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Singletary v. National Railroad Passenger Corp., 376 So. 2d 1191 (Fla. 2d Dist. Ct. App. 1979)

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meantime, the court's decision in *Bishop* voiding lex loci delicti and substituting the significant relationship test is reminiscent of the predicament of Lewis Carroll's Alice: "It sounded an excellent plan, no doubt, and very neatly and simply arranged; the only difficulty was, that she had not the smallest idea how to set about it."[53]

JERRY J. WAXMAN

Torts—WRONGFUL DEATH OF A MINOR CHILD—CONTRIBUTORY NEGLIGENCE OF DECEDENT SPOUSE DOES NOT BAR RECOVERY BY NON-NEGLIGENT SPOUSE IN THE WRONGFUL DEATH OF A MINOR CHILD, *Singletary v. National Railroad Passenger Corp.*, 376 So. 2d 1191 (Fla. 2d Dist. Ct. App. 1979).

The plaintiff father in *Singletary v. National Railroad Passenger Corp.*[1] brought a wrongful death action when his wife and two minor children were killed in an accident at a railroad crossing in Avon Park. The accident occurred when a train owned by the defendant Amtrack collided with a vehicle operated by the wife of the plaintiff and occupied by their two children.[2] The wife and children died as a result of injuries sustained in the accident.[3] The plaintiff father brought the action on behalf of each of the decedents' estates and on his own behalf as survivor of each to recover damages for the alleged negligence of the railroad in causing the deaths.[4]

The jury found the railroad sixty-five percent negligent and Singletary's wife thirty-five percent negligent.[5] In entering the final judgment for awards for the wrongful deaths, the plaintiff argued that the court should only reduce the amounts awarded to the wife's estate and the husband as her survivor in proportion to the percentage of the wife's negligence, and that no reduction should be made in the amounts awarded to the father as survivor of the

53. Shapira, *"Grasp All, Lose All": On Restraint and Moderation in the Reformulation of Choice of Law Policy*, 77 COLUM. L. REV. 248, 251 (1977), citing L. CARROLL, ALICE'S ADVENTURES IN WONDERLAND.

1. 376 So. 2d 1191 (Fla. 2d Dist. Ct. App. 1979).
2. Brief for Appellant at 1.
3. 376 So. 2d at 1192.
4. Brief for Appellant at 1.
5. 376 So. 2d at 1192.

children or to the estates of the children.[6] This reasoning, according to the plaintiff, reflected the appropriate interpretation of the Florida Wrongful Death Act and the doctrine of imputed comparative negligence.[7] The defendant railroad argued that all awards to the father, as survivor of his wife and children, and to the estates of the wife and the children, should be reduced in proportion to the percentage of negligence attributed to the wife.[8] The court agreed with the defendant and reduced all awards to the father as survivor and to the individual estates.[9]

Singletary appealed the reduction in the awards granted to him as survivor of the children and to their estates, arguing that the mother's negligence should only reduce his derivative claim as her survivor-husband and not his claims as survivor of the children.[10]

The Second District Court of Appeals reversed, holding that the damages awarded to the father as survivor of his minor children were not to be reduced in proportion to the percentage of fault attributed to the decedent wife; hence, the negligence of the mother was not to be imputed to the father.[11] By awarding the full amounts of damages to the father, the court deviated from the well-established position in Florida which had barred all recovery to a parent when the other parent was found to be contributorily negligent in the death of their child,[12] a view that had remained

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6. *Id.*
7. Brief for Appellant at 3.
8. Brief for Appellee at 2.
9. 376 So. 2d at 1192. Damages were as follows:

The Estate of Nancy Singletary	
$14,370.18	
Donald Singletary as Survivor of	
Nancy Singletary	
225,000.00	
The Estate of Matthew Singletary	
2,170.17	
Donald Singletary as Survivor of	
Matthew Singletary	
80,000.00	
The Estate of Jennifer Singletary	
958.49	
Donald Singletary as Survivor of	
Jennifer Singletary	
80,000.00	

10. Brief for Appellant at 3.
11. 376 So. 2d at 1194. The court affirmed reduction of damages due plaintiff as survivor of his wife and to her estate.
12. Martinez v. Rodriquez, 410 F.2d 729 (5th Cir. 1969); Orefice v. Albert, 237 So. 2d 142 (Fla. 1970); Klepper v. Breslin, 83 So. 2d 587 (Fla. 1955).

unchallenged since Florida's adoption of comparative negligence in 1973.[13] The purpose of this note is to show that the district court correctly found that the revised version of the Florida Wrongful Death Act[14] allows for recovery to a non-negligent parent when the other parent's negligence has contributed to the death of a minor child. The recovery should no longer be reduced by the percentage of the parent's negligence under the doctrine of imputed comparative negligence.

