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## Loss of Parental Consortium: Why Kentucky Should Re-Recognize the Claim Outside the Wrongful Death Context

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# Loss of Parental Consortium: Why Kentucky Should *Re*-Recognize the Claim Outside the Wrongful Death Context

*Collin D. Schueler*<sup>1</sup>

It is common knowledge that a parent who suffers serious physical or mental injury is unable to give his minor children the parental care, training, love and companionship in the same degree as he might have but for the injury. Hence, it is difficult for the court, on the basis of natural justice, to reach the conclusion that this type of action will not lie. Human tendencies and sympathies suggest otherwise. Normal home life for a child consists of complex incidences in which the sums constitute a nurturing environment. When the vitally important parent-child relationship is impaired and the child loses the love, guidance and close companionship of a parent, the child is deprived of something that is indeed valuable and precious. No one could seriously contend otherwise.<sup>2</sup>

## INTRODUCTION

GENERALLY, the term “consortium” has been defined as “[t]he benefits that one person . . . is entitled to receive from another, including companionship, cooperation, affection, aid, [and] financial support.”<sup>3</sup> Under Kentucky law, “[e]ither a wife or husband may recover damages against a third person for loss of consortium, resulting from a negligent or wrongful act of such third person.”<sup>4</sup> Furthermore, “[i]n a wrongful death action in which the decedent was a minor child, the surviving parent, or parents, may recover for loss of affection and companionship that would have been derived from such child during its minority . . . .”<sup>5</sup> Therefore, it is clear that the state of Kentucky “recognizes loss of consortium claims between husband and wife and the claim of a parent for the loss of the child’s affection and companionship upon the death of a child.”<sup>6</sup>

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<sup>1</sup> J.D. expected 2010, University of Kentucky College of Law; B.A., Political Science, 2006, University of Michigan. The author would like to thank his wife, parents, and family for their support.

<sup>2</sup> *Hoffman v. Dautel*, 368 P.2d 57, 59 (Kan. 1962).

<sup>3</sup> BLACK’S LAW DICTIONARY 328 (8th ed. 2004).

<sup>4</sup> KY. REV. STAT. ANN. § 411.145(2) (West 2006).

<sup>5</sup> *Id.* § 411.135.

<sup>6</sup> *Giuliani v. Guiler*, 951 S.W.2d 318, 319 (Ky. 1997).

In *Giuliani v. Guiler*, the Supreme Court of Kentucky added to this list of consortium claims, recognizing a minor child's claim for loss of parental consortium.<sup>7</sup> In expanding the common law, however, the scope of the court's decision was unclear. In *Lambert v. Franklin Real Estate Co.*, the Kentucky Court of Appeals summarized the issue, noting that "[t]he *Giuliani* opinion does not explicitly state whether the cause of action approved was for wrongful death actions only, or whether the cause of action is also available in cases, such as the present case, where the parent is severely injured."<sup>8</sup> After reviewing the context and language of *Giuliani*, the *Lambert* court held that "the former interpretation of the opinion is the sounder interpretation."<sup>9</sup>

Although the Kentucky Court of Appeals said that loss of parental consortium claims are limited to "those cases where there is likewise an action for the wrongful death of the parent,"<sup>10</sup> it did not provide a complete picture of the Kentucky Supreme Court's view of loss of parental consortium claims. Specifically, the *Lambert* court failed to analyze several elements of the majority opinion in *Giuliani*, which suggests a minor child *can* bring a loss of parental consortium claim outside the context of a wrongful death case.<sup>11</sup> The *Giuliani* opinion, combined with extensive persuasive authority and policy considerations, should prompt the Kentucky Supreme Court to overrule *Lambert* and recognize a minor child's loss of parental consortium claim even if his or her parent is only severely injured.

Part I of this Note reviews Kentucky's history of loss of parental consortium claims. Part II examines the Kentucky Supreme Court's decision in *Giuliani*, and Part III analyzes the *Lambert* court's narrow reading of *Giuliani*. Part IV discusses the aspects of the *Giuliani* decision that the Kentucky Court of Appeals failed to consider in *Lambert*. Part V reflects on these considerations, evaluating persuasive authority and policy considerations which point toward recognizing loss of parental consortium claims outside the wrongful death context. Part VI briefly considers why the law has yet to change, before concluding that the Kentucky Supreme Court should allow a minor child to bring a loss of parental consortium claim even if his or her parent is only severely injured.

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<sup>7</sup> *Id.* at 323.

<sup>8</sup> *Lambert v. Franklin Real Estate Co.*, 37 S.W.3d 770, 780 (Ky. Ct. App. 2000).

<sup>9</sup> *Id.*; see also *Clements v. Moore*, 55 S.W.3d 838, 839 n.3 (Ky. Ct. App. 2000) ("This Court [has] rejected the argument that *Giuliani* can be interpreted as recognizing a minor's claim for loss of parental consortium outside the wrongful death context.").

<sup>10</sup> *Lambert*, 37 S.W.3d at 780.

<sup>11</sup> See *Giuliani*, 951 S.W.2d at 319; see also Plaintiff's Response to Defendants' Motion to Dismiss, *Brown v. Mason & Dixon Lines, Inc.*, No. 307CV00712, 2008 WL 4239645, at \*2 (W.D. Ky. May 1, 2008).

## I. KENTUCKY'S THIN HISTORY OF LOSS OF PARENTAL CONSORTIUM CLAIMS

At early common law, Kentucky refused to recognize loss of consortium claims outside the narrow context of a husband recovering damages for the loss of his wife's companionship.<sup>12</sup> As early as 1939, Kentucky's highest court recognized "that a husband has such a right to his wife's services, society and companionship that he may maintain an action for damages for their impairment or loss resulting from the negligence or wrongful act of a third person."<sup>13</sup> Yet through the 1960s, the same court held "that a wife may not maintain an action to recover damages for loss or impairment of her husband's consortium caused by negligence of another party."<sup>14</sup> Finally, in 1970, the Kentucky Court of Appeals reversed course and held that "a wife has a cause of action for loss of consortium of her husband resulting from an injury to the husband due to the negligent act of another."<sup>15</sup>

Less than four months later, the Kentucky General Assembly codified this rule, stating that either a husband or wife may recover loss of consortium damages resulting from the negligent act of a third party.<sup>16</sup> In that same statutory provision, the legislature defined "consortium" as "the right to the services, assistance, aid, society, companionship and conjugal relationship between husband and wife, or wife and husband."<sup>17</sup> It seemed appropriate for "consortium" to be defined in the context of husbands and wives, since Kentucky's legislature and courts were silent on whether a child could successfully sue for loss of parental consortium. This silence was broken in the 1977 Kentucky Supreme Court decision of *Brooks v. Burkeen*.<sup>18</sup>

In *Brooks*, Samuel Childers and Donald Childers, the minor children of the deceased Luegean Childers, pursued loss of consortium claims after their father died as a result of the alleged negligence of his employer and the employer's foreman.<sup>19</sup> In just two sentences, the court rejected the children's claims, holding that they "fail because no court or legislature in the United States has yet seen fit to recognize such an action. We decline the opportunity to be the first to do so."<sup>20</sup> In the decades following the court's decision in *Brooks*, however, "at least fifteen jurisdictions . . .

