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' REPLY BRIEF ON THE MERITS

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

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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' Reply Brief On The Merits is 14 point proportionally spaced Times Roman font.

SUMMARY OF ARGUMENT

The Court in *Dempsey* held that "a parent . . . has the right to recover for the permanent loss of filial consortium." Unless permanent does not mean permanent, the answer brief's arguments fail. This case presents an injury to a 15-year-old, unmarried dependent, not an adult. The Court is empowered to review the "decision" below and not simply the "question" certified. The decision below imposed a *per se* rule of IME exams (e.g., the uncontroverted record showed the exam failed to evaluate the medical condition in issue) which conflicts with other district court opinions. Where the verdict that defendant negligently breach its duty to provide a reasonably safe school involves no medical issues, a disallowed IME offers no defense to such negligence and, thus, cannot reverse such verdict of negligence.

ARGUMENT

> Some say love, it is a river, that drowns the tender reed.
> Some say love, it is a razor, that leaves your soul to bleed.
> Some say love, it is a hunger, an endless aching need.
> But I say love, it is a flower, and you its only seed . . .
> When you feel that love is only, for the lucky and the strong.
> Just remember in the winter, far beneath the bitter snow,
> lies the seed that with the sun's love, in the spring, becomes The Rose.

BETTE MIDLER, *The Rose*, *on* THE ROSE (Atlantic Records 1979).

I. PARENT'S RECOVERY FOR PERMANENT LOSS OF

FILIAL LOVE AND SOCIETY EXTENDS BEYOND THE CHILD'S AGE OF MAJORITY OR ELSE RECOVERY IS NOT PERMANENT.

The answer brief opens by captioning "This Court has adopted a rule limiting filial consortium damages to the minority years," even though the express holding of *Dempsey* says nothing about "minority years," contains no period of limitation, and conversely chose language that negates limitation. *Dempsey's* holding says a parent of a significantly injured child suffering a *permanent* total disability has the right to recover for the *permanent* loss of filial consortium. The adjective "permanent" is used twice to modify two separate nouns (one in apposition), (1) loss of filial consortium; and (2) total disability. The answer brief ignores the former modifier and focuses only on the latter. This latter modifier (*permanent* total disability), which is required before recovery for *permanent* loss of filial consortium becomes viable, discredits the parade of horribles imagined in the answer brief.

No analysis can ignore *Dempsey's* express holding that creates recovery for a parent's "permanent loss of filial consortium" suffered from "the child's permanent total disability." *See Shaw v. U.S.*, 741 F.2d 1202, 1209 (9th Cir. 1984)(Washington law providing filial consortium for injury to the parent-child relationship contains no period of limitation, thereby precluding limitation of damages to the period of the child's minority.).

Petitioner does not presume to tell this Court what *Demsey's* holding means but can only presume that it means what it says. *Dempsey's* holding chose to say "permanent" (meaning without limitation) twice, in two different contexts, to include two different requirements of permanence. Its holding (not just a stray paragraph) assigns no words of limitation to either the class of those injured (child) or the extent of the recovery for loss of filial consortium (permanent loss of filial consortium). Thus, *Dempsey* can only mean to assign a non-temporary redress for a non-temporary injury, as it said.[1]

The answer brief accuses petitioner of relying on one sentence in *Dempsey*, the holding. (A.B.19) After expressing its holding, *Dempsey* repeats the phrase "damages recoverable for the permanent loss of filial consortium" reaffirming that it meant what it said. *Id.,* 635 So.2d at 965.