Recovery to parents for the wrongful death of a minor child was denied at common law on the theory that the private wrong merged into the crime which had caused the death of the child.[15] To change the common law doctrine, an act was passed by the Florida Legislature in 1899 allowing recovery to parents for the wrongful death of a minor child.[16] The statute required that the claim be brought by the father on behalf of himself and the mother for the loss of the child's services and for the mental pain and suffering of the parents.[17] Only in the event that the father did not survive the child was the mother allowed to state a separate claim.[18] The courts interpreted the requirement of an indivisible claim to bar recovery by both parents where the negligence of one was a contributing factor in the death of the child.[19]

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13. Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973).

14. Ch. 72-35 1972 Fla. Laws 174. The Florida Wrongful Death Act was first enacted as ch. 3439, 1883 Fla. Laws 59, patterned after Lord Campbell's Act, an Act for Compensating the Families of Persons Killed by Accidents, 9 and 10 Vict. c. 93 (1846). The Florida Wrongful Death to a Minor Act was passed as ch. 4722, 1899 Fla. Laws 114. Amended, ch. 6487, 1913 Fla. Laws 300. (Current version at FLA. STAT. §§ 768.16-.27 (1979)). Prior to its revision, the section read as follows:

> [T]he father of such minor child, or if the father be not living, the mother may maintain an action against such individual, private association of persons, or corporation, and may recover, not only for the loss of services of such minor child, but, in addition thereto, such sum for the mental pain and suffering of the parent (or both parents) if they survive, as the jury may assess.

Ch. 6487, 1913 Fla. Laws at 301. *See* Tampa Elec. Co. v. Knowles, 109 So. 219 (Fla. 1926). At common law, the father could recover for loss of services of an injured child, but not for the death of a minor child; hence the passage of the Florida statute. Stokes v. Liberty Mut. Ins. Co., 213 So. 2d 695, 697 (Fla. 1968); Seaboard Air Line Ry. v. Moseley, 53 So. 718 (Fla. 1910).

15. A right of action for wrongful death did not exist at common law. Baker v. Bolton, 170 Eng. Rep. 1033 (N.P. 1808). Seaboard Air Line Ry. v. Moseley, 53 So. 718 (Fla. 1910).

16. Ch. 4722, 1899 Fla. Laws 114. Repealed, ch. 72-35, 1972 Fla. Laws 174. (Current version at FLA. STAT. §§ 768.16-.27 (1979)).

17. 1913 Fla. Laws 300, 301. The statute did not authorize an award to the parent as heir to the child's estate.

18. *Id.*

19. Martinez v. Rodriquez, 410 F.2d 729 (5th Cir. 1969); Orefice v. Albert, 237 So. 2d 142 (Fla. 1970); Klepper v. Breslin, 83 So. 2d 587 (Fla. 1955).

The Florida Wrongful Death Act was completely revised in 1972. The 1899 section relating to the wrongful death of a minor was repealed and a new section adopted which substantially modified the act.[20] The new Wrongful Death Act makes significant changes in the law.[21] In an action for the wrongful death of a minor, it no longer requires that suit be brought by the father on behalf of himself and the mother for loss of services and mental pain and suffering.[22] Indivisible damages to the parents are not required because parents may now bring individual claims. The benefit to each survivor, and each survivor's claim, is stated separately by the jury.[23] The case of *Singletary v. National Railroad Passenger Corp.*[24] represents the first instance in which a court has acknowledged that the new statute enables a parent to recover for the wrongful death of his child even though the other parent's negligence had contributed to the child's death.[25]

The doctrine of comparative negligence,[26] as related to wrongful death, also played a significant role in the *Singletary* decision. The Court's acceptance of the father's contention, that the award for the death of his children should not be reduced by the percentage of the mother's negligence, presents a clear view of the doctrine of imputed comparative negligence in wrongful death cases.[27]

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20. Ch. 72-35, 1972 Fla. Laws 174, repealed FLA. STAT. §§ 768.01-.03 and enacted FLA. STAT. §§ 768.16-.27 effective July 1, 1972, hereinafter cited as the Florida Wrongful Death Act.