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<sup>12</sup> *Baird v. Cincinnati, New Orleans & Tex. Pac. R.R. Co.*, 368 S.W.2d 172, 174 (Ky. 1963).

<sup>13</sup> *Commercial Carriers, Inc. v. Small*, 126 S.W.2d 143, 146 (Ky. 1939).

<sup>14</sup> *Baird*, 368 S.W.2d at 172; *see also Cravens v. Louisville & Nashville R.R. Co.*, 242 S.W. 628, 632 (Ky. 1922); *La Eace v. Cincinnati, Newport & Covington Ry. Co.*, 249 S.W.2d 534, 534 (Ky. 1952).

<sup>15</sup> *Kotsiris v. Ling*, 451 S.W.2d 411, 412 (Ky. 1970).

<sup>16</sup> KY. REV. STAT. ANN. § 411.145(2) (West 2006).

<sup>17</sup> § 411.145(1).

<sup>18</sup> *Brooks v. Burkeen*, 549 S.W.2d 91 (Ky. 1977).

<sup>19</sup> *Id.* at 92.

<sup>20</sup> *Id.* (citation omitted).

validated a child's action for loss of parental consortium or guidance."<sup>21</sup> Nevertheless, in 1995, the Kentucky Supreme Court reaffirmed the *Brooks* ruling in *Adams v. Miller*.<sup>22</sup>

In *Adams*, a minor child's mother tragically died in a fire as a result of the alleged negligence of his mother's landlord; the minor sought damages for loss of parental consortium.<sup>23</sup> The court recognized that Section 411.135 of the Kentucky Revised Statutes, which was enacted in 1968, "gives a surviving parent a cause of action for the loss of affection of a minor child."<sup>24</sup> Nevertheless, the court refused to recognize the inverse—a claim by a surviving minor child for the loss of affection of a parent.<sup>25</sup> In his dissent, Justice Wintersheimer acknowledged that the court's reason for not recognizing the loss of parental consortium claims in *Brooks*—that Kentucky would be the only jurisdiction to recognize such a claim—was no longer accurate.<sup>26</sup> Moreover, Justice Wintersheimer stated that "[r]ecognizing a claim for loss of parental consortium is the only appropriate progression of Kentucky law and is in harmony with the public policy objectives behind allowing claims for loss of consortium."<sup>27</sup> Therefore, although the majority in *Adams* affirmed the court's holding in *Brooks*, Justice Wintersheimer's dissent illustrated a split in the court over whether children should be able to pursue loss of parental consortium claims in Kentucky.<sup>28</sup>

Furthermore, Justice Wintersheimer's dissent foreshadowed another important question: assuming Kentucky *did* recognize loss of parental consortium claims, could children raise such claims only in wrongful death cases, as was the case in *Brooks* and *Adams*, or could a child recover for loss of parental consortium where his or her parent is only severely injured?<sup>29</sup> Justice Wintersheimer held the latter view, saying it would be a "logical step . . . for Kentucky to provide children a claim for relief when their parent is severely injured."<sup>30</sup> Less than two years later, Justice Wintersheimer wrote the majority opinion in *Giuliani v. Guiler*, unequivocally recognizing loss of parental consortium claims.<sup>31</sup> Despite his seemingly clear dissent in *Adams*,

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21 13 DAVID J. LEIBSON, KENTUCKY PRACTICE § 20:4, at 939 (2d ed. 2008); *see also* Giuliani v. Guiler, 951 S.W.2d 318, 319 (Ky. 1997) ("Since 1977, when *Brooks* was decided, 15 courts and two state legislatures have recognized the claim of children for loss of parental consortium.").

22 *Adams v. Miller*, 908 S.W.2d 112, 116 (Ky. 1995).

23 *Id.* at 113–14.

24 *Id.* at 116 (citing KY. REV. STAT. ANN. § 411.135 (West 2006)).

25 *Id.*

26 *See id.* at 117 (Wintersheimer, J., dissenting); *see also* 13 LEIBSON, *supra* note 21, § 20:4, at 939 (highlighting this same point made by Justice Wintersheimer).

27 *Adams*, 908 S.W.2d at 117 (Wintersheimer, J., dissenting).

28 *Id.*

29 *See id.* at 118.

30 *Id.*

31 *Giuliani v. Guiler*, 951 S.W.2d 318 (Ky. 1997).

however, Justice Wintersheimer's opinion in *Giuliani* did not clearly state "whether a child may recover for their [sic] loss of parental consortium of an *injured, but not deceased, parent*,"<sup>32</sup> opening up a Pandora's box of debate.

## II. *GIULIANI V. GUILER*: AN (AMBIGUOUS) EVOLUTION IN THE LAW<sup>33</sup>

In *Giuliani*, Mary Giuliani tragically "suffered a cardiac and respiratory collapse" and died shortly after giving birth to her fourth child.<sup>34</sup> Mrs. Giuliani's other children were nine, seven, and three years old.<sup>35</sup> In addition to filing a wrongful death claim against Mrs. Giuliani's obstetrician (among others), the father of the four children filed loss of consortium claims as next friend for each child.<sup>36</sup> The trial court dismissed the loss of parental consortium claims in a summary judgment and the appellate court affirmed, citing *Brooks* as controlling authority.<sup>37</sup> In affirming the trial court's decision, the appellate court encouraged the Kentucky Supreme Court "to revisit this issue in the light of modern developments in this area of the law."<sup>38</sup> The supreme court agreed to do so, accepting discretionary review.<sup>39</sup>

Justice Wintersheimer wrote the opinion for the majority of the court, and he explicitly held that "Kentucky recognizes the claim of minor children for loss of parental consortium."<sup>40</sup> Justice Wintersheimer echoed his dissenting opinion from *Adams*, stating that Kentucky should allow children to recover for loss of parental consortium damages caused by the negligent acts of third parties.<sup>41</sup> To support his holding, Justice Wintersheimer acknowledged that

[t]he loss of consortium is a judge-made common law doctrine which this Court has the power and duty to modify and conform to the changing conditions of our society. When the common law is out of step with the times, this Court has a responsibility to change that law. Development of the common law is a judicial function and should not be confused with the expression of public policy by the legislature.

