IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-1550

LOWER TRIBUNAL NO: 4D98-2170

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

Petitioners

-vs-

BROWARD COUNTY SCHOOL BOARD,

Respondent

PETITIONERS' INITIAL BRIEF ON THE MERITS

ON APPEAL FROM THE FOURTH DISTRICT COURT OF APPEAL,
STATE OF FLORIDA

GALE CICERIC PAYNE, ESQ.
FLORIDA BAR NO. 306967
Gale Payne & Associates
1220 East Broward Boulevard
Fort Lauderdale, FL 33301-2134
Telephone (954) 761-9600
Telefax (954) 760-9907

Counsel For Cruz Family
Petitioners

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Page

Cases Continued **Page**

Statutes and Rules

Miscellaneous

Cruz v. Broward County School Board, SC00-1550

CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENTS OF F. R. APP. P. 9.210(a)(2)

In compliance with Supreme Court of Florida Administrative Order In re: Briefs Filed in the Supreme Court of Florida, dated July 13, 1998, it is hereby certified that the size and style of type used in Petitioners' Initial Brief On The Merits is 14 point proportionally spaced Times Roman font.

STATEMENT OF THE FACTS

The Jury Verdict Decreed The School Board Negligent In Providing An Unreasonably Unsafe Environment For Student Louie John Cruz At Miramar High School.

On November 30, 1993 at Miramar High School, student Marie Tyther was the last to exit Miss Burgess' portable class when she witnessed Louie John Cruz and another student, Donny Velasquez, in the middle of a verbal confrontation. (T.696, 700-01). She observed Donny calling Louie Cruz "stupid, you stupid ESE kid" and Louie fixing his glasses, holding onto his school bag with his hand and swinging to get away from Donny. (T.701-04) Miss Tyther recounted that Louie John was not saying anything much during the incident, "just like get away, get away, swinging his arms, just telling him to get away from him" (T.705) "and not hurt him or anything, not meaning to start a fight with Donny . . ." (T.722) She came up to Donny and said, "why don't you leave him alone, he doesn't know better." Fearing that Donny would hit her too, she stepped away then turned and saw that Donny picked up Louie and "slammed" him straight down flat on his back. Louie "went all the way down to hit his head first on the ground . . . on the concrete." (T.704-05, 732) When Louie cried and held his head, Donny ran away and left with a friend. (T.702). The day of the incident, she saw no ESE teachers out in the area, e.g. Miss Burgess, Miss Siskind, Mr. Peskin, Mr. Schaffer. (T. 696-97)

Per Louie John Cruz, the day of the incident it was raining and he was running to get to his next class with Mr. Peskin. When he saw the other two boys involved in the incident, he put his hand out in peace to shake their hand. They squeezed his hand, wouldn't let go, picked him up, slammed him on his head to the ground and ran away. The back of his head above the neck hit the ground. (T.2894-2904) No teachers were around. (T.2899-2900)

Donny Velasquez, a tenth grader, wrestler and football player at Miramar High (T. 2995, 3043), gave three different versions of what happened. At trial: Luis put out his hand to shake mine and squeezed my hand real hard[1]; When I shook Luis' hand and started to put pressure, Luis karate chopped me; I grabbed Luis right away, picked him up, threw him down, "heard him say help, help" and walked away. (T. 2990-91, 2993, 3038-39) Velasquez did not see if Louie's head hit the ground (T. 2993) but swore that he "didn't hit his head." (T.3036) Velasquez told the jury that neither he nor Louie exchanged words during the episode. (T.2991, 2993) He denied everything said by Marie Tyther and even her presence at the scene. (T.3037, 3040-41) He could not say if there were any teachers out there to supervise at the time (T.3042)

[1] Dr. Appel testified that Louie's hypotonia would not allow him to squeeze a hand with any degree of strength to alarm anyone. (T.1157)

Signed Statement of Velasquez on 11/30/93, Exhibit 24: On 11/30/93 between classes, I approached Luis, playing around and started to shake hands, then Luis started to say he's the man and all that other crazy stuff. (T. 3028, 3030) Luis started taking swings at me, then I picked him up, threw him on the ground and went to class. (T.3029) Sworn Statement of Velasquez on 5/23/97: I put Luis in a bear hug, real quick not for long and let him go. I just dropped him and he fell to the ground. (T.3035) When asked at trial which version is true, Velasquez replied, "The one I gave this morning." (T.3034)

Manuel Nuñez, a ninth grader at Miramar High, testified that Louie was running to his next class when he stuck his hand out to Donny; Donny and Louie were shaking hands when Louie started chopping Donny; Donny pulled away; When Louie did not stop hitting, Donny grabbed Louie in a bear hug, picked him off the ground and let him go. (T.3061-3074) Nuñez told the jury that Louie said nothing during this time. (T.3064, 3073)

On 02/15/94 Nuñez sent Louie a get-well note. (T. 3078-79, Defendant's Exhibit 3) It said, "I was there, but was not the one who hit you. . . . Many people believe that I have done this. I haven't. So I hope the person who did it will face the consequences." Nuñez admitted that there were no teachers to supervise Donny Velasquez, himself and any other children out there. (T3089)

The ESE teachers at Miramar High on 11/30/93 admitted that they were unable to supervise the students changing classes before the incident. Miss Burgess testified that she was not outside supervising the students after the bell rung from her class. She was inside, in the loud noise of the air conditioning, listening to and comforting a crying student, who stayed behind to talk about her parents' divorce. (T.526-27, 561-65) After this student had explained the things that were going on in her home, Miss Burgess heard a cry, opened the door of her classroom, looked outside, and saw no one from Administration in the portable area, only Louie John on the ground holding his head and crying help me, help me. (T.527-28) Miss Burgess saw Louie later that day in the school clinic. To use her words, "he wasn't talking, he was – he was like not moving, he wasn't emotional . . . he seemed just despondent, he just looked and stared"—in a phrase not the Louie she knew from that morning. (T.529).

Miss Siskind testified that, although Louie John had attended her class right before the incident, she was unable to stand by her door and watch the students going to their next class. Like Miss Burgess, she too had been detained by a student, hers with a motor disorder who needed help getting books in his bag. She explained that she could not go outside to supervise if that meant leaving a student alone in her classroom. (T.593-94) She learned of

the incident when she heard another teacher yell. (T.596) She saw no administrators in the area. (T.599)

Mr. Peskin admitted that he too did not see the incident. (T3109) He said he was outside but looking the other way. Afterwards, he heard a scream, saw a bunch of students huddled around Louie John who "was obviously hurt in some sort of way." (T.3113) He did not recall seeing another teacher outside supervising and controlling students on that day. (T.3183)

Miss Esposito said she was inside her classroom when she "heard like a gang type yelling outside. I stuck my head out, I saw a person in a blue jacket lift up Louie Cruz and slam him down in a head first type manner." (T.3263 again 3266) It wasn't a bear hug. (T.3292) When she first observed the incident Louie John was already in the air. (T.3266) She could not see him strike the ground but noticed "gravel in his hair" (T.3278) and said that "the way he was being thrown indicated that his head was going to hit." (T.3279) She "heard a loud hollow type thud" which she "thought it was his head" *Id.* or, more precisely, a bang which was not be confused with a book bag hitting the cement. (T.3292) Miss Esposito described the bang as "a chilling sound." *Id.* She too did not notice any teachers or aides out there that day to stop any confrontations. (T.3287-88) No other teachers testified at trial.