Loss of filial consortium traditionally only included the pecuniary services of children's earnings (master-servant analogy) but now focuses on the non-pecuniary services of children's companionship, society, love, affection, and

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[1] The Supreme Court Committee on Standard Jury Instructions fashioned jury instructions that (although not having the imprimatur of this Court) took the *Demsey* holding as meaning what it said and thereby provided for the loss of society feature of filial consortium damages "in the past and in the future" without limitation. *Standard Jury Instructions-Civil Cases (No.99-2),* 25 Fla. L. Weekly S625 (Fla. August 17, 2000).

solace (collectively referred to as "society"). The answer brief argues that loss of filial pecuniary earning services is traditionally restricted to the minority years, commingles loss of filial pecuniary services with non-pecuniary loss of filial society, and therefore posits that *Dempsey* restricted loss of filial society to the minority years, a tautology that respectfully would have driven Socrates to the hemlock prematurely. The argument is falsely premised. It requires one to surmise that *Demspey* didn't mean what it said about permanent and to ignore the clear segregation *Dempsey* accords to the pecuniary element of lost services versus the non-pecuniary, loss of society.

Dempsey answered a second certified question by assigning a different standard of proof to the pecuniary as opposed to the intangible aspect of filial consortium and featured the dominance of the latter. The master-servant analogy obviously pertained only to pecuniary loss of filial earnings, as children's earnings no longer belonged to their parents after majority. Conversely, Children's love, comfort, and society still belong to their parents after majority. *Frank v. Superior Court Of Arizona,* 722 P.2d 955 (Ariz. 1986)(en banc), and cases that shed the master-servant analogy's applicability to the loss of filial society component by releasing analogous age limitations thereon, had "looked to this Court for guidance." *Dempsey,* 635 So.2d at

963.

The answer brief's survey of other jurisdictions is an exercise of futility, where this Court has offered an opinion on point. It is likewise futile to tally a majority rule in an emerging area of common law such as this. Flexibility and courage in our jurisprudence plant the seeds of change that, once time tested in the garden of virtual reality, bloom into consensus. This Court recognized the seed of its guidance in this area of law upon *Frank* and its progeny. *Dempsey*, at 963 n.2. The answer brief ignores many of these cases and, instead, cites ten cases that either deny filial consortium for injury to adult children

[2] or completely deny filial consortium damages. Half the cases predate *Dempsey*, and yet did not persuade a different holding. The excerpt from *Ruden v. Parker*, 462 N.W.2d 674, 676 (Iowa 1990) quoted at page 24 of the answer brief expressed, not policy, but simply a rationale basis for the legislative

[2] The analysis here is not compensation for injury to minors versus injury to adults. This case does not present an adult injury scenario. Analysis of the facts presented here is whether a permanently disabling, significant injury to a 15-year-old, unmarried dependent allows a parent "to recover for the permanent loss of filial consortium" society which, by definition of permanent, extends beyond the child's minority years.

enactment of an Iowa consortium statute being reviewed for an equal protection violation.

Frank v. Superior Court Of Arizona, 722 P.2d 955 (Ariz. 1986)(en banc) is the only out of state case discussed in the answer brief that is cited approvingly in *Dempsey*. *Id.* at 965. The answer brief argues that *Frank's* reasoning in awarding non-pecuniary filial society damages past majority is "just plain wrong" (AB.33, 35) and "inside out and backwards." (AB.36) The reasoning in *Frank*, as guided by *Dempsey*, was approved by *Dempsey* without any stated reservation. The court below in fashioning the instant certified question

footnoted *Dempsey's* reference to *Frank*. *Dempsey*, 761 So.2d at 396 n.1.

The answer brief tries a cheeky phrase, "you don't get child damages for someone who is no longer a child." (AB.1) The subject here is parental damages

for the permanent loss of filial society from someone who is no longer without significant, permanent injury. The substituted reasoning offered in the answer brief argues that non-pecuniary, filial society should be restricted to minority years, because "today's parents tend to aspire to raise their children to be independent, not to be 'servants' or parental 'economic

assets,'" (AB.24) How can the School Board be so out of touch with the very relationship they are entrusted to supplement in partnership? How does raising a child to achieve economic independence and internal strength of character negate the concomitant ability of such child to reciprocate to a parent the permanent bonds of love, affection and society crucial to a healthy culture? The answer brief keeps focusing on the pecuniary aspect of the filial relationship (not claimed by Mrs. Cruz and, thus, stricken from the jury's consideration) and commingles it with the non-pecuniary loss of filial society dominating consortium analysis.