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<sup>32</sup> Susanne Cetrulo, *A Practitioner's Analysis of the Loss of Parental Consortium in Kentucky*, 26 N. KY. L. REV. 1, 10 (1999) (emphasis added).

<sup>33</sup> For a more extensive discussion of the *Giuliani* decision, see Jamie M. Ramsey, Note, *Giuliani v. Guiler: Stealing the General Assembly's Thunder*, 25 N. KY. L. REV. 445 (1998).

<sup>34</sup> *Giuliani*, 951 S.W.2d at 318–19.

<sup>35</sup> *Id.* at 318.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 319.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 323.

<sup>41</sup> *Id.* at 319; see also *Adams v. Miller*, 908 S.W.2d 112, 117 (Ky. 1995) (Wintersheimer, J., dissenting).

... It is a natural development of the common law to recognize the need for a remedy for those children who lose the love and affection of their parents due to the negligence of another.

... [I]t is long overdue that we recognize the essential personhood of each individual while giving homage and deference to their inclusion in the family.<sup>42</sup>

In making its decision, the court expressly overruled *Brooks* and *Adams*, rejecting “the view that children do not have identity as individuals and as members of the family separate from their parents.”<sup>43</sup>

The court’s holding in *Giuliani*—that Kentucky now recognizes a minor child’s claim for loss of parental consortium<sup>44</sup>—initially sparked a discussion over whether the court overstepped its authority by developing this common law cause of action.<sup>45</sup> As the dust continued to settle on *Giuliani*, however, legal scholars recognized another important question left unanswered by the court’s decision—does a minor child have a cause of action for loss of parental consortium if his or her parent is only severely injured?<sup>46</sup>

After the decision, practitioner Susanne Cetrulo recognized that “[u]nder the specific facts of the *Giuliani* case, defendants can easily argue that a claim for loss of parental consortium would be limited to children whose parents were killed and entitled to file a wrongful death action.”<sup>47</sup> That being said, Cetrulo recognized that “plaintiffs maintain that the logic of this decision would easily apply to allow recovery for the serious personal injury of a parent.”<sup>48</sup> Hence, there appeared to be two ways to read the majority’s opinion in *Giuliani*.<sup>49</sup> Cetrulo foreshadowed the future of this debate precisely, asking “[w]hat lies ahead from the appellate courts as to recovery for the loss of services of a *severely-injured* parent?”<sup>50</sup> Less than one year later, the Kentucky Court of Appeals gave its answer to Cetrulo’s question in *Lambert v. Franklin Real Estate Co.*<sup>51</sup>

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42 *Giuliani*, 951 S.W.2d at 319–20.

43 *Id.* at 320.

44 *Id.* at 323.

45 *See, e.g., id.* at 326 (Cooper, J., dissenting) (“[I]n this case, we [the court] illegitimately usurp the province of the legislature . . .”); *see also* Ramsey, *supra* note 33, at 471 (“[T]he supreme court, in recognizing this cause of action, has exceeded its jurisdiction.”).

46 *See, e.g., Cetrulo, supra* note 32, at 10–14.

47 *Id.* at 11.

48 *Id.*

49 *See id.*

50 *Id.* (emphasis added).

51 *Lambert v. Franklin Real Estate Co.*, 37 S.W.3d 770 (Ky. Ct. App. 2000).



III. *LAMBERT V. FRANKLIN REAL ESTATE CO.: A (TOO?)*  
NARROW READING OF *GIULIANI*

In *Lambert*, Donald Lambert, John Durman, and Carl Marshall were trying to repair a water well when a pipe they raised in the air “came into contact, or into extremely close proximity, with a 7,200–volt electric power line . . . killing Lambert and Durman, and severely injuring Marshall.”<sup>52</sup> Marshall and the estates of Lambert and Durman filed negligence actions against various defendants, and the children of each victim filed claims for loss of parental consortium.<sup>53</sup>

Regarding the loss of parental consortium claims brought by the three minor children of Carl Marshall, the court began by citing *Giuliani* and its holding that “a surviving child may file a claim for loss of parental consortium.”<sup>54</sup> Then, the court in *Lambert* recognized that the *Giuliani* opinion did not say whether loss of parental consortium claims were limited to wrongful death actions, or could also be brought in cases in which a parent is severely injured.<sup>55</sup> After parsing the language of Justice Wintersheimer’s majority opinion in *Giuliani*, however, the *Lambert* court provided at least three reasons in support of the former interpretation.<sup>56</sup>

First, the *Lambert* court quoted Justice Wintersheimer’s opinion in *Giuliani*, where he stated “[t]he claim of loss of parental consortium is a reciprocal of the claim of the parents for loss of a child’s consortium which was recognized in KRS 411.135.”<sup>57</sup> The court reasoned that since “KRS 411.135 provides a parent with a loss of consortium claim for the loss of a minor child only in wrongful death actions[,] . . . the ‘reciprocal’ of KRS 411.135 would appear to be limited to wrongful death cases.”<sup>58</sup> Likewise, the *Lambert* court quoted the *Giuliani* court’s statement that it was persuaded by the suggestion that “there is no legal distinction between the claim of a parent for loss of a child’s consortium from the claim of a child for the loss of a parent’s consortium.”<sup>59</sup> The court said this statement “limits the child’s claim to those situations in which the parent would have a cause of action.”<sup>60</sup> In light of Section 411.135 of the Kentucky Revised Statutes,

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<sup>52</sup> *Id.* at 774.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 779–80.

<sup>55</sup> *Id.* at 780.

<sup>56</sup> *See Id.*; *see also* *Brown v. Mason & Dixon Lines, Inc.*, No. 3:07CV–712–R, 2008 WL 2224881, at \*2 (W.D. Ky. May 27, 2008) (mem.) (providing a similar discussion of the reasons provided by the *Lambert* court).

<sup>57</sup> *Lambert*, 37 S.W.3d at 780 (quoting *Giuliani v. Guiler*, 951 S.W.2d 318, 321 (Ky. 1997)); *see also* KY. REV. STAT. ANN. § 411.135 (West 2006).

<sup>58</sup> *Lambert*, 37 S.W.3d at 780.

<sup>59</sup> *Id.* (quoting *Giuliani*, 951 S.W.2d at 321).

