek per quod damages beyond that permitted by common law." Id. at 192. If, however, the *amicus* employs the overruled case to merely fuel the proposition that there might be no "meaningful distinction between death and severe injury," (*amicus* brief at 6), then it is again highlighting a controversial policy issue, one involving line drawing, one squarely within the legislative province.

Both the petitioner and the *amicus* urge this Court to follow Frank, 722 P.2d 955. While the language in Frank is admittedly quite eloquent and seductive, the reasoning is just plain wrong.[16] In Frank, 722 P.2d at 959, the court opined that states which restrict the parents' filial consortium action to recovery for minor children are "haunted by the common law master-servant heritage." The court felt that "[t]he demise of the pecuniary services theory of consortium and subsequent emergence of companionship and society as the primary components of the action has vitiated the legitimacy of any age distinction in filial

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[16] While Cruz's contention that "the Dempsey opinion repeatedly cites Frank" (petitioner's brief at 40) is somewhat hyperbolic, we, of course, concede that in Dempsey, this Court cites Frank, but, as the court below pointed out, this Court cited it for a completely different proposition - - not one pertaining to the issue before this Court. See decision below, Broward County School Board v. Cruz, 761 So.2d at 396 n. 1 ("Frank was cited for a different proposition").

consortium actions." Id. at 960. See also Masaki, 780 P.2d at 577 (same).

The problem with the analysis in Frank and Masaki is that it is inside out and backwards. As explained above, the common law drew an analogy between the parent-child relationship and the master-servant relationship. See Dempsey. 635 So.2d at 963. As we also said, such a model no longer "reflects our modern concept of family relationships." Id. at 964. What emphasized above and reiterate here is that **allowing** a filial consortium award for adult children is what is "haunted by the common law master-servant heritage." Frank, 722 P.2d at 959. What such a limitless recovery embraces is the archaic agrarian notion of the adult child as an ongoing economic asset that will continue to "work the farm" or provide monetary support for aging parents. Such, an approach clashes with contemporary reality, the fact that today children go away and tend to live independently. See, e.g., E.L.K., 760 F. Supp. at 147 ("Once emancipation or majority is attained, the [parent/child] relationship is different"). In short, the only arguable support for Cruz's position is either inapplicable or just flawed.

II.

THIS COURT SHOULD NOT RECONSIDER THE *EN BANC* COURT'S RECORD-BASED DETERMINATION THAT THE TRIAL COURT HAD

ABUSED ITS DISCRETION IN DENYING THE SCHOOL BOARD'S REQUEST FOR AN INDEPENDENT NEUROLOGICAL EXAMINATION WHEN THE CRITICAL ISSUE AT TRIAL WAS WHETHER THE PLAINTIFF'S ALLEGED NEUROLOGICAL CONDITION WAS CAUSED BY THE BUMP ON THE HEAD THAT HE SUSTAINED AT SCHOOL OR WAS PRE-EXISTING

Cruz's brief goes beyond the certified question to ask this Court to review the *en banc* determination below that the trial court had abused its discretion and committed reversible error in refusing to permit the School Board's neurological expert, Dr. Brown, to conduct an independent neurological examination of Cruz.

We observe at the outset that this is a singularly inappropriate issue for this Court's consideration. It involves no novel issue of law, and no issue upon which there is a conflict among the district courts of appeal. Rather, it involves a straightforward application of the settled rule that an examination by a medical expert is allowed as an essential part of discovery whenever the plaintiff's claim places his medical condition in issue. Fla. R. Civ. P. 1.360(a)(1). Rather than presenting an open question of law in need of resolution by this Court, Cruz's brief seeks review of an essentially factual determination made by the *en banc* court that the trial judge had abused its discretion in this regard and that this error was seriously prejudicial to the School Board's ability to conduct

its defense at trial.

The *en banc* court conducted a searching examination of the extensive record in this case and unanimously concluded that the trial court's refusal to permit the School Board's expert to conduct this critical neurological examination of the plaintiff, based in part on misrepresentations by Cruz's lawyer that neurological damages were not involved, constituted error and that the error was not harmless. This Court should not reach out beyond the certified question to revisit this highly record-based determination.

Although we do not think it appropriate for this Court to expend its scarce appellate resources in reconsidering the highly fact-bound issue that served as the basis for reversal below, we would like to comment on some of the Cruz argument in this connection and to refer the Court to the opinion below, which clearly and properly rejected them, and to our Initial Brief and Cross-Appellee's Answer/Rely Brief in the district court, which demonstrate that the trial court abused its discretion in depriving the School Board of its right to an independent neurological exam and that such deprivation was highly prejudicial. As the court below found, "[d]espite any argument to the contrary, Cruz's mental condition was clearly in

controversy in this case." Broward County School Board v. Cruz, 761 So.2d at 393. The trial court had been "misled" by arguments to the contrary opposing Dr. Brown's neurological examination, and therefore denied the request. Id. As the court below found, "the cause of Cruz's mental condition and, specifically, the change, if any, in his neurological state, was the central issue in this trial. . ." Id. at 394. In arguing that the school had no liability for Cruz's injuries, the School Board sought to show that Cruz's condition was pre-existing and not caused by the bump on his head. The trial court's denial of the School Board's proper request for an independent neurological examination prevented the School Board from defending itself on liability and damages. Consequently,the court below properly found that "the School Board should have been allowed the opportunity to have its own expert conduct an independent examination." Id.