21. FLA. STAT. §§ 768.16-.27 (1979).

22. FLA. STAT. § 768.21(1) and (4) (1979) read as follows:

> (1) *Each survivor* may recover the value of lost support and services from the date of the decedent's injury to his death, with interest, and future loss of support and services from the date of death and reduced to present value. In evaluating loss of support and services, the survivor's relationship to the decedent, the amount of the decedent's probable net income available for distribution to the particular survivor, and the replacement value of the decedent's services to the survivor may be considered. In computing the duration of future losses, the joint life expectancies of the survivor and the decedent and the period of minority, in the case of healthy minor children, may be considered. (Emphasis added)
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> . . . .
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> (4) *Each parent* of a deceased minor child may also recover for mental pain and suffering from the date of injury. (Emphasis added)

23. FLA. STAT. § 768.22 (1979). Parents may also recover the decedent's lost earnings and medical and funeral expenses through the estate, FLA. STAT. § 768.21(6)(a) and (b) (1979).

24. 376 So. 2d 1191 (Fla. 2d Dist. Ct. App. 1979).

25. *Id.* at 1194.

26. Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973). *See generally* V. SWARTZ, COMPARATIVE NEGLIGENCE (1974); FLA. BAR, COMPARATIVE NEGLIGENCE AND CONTRIBUTION IN FLORIDA (1977).

27. 376 So. 2d at 1194.

The effect of imputed negligence in a wrongful death action must be distinguished from its effect in a personal injury action. Since Florida's adoption of comparative negligence in 1973,[28] full awards have been granted in personal injury cases to the non-negligent parent, with imputed negligence only playing a role when agency or joint enterprise was involved.[29] In all cases prior to 1973 involving parental negligence in the wrongful death of a child, however, the courts permitted no award to the non-negligent parent. Since 1973, no appellate court in Florida had reached the issue of imputed negligence between parents in a wrongful death action until *Singletary*.

The repealed section of the Florida Wrongful Death Act was the basis for the two leading cases regarding parental negligence in the wrongful death of a minor child.[30] *Klepper v. Breslin*[31] involved the death of a minor child who was hit by a car as he darted across the street in front of his home. In a suit against the driver, the father was held accountable for the negligence of the mother, and thus both parents were barred from recovery.[32] The defendant contended that the mother had failed to maintain adequate supervision and control of the child by allowing him to play unattended and that the father was aware of the mother's negligence.[33] The supreme court cited the peculiarity of the Florida Wrongful Death Act which required the father to sue on behalf of the mother for the wrongful death of their child, stressing the indivisibility of the award and the imputation of the mother's negligence to the father.[34]

In *Martinez v. Rodriquez*,[35] the *Klepper* decision was made more stringent by holding that the mother's negligence was a bar to the father's recovery for the wrongful death of their child even though the father neither knew nor should have known of the mother's negligent supervision. In *Martinez*, the father had not

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28. Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973); Acevedo v. Acosta, 296 So. 2d 526 (Fla. 3d Dist. Ct. App. 1974).

29. For a discussion of the elements of joint enterprise, *see* RESTATEMENT (SECOND) OF TORTS, *Joint Enterprise* § 491 (1965).

30. *See* note 14, *supra*.

31. 83 So. 2d 587 (Fla. 1955).

32. *Id.* at 593.

33. *Id.* at 590.

34. *Id.* at 591.

35. 410 F.2d 729 (5th Cir. 1969). The imputed negligence issue was certified to the Florida Supreme Court, 394 F.2d 156 (5th Cir. 1968), with response by the court, 215 So. 2d 305 (Fla. 1968).

even been present in the United States prior to the child's death by drowning in the swimming pool of the apartment complex where the mother and child lived.[36] Despite the father's lack of knowledge, the Florida Supreme Court affirmed the *Klepper* decision and again stressed that its decision was based upon the peculiarity of the Florida statute which precluded apportionment of damages between the parents.[37]

The decision of the Florida Supreme Court in *Orefice v. Albert* continued the precedent established by *Klepper* and *Martinez* when it denied recovery to a mother whose minor son was killed in a plane negligently piloted by his father.[38] The supreme court upheld the lower court in denying the mother's recovery on her own behalf, stating that the mother's action in entrusting custody and control of her son to the father was a sufficient community of interest to permit the father's negligence to be imputed to her as the surviving parent. The *Orefice* decision made no reference to the so-called "peculiarity" of the statute relating to wrongful death to minors as emphasized in *Klepper* and *Martinez*, but instead, relied on the community of interest aspect, which was not stressed in either of the earlier cases.[39]

The trial court in *Singletary* followed the precedent of imputed negligence established in *Klepper* and *Martinez* and then applied the comparative negligence theory in its reduction of the awards by the percentage of negligence.[40] The Second District Court of Appeal, by reversing the trial court, has released the trial courts of that district from precedents founded on the repealed section of the Florida Wrongful Death Act and charted a new direction, taking notice of the comparative negligence doctrine, yet refusing to impute negligence to the non-negligent parent.[41] If, indeed, the key determinant in *Singletary*, in allowing recovery to the non-negligent parent, is the repeal of chapter 4277[42] within the old wrongful death act, then the 1972 revisions must have significant ramifications.[43] Since the earlier precedents of *Klepper* and *Martinez* were

36. 394 F.2d at 159.