<sup>60</sup> *Id.*

the *Lambert* court concluded that “if there is no legal distinction between the two causes of action, then the cause of action for the loss of parental consortium should likewise be limited to cases involving the wrongful death of the parent.”<sup>61</sup>

Second, the *Lambert* court noted that in *Giuliani*, Mary Giuliani *died* while giving birth to her fourth child.<sup>62</sup> Thus, the court concluded that since “*Giuliani* was a wrongful death case . . . it was within a wrongful death context that the Supreme Court approved loss of parental consortium.”<sup>63</sup> In addition, the *Lambert* court pointed out that the *Giuliani* decision overruled *Brooks* and *Adams*, “cases which denied loss of parental consortium in cases of wrongful death,” rather than in situations in which a parent was only severely injured.<sup>64</sup> These factors suggested to the appellate court that the holding in *Giuliani* was limited to wrongful death actions.<sup>65</sup>

Finally, the *Lambert* court pointed to two statements by the Kentucky Supreme Court in *Giuliani* to infer that it intended to limit loss of parental consortium claims to wrongful death situations.<sup>66</sup> First, Justice Wintersheimer stated that “[t]he loss of parental consortium is simply another factor to be considered in reaching a fair and equitable conclusion to any constitutionally protected *wrongful death claim*.”<sup>67</sup> Second, he said that “[t]he proof of such loss [of parental consortium] and the necessary proof of monetary loss resulting therefrom are factors to be considered by the trier of fact separate from any *wrongful death claim* pursued under the wrongful death statute.”<sup>68</sup>

For the foregoing reasons and “the absence of a direct holding that the loss of parental consortium is available beyond wrongful death cases,”<sup>69</sup> the court in *Lambert* concluded that “*Giuliani* is best read as providing a cause of action to a child only in those cases where there is likewise an action for the wrongful death of the parent.”<sup>70</sup> Since this was not the case in *Lambert*, the court dismissed the loss of parental consortium claims brought by Carl Marshall’s three minor children.<sup>71</sup>

The *Lambert* court’s analysis of the *Giuliani* opinion is in line with at least one potential reading of that decision.<sup>72</sup> Susanne Cetrulo noted that since

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61 *Id.*

62 *Id.*

63 *Id.*

64 *Id.*

65 *See id.*

66 *Id.*

67 *Id.* (quoting *Giuliani v. Guiler*, 951 S.W.2d 318, 322 (Ky. 1997)).

68 *Id.* (quoting *Giuliani*, 951 S.W.2d at 323).

69 *Id.*

70 *Id.*

71 *Id.*

72 *See Cetrulo, supra* note 32, at 10–14.

the Kentucky Supreme Court cited and analyzed Kentucky's wrongful death statute throughout its analysis of loss of parental consortium claims, "[i]t would seem . . . that the *Giuliani* court has only recognized recovery for this claim where a parent has died."<sup>73</sup> Still, Cetrulo recognized that "[t]his *apparent* limitation within the *Giuliani* decision . . . has not prohibited filings throughout the Commonwealth for loss of parental consortium on behalf of children whose parents merely have been injured."<sup>74</sup> Thus, as Cetrulo suggested, there are multiple ways of reading *Giuliani*.<sup>75</sup> In *Lambert*, the Kentucky Court of Appeals read *Giuliani* narrowly—perhaps too narrowly.

After reviewing the *Giuliani* opinion, it is clear that the *Lambert* court does not provide a complete picture of the Kentucky Supreme Court's view of loss of parental consortium claims. This Note does not dispute the accuracy of the appellate court's analysis of *Giuliani*. Rather, it highlights several elements of Justice Wintersheimer's opinion that suggest a minor child *can* bring a loss of parental consortium claim outside the context of a wrongful death case<sup>76</sup>—all of which the *Lambert* court failed to analyze. In light of these statements, and extensive persuasive authority and policy considerations, the Kentucky Supreme Court should not follow the holding in *Lambert*. Instead, Kentucky should recognize a minor child's loss of parental consortium claim even if his or her parent is only severely injured.

#### IV. WHAT THE *LAMBERT* COURT DID NOT SEE: ANOTHER LOOK AT *GIULIANI*

To support its position that the Kentucky Supreme Court intended to limit loss of parental consortium claims to the wrongful death context, the *Lambert* court cites Justice Wintersheimer's statement that a loss of parental consortium claim is a reciprocal of Section 411.135 of the Kentucky Revised Statutes.<sup>77</sup> Section 411.135 allows the surviving parent, or parents, of a deceased minor child to recover for loss of the child's affection and companionship.<sup>78</sup> Likewise, the *Lambert* court notes that the *Giuliani* court viewed a parent's claim for loss of a minor child's consortium as being similar to a minor child's claim for loss of parental consortium.<sup>79</sup> Yet, as one practitioner points out, "the Court in *Giuliani* relied upon further factors which would seem to support the claim [of loss of parental consortium]

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73 *Id.* at 11.

74 *Id.* (emphasis added).

75 *See id.*

76 *See Giuliani v. Guiler*, 951 S.W.2d 318, 319-20 (Ky. 1997); *see also* Plaintiff's Response to Defendants' Motion to Dismiss, *supra* note 11, at \*2-3.

77 *Lambert v. Franklin Real Estate Co.*, 37 S.W.3d 770, 780 (Ky. Ct. App. 2000).

78 KY. REV. STAT. ANN. § 411.135 (West 2006).

79 *See Lambert*, 37 S.W.3d at 780.

existing outside a wrongful death action.”<sup>80</sup> In particular, the *Giuliani* court said:

Given the legislatively expressed public policy of this Commonwealth to strengthen and encourage the family for the protection and care of children, [as stated in Section 600.010 of the Kentucky Revised Statutes], it is only logical to recognize that children have a right to be compensated for their losses when such harm has been caused to them by the wrongdoing of another. It is the purpose of all tort law to compensate one for the harm caused by another and to deter future wrongdoing. Loss of consortium is a common law cause of action. Common law grows and develops and must be adapted to meet the recognized importance of the family, and the necessity for protection by the law of the right of a child to a parent’s love, care and protection so as to provide for the complete development of that child.<sup>81</sup>

In light of this position by Justice Wintersheimer, it has been argued that “[a]s in a claim for the wrongful death of a parent, children whose parent or parents suffer sufficiently severe, permanent, and debilitating injuries . . . effectively lose their right to this love, care, and protection.”<sup>82</sup> Simply and eloquently put, “[i]f this loss occurs, a child’s right to recover for this loss should not depend on whether or not the parent’s life was fully extinguished.”<sup>83</sup> Stated another way, “[i]f a parent, due to a serious physical injury, is unable to provide parental services of financial support, training, parental attention, and society, then the child’s claim should be as valuable, or more so, than if the parent is deceased.”<sup>84</sup> There is additional evidence in the supreme court’s opinion in *Giuliani* to indicate that Justice Wintersheimer would agree with this position.