The defense urged that the incident happened in the blink of any eye and couldn't be prevented. But, evidence as detailed above existed for the jury to conclude otherwise. For example, the amount of time needed to allow Miss Burgess to talk after class with a crying student about her parents' divorce, Miss Siskind to help her student after class and Marie Tyther to try and intervene are more accurate gauges of elapsed time than a person's recollection four years after the event. (T.4561-63)

Evidence at trial portrayed this incident as foreseeable, arguably even inevitable. The ESE teachers at Miramar High drafted and sent a memo as well as a letter. The memo dated 11/09/93 from the ESE Department, addressed to Mr. Robert Gillette, Principal and typed on Miramar High School stationary was introduced into evidence as Plaintiff's Exhibit 2. (T.518) The ESE teachers testified that they agreed with the statements contained in the 11/09/93 memo. (Burgess T.519-21); (Siskind T.585-86) (Peskin T.3192-93) (Esposito T. 3294-95) This 11/09/93 memo states:

> We, the ESE teachers of Miramar High School, are writing this letter to express our concerns over the lack of security and safety of the teachers and students in the ESE area of the school. Because of the amount of safety problems in the portable area, [a couple lines were redacted per court order] Teachers and ESE students have been threatened and harmed. We are concerned about our physical safety. Please address this problem and implement solutions as soon as possible. Thank you for your prompt attention.

Every teacher who testified in this case admitted to the jury that it was an extraordinary action to write and send a memo like that (T.3212). They explained it was done because they feared for their own and their students' physical safety at Miramar High around the ESE portables where the very danger that they warned about later harmed Louie John Cruz. (T.500, 582-83, 3206, 3283-85)

Miss Burgess testified that the ESE teachers grouped together to discuss the lack of safety at Miramar High and talked to the school's principal and administration. (T.503) She was personally involved in writing the 11/09/93 memo (T.519,524) and attested that it was delivered to the administration, Mr. Gillette on that date (T.520,524). She explained that the memo addressed the safety of both teachers and students in the ESE portable area as a culmination of many things going on there. (T.521, 567) Some particulars of what led up to this 11/09/93 memo were given: Miss Burgess saw the cluster students get teased by the other students at Miramar High (T.502); students dealing drugs (T.495); "one student slash another in the face" with "a razor exacto knife type of instrument" (T.497) next to the ESE portables (T.560); students having sex underneath her portable during lunchtime when she was tutoring a blind student (T.498, 542); a knife found out in the portable area that had been displayed to another student (T.567); and fellow teacher, Mr. Peskin, being

threatened by a student who "started throwing chairs and things through the windows of the portable and at Mr. Peskin" when told to stop smoking. (T.523)

To alert administration, Miss Burgess stated, "We sent a student, however long it took the student to run to the front office and get somebody and bring them back." (T.524) During these times, she observed no supervision (T.497, 522) and admitted that the call buttons used to call for help were not working in her portable. (T.493) After seeing all these things, she unequivocally admitted that she did not feel safe prior to 11/30/93 teaching in that portable area and did not feel her students were safe out in that portable area. (T.500) Nothing changed in the ESE portable area between the 11/09/93 memo and the 11/30/93 incident injuring Louie John. (T.524)

Miss Siskind left Miramar High because she did not feel safe. (T.582-83) She felt its administration was not responding to the teachers' worries about safety in the isolated area of the portables where she taught and where nobody assisted the ESE teachers in the supervision and control of behavior (T.583-84). She carried a cellular phone so she could call for help if she needed it. (T.585) In her own words, "I just felt like there was no presence of security to deter anybody from doing whatever they wanted, and I used to see a lot of kids that – I would describe in a word as scary hiding back there." (T.585)

Prior to the 11/9/93 memo, the ESE teachers drafted, signed and turned in a letter to Pam Carroll, the "ESE specialist" who oversaw the records and placement of all students in the ESE programs (T.1979), and as of 12/01/93 also assistant principal. (T.1991, 2031). That letter voiced the ESE teachers' safety concerns and asked for solutions. Miss Siskind was present when this letter to administration at Miramar High was delivered to and read by Pamela Carroll. (T.586, 625) The letter dealt with the same issues as the 11/09/93 memo but in more expanded form. All of the ESE teachers in the portable area admitted to signing the letter delivered to Pam Carroll. When it was delivered, Pamela Carroll held a meeting with the ESE teachers to criticize them for signing something so poorly written with typos and grammatical errors. Miss Siskind said, "She [Pamela Carroll] felt that since the letter was so poorly written, if this is what we wanted to say, we should say it different and get it to Mr. Gillette." (T592) It was rewritten in the form of the 11/09/93 memo to the Principal, Mr. Gillette. (T.586-92) When asked whether, prior to Louie being hurt, the administration at Miramar High responded to these fears for safety expressed by the teachers, Siskind answered, "The administration being Mr. Gillette, no, they didn't respond." (T.602)

Mr. Peskin signed onto the 11/09/93 memo (T.3192-93) and remembered signing his name to the letter criticized by Pam Carroll but not the specifics of

that letter (T.3196-97). He admitted that the area in which the ESE teachers were concerned about the safety of their students was the exact area where Louie John Cruz got hurt. (T.3206) He recollected incidents where students in this area were fighting (T.3212-13), where special students had things stolen from them in this area (T.3214-15) and where students would get their lunch money stolen because "our kids looked like an easy mark." (T.3207)

Miss Esposito recalled the threat to Mr. Peskin and another where a student in her class pulled a knife out for her to see while showing it to another student. (T.3282, 3296-97) She was part of the ESE teachers' group that brought the safety and security problems to the attention of their superior, Pamela Carroll. (T.3283-84) She admitted that she did not feel safe at that time (T3284-85), was very concerned about the isolation of the portables and the mainstream kids going there to cut classes and hide out ("hanging out back there getting high back there, things like that" T.3300), and thought she was in physical danger in the portable area. (T.3294) The teachers talked about it so much they went as a group to Pamela Carroll with their concerns about the safety and security in the area of the portables but were rebuked for their poor grammar. (T.3295)

Miss Carroll admitted that the expression of fear for the safety of the students and teachers under her supervision in the memo was of significance

(T.1984), but she could not recall the memo or being aware of parent concerns for safety in the ESE portable area of Miramar High during the fall of 1993 (T1992). She could not recall speaking with parents such as Mrs. Piedra about this. (*Id.*) She could not recall Mrs. Cruz coming to her before Louie John was hurt with concerns about his safety (T.2161). She admitted that unlawful behavior at Miramar increased after the Cruz incident until 1995. (T.2160).

Mrs. Tanya Piedra testified. Her son Danny was a 15-year-old student in the cluster program at Miramar High in the beginning of the 1993 school year. She told how her Down Syndrome boy "would repeatedly come home with chewing gum in his hair," "without his crucifix we had for generations," "without lunch because . . . his lunch money was taken away from his backpack," and "with a pencil that stuck on the side of his rib cage." (T.1395, 1398).

Every day she dropped and picked up Danny at Miramar High and "would sit in my car facing directly to the portable and watch what went on." (T.1392). She saw hair pulling fights, book throwing, pushing, shoving and mischief and became afraid for her son and the rest of the children. (T.1397) She observed, "There was no supervision whatsoever in the mornings or in the afternoons, especially in the mornings." (T.1393) When she complained

several times to the administration of Miramar High, and specifically to Pamela Carroll, about these concerns for safety, the administration assured her that "they were going to do something about it . . . and nothing was ever done." (T.1394-95) She took Danny out of school in December 1993, because she was afraid he was going to get hurt. (T.1405)

Mrs. Cruz remembered speaking with Pamela Carroll repeatedly before 11/30/93 about her concerns for safety and the lack of supervision at Miramar High. (T.2184) Specifically she told Miss Carroll about a student who threatened to kill her son and how her son was scared of that boy, about her son's lunch money being taken and how he couldn't make a phone call in an emergency if he was left without even a quarter, and asked why nothing was being done about it. (T.2184-88) She shared her concerns with many of the teachers. Like Mrs. Piedra, when she would drop off and pick up her son, what she observed made her scared, frightened and uncomfortable when nothing was changed. (T.2191-93)

On cross-examination, the defense asked Miss Tyther, the student who witnessed the Cuz altercation, about any problems she had with security in the portable area. In response, and without any objections, she replied that:

> Security – out there in the portables there was not enough security. There was security in the main part . . . but none out there. The only person out there was the teachers, and the teachers cannot teach and watch the kids . . . so they did need more security out in the portables.