Cruz incorrectly contends that Dr. Brown's neurological examination would have been superfluous in light of examinations already conducted by the School Board's psychiatrist, Dr. Mutter and neuropsychologist, Dr. Russell. But Dr. Mutter did not conduct a neurological examination; he merely performed a psychiatric evaluation that served as the basis for his testimony that Cruz suffered only from a psychiatric disorder, a treatable post-traumatic stress disorder. And Dr. Russell, who was a

neuropsychologist, not a neurologist or a medical doctor, was not qualified to render an opinion as to the cause of organic brain damage, the central issue in the case.[17] This is why the School Board sought to have Dr. Brown, a pediatric neurologist, conduct an independent neurological examination of Cruz, and why the trial court's denial of this request prejudiced its ability to show that Cruz's damages were pre-existing and not caused by the injury he sustained at school. See Appellant-cross Appellee's answer brief/reply brief in the court below at 14-18; appellant-Cross-Appellee's Initial Brief in the court below at 9-10.

Cruz's argument is essentially one of harmless error, an issue upon which it had the burden of proof. Because there can be no way of knowing what Dr. Brown's independent neurological examination would have found, the value of permitting the requested exam cannot be said to be harmless. Moreover, after Cruz succeeded in blocking the School Board's attempt to obtain an independent neurological examination by Dr. Brown, Cruz's counsel was allowed, right in front of the jury, to denigrate Dr. Brown for his failure to conduct that very examination. See Appellant's Initial Brief in the court below at 46-47. Cruz's

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[17] It was then the law that a neuropsychologist was not qualified to render an opinion about the cause of organic brain damage. See generally Executive Car & Truck Leasing, Inc. v. DeSerio, 468 So.2d 1027 (Fla. 4th DCA 1985).

attempt to justify this outrageous remark on the basis that the School Board's trial counsel questioned one of Cruz's witnesses is misleading[18] and does not detract from the fact that emphasizing before the jury that Dr. Brown had not done his job by conducting the necessary examination further demonstrates the harmfulness of the denial of the School Board's opportunity to have him do so.

III.

THE *EN BANC* COURT CORRECTLY DEEMED THE SCHOOL BOARD TO BE ENTITLED TO AN ENTIRELY NEW TRIAL BECAUSE THE ERROR AFFECTED NOT ONLY DAMAGES, BUT LIABILITY AS WELL

Cruz also argues that the new trial ordered by the court below must be limited to damages. But, as the *en banc* court recognized, the trial court's improper refusal to permit this critical neurological examination goes not only to damages, but to liability as well.

Even if the School Board breached its duty of care to Cruz,

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[18] In petitioners' brief at 35, Cruz suggests that the School Board did it first and cites in part to cross-examination that took place after Dr. Brown's cross. Also, a reading of the pertinent portions of the transcript discloses that Cruz's expert, Dr. Appel, emphasized that the plaintiffs had their own neurological testing done and that she could rely on it. The implication, however, derived from the cross examination of the School Board's expert, Dr. Brown, is that the defendants **failed** to do their own neurological testing and therefore, the expert's opinion (and thus, School Board's defense) is baseless.

it would be liable only if that breach of duty caused any damage to him. Whether the damages asserted by Cruz were due to the bump on the head he sustained at school or were the product of his pre-existing condition was the critical issue in the case. Without the requested neurological examination, the School Board was hampered in its ability to defend on the essential issue of causation. A new trial, therefore, must extend as well to the question of liability.[19]

CONCLUSION

For the reasons set forth above, we request this Court to affirm the *en banc* decision below in all respects and specifically, to agree with the *en banc* determination below that loss of filial consortium damages should be capped at the point at which a child attains majority.

RESPECTFULLY SUBMITTED,
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[19] The cases upon which Cruz relies, Massey v. Netschke, 504 So.2d 1376 (Fla. 4th DCA 1987) and Griefer v. DiPietro, 625 So.2d 1226 (Fla. 4th DCA 1993) are irrelevant. Unlike the situation in those cases, the present case reversed on a point that affected both liability and damages.

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By Order Of this Court

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to Counsel for Petitioners: Gale Ciceric Payne, 1220 East Broward Boulevard, Fort Lauderdale, Florida 3301 and Counsel for Amicus Curiae, Richard A. Barnett, Esq., 121 S. 61st Terr., Suite A, Hollywood, Florida 33023, this _____ day of October, 2000.

By:_____
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