37. 215 So. 2d at 307. *See* note 14, *supra*.

38. Orefice v. Albert, 237 So. 2d 142 (Fla. 1970). In *Orefice*, the suit by the mother on behalf of the child was allowed but only against the co-owner of the plane and not against the decedent father due to interfamily immunity. *Id.* at 146.

39. *Id.* at 145.

40. 376 So. 2d at 1192.

41. *Id.* at 1194.

42. 1899 Fla. Laws 114.

43. The offending section was not the prime target of the Florida Revision Commission

based on the wording of the old statute, then the *Singletary* case stands as a noteworthy beacon recognizing the change in the statute and alerting trial courts to the fact that the traditionally cited cases of *Klepper* and *Martinez* are no longer good law. *Singletary* also places Florida in step with the majority of other states.[44] Contrary to statements in *Klepper*[45] and *Singletary*,[46] a minority of other jurisdictions, notably community property states, bar recovery *in toto* when one parent or beneficiary is contributorily negligent in a wrongful death action.[47]

An Illinois statute requires a single assessment of damages, as did Florida, and contributory negligence of one of several beneficiaries bars recovery for all.[48] In certain other states, without such a statute, recovery is still barred.[49]

The *Singletary* decision also puts wrongful death claims by a non-negligent parent in accord with personal injury claims that involve a child injured due to the comparative negligence of one parent. In *Ward v. Baskin*,[50] the Florida Supreme Court distinguished wrongful death from personal injury in its award of expenses to the father when his child was injured in an automobile accident. The child was a passenger in the mother's car, and the mother was

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or the Florida Legislature, whose main objective was to eliminate the multiplicity of suits which could be brought under the old act and to avoid the rigid hierarchy of those entitled to bring suit. For death of a minor child, three suits could be brought under FLA. STAT. §§ 768.02, 768.03, and 46.021 (1971). See Wilcox & Melville, *The Computation of Damages under the new Florida Wrongful Death Act*, 26 U. MIAMI L. REV. 737 (1972).

The constitutionality of FLA. STAT. §§ 768.16-.27 (1979) was upheld in Martin v. United Security Servs., Inc., 314 So. 2d 765 (Fla. 1975).

44. 376 So. 2d at 1194, citing Annot., 2 A.L.R.2d 785 (1948); Annot., 23 A.L.R. 670 (1923); and RESTATEMENT (SECOND) OF TORTS §§ 493, 494A (1965).

45. 83 So. 2d at 591.

46. 376 So. 2d at 1193.

47. Annot. 23 A.L.R. 690 (1923); Annot. 2 A.L.R.2d 785 (1948). *See* Atlanta & C. Air-Line Ry. Co. v. Gravitt, 20 S.E. 550 (Ga. 1894).

48. Nudd v. Matsoukas, 131 N.E.2d 525 (Ill. 1956), overturning Hazel v. Hoopeston-Danville Motor Bus Co., 141 N.E. 392 (Ill. 1923); Henry v. Robert Kettell Constr. Corp., 226 N.E.2d 89 (Ill. App. Ct. 1967).

49. Recovery may be denied on the grounds that the award would be community property and the negligent parent should not profit from his wrongdoing. Keena v. United R.Rs., 207 P. 35 (Cal. Dist. Ct. App. 1922); Crevelli v. Chicago, M. & St. P. Ry., 167 P. 66 (Wash. 1917). *But see* Baca v. Baca, 379 P.2d 765, 771 (N.M. 1963), where the award was held not to be community property and negligence was not imputed. The community property rationale for imputed negligence has been held inapplicable where the negligent parent is not a survivor, Michie v. Calhoun, 336 P.2d 370, 373-74 (Ariz. 1959).

Another basis for imputing negligence is the doctrine of marital unity, discussed in *Singletary*, 376 So. 2d at 1194. This doctrine has been criticized, *see* PROSSER, LAW OF TORTS 914 (4th ed. 1971), and rejected by Florida, Ward v. Baskin, 94 So. 2d 859, 861 (Fla. 1957).