(T. 728) A student peer counselor during the 1993 fall semester observed gambling and fighting as a regular occurrence in the ESE portable area with no teachers around. (T.2722-23) Teachers, students, parents and administrators unanimously proved that defendant negligently breached its duty to provide a reasonably safe environment for students like Louie John Cruz on 11/30/93.

Damages

Although Louie was mildly mentally retarded before the incident,[2] he led a normal life. He was obedient, respectful, personable, polite, happy and kind. (T.484, 581, 2907, 2790, 2728, 2731,3932) He worked hard at school and even received recognition for his championship spirit. (T.2701, 3923) Louie wrote a Halloween story in school before the incident:

> It was a dark night, I was walking home as usual down a dark alley. All of a sudden a car zoomed past me, but there was no driver in the car, it was driving itself. I ran as fast as I could into an old shack. I decided to take a look around. I saw a rifle on the wall and it began shooting by itself. I ducked.
>
> Then the door of the old shack opened by itself. I ran outside the door and up the street. I found a car. When I got in it, it began driving me by itself. I looked out the back car window and saw we were in some kind of dark tunnel, and it was filled with blood

[2] Broward County School Board never used this label, only learning disabled. (T.575, 1790, 2686-87, 2702, 3561) Although Mrs. Cruz found the word "retard" painful, she accepted this about her son. (T.2686)

> sucking bats and spiders, and I didn't know if this was a trick or a treat. After all, it was Halloween.
>
> I decided to take it all as a treat, especially since a Snicker bar appeared in my hand all by itself. I just sat back and ate my candy bar in the car with no driver enjoying my ride all by myself to my home.

(T.2700-01) Mrs. Cruz, when asked, said she lent no assistance on this story. (T.4350) Louie's "mission was to save the world." (T.2669)

After school and on weekends Louie would visit museums, fish and dig for worms, skateboard, play tennis and basketball, throw a football and Frisbee, ride his bike, go to movies and out to dinner, attend friends' sports games, play and eat with friends, and take tae-kwon-do instruction. (T.2179-80, 2780, 2786) He never used foul language, thought "shut up" was a swear word, and was never verbally or physically aggressive. (T.2180-83) Louie wanted to please, never to hurt. "He fed mocking birds out of his hands, brought butterflies on his arm." (T.2182) Neighbors described Louie John as a very active, polite and loving boy. (T.2711-16, 2731, 2907-08, 2947)

His younger brother, Anthony, wrote of him in a school paper as "a hero in his life because he was the most courageous person he ever knew. He was able to overcome everything that ever happens to him." (T.2170) With one exception–when he was slammed to the ground on his head on 11/30/93.

Afterwards, Louie John was never the same. (T.529, 2196) By next morning he was whistling and howling like a bird, growling like a bear. He stopped talking. His eyes were vacant. (T.2198-99) He told the psychiatrists[3] he "can see like the animals, knows how to defeat animal spirits." (T.2663, 817-18) He talked about having "peace serum in my brain." (T.818, 2664) He warned, "Don't look at lights directly or you might loose your hair." (T.818, 2667) He kept seeing a blue flame around everything and kept on touching it. (T.2667, 820) When able to talk about the incident he said I was "hit on the head at school by bad kids who had souls of devil and strength of a bear," (T.818, 2664) and felt "that they took away his head." (T.2235) He told a psychiatrist, "My brain is empty, my heart is full" (T.818, 2666) and explained his "head feels empty." (T.2673)

On 12/3/93 Dr. Wiener reported that Louie thinks "he is dead, that he had lost his brain and his face." (T.837) A neighbor reported that Louie talked to her "about a lot of strange things and that he had a brain exchange and things like that." (T.2944) On Christmas 1993, Louie did not care what Christmas presents he got. (T.2857)

Starting a few days after this incident, Louie John needed antipsychotic medications. He began to take them every day and still remains on them more

[3] HMO forced change from Dr. Wiener to Dr. Klass. (T.2230, 2682, 3666-67)

than a half decade later. These are serious drugs, ("heavy duty stuff" as described by Dr. Afield, not to be used lightly especially in a young person as per Dr. Wiener), with side effects of sudden death and seizure disorders. (T.854, 1566, 2201, 3859)

Beginning 12/3/93 Louie John took 2 milligrams of Stelazine per day, increased to 4 by the next visit. When Louie John developed tremors on the Stelazine, Cogentin was added. Dr. Wiener tried to wean him off the antipsychotic medication without success. The psychotic behavior returned terribly. Stelazine was prescribed again, increased up to 10 milligrams daily, but failed to contain his psychosis. Haldol was then prescribed but had a very violent effect on Louie. (T. 838-839, 2199, 2204, 2670, 2682-83, 1792-93, 833-35) Louie started to go into violent rages, spew foul language, physically attack his family members, punch and kick holes in walls, break whole doors, smash dishes, break furniture, toys and home electronics and "rip the plant right out of the ground, break it." After these rages he seemed to have no recall about what went on and would be upset. Nothing in particular provokes or brings on these rages. (T.2205-06, 2234, 2246)

Risperdal was finally prescribed, but its dosage has been gradually increasing, up to 5 milligrams per day, in order to control his breakthroughs of psychosis. (T.1620, 2206, 2210, 2231, 2246) As of trial, Louie John was at the

brink of taking the maximum dosage of Risperdal but it still is not controlling it. (T.1659) As of trial, these rages and violent outbursts continued. (T.2246, 2254)

Before the 11/30/93 incident, Louie never had these rages (T.2207, 2210), never used foul language (T.2232-33), never physically attacked his family (T.2685-86), never had been violent (T.2204), or never had been on an antipsychotic or mood altering medication (T.2200).

Mrs. Cruz testified that she and the doctors (including Klass) could find no program, like Special Olympics, or activity for Louie John because he gets out of control, could hurt somebody and would be put in a mental hospital or ward. (T.2680-81, 2251-52) She admitted to being afraid of her son when he gets out of control. (T.2683) Louie could not return to Miramar High because he was getting worse with his violent outbursts and, as his mother explained, "it wasn't secure there, they weren't being watched, it wasn't supervised, and I wasn't going to put him back in the same dangerous situation." (T.2679, 2659-60) She had no reason to believe that Pamela Carroll would be any more responsive now than before. *Id.* Under these circumstances, Dr. Wiener would not advise Louie to return to this school environment. (T.3682, 852-53) Mrs. Cruz watched Louie suffer so badly, when he wasn't like this before, that she wondered if he would have been better off dead. (T.2239-40)

Mrs. Cruz described how her family began to fall apart and became violent after the 11/30/93 incident. (T.2233-34, 2237) She and her husband separated for about 6 months in November 1995 and then reunited. (T.2240, 2253) The defense urged that domestic violence and tension from legal proceedings against father Cruz, not the 11/30/93 incident, caused Louie John's problems, and that Louie had become agitated and anxious before 11/30/93 because of this. The defense even cited the tension from this litigation as a source of Louie's problems. The jury weighed the evidence in favor of Cruz.