The answer brief states that, "Today, the norm is for emancipated children to move away and live independently," (AB.23-24) with the implication that they thereby take their love with them. Once again, this commingles the loss of pecuniary services with the loss of society aspect of filial consortium.

With respect to filial society, children may move out of their parent's home but not their heart. It is not an out of sight, out of mind relationship stereotypical of some romances. Filial society is a permanent relationship. *Dempsey* recognized the permanence of filial love and society, refused to unbundle these fundamental, even constitutionally recognized intangible

family values, and answered its judicial call to expand our common law to fill the void. It recognized that the seed of filial society becomes a rose of modern society.

The answer brief proffers *Estate of Wells v. Mount Sinai Medical Ctr.*, 515 N.W.2d 705 (Wis. 1994) as having more persuasive reasoning. *Wells* involved injury to a twice married, 34-year-old as a result of medical malpractice, unlike this case's injury to a 15-year-old as a result of general negligence. Wisconsin's wrongful death statute had been amended to allow parents to recover for the lost society of their adult children. Nevertheless, *Wells* declined to apply wrongful death statute analysis to a tort action for severe injury, as the two were considered "impossible to analogize." *Id.* at 710. Severe injury has been characterized as more egregious. *Frank*, 722 P.2d at 958.

The answer brief, quoting *Wells*, complains that it makes no sense to award loss of consortium damages to "individuals who have been only indirectly injured." (AB.29) Apart from begging the question, as consortium damages by definition compensate those secondarily injured, mother Cruz has suffered direct injury. Every day mother Cruz faces physical harm at the hand of her permanently and totally disabled 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)

"The more enlightened and realistic view of the role of children in their parents' lives," has achieved the status of "fundamental constitutional significance." *Stone v. Wall*, 734 So.2d 1038, 1044 (Fla. 1999). *See also Dempsey*, 635 So.2d at 965. It makes no sense to say that claims of such significance should have no permanence.

Ironically, *Mizrahi v. North Miami Medical Center*, 761 So.2d 1040 (Fla. 1999), like *Wells*, involved medical malpractice but, unlike *Wells*, involved the wrongful death statute. Under Florida's wrongful death statute, our legislature treated the same class of claimants (adult children of wrongful death parents with no surviving spouse) differently depending on whether the negligence was general (in which case adult children can recover for lost parental companionship, instruction and guidance) or the product of medical malpractice (wherein they cannot so recover). As such, the answer brief's solicitation to treat lost consortium claims at common law exactly like the legislature ignores not only the distinct factors defying analogy between wrongful death and severe permanent injury but also the legislature's own inconsistency even on statutes dealing with the same class of claimants.

Nevertheless, the *Dempsey* holding is not inconsistent with legislative law dealing with severe permanent injury to a different class of claimants. The *Dempsey* holding and Section 768.0415 both limit loss of society recovery to significant injuries resulting in permanent total disability. Both impose no limitation on consortium damage recovery for such severe cases of permanent injury. Both require recovery for permanent loss of the intangible society feature of consortium. Section 768.0415 identifies a different class of those physically injured (parents of unmarried dependents) than *Dempsey* (child). To the extent this somehow makes a difference, the instant case is compatible with this legislation where the injury was inflicted upon a boy of 15, unmarried, and dependent.

The answer brief suggests, at page 30, that upholding this expansion of permanent filial consortium damages will open pandora's box of torts to include relatives and business associates. The *Wells* dissent replies to such threat and echoes the theme guided by this Court and adopted in *Dempsey*.

> [I] believe that our allowance of recovery only for the negligent injury of a member of the nuclear family sufficiently limits liability for loss of society and companionship. I would not impose an inflexible age limitation. The extent of any claimed loss of society and companionship between a parent and an adult child is, I conclude, a matter of proof to be determined by the factfinder.