50. 94 So. 2d 859 (Fla. 1957).

found contributorily negligent. The Court stated that *Klepper v. Breslin* was a wrongful death action and, therefore, did not apply. The marital relationship alone was ruled insufficient to impute negligence between parents in an injury action.[51] In the more recent case of *Acevedo v. Acosta*,[52] the father's claim for medical expenses for his son's injuries was allowed despite the comparative negligence of the mother. The son was injured while a passenger in a car driven by his mother. In the ensuing trial, the mother as driver was found comparatively negligent, yet the father was allowed full reimbursement for the medical expenses he incurred as a result of his son's injuries. The father's derivative claim for the mother's injuries, however, was reduced by her degree of negligence.[53] Similarly, in *Singletary*, the husband's derivative award as survivor of his wife was reduced by the degree of her comparative negligence, and this portion of the trial court decision was not appealed.[54]

The death of a child has harsh and irreparable repercussions on a family. The failure to compensate innocent parents under the *Klepper* and *Martinez* line of cases has been deemed unpalatable since the precedent was set.[55] The courts, however, felt compelled to adopt this rule which denied award to the non-negligent parent because of the strictures of the old wrongful death statute and the pre-1973 doctrine of contributory negligence.[56] In *Singletary*, the Second District Court of Appeal has now recognized that it is no longer constrained by the offending statute, and that it may now grant full award to the non-negligent parent.[57]

If the *Singletary* court is wrong, and the *Klepper* and *Martinez* view, modified by comparative negligence, prevails, then the courts of Florida must continue to impute the negligence of one parent to

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51. *Id.* at 860-61.

52. 296 So. 2d 526 (Fla. 3d Dist. Ct. App. 1974).

53. *Id.* at 527, 529-30.

54. 376 So. 2d at 1192.

55. In a strong dissent in *Klepper*, Chief Justice Drew noted that jurisdictions which imputed negligence between parents in the death of a child were those which had previously recognized the rule of imputed negligence, or which did so on the basis of community property laws. Since neither of these doctrines were viable in Florida, Chief Justice Drew described the *Klepper* holding as "contrary to principles long settled in this state." 83 So. 2d 587, 594-95 (Fla. 1955). Dissenting in *Martinez*, Justice Ervin agreed with the *Klepper* dissent and also expressed concern that the imputed negligence between parents rule might be in violation of Florida's constitutional provision guaranteeing access to the courts (current version at FLA. CONST. art. I, § 21). 215 So. 2d 305, 308 (Fla. 1968).

56. *See* note 14, *supra*.

57. 376 So. 2d at 1194.

the other in a wrongful death action and reduce the awards accordingly. The reader of the *Martinez* case is left frustrated and concerned at the harsh result, one which approaches punishment of a bereaved parent who had no part in the tragic death of his child. His grief, and his loss of the child's companionship and love, was just as great regardless of the negligence of the other parent. Although comparative negligence has mitigated the total bar to recovery reached in *Klepper* and *Martinez*, results such as those reached by the trial court in *Singletary* will continue to plague the conscience of the court if the avenue of escape in the revised wrongful death act is not recognized.

If the *Singletary* view prevails, however, the courts can then award the non-negligent parent as survivor of his child, just as they do in personal injury actions.[58] This is a more logical and humane approach than reached under the *Klepper* rule. It is also in step with the majority of other jurisdictions which allow recovery by the non-negligent parent in both personal injury and wrongful death actions involving a minor child.

JULIA S. CHAPMAN

Water and Watercourses—PUBLIC USE—THE EFFECT OF PROPERTY LAW AS A LIMITATION ON FEDERAL NAVIGATIONAL SERVITUDE—*Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

In 1961, Kaiser Aetna entered into an agreement with Bishop Estate to develop a 6,000 acre area known today as Hawaii Kai on the island of Oahu, Hawaii.[1] The development agreement gave Kaiser Aetna the right to lease Kuapa Pond,[2] a 523 acre area

58. *See* Acevedo v. Acosta, 296 So. 2d 526 (Fla. 3d Dist. Ct. App. 1974); Ward v. Baskin, 94 So. 2d 859 (Fla. 1957).

1. Kaiser Aetna v. United States, 444 U.S. 164, 167 (1979).

2. Brief for Petitioner at 6, Kaiser Aetna v. United States, 444 U.S. 164 (1979). Fishponds, regarded under Hawaiian property law as private property, were frequently found within the boundaries of large land units called "Ahupua'as." Kuapa Pond, a fishpond, was included in the Ahupua'a that eventually vested in Bishop Estate.

In its original state, Kuapa Pond was a shallow body of water contiguous to Maunalua Bay and the Pacific Ocean but separated from the bay by a narrow barrier beach. The pond was subject to the ebb and flow of the tide because of two natural openings in the barrier beach and also because the tidal waters percolated through the beach into the pond.

For centuries prior to 1961, Kuapa Pond was used for aquatic agriculture. Early