No testimony dated the domestic violence before the 11/30/93 incident. No evidence indicated Louie even knew about the legal proceedings against his father. Mrs. Cruz testified there was no domestic violence in her household before the 11/30/93 incident (T.2242), denied that Louie John was coming apart before 11/30/93 due to domestic violence or otherwise (T.2602), and denied that the legal proceedings against her husband affected her children, because "they didn't even know that was going on." (T.2635) Anthony Cruz testified that he was not told about the legal proceedings until 1995 in Ohio (T.2823, 2832) and denied any domestic violence or family problems in their household before Louie John's fits of violence that erupted after 11/30/93 and affected the whole family. (T.2789-91, 2797, 2837, 2856, 2872-73, 2875)

No one testified or reported that the Cruz parents' relationship or domestic violence was the basis for Louie's problems, as opposed to *vice versa*. (T.841-42, 1473-74) Even Dr. Mutter, the psychiatrist hired by the defense to examine Louie and testify at trial, elected not to ask or discuss with Louie his relationship with his father before the 11/30/93 incident, because he felt that Louie could not process that type of information. In discussing the current relationship with his father, Louie told Dr. Mutter he believed the changes in his father's personality were due to what happened to him at Miramar High. (T.3790) Defense experts, Drs. Russell and Mutter, never asked Louie about domestic violence in the house before 11/30/93. (T.4046) Dr. Afield opined that the tearing apart of the family and the physical violence were not the cause of Louie John's problem, "the hitting on the head is what caused it." (T.1661-62)

Plenty of evidence suggested that the unsafe environment at Miramar High was the source of anxiety to Louie John. For example, Louie John was in the classroom in October 1993 when the Baptista student attacked Mr. Peskin with scissors and began throwing furniture through the windows of the portable. (T.2451, 3236) He saw it and became "scared." (T.2901) Louie also had his favorite Mets jacket taken, suffered the indignity of having to crawl under a portable to retrieve it, had his lunch money stolen and was taunted

with words like, "retard, dummy, stupid ESE kid." (T.2685, 2176, 2178, 1606-08, 1191) Even the teachers and parents were anxious and afraid in this environment. Also, Dr. Afield opined that Louie John "he's not going to get well when the litigation is over, it's not going to change one bit." (T.1662)

Sometime after 11/30/93, a neighbor heard Louie in what she described as a "complete rage." (T.2910) Another neighbor called and was asked by Anthony Cruz to come over during one of these rages. (T.2936-40) Anthony Cruz described his brother's rages since 11/30/93. "It was like controlling a wild animal." (T.2791) During these rages Louie would break countless things in the house. (T.2794). He put a hammer through the door of his parents' bedroom, snapped fishing rods in half, picked up golf clubs and attacked his family with them. (T.2794-95) Anthony used to call home during school to make sure Louie did not hurt or kill his mother. (T.2791) He said that prior to 11/30/93 he was never afraid of verbal or physical violence from his brother, nor afraid that Louie would hurt their mother, but he constantly fears these things now. (T.2875) Nevertheless, he said, "What I have left of my brother I want to keep." (T.2796)

Psychiatrist Afield identified the 11/30/93 incident as the causative factor for significant organic brain damage and permanent psychotic disorder. (T.1655-59) There was cumulative expert testimony from Drs. Afield and

Appel that this permanent organic brain damage and psychotic disorder will not improve and, ultimately, will require institutionalization. (T.1666-68, 1194) Dr. Afield, a neuropsychiatrist taught in the field of neurology as it pertains to the brain at Harvard, Johns Hopkins and University of South Florida Medical Schools. (T.1510-11, 1553) His medical practice is devoted mostly to head injury and treating neurological diseases. (T.1520, 1524) For 37 years he dealt with organic brain injury and acted as an examiner in this field for over 2 decades. (T.1549-50) He was tendered and accepted as an expert in the field of head injuries. (T.1536-37). Dr. Appel was tendered and accepted as an expert in the fields of "forensic medicine" "neuropsychology" and "scientific research into the brain and brain damage." (T.1027)

At trial, Dr. Afield remarked that when you have a brain like Louie John's where "you have some preexisting stuff, it's the straw that breaks the camel's back if you get hit again." (T.1522) When asked, Drs. Appel and Levitt repeated that a person with a preexisting brain injury is three times more likely to have another or, stated differently, is at risk to have a greater consequence from a subsequent head injury. (T.1067, 967-68)

At trial, Afield testified that Louie sustained severe permanent organic brain damage from the 11/30/93 incident in the detail that he gave. At trial, Dr. Afield identified the extensive birth, medical and health records,

evaluations, depositions, examination transcripts as well as the complete school records of Louie from his birth to the present that he had reviewed, all of which he had looked at in depth. (T.1567-68, 1597-98) Dr. Afield testified that Louie's MMPI, neuropsych, original and quantitative EEG—the latter for seizure disorder not schizophrenia—all were abnormal. (T.1596-97, 1622-23, 1634-35) He agreed with the other experts in saying that you can have a normal CT Scan, MRI and EEG and still have brain damage. (T.1534-35, 1558, 1071) During his testimony, he viewed the stipulated, pre-11/93 video of Louie with the jury. (T.1573-81)

Much of Dr. Afield's trial testimony was devoted to discussing these records and how they supported his opinions. For example, Dr. Afield enumerated some of the symptoms and clinical signs chronicled in those records that are consistent with his diagnosis of organic brain injury: "dizziness, nausea, confusion, dilated eyes, memory disturbances, concentration problems." (T.1568-69); Also, "repeated episodes of psychosis, hallucinations, behaving like a bird, behaving like a bear, putting his fist through walls" (T.1755) He saw no evidence in these medical or school records, or the videotape, of anything to suggest autism, schizophrenia, psychosis, psychotic behavior or any precursors thereto before 11/30/93. (T.1584, 1599,1601-06) Neither did Dr. Appel (T.1164) He explained that

Louie John's pre-morbid condition of repeating to himself does not suggest schizophrenia or hallucinations or delusions. (T.1650-51) So did Appel (T.1161) His poor eye contact as noted by his teachers was explained by his visual field defects demonstrated in the records throughout his lifetime. (T.1651) Dr. Appel agreed. (T.1132) He commented that Louie John's present degree of cognitive functioning posed an impediment to successful psychotherapy for post traumatic stress syndrome. (T.1649) So did Dr. Appel (T.1354) So did Dr. Wiener who noted Louie had regressed so terribly that he barely talked during their sessions. (T.3672-73) Yet, the defense experts who diagnosed post traumatic stress syndrome predicated their opinion of non-permanency upon successful psychotherapy or psychological counseling. (T.3810-11, 4245)

After discussing these extensive school/medical records, evaluations and examinations from Louie's birth to present, Dr. Afield offered his opinions to a reasonable degree of medical certainty. The 11/30/93 incident is the causative factor for Louie John's permanent psychotic disorder (T.1655); Looking through the medical and school records from this child's birth on establishes there is no other causative factor (T.1655-56); Louie John suffered an injury on 11/30/93 that resulted in organic brain damage that is permanent

and will manifest itself throughout his lifetime and "that's a permanent problem." (T.1659). Afield further opined that:

> [T]his boy would have been trainable for a job situation . . . before this accident. He's not going to go to work at this point. He is going to need to be taken care of, and the ideal place is with the family as long as they can put up with it . . . or an institution steps in. That's ultimately the fate of this child because I don't think there is going to be an improvement.

(T.1667) Dr. Afield saw nothing in these extensive records up into 1997 that would indicate Louie John is getting better and said, "It's not being resolved. They are really almost at maximum dosage with this Risperdal, and it's still not controlling it…" (T.1659)

For the Cruz family, Dr. Afield remarked, "basically it's kind of over for them. This is a very difficult situation now for them to handle. It's almost an impossible one."(T.1664) He concluded that Louie's post morbid condition "unravels the heart of the family." (T.1668)

Dr. Appel also testified. Dr. Appel, with a Master's Degree in biological science and Ph.D. in neuropsychology, did her dissertation on visual field exams and helped develop a patent on a device used to test visual field defects while serving as a U.S. Public Service Fellow. Before graduate school, she conducted research for the National Science Foundation on visual arrays. During graduate school she studied neural transmission at NIH biophysics lab with the men who won a Nobel Prize for that work, and later did research for

NASA's bio-space technology program studying the response of gravitational acceleration.