Wells, at 711. *Dempsey* went even further to require the derivative injury to be a significant, permanent total disability. It took nearly 2000 years to get to

Dempsey and include permanent loss of filial society inside the "nuclear family" in the bundle of consortium rights. To rave that relatives and business associates will now qualify in short order is a rabid musing negated by experience.

The answer brief's argument that this area of the common law "is not a real agenda for the judiciary" and would "preempt the political process," (AB.30, 32) is also plain wrong and inside out and backwards. Common law in this country, patterned from that of England, is a creature of the judiciary, not legislature. The Court, most recently in *Stone,* 734 at 1045, reiterated that, "the recognition of a common law tort, which is not inconsistent with our statutes and Constitution,

[3] falls within the judicial domain . . . we are not prevented from recognizing a cause of action simply because the legislature has not created it."

Even *Wells* stated, "the rules against recovery for loss of society and companionship were created by the courts, and it is our responsibility, as much as it is the legislature's, to continue to shape this area of the law." *Id.* at 708. During the last six years, the legislature has not challenged *Dempsey's* unequivocal holding awarding permanent loss of filial society damages without limitation. Moreover, the floodgates of litigation have not opened.

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[3] No Florida statute deals with loss of filial consortium rights when children, regardless of age, are severely and permanently injured. Thus, *Dempsey* created a common law right to recover permanent loss of filial society for this. Other statutes cannot derogate this common law right.

The certified question deserves an affirmative answer. If so, the answer brief does not dispute that the consortium verdict deserves reinstatement.

II. *CRUZ* DECISION'S *PER SE* RULE FOR IME EXAMS THAT ARE PROVEN TO BE MEDICALLY NON-EVALUATIVE CREATES DIVISION ON IME'S GOOD CAUSE REQUISITE.

This Court is constitutionally empowered to review the entire "decision" of a district court of appeal that passes upon a question certified to be of great public interest and not simply the "question." *Zirin v. Charles Pfizer & Co.*, 128 So.2d 594, 596 (Fla. 1961); FLA. CONST. art. V, § 3(b)(4). Additionally, the decision below failed to require a showing of good cause for an IME exam that was shown on the record without contradiction to have no evaluative impact on the medical condition in controversy.

[4] By doing so, the

decision below effectively imposed a *per se* rule of IME exams in all areas of

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[4] The answer brief does not even address the uncontroverted testimony of Drs. Appel and Hoche that a general neurological exam fails to evaluate Cruz's claimed medical condition. Nothing was offered from Dr. Brown or anyone else rebutting this. The answer brief says only that Dr. Appel relied on "neurological testing." (AB.41 n.18) Dr. Brown never requested neurological testing. He requested a general neurological exam. Dr. Appel's opinion that Cruz's injury at school resulted in permanent brain deficits (contrasted with the defense neuropsychologist's counter opinion that "Luis John did not suffer brain damage from a neurological standpoint as a result of the incident" T.3971) obviously was not based on a general neurological exam shown to be non-evaluative of Cruz's medical condition.

specialty affecting a claim of injury,

[5]thereby divesting the courts of discretion to weigh a challenge thereto made with uncontroverted record evidence. Other district courts do not impose such a *per se* rule and, instead, require the proponent of a challenged exam to show good cause justifying the exam. *Reynolds v. Dade County School Board*, 621 So.2d 748 (Fla. 3d DCA 1993). *See also, Brown v. State Farm*, 705 So.2d 117 (Fla. 2d DCA 1998)(opponent of IME procedure must provide affidavit and proof at evidentiary hearing).