In *Giuliani*, Justice Wintersheimer quoted his dissent in *Adams*, where he stated that “[t]he injury in a loss of parental consortium claim is no more remote than the injury in a spouse’s cause of action for loss of consortium, which Kentucky already recognizes.”<sup>85</sup> In 1970, Kentucky’s highest state court held that “a wife has a cause of action for loss of consortium of her husband resulting from an *injury* to the husband due to the negligent act of another.”<sup>86</sup> Therefore, as Susanne Cetrulo points out in her article, if a loss of consortium claim is “available to children in the same means and

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80 Plaintiff’s Response to Defendants’ Motion to Dismiss, *supra* note 11, at \*2.

81 *Giuliani*, 951 S.W.2d at 320 (citations omitted); *see also* Plaintiff’s Response to Defendants’ Motion to Dismiss, *supra* note 11, at \*2.

82 Plaintiff’s Response to Defendants’ Motion to Dismiss, *supra* note 11, at \*2.

83 *Id.*

84 Cetrulo, *supra* note 32, at 12.

85 *Giuliani*, 951 S.W.2d at 322 (quoting *Adams v. Miller*, 908 S.W.2d 112, 119 (Ky. 1995) (Wintersheimer, J., dissenting)).

86 *Kotsiris v. Ling*, 451 S.W.2d 411, 412 (Ky. 1970) (emphasis added).

manner in which it is available to adults,” and “the loss of consortium of a spouse has not been limited to a wrongful death scenario,” then it is logical to conclude that loss of parental consortium should likewise not be limited to wrongful death cases.<sup>87</sup> Justice Wintersheimer appeared to endorse this position when he stated that “[e]ven though a wrongful death action and a loss of consortium claim *may* arise from the same injury, they belong to *separate* legal entities and consequently should *not* be treated as a single claim.”<sup>88</sup>

Finally, the *Giuliani* court cited fifteen cases and two state statutes to bolster its view that Kentucky should recognize loss of parental consortium claims generally.<sup>89</sup> Twelve of the fifteen cases cited by the court involved loss of parental consortium claims outside the wrongful death context.<sup>90</sup> This further implies that the *Giuliani* court intended to recognize loss of parental consortium claims when a parent is only severely injured.<sup>91</sup>

Despite the foregoing analysis, the *Lambert* court was correct in saying “[t]he *Giuliani* opinion does not explicitly state whether the cause of action approved was for wrongful death actions only, or whether the cause of action is also available in cases . . . where the parent is severely injured.”<sup>92</sup> Clearly, the *Giuliani* opinion could be read in multiple ways; even if Justice Wintersheimer’s seemingly contradictory statements lean more toward limiting loss of parental consortium claims to the wrongful death context, the existence of extensive persuasive authority and policy considerations suggest that the Kentucky Supreme Court should recognize a minor child’s claim for loss of parental consortium when his or her parent is only severely injured.

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87 Cetrulo, *supra* note 32, at 11.

88 *Giuliani*, 951 S.W.2d at 322 (emphasis added).

89 *See id.* at 319–20.

90 *See* Hibpshman v. Prudhoe Bay Supply, Inc. 734 P.2d 991, 991 (Alaska 1987); Villareal v. State, 774 P.2d 213, 215 (Ariz. 1989); Reagan v. Vaughn, 804 S.W.2d 463, 464 (Tex. 1990); Ferriter v. Daniel O’Connell’s Sons, Inc., 413 N.E.2d 690, 695 (Mass. 1980); Berger v. Weber, 303 N.W.2d 424, 424 (Mich. 1981); Pence v. Fox, 813 P.2d 429, 430 (Mont. 1991); Williams v. Hook, 804 P.2d 1131, 1132 (Okla. 1990); Hay v. Med. Ctr. Hosp. of Vt., 496 A.2d 939, 940 (Vt. 1985); Ueland v. Reynolds Metals Co., 691 P.2d 190, 191 (Wash. 1984); Belcher v. Goins, 400 S.E.2d 830, 833 (W. Va. 1990); Theama v. City of Kenosha, 344 N.W.2d 513, 513 (Wis. 1984); Nulle v. Gillette–Campbell County Joint Powers Fire Bd., 797 P.2d 1171, 1171 (Wyo. 1990).

91 *See* Plaintiff’s Response to Defendants’ Motion to Dismiss, *supra* note 11, at \*2–3.

92 *Lambert v. Franklin Real Estate Co.*, 37 S.W.3d 770, 780 (Ky. Ct. App. 2000).

V. PERSUASIVE AUTHORITY AND PUBLIC POLICY:  
ADVOCATING FOR THE RECOGNITION OF LOSS OF PARENTAL CONSORTIUM  
CLAIMS OUTSIDE THE WRONGFUL DEATH CONTEXT<sup>93</sup>

A. Justice Wintersheimer's Prior Writings

Since Justice Wintersheimer's majority opinion in *Giuliani* is ambiguous, the most persuasive authority for understanding the meaning behind his words would arguably be his own prior writings on the subject of loss of parental consortium. In *Giuliani*, Justice Wintersheimer quoted his dissent in *Adams*.<sup>94</sup> However, he failed to quote the critical words that would have almost certainly resolved this controversy. In *Adams*, Justice Wintersheimer acknowledged that a child's interest in "proper parental care and affection" is hindered when a parent is injured by the negligence of a third party, but noted that "there was no protection given to the child for loss of society, guidance, and attention that resulted from cases of *parental injury*."<sup>95</sup> Justice Wintersheimer then stated:

Kentucky has recognized a cause of action for loss of consortium in favor of spouses. We have also held that parents have an independent cause of action for loss of services and other pecuniary damages resulting from negligent injuries to their minor children. *Thus, the next logical step is for Kentucky to provide children a claim for relief when their parent is severely injured.* When such recovery is allowed to other, equally significant family members, there is no reason to deprive children of compensation for loss of their parent's love and affection, while allowing a parent or a spouse to recover.<sup>96</sup>

Therefore, any remaining questions from *Giuliani* about Justice Wintersheimer's position on loss of parental consortium claims appear resolved in light of his dissenting opinion in *Adams*. Although these statements are not binding law, they should persuade the Kentucky Supreme Court to recognize a minor child's claim for loss of parental consortium when his or her parent is only severely injured.