After her Master's, she studied physics, molecular biochemistry and calculus before transferring into a neuropsychology program. After her Ph.D. she taught neuro-opthalmology, also visual fields and how they affect brain functioning, to medical students, residents and interns and served as a consultant to the department of neurosurgery and neurology and endocrinology at Mount Sinai in New York. At Mt. Sinai, she researched the vestibular system, set up the electronystagmus brain lab and did a fellowship in neurology from 9/71 to 12/72. (T.983-994) She participated in scientific research in neuroradiology on the imaging potential and techniques of CT, MRI, SPECT and PET. (T.994-1003, 1009) She conducted research for the US Air Force on what happens to the brain when it rotates rather than moves in a straight line and how much rotational acceleration the brain can withstand, e.g. the "G" forces it can withstand. (T.1003-08)

She was awarded a diplomate in forensic medicine by the American Board of Forensic Medicine, one of only 1,102 in the world to do so at the time. (T.1021, 1026) In her practice, she tests and diagnoses traumatic brain injury. (T.1027) Dr. Appel further expounded that, "Neuropsychology involves . . . how the brain functions, what happens when its injured, what kind of things

can tell you it's injured . . . It includes neuro chemistry, some neuropsychologists do neuro anatomy, some do neuro chemistry, some do studies on MRI's." (T.1083)

At trial, Dr. Appel repeatedly emphasized the significance of the post-incident drop of Louie's verbal IQ. She explained how the left side of the brain deals with verbal, the right side performance. (T.1121) Prior to 11/30/93 his verbal IQs of 91, 94 & 85 were all in the normal range. His performance IQs of 45, 52 & 51 were not. (T.1121) In her opinion, Louie's preexisting right hemisphere deficit, which manifested itself by a visual field defect, explained why the earlier IQ tests on the performance side were abnormal. (T.1132) After 11/30/93 his verbal IQs dropped into the 70s, ranging from 71 to 79, all of which are abnormal. (T.1180, 1201-02) Dr. Appel identified this drop in verbal IQ as an objective sign of organic injury to the left hemisphere of Louie's brain that did not exist before the 11/30/93 incident. (T.1146, 1177-78, 1180) "The consequence of this is that Louie John's previous strong suit is gone, and he doesn't have another strong suit." (T.1202)

Conversely, she pointed to the post incident increase in his performance IQ, (when combined with the drop in verbal IQ evened out his full scale IQ), as further objective indicia that after 11/30/93 Louie's brain was structurally reconstructed differently and recircuited. (T.1146, 1364-65) Additional

objective indicia included a post 11/30/93 drop in his SAT test scores in reading, spelling and math. Before 11/30/93 Louie could read and write a story like his Halloween story. (T.1152) Not after. His episodic rages and foul language surfacing after 11/30/93 established more objective signs of a new brain injury. (T.1087) She recommended short term rehabilitation followed by long term institutional care. (T.1198-1203)

Regarding Dr. Appel's testimony in the area of visual field defects, she pointed out that this was the area of her Ph.D. dissertation, and she developed the patented machine to test for visual field defects. (T.1128) Her training in this area was extensive. The trial court even noted, "Yes, but she studied it." (T.3705) Dr. Appel testified that the head injury criteria she discussed was regularly and readily used by neuro- psychologists and utilized by her at least 3,000 to 4,000 times. (T.1064-65)

Dr. Appel resorted to her research sponsored by the US Air Force and NASA to say that if you took 125 pounds (like Louie) and dropped it 5 feet it will reach between 1,800 and 3,000 Gs at impact. (T.1065) She told that at 1,000 Gs, really 700, the brain is known to demonstrate fairly significant injuries even though the skull does not fracture. (T.1066) Loss of consciousness is not necessary for there to be a brain injury. (T.1245)

On cross, the defense pointed out that Dr. Appel was unable to examine Louie. (T.1217, 4428) Dr. Appel acknowledged that this was because Louie underwent testing by another too close in time before she saw him. (T.1217) However, she scored his IQ independently from the transcript of the questions and answers administered by (defense neuropsychologist) Dr. Russell in her testing. (T.1174-75) She declined to defer on the issue of brain damage saying, "I think I have my own independent set of skills with respect to that." (T.1256)

Dr. Weiner stated that by the time he saw Louie in December 1993, he was in very bad shape. (T.3630) As of 7/20/94 he had regressed terribly. (T.3647) Louie could not even do subtraction. (T.3661, 3664) He never saw Louie after 6/19/95 (T.3665) and knows nothing about his current condition (T.3667).

Dr. Schwartz, a neurologist, admitted that Louie was having some major psychiatric problems when he saw him on 12/1/93 before referring him out to a psychiatrist. (T.788, 797) Dr. Schwartz reported that Louie "couldn't do simple calculations . . . couldn't remember how to draw a clock, or sign, or write a sentence." (T.784) He found these to be objective findings of an organic nature but had insufficient information to relate them to the 11/30/93 incident. (T.783-84)

Defendant's forensic experts opined that Louie John simply sustained a post traumatic stress syndrome disorder from the 11/30/93 incident that was correctable by psychotherapy (T.3803-11, 4210-17, 4245). Drs. Brown and Russell ruled out brain damage on the basis that Cruz did not lose consciousness or have amnesia about the incident. (T. 4020, 4022, 4215-17) As with Dr. Appel, defense neuropsychologist Russell opined on the issue of organic brain injury. Dr. Russell testified that Cruz did not suffer neurological brain damage as a result of the 11/30/93 incident. (T.3971, 4020-25)

The defense urged that Louie unraveled before the incident. But, plenty of evidence showed otherwise. No records or witness demonstrated or said that Louie was psychotic, or physically violent or prone to foul language or taking anti-psychotic medication prior to the injury at Miramar High. Having reviewed Louie's extensive medical, testing and school records from birth on, Dr. Appel observed no notation from any teacher, school psychologist or anywhere suggesting he was psychiatrically disordered or saying they are worried this boy is, or even potentially coming close to, unraveling. (T.1071-77, 1167, 1191). Nor did Dr. Afield (T.1584, 1588-1606) Although Dr. Wiener never reviewed Louie's previous medical or school records (T.3656), the psychological evaluations he did review gave him a base line that there had been a change in Louie. (T.3680-81)

Dr. Klass acknowledged there was nothing to indicate that Louie had a need for anti-psychotic medication before the 11/30/93 incident, nor violence, rage, hallucinations, disorganization, paranoia, or volatile behavior. (T.1477-78) He admitted that now Louie is a very disturbed individual (T.4179) and that it is more likely than not that he will have continued difficulties. (T.4178) But, Dr. Klass did not consider himself a specialist in the field of organic brain damage as it relates to or results in cognitive or behavior dysfunction. (T.1475) It was not his opinion that Louie was schizophrenic before this incident occurred. (T.4172) Similarly, Dr. Levitt reported that before 11/30/93 no one ever diagnosed Louie as psychotic or psychiatrically disabled, mentally ill or schizophrenic. (T.957)

As one neighbor observed after 11/30/93, Louie "is a ticking time bomb." (T.2752) "Something in Louie has died." (T.2756)

Plaintiffs called a vocational rehabilitation expert (Sharon Griffin) and economist (Dr. Frederick Raffa) who numerically assessed damages, (backing out the costs for Louie's preexisting condition), under three scenarios of life care or management plan models for Louie John's needed long-term care. Their present value, including prescriptions, medical costs and loss of earnings, ranged from approximately $6.1 million (Scenario 1), $4 million (Scenario 2) and $6.6 million (Scenario 3).

Defendant called no witness to rebut this damage case nor even mentioned damages in its closing argument. The court commented after the closing arguments at a side bar, "He [defense counsel] didn't argue it [damages] at all. I didn't hear numbers. When you don't argue numbers and they find for the Plaintiffs, they give what the Plaintiffs ask just about." (T.4662)

The jury returned a verdict for $6,197,725, attributing $3,500,000.00 to loss of filial consortium. The allotment would preserve the verdict's integrity given the fear that, if Louie loses control and hurts someone outside the home, the family could lose "jurisdiction" and "the guardianship of him." (T.1968)

STATEMENT OF THE CASE

The trial lasted 7 weeks, from August 11, 1997 until September 29, 1997. The trial Judge was different from those assigned to handle pre-trial matters.

Mrs. Cruz's Loss Of Filial Comfort Or Society

In instructing the jury on Mrs. Cruz's loss of her son's comfort, society or attentions, any reference to "services" as well as losses "in the future" was removed. The court instructed the jury on this element of damage as follows:

> E. Any loss by reason of Jane Alice Cruz' son's injury of his comfort, society or attentions in the past. You cannot award anything in the future for that kind of loss, comfort, society and attentions past his majority, okay, that's the law.