The answer brief paints a portrait of unfairness with a brush missing essential bristles. Attorney Alex Clark mistakenly said that neurological condition was not in issue at the first hearing for Dr. Brown's examination. This mistake was corrected by Cruz's counsel and the circuit court. The trial court reconsidered Dr. Brown's examination after plaintiff corrected its mistaken statement and, at the second hearing thereon, denied his exam - not because neurological condition failed to be at issue, but where the uncontroverted record demonstrated that Dr. Brown's general neurological examination failed to evaluate plaintiff's medical condition in question.

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[5] While expert testimony in all such areas of specialty is allowed, medical exams therein that fail to evaluate the claimed medical condition are not.

Any problem posed by presenting Dr. Affield's report containing the grounds of his opinion in May 1997, as earlier answers to interrogatories detailed no such information, was also corrected. The continuance sought by the defense to allow Dr. Brown enough time to check Dr. Affield's opinions before the trial started was granted by removal of the case from the June 23, 1997 trial docket until August 1997. (R.1) This two-month continuance cured any time disadvantages regarding Dr. Affield's report and placed the parties on equal footing. After receiving this continuance, the defense never complained that Dr. Brown needed more time to formulate his opinions.

The trial court exercised reasonable discretion to avoid burning down the client's barn to roast the pig for mistakes it cured. Its discretion was not abused by failing to impose an examination that the uncontroverted record evidenced would not evaluate plaintiff's medical condition at issue.

Florida law does not adopt a *per se* rule requiring independent medical examinations even where no evidence controverted proof that exam was medically non-evaluative. The district courts' division over the good cause requirement in the context of challenged IMEs needs the Court's attention. It would create bad precedent, and a waste of judicial resources, to reverse an eight-week trial on the basis of a disallowed IME for which the defense never offered

any evidence whatsoever to sustain its burden of showing good cause.

III. WHERE VERDICT THAT DEFENDANT NEGLIGENTLY BREACHED ITS DUTY TO PROVIDE A SAFE SCHOOL INVOLVES NO MEDICAL ISSUES, DECISION REQUIRING IME CANNOT REVERSE NEGLIGENCE VERDICT.

The answer brief incorporates the briefs filed below. (AB.38) The five sections of argument in the initial brief below assigned 23 errors. Many challenged the liability or negligence portion of the verdict deciding the School Board negligently breached its duty to provide a reasonably safe environment for students like Louie John Cruz. (For example, School Board failed to produce the safety memorandum so crucial to this negligence issue and challenged references made to this during cross-examination of its designated records custodian, Pam Carroll (T.1981-82); challenges were made regarding other testimony and opening/closing remarks directed to negligence). The *Cruz* opinion reversed only for failure to allow an IME and said, "we affirm the remaining issues and various sub-issues raised by the School Board in this appeal." *Id.,* 761 So.2d at 389.

No matter how the term liability is semantically rearranged from noun to verb, [6] it is apodictic that liability means the School Board's negligence in

[6] The answer brief says that, "Even if the School Board breached its duty of care to Cruz, it would be liable only if that breach of duty caused any damage to him." (AB.41) Such semantical manipulation ignores the reality that an IME exam unequivocally cannot affect, or overturn, the jury verdict of negligence

breaching its duty of care to Cruz. To say a negligence verdict finding the defendant breached its duty of care is reversible because a damages expert may promote a low or zero damage verdict, commingles the obvious segregation between negligent breach of one's duty of care and damages.

Where the instant negligent breach of duty to provide a reasonably safe school involves no medical issues, an IME offers no defense to the negligent breach of care here. A retrial on negligence liability (large part of the 8-week trial was devoted to negligence) would cause vastly greater judicial labor than that needed to clarify the remand procedure following appellate decision.

CONCLUSION

Cruz requests that the $3,500,000 verdict for loss of filial consortium be reinstated and that the verdict and judgment at trial be affirmed or, alternatively, that a retrial to allow an IME be confined to damages.

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finding the School Board breached its duty of care to Cruz. At best, it can only change the damage verdict assessed for that negligence.

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 October, 2000.

By:_____
Gale Ciceric Payne