Beyond his own views of loss of parental consortium, Justice Wintersheimer said in *Giuliani* that "[w]hen the common law is out of step with the times, this Court has a responsibility to conform the common

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<sup>93</sup> See also Bruce Gehle, Note, *Loss of Consortium: Kentucky Should No Longer Prohibit a Child's Claim for Loss of Parental Consortium Due to the Negligent Act of a Third Party*, 84 Ky. L.J. 173, 192-95 (1996) (discussing policy considerations supporting a claim for loss of parental consortium).

<sup>94</sup> *Giuliani*, 951 S.W.2d at 322 (quoting *Adams v. Miller*, 908 S.W.2d 112, 118-19 (Ky. 1995) (Wintersheimer, J., dissenting)).

<sup>95</sup> *Adams*, 908 S.W.2d at 118 (Wintersheimer, J., dissenting) (emphasis added).

<sup>96</sup> *Id.* (emphasis added).

law.”<sup>97</sup> Therefore, even if the Supreme Court of Kentucky believes that the *Lambert* court’s interpretation of *Giuliani* is convincing, it should look to persuasive authority to determine whether Kentucky’s position on loss of parental consortium is in line with societal trends.

### B. Persuasive Case Law

There appears to be a clear trend in the law toward recognizing loss of parental consortium claims when the parent is only severely injured.<sup>98</sup> Although no such causes of action existed at early common law,<sup>99</sup> approximately nine states recognized the claim by 1990,<sup>100</sup> and in 1997, when *Giuliani* was decided, at least twelve jurisdictions recognized the claim.<sup>101</sup> Within those twelve jurisdictions, three landmark cases prove particularly illustrative and persuasive.

First, in 1981, the Supreme Court of Michigan heard a case involving a loss of parental consortium claim.<sup>102</sup> *Berger v. Weber* involved an automobile accident in which the plaintiff’s spouse survived, but suffered permanent injuries.<sup>103</sup> In addition to bringing a negligence claim, the plaintiff sought damages for loss of parental consortium on his minor daughter’s behalf.<sup>104</sup> The trial court granted the defendants’ motion for summary judgment as to the issue of the minor daughter’s loss of parental consortium; however, the appellate court reversed, prompting the defendants to appeal to the Supreme Court of Michigan.<sup>105</sup>

The court argued that “the real anomaly is to allow a child’s recovery for the loss of a parent’s society and companionship when the loss attends the parent’s death but to deny such recovery when the loss attends the parent’s injury.”<sup>106</sup> Then, in a stunning display of candor, the court said plainly: “Convinced that we have too long treated the child as second-class citizen or some sort of nonperson, we feel constrained to remove the disability we have imposed.”<sup>107</sup> The court ultimately held that a minor child may bring a loss of parental consortium claim even if his or her parent is only

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97 *Giuliani*, 951 S.W.2d at 321.

98 Elizabeth Williams, *Cause of Action by Child for Loss of Parent’s Consortium*, in 12 CAUSES OF ACTION 2D 419 § 4, at 428 (1999); see also Gehle, *supra* note 93, at 173.

99 See Williams, *supra* note 98, § 4, at 427.

100 *Belcher v. Goins*, 400 S.E.2d 830, 836 (W. Va. 1990).

101 See cases cited *supra* note 90.

102 See *Berger v. Weber*, 303 N.W.2d 424 (Mich. 1981).

103 *Id.* at 424.

104 *Id.*

105 *Id.* at 424–25.

106 *Id.* at 426.

107 *Id.* at 427.

injured.<sup>108</sup>

Second, in 1984, the Supreme Court of Wisconsin was confronted with the same issue.<sup>109</sup> *Theama v. City of Kenosha* involved a tragic motorcycle accident.<sup>110</sup> In June of 1978, Robert Theama was severely injured when his motorcycle allegedly hit a deep pothole, throwing him from his vehicle.<sup>111</sup> Theama claimed that the accident, which occurred late at night, resulted from the City of Kenosha's failure to adequately light the roadway.<sup>112</sup> Theama sought damages for his injuries, and his two minor children, Tracy and Terry Theama, brought claims "for the loss of the care, society, companionship, protection, training, and guidance of their father because of his extensive injuries."<sup>113</sup> The trial court dismissed the loss of parental consortium claims, and the appellate court affirmed.<sup>114</sup>

The Supreme Court of Wisconsin reversed, acknowledging three key points. First, the court recognized the significance of "the family unit in our society."<sup>115</sup> Second, the court accepted the contemporary view that children merit special protection by the judicial branch.<sup>116</sup> Third, the court acknowledged "the necessity of the parent's love, care, education and protection in contributing to the wholesome and complete development of the child."<sup>117</sup> The court used each of these to justify its holding that a minor child could bring a claim for loss of parental consortium even if his or her parent is only severely injured.<sup>118</sup>

Third, in 1990, the Supreme Court of Texas was given its opportunity to decide this issue.<sup>119</sup> *Reagan v. Vaughn* involved a fight in the parking lot of a Texas saloon.<sup>120</sup> David Reagan, a patron of the saloon, was in a fight with another patron when "the manager of the bar, Vaughn, struck Reagan on the head with a baseball bat."<sup>121</sup> Reagan was permanently disabled from the blow and was left to function at the level of a young child.<sup>122</sup> Reagan sued Vaughn and the owners of the saloon, seeking damages for

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<sup>108</sup> *See id.*

<sup>109</sup> *Theama v. City of Kenosha*, 344 N.W.2d 513, 514 (Wis. 1984).

<sup>110</sup> *Id.* at 513.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 514.

<sup>115</sup> *Id.* at 518.

<sup>116</sup> *See id.* at 514-18.

<sup>117</sup> *Id.* at 518.

<sup>118</sup> *See id.* at 518-19.

<sup>119</sup> *Reagan v. Vaughn*, 804 S.W.2d 463 (Tex. 1990).

<sup>120</sup> *Id.* at 464.