The trial court reduced the $3,500.000 verdict for Mrs. Cruz's loss of her child's comfort, society or attentions up to majority (T.4721) to $1,000,000. Cruz cross appealed the reduction of such loss *past his majority*. (R.720-21)

Dr. Brown's Examination

The defense's third expert (neurologist Brown) was not allowed an examination. At a 4/16/97 pretrial hearing to compel his exam, Plaintiff's counsel mistakenly argued that neurological condition was not in issue. Immediately thereafter, a 4/23/97 letter of redaction was sent to the defense expressing that there will be testimony "as to the neurological component of his head injury . . . " (SR.10, 28) Based on this correction, another hearing was held on 6/11/97 to reconsider the propriety of Dr. Brown's examination.

As per Dr. Brown's 3/16/97 letter, his examination would last 1 hour (30 minutes for a history and 30 minutes for a physical exam). No tests were requested. (SR.8-9) Histories and neurological examinations evaluative of Cruz's medical condition had already been taken and recorded by defense neuropsychologist (Dr. Russell) and defense psychiatrist (Dr. Mutter). (T. 3960-62, 3722-28, SR.38) Dr. Russell tested and examined Louie John Cruz for two days, each almost a month apart. (T.3960) She interviewed him and performed a litany of tests: two IQ tests; frontal lobe test; sensory perceptual examination; motor function tests; lateral dominance examination;

achievement testing; word fluency and vocabulary picture tests; memory functions test: two projective and one sentence completion test; and an objective personality test in the same genre as an MMPI. (T.3960-61) Her examination was transcribed. (T.3962) Dr. Mutter also independently examined Louie John Cruz, interviewed him and evaluated his mental status and psychomotor activity, with a court reporter also present to transcribe his entire examination *verbatim.* (T.3722-28)

Uncontroverted evidence at the June rehearing established that Dr. Brown's requested exam failed to evaluate Cruz's medical condition in question. Dr. Appel's testimony was presented to the court at that rehearing:

> [Question]: 'The manner by which you diagnose and/or measure the deficits that are in Louis John Cruz is the neuropsychological testing and then psychiatric diagnosis?'
>
> [Answer]: 'That's correct.'
>
> [Question]: 'Would a general neurological examination be able to evaluate the neurological deficits that you find in neuropsychological testing or the psychiatric disorders arising from this injury?'
>
> [Answer]: 'Neither. It would not be able to do either one. It only measures."
>
> [Question]: 'Is this particular neurological injury one that falls within the realm of psychiatric disorders and/or common deficits arising from organic brain damage?"
>
> [Answer]: 'These are neurocognitive deficits. In other words the cognitive deficits and the psychiatric deficits that are based upon

> damage to the nervous system, that the reflexes aren't going to change that."

(SR.38,39) Defendant offered no counter. Dr. Brown's exam was not decreed.

Defendant supported this evidence from Dr. Appel, when it called Dr. Hoche (a neurologist) as a witness at trial. On direct, he testified:

> [Question]: Did you find anything abnormal about him in your neurological examination?
>
> [Answer]: The neurological examination is not a neuropsychiatric examination, we don't do a neuropsychiatric examination. And unfortunately or fortunately, I don't know, the post traumatic brain disorders are in the – or are dealt with in the realms of psychiatry more than neurology.
>
> [Question]: And psychiatrists will – have testified and will testify, I am only asking you in terms of your neurological examination was it normal?
>
> [Answer]: Correct.

(T.3596) This confirmed Dr. Appel's prior testimony offered at the June rehearing and reiterated that a normal neurological exam does not evaluate Cruz' claimed injury.

At the same June 11th hearing, the defense also requested a new set of neurological evaluations by its neuropsychologist Russell which, due to proximate testing, could only be conducted 11 months later. (SR.26) The

hearing was cut short because time ran out,[4] leaving issues unresolved. (SR.71) The court did not continue the trial for a year to allow Dr. Russell a new set of tests (SR.79-80). This decision was not appealed.

At the June hearing, the defense also moved for a continuance. It received Dr. Affield's report in late May 1997 and needed more time to review the findings reported therein, as answers to its interrogatories detailed no information of his findings. The continuance sought by the defense to allow Dr. Brown more time to check these findings before the trial started was granted by removal of the case from the June 23, 1997 trial docket until August 1997. (T.1) The defense did not ask for more time.

Both sides called a non-treating psychiatrist and neuropsychologist. All were permitted examinations, except plaintiff's neuropsychologist (Appel) who was deprived one. Additionally, neurologist Brown testified for the defense. Plaintiffs were denied a general neurologist to use in rebuttal. (T.3771-78) At trial, defendant pointed out on cross that Dr. Appel neither treated nor examined Cruz. (T.1217, 4428) At trial, Plaintiff followed suit by pointing out on cross that Dr. Brown likewise did not examine or treat Cruz. (T.4253)

---

[4] "MRS. WEAVER: [T]he only evidence in front of you is that a general neurological examination will not provide any information. No one - -
COURT: I'm sorry, we are out of time here - -" (SR.71)

The district court reversed and remanded for a new trial and certified as a matter of great public importance the issue of filial consortium extending beyond majority raised in Cruz's cross appeal. Reversal was predicated on the sole basis that the trial court abused its discretion by not allowing Dr. Brown to examine Louie Cruz. All other issues appealed by the defense were expressly affirmed. Cruz timely moved to clarify that the new trial be limited to damages and for rehearing as to abuse of discretion. Both were denied on 6/27/00. Notice to invoke discretionary jurisdiction was filed 7/17/00.

SUMMARY OF ARGUMENT

The jury verdict for filial consortium deserves reinstatement where the court misapplied the law in barring permanent loss of filial comfort, society or attentions past majority. It was not an abuse of discretion to disallow a third medical examination where unrefuted evidence showed it did not evaluate the medical condition at issue and negated good cause for such examination.

ARGUMENT

I. 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?

"Children are the anchors that hold a mother to life."

Sophocles, *Phaedra* (c. 435-29 B.C.)

A. The Explicit Phrasing of *United States v. Dempsey* Answers This Certified Question In The Affirmative.

The Court in *United States v. Dempsey*, 635 So.2d 961 (Fla. 1994) ordered:

> 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 a significant injury resulting in the child's permanent total disability . . . loss of 'consortium' to include the loss of companionship, society, love, affection, and solace . . . and comfort.

Id., at 965. Recovery for "permanent" loss of filial society means just that – past, present and future. It defies logic and common sense to say that recovery for permanent loss of filial consortium will only be temporarily recompensed. The requirement that the child sustain a permanent total disability ensures that the filial relationship, once tortiously harmed, will not improve over time. *Permanent* damages address *permanent* loss. *See Standard Jury Instructions-Civil Cases (No.99-2)*, 25 Fla. L. Weekly S625 (Fla. August 17, 2000), authorizing use of revised jury instruction 6.2(f):

> [I]f you find that . . . (claimant child) sustained a significant injury resulting in (claimant child's) permanent total disability . . . you shall consider the following element of damage: Any loss by parent(s), by reason of that injury, of the child's companionship, society, love, affection, and solace in the past and in the future."

The record is replete with evidence that Louie John suffered a significant, permanent total disability. I.B. 13-31 above. Mrs. Cruz is confronted with this loss each day where she faces physical harm at the hand of her child.

(T.2683, 2797) Her other son calls home from school to "make sure that my mother was okay and my brother didn't hurt or kill my mother." (T.2791)

In addition to phrasing recovery for "permanent loss," *Dempsey* also chose to use the word "child" (not "dependent") without any period of limitation or qualification for coming of age. As recognized in Florida, "without any words of limitation, a 'child' commonly refers to *any* son or daughter, regardless of his or her age." *Mazzella v. Boinis*, 617 So.2d 1156, 1157 (Fla. 4th DCA 1993). Words of qualification, (e.g., "unemancipated minor child" expressed earlier in *Yordon* as being attributed to *Wilkie*), were noted but never used in *Demsey*. The only qualification used in *Dempsey* said that the child must suffer a "significant injury" resulting in "permanent total disability," a qualification that dispels the floodgates of litigation prophecy and fabled "cry wolf" scenarios imagined by naysayers of reform.

Logically, there would be no need to qualify recovery for loss of filial society upon a child's permanent total disability, if the loss therefor would be cut off at majority age. A temporary total disability during a child's minority years would suffice. Placing an artificial barrier at the age of majority would, in *Dempsey's* own words, fail "to ensure the parent adequate compensation" for "one of the primary losses that the parent of a severely injured child must

endure" – "the loss of a child's companionship and society." 635 So.2d at 964.

On that 30th day in November 1993, Louie John was severely and permanently injured thereby irretrievably shattering the familial bonds that tie mother and son. The question here is whether his mother's "right to recover for the permanent loss of filial consortium suffered as a result of a significant injury resulting in the child's permanent total disability," to use *Dempsey's* phrasing, should be made temporary by cutting off at her son's majority. The answer can only be no, given *Dempsey's* language awarding recovery for "permanent loss" of filial society. *Compare* § 768.0415, Fla. Stat. (1988), allowing "unmarried dependent" to seek damages for significant permanent injury to parent "including damages for permanent loss of services, comfort, companionship, and society." At the very least, *Dempsey* reciprocates this right to allow a parent like Mrs. Cruz to recover for the significant permanent injury to her unmarried dependent son, including damages for the permanent loss of his comfort, society and attentions over the life of this relationship. The recovery is not thereby limited, simply the people from whom a filial society claim derives.

Some jurisdictions created a filial consortium claim at common law to achieve parity with spousal consortium claims. In Florida, and elsewhere, spousal consortium claims are not arbitrarily limited in time to account for high

divorce rates in modern society. Unlike marriages, filial relationships last for life.

The *Dempsey* opinion repeatedly cites *Frank v. Superior Court Of Arizona*, 722 P.2d 955 (Ariz. 1986)(en banc). *Frank* concluded:

> It is irrelevant that parents are not entitled to the services of their adult children; they continue to enjoy a legitimate and protectible expectation of consortium beyond majority arising from the very bonds of the family relationship. Surely nature recoils from the suggestion that the society, companionship and love which compose filial consortium automatically fade upon emancipation; . . . 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.'

722 P.2d at 960. The logic in *Frank*, spawned from the guidance of this Court, mirrors "the policy of this state that familial relationships be protected" and permanently redressed. *Dempsey*, 635 So.2d at 964.

B. Florida's Modern Public Policy Protects The Entire Bundle Of Rights And Expectations Within Family Relationships.

In tailoring the public policy of Florida to conform with current realities, the *Dempsey* opinion traced the common law genesis of filial consortium claims. Its earlier decision in *Wilkie v. Roberts*, 109 So. 225 (Fla. 1926) "can be read as limiting a parent's recovery to the pecuniary losses suffered as a result of a

negligent injury to a child." *Dempsey*, 635 So.2d. at 963-64. *Dempsey* next chronicled that, "in 1973 [the year *Yordon* v. *Savage*, 279 So.2d 844 (Fla. 1973) was decided] . . . it was apparent that a child's companionship and society were of far more value to the parent than were the services rendered by the child." *Id.* at 964 (bracketed material supplied). Yet, by 1985 in "*Zorzos v. Rosen* . . . we declined to recognize a cause of action for loss of parental consortium . . ." *Id.*

A decade later, *Demsey* expanded the common law to " 'to keep pace with changes in our society.' " *Id.* It observed that modern society no longer perceives children as servants, valued merely for their services or earning capability. Now "children are valued for the love, affection, companionship and society they offer their parents . . . The loss of a child's companionship and society is one of the primary losses that the parent of a severely injured child must endure." *Id.* Thus, *Dempsey* created recovery for the "permanent loss" of a child's society "to ensure the parent adequate compensation" for a severely injured child, "particularly . . . considering the limited damages generally recoverable for the loss of ordinary services rendered by a child under present day standards." *Id.* It noted such fundamental right was even constitutionally recognized. *Id.* at 965. *See Stone v. Wall*, 734 So.2d 1038 (Fla. 1999) (created common law action for intentional interference with parent-child relationship to further accommodate emergent family values).

Loss of filial consortium is most severe when dealing with a significant, permanent injury, as opposed to a fatal one. As echoed in *Frank*

> 'Perhaps the loss of companionship and society experienced by the parents of a child permanently and severely injured . . . is in some ways even greater than that suffered by parents of a deceased child. Not only has the normal family relationship been destroyed, as when a child dies, but the parent also is confronted with his loss each time he is with his child and experiences again the child's diminished capacity to give comfort, society, and companionship.'

722 P.2d at 958. *See Theama v. City Of Kenosha*, 344 N.W.2d 513, 519 (Wis. 1984)(created common law loss of consortium for severely injured parent even where no like claim existed for wrongful death).

Clothed with the prerogative to adopt change needed to accommodate present day values, *Dempsey* expanded the common law by placing no age-related qualifications on the non-pecuniary feature (i.e., society) of filial consortium claims where such consortium was permanently injured. Statutory models addressing different claims cannot derogate this common law right.

C. Permanent Loss Of Filial Society Can Only Be Adequately Compensated Over Life Of That Relationship.

Filial consortium now features multiple components, loss of society and comfort given favored status over the traditional loss of services. The differences in these components and their relative value warranted the change heralded in *Dempsey*. Due to Louie John's previous condition, his loss of services was unavailable as an element of Mrs. Cruz's filial loss of consortium claim. Her claim

for the permanent loss of Louie John's comfort, society and attentions should not have been limited to the age of his majority.

Florida common law limited a parent's recovery for a child's services/income or medical/educational expenses to the child's age of majority. Parental rights to those services and obligations for those expenses ordinarily expire when a child attains majority. While emancipation frees parents and children from the reciprocal legal obligations of services and support, a parent has a reasonable expectation for the society of their children to last a lifetime. The seeds of comfort and society planted in the garden of a parent/child relationship do not wither when a child moves out of the house. In fact, they blossom after the child reaches majority, because only then do most sons and daughters begin to appreciate and reciprocate the foliage of affection, companionship and solace sown by their parent's heart.

Dempsey recognized this by reiterating that, "a child's companionship and society were of far more value to the parent than were the services rendered by the child." *Id*. at 964. *See also Frank*, 722 P.2d at 959 n.6 (filial consortium "is no longer predicated upon loss of services; 'sentimental interests now predominate.' "). Mrs. Cruz's parental feelings and happiness have been stripped away. To echo the words of Dr. Afield, "basically it's kind of over for them." (T.1664) "This unravels the heart of the family." (T.1668).

The paramount value assigned to preserving this bundle of rights pervading the nucleus of the family directed the *Dempsey* Court to expand common law and allow permanent recovery for the irrevocable loss of a child's solace, companionship and love. Otherwise, society would have to shoulder that which is tortiously rendered incapable of nurture within the family circle.

"The family relationship 'is the relationship on which all society must depend for endurance, permanence, and well-being.' " *Theama*, 344 N.W.2d at 525. As expressed in *Dempsey*, filial society is the most vital part of the parent/child relationship. It is a right now appropriately vesting to all citizens who have procreated. Of all people, The School Board seeks to disregard the natural consequences of this relationship and, thereby, disavow *Dempsey*.

Our jurisprudence allows reinstatement of a jury verdict to accommodate for an error of law. *Gilmore v. Morrison*, 314 So.2d 5 (Fla. 4th DCA 1975)(verdict reduction based on a misapplication of the law reinstated on appeal); *Ramos v. Ambu-Car Of Dade County,Inc.*, 627 So.2d 1255 (Fla. 3d 1993)(reinstatement where verdict reduced by inapplicable seat belt and comparative negligence defense). The filial consortium portion of the verdict was reduced below as a result of misapplication of law, e.g. by illegally removing filial consortium damages past majority, and should be reinstated. Stated differently, a $3.5 verdict for permanent loss of filial society is just.