<sup>121</sup> *Id.*

<sup>122</sup> *See id.*



his injuries.<sup>123</sup> Reagan's minor daughter, Julia, sought damages for loss of parental consortium.<sup>124</sup> At trial, the jury awarded damages to both Reagan and Julia; however, the appellate court reversed the loss of parental consortium damages.<sup>125</sup> The Supreme Court of Texas agreed to hear Julia's appeal because this was a case of first impression.<sup>126</sup>

To reach its decision, the court conducted a step-by-step logical review of its prior case law.<sup>127</sup> First, the court recognized that just as "the death of a child inflicts upon his parents a loss of love, advice, comfort, companionship and society,"<sup>128</sup> the death of a parent inflicts an equivalent loss upon a child.<sup>129</sup> Second, the court "acknowledged that [a] nonfatal injury to a spouse can result in a real, direct, and personal loss to the other spouse."<sup>130</sup> Then, the court concluded that it "would be hard pressed to say that a serious, permanent and disabling injury to a parent does not potentially visit upon the child an equally serious deprivation."<sup>131</sup> The court ultimately joined Michigan and Wisconsin and held that a minor child could bring a claim for loss of parental consortium even if his or her parent is only severely injured.<sup>132</sup>

### C. Persuasive Commentary

A few commentators "applaud the majority rule denying a claim for lost or impaired parental consortium in a non-fatal injury case."<sup>133</sup> Nevertheless, most scholars stalwartly support such a claim.<sup>134</sup> For example, as early as 1916, Dean Roscoe Pound of Harvard Law School disagreed with the common law approach which denied loss of parental consortium claims when the parent survived.<sup>135</sup> Specifically, Dean Pound wrote:

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<sup>123</sup> *Id.*

<sup>124</sup> *See id.*

<sup>125</sup> *See id.*

<sup>126</sup> *See id.* ("This court has never addressed the issue of whether a child may recover damages for the loss of parental companionship, love, and society when a parent is injured.")

<sup>127</sup> *See id.* at 465–66.

<sup>128</sup> *Id.* at 465 (citing *Sanchez v. Schindler*, 651 S.W.2d 249, 251 (Tex. 1983)).

<sup>129</sup> *See id.* (citing *Cavnar v. Quality Control Parking, Inc.*, 696 S.W.2d 549, 551 (Tex. 1985), *abrogated by Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507 (Tex. 1998)).

<sup>130</sup> *Id.* at 465–66 (citing *Whittlesey v. Miller*, 572 S.W.2d 665, 667 (Tex. 1978)).

<sup>131</sup> *Id.* at 466.

<sup>132</sup> *See id.*

<sup>133</sup> *Belcher v. Goins*, 400 S.E.2d 830, 835 n.5 (W. Va. 1990).

<sup>134</sup> *See id.* at 836.

<sup>135</sup> *See* Roscoe Pound, *Individual Interests in the Domestic Relations*, 14 MICH. L. REV. 177, 185–86 (1916); *see also Goins*, 400 S.E.2d at 836.

As against the world at large a child has an interest . . . in the society and affection of the parent, . . . [b]ut the law has done little to secure these interests.

....

It will have been observed that legal securing of the interests of children falls far short of what general considerations would appear to demand.<sup>136</sup>

Over fifty years later, Dean William Prosser of the University of California at Berkeley School of Law<sup>137</sup> agreed, arguing that a child who loses a parent's "care, companionship and education" suffers "a genuine injury, and a serious one."<sup>138</sup> Another writer urged courts to recognize loss of parental consortium claims when the parent is only severely injured, saying "[c]ourts cannot abdicate their role as arbiters of justice merely because recognition of a new cause of action would involve administrative difficulties . . . . A child who has been deprived of the care and companionship of a parent . . . is entitled to compensation from the wrongdoer."<sup>139</sup> This view represents an emerging trend.<sup>140</sup>

In contrast to this position, the Restatement (Second) of Torts § 707A provides the majority position: "One who by reason of his tortious conduct is liable to a parent for illness or other bodily harm is *not* liable to a minor child for resulting loss of parental support and care."<sup>141</sup> Nevertheless, it has been noted that this "position pre-dated all of the minority-view cases."<sup>142</sup> In addition, as the Supreme Court of Oregon acknowledged, the rule was adopted "with some reluctance on the part of several of the drafting group, and under compulsion of the case law [failing to recognize the cause of action]."<sup>143</sup> Specifically, in the hearings behind Section 707A, Dean Prosser said:

Well, I gather that nobody wants to reverse the position of 707A and allow the child to recover for loss of the equivalent of consortium when the father or mother is personally injured. One federal case in Hawaii did that

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<sup>136</sup> Pound, *supra* note 135, at 185–86; *see also* Theama v. City of Kenosha, 344 N.W.2d 513, 518 n.5 (quoting the same statement from Pound).

<sup>137</sup> *See* Berkeley Law—History, <http://www.law.berkeley.edu/138.htm> (last visited Jan. 24, 2010).

<sup>138</sup> WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 125, at 896 (4th ed. 1971); *see also* Theama, 344 N.W.2d at 516 (quoting PROSSER, *supra* § 125, at 896).

<sup>139</sup> Elaine Tabor McParland, Note, Ipock v. Gilmore: *North Carolina's Refusal to Extend Recovery to the Infant Secondary Tort Victim*, 66 N.C. L. REV. 1337, 1348 (1988).

<sup>140</sup> *See* Goins, 400 S.E.2d at 835–36.

<sup>141</sup> RESTATEMENT (SECOND) OF TORTS § 707A (1976) (emphasis added).

<sup>142</sup> Goins, 400 S.E.2d at 835.

<sup>143</sup> *Norwest ex rel. Crain v. Presbyterian Intercommunity Hosp.*, 652 P.2d 318, 319–20 (Or. 1982) (quoting RESTATEMENT (SECOND) OF TORTS § 707A (Tentative Draft No. 14, 1969)).

once, and presently got reversed when the state law changed, and all of the cases have refused to allow recovery, so we would have no case support whatever for taking the position that the action would lie.

I don't hear any voices uplifted in favor of reversing 707A, so I would assume that it is approved, and proceed.<sup>144</sup>

Therefore, the Restatement's position does not provide much support for those seeking to limit loss of parental consortium actions to the wrongful death context.

The Supreme Court of Appeals of West Virginia has identified a number of justifications other courts have used in refusing to recognize loss of parental consortium claims outside the wrongful death context.<sup>145</sup> These include the notion that courts should defer to their state legislatures, the risks of double recovery, increased liability insurance costs, and the difficulty of assessing the amount of damages, among others.<sup>146</sup> Just as the Supreme Court of Appeals of West Virginia found these reasons unconvincing,<sup>147</sup> Justice Wintersheimer's opinion in *Giuliani* found them equally unpersuasive.<sup>148</sup>

Justice Wintersheimer expressly stated that “[r]ecognition of loss of consortium as a proper development of the common law does not invade the province of the legislature to determine public policy questions.”<sup>149</sup> While this claim has been strongly criticized,<sup>150</sup> the majority in *Giuliani* is unequivocal regarding its position: “It is indeed not the province of the legislature to develop the common law.”<sup>151</sup> Furthermore, the *Giuliani* court specifically rejected outright the risks of double recovery, rising insurance costs, and difficulty of assessing the amount of damages as reasons for not recognizing loss of parental consortium claims generally.<sup>152</sup> Since the *Giuliani* court has rejected the foregoing arguments, the Kentucky Supreme Court should fall in line with West Virginia and “conclude[] that each of the above reasons offered for not recognizing a parental consortium claim in a *nonfatal injury* case is without merit.”<sup>153</sup>

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144 *Norwest*, 652 P.2d at 320 n.3 (quoting RESTATEMENT (SECOND) OF TORTS § 707A (Proceedings, 1969)).