II. NOT ABUSE OF DISCRETION TO DISALLOW MEDICAL EXAMINATION BY THIRD DEFENSE EXPERT WHERE UNCONTRADICTED RECORD NEGATED UTILITY OF SUCH EXAMINATION.

A. Unrebutted Evidence That Dr. Brown's General Neurological Examination Is Unable To Evaluate Plaintiff's Medical Condition At Issue Negated Good Cause For Such Examination.

The opinion below, 761 So.2d 388, 393-94, held that, "the School Board should have been allowed the opportunity to have its own expert conduct an independent examination . . . it was an abuse of discretion not to grant the continuance." Of its numerous (sub) issues raised below on appeal, the School Board assigned no error to the denial of it's neuropsychologist, Dr. Russell's second round of neurological testing or the denial of a continuance. Therefore, neither denial can form the basis for reversal.

With respect to not allowing neurologist Brown's examination, which was appealed, reversal hinges upon the stringent standard of abuse of discretion. *Id.; Wal-Mart Stores, Inc. v. Liggon*, 668 So.2d 259,273 (Fla. 1st DCA 1996). Dr. Brown requested ½ hour to interview the Cruz boy for a history and ½ hour to conduct a physical neurological examination. (SR.8, 9) His examination did not include administering any tests like an EEG, CT scan or the like. *Id.* Both parties used deposition testimony of Dr. Appel as evidence to support their respective arguments at the June 1997 hearing to reconsider Dr. Brown's examination. (SR 17-18, 22-25, 37-39) The opinion below, 761 So.2d at 392, quotes Dr. Appel's

testimony presented by defendant at that rehearing saying that Cruz suffered a neurological injury. But, Dr. Appel's uncontroverted testimony presented by plaintiff at the rehearing, quoted at pp. 33-34 above, established that the general neurological examination requested by Dr. Brown would not evaluate plaintiff's medical problem. (SR 38, 39)

Defendant presented the trial court with no evidence, or argument, countering how Dr. Brown's examination would evaluate plaintiff's injury in rebuttal to Dr. Appel's evidence. Defendant failed to carry its *Anderson* burden to show good cause for Dr. Brown's examination. *Anderson v. Anderson,* 470 So.2d 52 (Fla. 4th DCA 1985). Stated differently, Dr. Appel's *uncontroverted* evidence that Dr. Brown's requested examination is non-evaluative of Cruz's medical condition (particularly when weighing plaintiffs' severe exigencies that would accrue from a continuance) sustained the trial court's discretion to not require an unsubstantiated examination by a third defense expert. At a minimum, this evidence planted the seed of debate in the reasonable minds of those weighing the propriety of such discretion. *Canakaris v. Canakaris,* 382 So.2d 1197 (Fla. 1980) (trial court's discretion can be overturned only where reasonable minds could not differ on issue).

The only evidence defendant ever offered relative to this issue buttressed Dr. Appel's testimony and confirmed what Dr. Appel said about the incapability of a

general neurological examination, like the one requested by Dr. Brown, to evaluate Cruz' medical condition. At trial, the defense called neurologist Hoche to testify in its case in chief. (T.3572-3606). Dr. Hoche agreed with Dr. Appel that a normal, general neurological examination neither evaluates nor discounts the type of injury Cruz claims here. (T.3596)

The record evidence of Drs. Appel and Hoche unanimously negated the utility of Dr. Brown's neurological examination to evaluate plaintiff's medical condition. Dr. Brown never offered any statement or opinion, during pretrial or at trial, disagreeing with such testimony from Dr. Appel or Dr. Hoche or showing good cause how his general examination would affect his testimony and, if denied, cause prejudice. Thus, review thereof was not preserved.

Aside from the ½ hour general physical, Dr. Brown's examination was also to include an interview of Louie John Cruz to obtain a history (SR. 8,9). (Dr. Brown never asked to take an EEG, CAT, MRI or like tests). Defendant's two other experts (Dr. Mutter and Dr. Russell) had already extensively interviewed plaintiff and transcribed their examinations *verbatim,* (T.3960-62; 3722-28), rendering a third interview by the defense superfluous.

The opinion below, 761 So.2d at 393, states that, "It is not enough that the defendants are allowed to depose plaintiff's medical experts and then review plaintiff's medical records." The instant record contradicts this. The defense had

at its fingertips the verbatim transcripts of extensive histories taken by two of its own forensic experts and much more. Defense neuropsychologist Russell and psychiatrist Mutter personally examined plaintiff and took a battery of neurological tests. (T.3960-62; 3722-28) Transcripts of their independent examinations and interviews were used by other defense experts. (T.3957, 4231, 4283). These extensive exams taken by the defense team of experts constituted the genre of examinations identified by neurologist Hoche and neuropsychologist Appel as being evaluative of Cruz's condition at issue – as opposed to Dr. Brown's general neurological examination that the evidence below established would not be so evaluative. (T.3596, SR 38-39)

It cannot be an abuse of discretion to deny an independent examination when the uncontroverted record below showed it would not evaluate plaintiff's neurocognitive condition at issue. It is not within the province of appellate courts to look outside the record, guess otherwise and force a retrial

to allow an unsubstantiated examination for which good cause was not shown.

The cases cited in the opinion below, *Dominique v. Yellow Freight Sys., Inc.*, 642 So.2d 594 (Fla. 4th DCA 1994) and *Anderson*, 470 So.2d at 52, addressed circumstances where the complaining party was permitted no examination of the party who placed his medical condition in issue. Here defendant was given multiple opportunities to independently examine and test plaintiff by two of its

experts. The type of general examination by Dr. Brown, the defense's third expert, was shown to not address the specific medical condition at issue in this case. *See* unrebutted testimony of Dr. Appel, confirmed by defense witness Dr. Hoche. (SR 38, 39; R 3596) The law does not afford a *per se* right to unsubstantiated examinations by every defense expert, absent good cause. As the trial court observed, "You don't get 18 examinations." (T.3778) *Reynolds v. Dade County School Board*, 621 So.2d 748 (Fla. 3d DCA 1993)(order compelling additional psychological evaluation quashed where good cause was not shown on the record)(citing *Anderson*). The unrebutted record testimony from neuropsychologist Appel and neurologist Hoche, coupled with the independent examinations by two other defense experts that did evaluate plaintiff's neurocognitive condition at issue, tipped the scale in favor of the propriety of the trial court's discretion or, stated differently, the issue of harmless error. At the very least, they highlight that reasonable minds could differ in evaluating the path of the trial court's discretion paved by the record before it.

III. A NEW TRIAL TO REQUIRE FORENSIC MEDICAL EXAMINATION MUST BE LIMITED TO DAMAGES.

An independent neurological examination does not and cannot overturn the separable liability verdict deciding the School Board negligently breached its duty to provide a reasonably safe environment for its students, specifically plaintiff. A forensic examination only affects the damages component of this negligence

action. *Massey v. Netschke,* 504 So.2d 1376, 1377 (Fla. 4th DCA 1987)(new trial for damages only, where upheld liability verdict separable); *Griefer v. DiPietro,* 625 So.2d 1226 (Fla. 4th DCA 1993) (rehearing granted to clarify that new trial on damages is inappropriate where error affects only issues of liability). Where a forensic examination affects only damages, any new trial to require such examination must be narrowed to damages.

CONCLUSION

Cruz requests that the verdict and judgment at trial be affirmed and that the $3,500,000 verdict for loss of filial consortium be reinstated.

Gale Payne & Associates
1220 East Broward Boulevard
Fort Lauderdale, FL 33301-2134
Telephone (954) 761-9600

By:_____
Gale Ciceric Payne, FBN 306967

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to Counsel for Appellants, Amy D. Ronner, Esq., 16400 N.W. 32nd Avenue, Miami, FL 33054 and Bruce J. Winick, *Pro Hac Vice*, 1311 Miller Drive, Coral Gables, FL 33314, this _____ day of September, 2000.

By:_____
Gale Ciceric Payne