145 *Goins*, 400 S.E.2d at 837.

146 *Id.*

147 *Id.*

148 *See Giuliani v. Guiler*, 951 S.W.2d 318, 321–23 (Ky. 1997).

149 *Id.* at 321.

150 *See, e.g., id.* at 323–26 (Cooper, J., dissenting); Ramsey, *supra* note 33, at 456–68.

151 *Giuliani*, 951 S.W.2d at 321.

152 *Id.* at 322.

153 *Belcher v. Goins*, 400 S.E.2d 830, 840 (W. Va. 1990) (emphasis added).

## VI. A BRIEF REFLECTION ON WHY THE LAW HAS NOT CHANGED

A. *Falling Victim to Erie Railroad Co. v. Tompkins*

Recently, the United States District Courts in Kentucky heard several cases involving claims for loss of parental consortium.<sup>154</sup> In each case, the courts adhered to the decision in *Lambert*, refusing to recognize loss of parental consortium claims outside the wrongful death context.<sup>155</sup> Of course, their justification relied on the landmark case of *Erie Railroad Co. v. Tompkins*, where the United States Supreme Court held that in a federal diversity case, “the law to be applied . . . is the law of the state” in which the federal court sits.<sup>156</sup> In October 2006, the United States District Court for the Eastern District of Kentucky summarized the issue when it recognized that “in diversity cases . . . [the court] must apply the law of the state’s highest court. Further, when the state’s highest court has not decided the applicable law, the court must attempt to ascertain it ‘from all relevant data.’ Such ‘relevant data’ includes the state’s appellate court decisions.”<sup>157</sup> Thus, many plaintiffs pursuing loss of parental consortium claims have fallen victim to diversity jurisdiction.

B. *Stare Decisis*

An unpublished decision from the Kentucky Court of Appeals in 2004 illustrates a similar problem facing plaintiffs.<sup>158</sup> *Hall ex rel. Perry v. Hunt* involved a medical malpractice case.<sup>159</sup> After falling down a flight of stairs and injuring her wrist, Jennifer Hall sought medical treatment from Dr. Daniel Hunt.<sup>160</sup> According to Hall, Dr. Hunt was negligent in his diagnosis and treatment, leaving “her permanently disabled and in constant pain.”<sup>161</sup> In addition to filing her cause of action for medical malpractice, Hall’s minor son, Logan Perry, filed a claim for “loss of parental consortium due to the loss of his mother’s affection, services, companionship, and assistance

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154 See *Brown v. Mason & Dixon Lines, Inc.*, No. 3:07CV-712-R, 2008 WL 2224881 (W.D. Ky. May 27, 2008) (mem.); *Ferguson v. Aventis Pasteur Inc.*, 444 F. Supp. 2d 755 (E.D. Ky. 2006); *Brown v. John Deere Co.*, No. 6:06-429-DCR, 2006 U.S. Dist. LEXIS 76289 (E.D. Ky. Oct. 19, 2006) (mem.).

155 See *Mason & Dixon Lines, Inc.*, 2008 WL 2224881, at \*3; *Ferguson*, 444 F. Supp. 2d at 761; *John Deere Co.*, 2006 U.S. Dist. LEXIS 76289, at \*1-3.

156 *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

157 *John Deere Co.*, 2006 U.S. Dist. LEXIS 76289, at \*2-3 (citations omitted).

158 See *Hall ex rel. Perry v. Hunt*, No. 2003-CA-000916-MR, 2004 WL 2192605 (Ky. Ct. App. Oct. 1, 2004).

159 *Id.* at \*1.

160 *Id.*

161 *Id.*

for the remainder of his life.”<sup>162</sup> The trial court, citing the court of appeals decision in *Lambert*, granted the defendant’s motion to dismiss Logan’s claim.<sup>163</sup> The court of appeals affirmed, saying

[the plaintiff] urges us to reject the holding in *Lambert* because the *Lambert* Court misinterpreted prior case law on the issue and because public policy dictates a contrary interpretation. The doctrine of stare decisis mandates that courts must follow controlling case law if the relevant facts are the same or similar. In the present case, the salient facts are the same as in *Lambert*—the parent was injured and the child seeks to recover for loss of consortium with that parent due to the injury. Accordingly, we are bound by the holding in *Lambert*.<sup>164</sup>

Unfortunately for Logan, the Supreme Court of Kentucky denied discretionary review.<sup>165</sup> Since the court of appeals does not seem interested in overturning its own decision in *Lambert*, plaintiffs must wait until the Supreme Court of Kentucky decides this issue.

#### CONCLUSION

In 1997, the Kentucky Supreme Court answered the call to recognize loss of parental consortium claims.<sup>166</sup> Unfortunately, Justice Wintersheimer’s majority opinion did not unequivocally “decide[] whether a loss of parental consortium claim is available beyond wrongful death cases.”<sup>167</sup> Despite the *Lambert* court’s narrow reading of *Giuliani*, there is significant evidence in the language of the opinion suggesting the court intended to recognize loss of parental consortium claims even when a parent is only severely injured.<sup>168</sup> This evidence, in conjunction with persuasive authority and public policy, should lead the Kentucky Supreme Court toward recognition of a minor child’s loss of parental consortium claim even if his or her parent is only severely injured. As one court stated, “it would be contrary to justice to deny the gravity of harm suffered by a child who is deprived of his or her

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<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* (citation omitted).

<sup>165</sup> *See id.*

<sup>166</sup> *Giuliani v. Guiler*, 951 S.W.2d 318, 323 (Ky. 1997) (mem.); *see also* Gehle, *supra* note 93, at 174–75 (calling on the Kentucky Supreme Court to recognize the claim for loss of parental consortium).

<sup>167</sup> *Brown v. Mason & Dixon Lines, Inc.*, No. 3:07CV-712-R, 2008 WL 2224881, at \*3 (W.D. Ky. May 27, 2008).

<sup>168</sup> *Giuliani*, 951 S.W.2d at 320; *see also* Plaintiff’s Response to Defendants’ Motion to Dismiss, *supra* note 11, at \*2.

parent's society and companionship due to another's negligence."<sup>169</sup>

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<sup>169</sup> *Theama v. City of Kenosha*, 344 N.W.2d 513, 518 (Wis. 1984).